

CONFIDENTIALITY ISSUES IN PUBLIC PROCUREMENT

**By Jennifer Skilbeck,
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(jskilbeck@monckton.com)**

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London WC1R 5NR

Tel 020 7405 7211
Fax 020 7405 2084
DX LDE 257

chambers@monckton.com
www.monckton.com

1. Advisers may need to address confidentiality issues during the procurement process itself, and, subsequently, in relation to discovery if proceedings are begun. Both cases raise quite different issues.

(a) Disclosure of confidential information during the procurement process

2. It is probably unnecessary to discuss the general requirement of confidentiality during the procurement process. Bid rigging is a criminal offence under the Enterprise Act.
3. However issues frequently arise in the use of the negotiated procedure (and, presumably, will also arise in the competitive dialogue). If one tenderer suggests a better way of achieving the same result, for example by using a lighter building material, or, in a hospital PFI/PPP, by using private off-site parking to release land for clinical use, can the contracting authority put that suggestion to other tenderers? Some have suggested that fairness obliges them to do so.
4. Clearly the obligation of confidentiality obtains as a matter of contract law, where specifically requested. This is also set out in the outgoing Regulations and the new Directives, eg The Services Regulations 1993:

Confidentiality of information

“30. A contracting authority shall comply with such requirements as to confidentiality of information provided to it by a services provider as the services provider may reasonably request.”

5. The new Directives include similar provisions (2004/18/EC Art 6; 2004/17/EC Art 13).
6. What are the consequences if the tenderer has not expressly set out the confidentiality requirement? Arguably, the competition is not “fair” as required by EC law if innovative solutions are shared by the contracting authority with competitor tenderers. This is, after all, not that different from sharing pricing information.
7. Against that is an interesting case where a contracting authority discovered after the conclusion of the procurement that cost information had effectively been shared between tenderers during the procurement process. Bedfordshire County Council entered into a contract with FCL, allegedly terminated or repudiated shortly afterwards. Following a trial of that dispute, the court found in favour of FCL. During subsequent disclosure in respect of quantum it came to light that a member of FCL had given advice to a local authority’s in-house team on the preparation of the team’s tender, on costs in particular. It was alleged by the County Council that the advice had been intended by FCL to ensure that the in-house tender was unduly high, and the County Council sought to have the judgment set aside.
8. The judge found the assistance given by FCL to the in-house team immaterial in determining which party was awarded the contract, and the allegation of bad faith without evidence. It is, of course, relevant that this was a case in which what was sought was the setting aside of a judgment, not a breach of the procurement rules as such. (*Bedfordshire County Council v Fitzpatrick Contractors Ltd* 27th November 2000, QBD TCC).
9. An important case, though equally exceptional on its facts, in which the judge permitted disclosure of information *during* the procurement process itself, is *LRT v the Mayor and LUL* 31st July 2001 (QBD). In that case the public interest in what was largely a political decision was weighed against the confidentiality of the bid information in the reports sought to be publicly disclosed. The judge found that redactions were adequate to protect all the relevant “confidential” information.

(b) confidential information to be disclosed after the procurement process

10. A quite different issue arises *after* the procurement process in respect of disclosure of information in the context of proceedings (or possible proceedings). In many cases it is likely that the information sought is likely to be of a "confidential" nature, usually relating to the prices or "technical merit" of the successful tenderer.
11. In all cases involving the disclosure of confidential information (regardless of whether it is in some formal sense confidential, for example as a result of a contractual agreement) the court must weigh the public interest, usually "in disposing fairly of the matter" against the strength and value of the interest in preserving confidentiality (see the short survey in *Express Medicals v Network Rail* 28th May 2004 QBD TCC). Often redactions will provide a satisfactory solution. In *Express Medicals* the judge regarded the information sought in unredacted form as a fishing expedition – it was alleged that the individuals provided by the successful tenderer in the tender document intended to service the contract may not have had the qualifications claimed, but no evidence was advanced to support that suspicion.

The Freedom of Information Act 2000

12. The FOIA provides for the provision of written information by public bodies (as specifically defined) within 20 working days, if not unduly costly, and not subject to one of many exceptions. The failure to produce information can be appealed to the Information Commissioner.
13. The exceptions most relevant to the procurement field are:
 - (1) Section 41: release of confidential information, the release of which is otherwise actionable by a third party.
This is not as clear as it seems. As indicated above the common law will allow the disclosure of information that has been defined by the parties as "confidential", when it is the public interest to do so.
 - (2) Section 43: release of information which would or would be likely to be prejudicial to the commercial interests of any party (including the contracting authority).
This exception is subject to the same uncertainties as in respect of confidential information.
14. It is far too early to know what effect the Act will have on procurement, but there are some interesting questions to consider as it develops.
 - a) Will the Commissioner apply the same balancing tests as the courts? Or, perhaps, how will the rather patchy law develop in the hands of the Commissioner?
 - b) Will the obvious scope for "fishing expeditions" assist claimants, or will the exceptions have the effect of preventing significant "fishing"?
 - c) Will the Act have the effect of advancing disclosure to an early stage, before the issue of proceedings, without the necessity of seeking an order of the court?
 - d) Will a claimant's failure to seek (early) information under the Act prejudice their position under the limitation period?
 - e) Will the information on tenders, which becomes less critical with age, be available later, when the time for action under the procurement legislation has passed? Would that amount to grounds for extending time? It would assist a claim, where otherwise available, under the Competition Act.

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