

**“RISKS AND REALITIES OF YOU
BEING CAUGHT OUT AS NON-
COMPLIANT AND IN BREACH OF
PROPRIETARY INFORMATION”**

**Whitepaper conference April 25th 2006
Jennifer Skilbeck**

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

CONFIDENTIALITY OF TENDER INFORMATION

1. Confidentiality arises at various stages of the procurement process: before tenders are submitted, during the assessment process and in the context of debriefing and litigation. Special problems arise – or are believed to arise – in the context of the competitive dialogue. Before considering that issue, a brief summary of the law relating to confidentiality is set out.
2. Information may be protected as “confidential” by contract, through intellectual property protection, by statute or through the general equitable obligation of confidentiality. The first two raise no particular conceptual difficulties in the present context. As far as statutory obligations are concerned these are considered further below.
3. For a breach of the equitable duty to be established it is necessary (1) that the information must have the necessary quality of confidence (2) that it was imparted in circumstances imposing a duty of confidence and (3) it was used without consent to the detriment of the claimant. Breach of confidence may lead to an account of profits. The Court can award damages *in lieu*.
4. In the present circumstances the requirements set out for establishing the equitable duty must be considered alongside the specific regulatory framework in place in respect of procurement.
5. The procurement Directives and Regulations have the following provision (which was also contained in broadly similar form in the earlier legislation):

“Confidentiality of information

43. (1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.”

(Directive 2004/18/EC Art 6, Regulation 43 of SI 5/2006, The Public Contracts Regulations; 2004/17/EC Art 13, Regulation 41 of SI 6/2006, the Utilities Contracts Regulations. The previous Regulations provided, eg, “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.” (the Services Regulations, Regulation 30).

6. There thus seems to be little difficulty in imposing an obligation of confidentiality on the contracting authority where the tenderer *reasonably* requests it. The problem arises when no such request has been made. A question also arises as to whether “reasonableness” goes beyond the equitable duty.
7. Since a contracting authority has an obligation to achieve the “Best Value”, it has, in effect, an obligation to share suggestions that would reduce tender costs, where it is lawful to do so.

The open and restricted procedures

8. It is accepted practice that questions put to the contracting authority during the preparation of tenders, together with the answers, must be circulated to all tenderers. Thus if a tenderer wishes to enquire as to whether a particular solution is acceptable it cannot, if it

uses this facility, easily avoid sharing that information with others, although it may be able to devise a wording that avoids revealing the precise nature of the solution offered.

9. The routine questions and answers normally cover straightforward *clarifications* of the ITT (such as, for example, whether measurements referred to are metric) rather than whether particular solutions would be acceptable. There is no reason why the confidentiality referred to in the Regulations should not be claimed in respect of an enquiry that relates to the acceptability of any *particular solution*.
10. In the absence of any appropriate request for confidentiality and where copyright does not apply, there is unlikely to be a successful claim for breach of confidence against a contracting authority which chooses to share the information with other tenderers, unless, exceptionally, the equitable duty can be relied upon. The question of "reasonableness" in respect of a particular request must ultimately to a question for the ECJ to consider in the interests of compatibility between the courts of Member states.

The negotiated procedure and the competitive dialogue

11. The situation in the negotiated procedure and competitive dialogue is quite different. To a greater or lesser degree the parties are engaged together in a discussion as to how any tender may ultimately be framed.
12. Regulation 18(21) of the Public Contracts Regulations provides:
 - 18 (21) During the competitive dialogue procedure, a contracting authority—
 - (a) may discuss all aspects of the contract with the participants selected;
 - (b) shall ensure equality of treatment among all participants and in particular, shall not provide information in a discriminatory manner which may give some participants an advantage over others; and
 - (c) shall not reveal to the other participants solutions proposed or any confidential information communicated by a participant without that participant's agreement
13. It is thus clear that in the competitive dialogue the obligation of confidentiality applies to solutions offered, regardless of whether any confidentiality has been claimed.
14. Negotiations in the negotiated procedure will be covered by the provisions set out above in respect of open and restricted procedures, and confidentiality must be claimed. Prudence suggests that an undertaking set out in the terms that apply to the competitive dialogue should be sought from contracting authorities.
15. Obviously the bids must be assessed fairly and maintaining confidentiality. Normally the confidential suggestions will be those that reduce costs or otherwise benefit the tenders. Appropriate adjustments must be made in respect of the discovery of hidden costs (such as a right of way) by one tenderer only.

CAN A CONTRACTING AUTHORITY DISCLOSE "NON-CONFIDENTIAL" INFORMATION TO OTHER TENDERERS?

16. Regulation 18(21)(c) suggests that no information concerning a tenderer's proposals can be disclosed, at least during the procurement process, regardless of whether or not it is confidential. In the other procedures "confidential information" will be protected, but other information will only be protected if confidentiality is claimed.

THE SCOPE FOR INFORMING THE WINNING BIDDER WITH A COMPETITOR'S IDEAS

17. The primary issue is, of course, a question of an interpretation of the Regulations. Perhaps the Regulations are no longer the governing law once an award has been made. The law relating to breach of confidence is relevant in any event because the Regulations do not admit of an interpretation that, after the award, the contracting authority has a greater right to use the information supplied by a losing tenderer than would be granted through the equitable doctrine.

The characteristics of "confidential information"

18. The characteristics of "confidential information" are quite wide. For the equitable doctrine to apply, the information must not be in the public domain: "when the information is ... partly public and partly private ... the recipient must take special care to use only the information in the public domain. He should not be in a better position than if he had gone to the public source" (Lord Denning: *Seager v Copydex (no 1)* [1967] RPC 349). In *Seagar* the patent was public, but not the information required to make successful use of it, such as the requirement that the carpet grip should have a "strong, sharp tooth". The information may be "confidential" even if it comprises information all of which is in the public domain, if something new has been created through the use of skill and ingenuity.
19. Reverse engineering of a product on the market will generally be lawful for the same reason – although there is nothing to prevent a party from protecting its product from reverse engineering through a contractual agreement, subject to the principles of restraint of trade (*EPI v Symphony* (CA 26 January 2006, §64).
20. In *Inline Logistics v UCI Logistics Ltd* ([2001] EWCA Civ 1613) the Court of Appeal summarised and elaborated the law. In order to determine whether information is "confidential" and has been used without permission the information must be defined with some precision (§29). "[C]onfidential information is intangible. In some cases it may not even have taken any material or permanent form. It may consist, for example, of an oral communication. Confidentiality may exist in individual items of information, ... a particular combination of ideas, concepts or features which have been embodied in a drawing" (§29). "[A] particular combination of design features – themselves no confidential because they are common knowledge, obvious or commonplace – may be protected as confidential information" (§38). This case, which involved the relatively complex design of storage within a warehouse, involved information which was "borderline". Confidentiality would not normally apply to the *gathering of information*, even if it involved skill (§37).

Two lines of authority concerning continuing duties of confidentiality

21. First, solicitors have a duty to their clients which may lead them into situations of potential conflict in disclosing information supplied by one client that is of material interest to another. The situation has arisen particularly in relation to property transactions. It is not easy to follow a clear line of reasoning in the cases, but there is some authority for the following propositions:
- While a solicitor is acting for a client he has a fiduciary duty not to disclose information supplied by the client, including information that does not have the quality of confidentiality.
 - The duty to a client includes disclosing to the client only information he has discovered in the course of carrying out those particular instructions. He is probably not obliged to disclose information that might be of value, if otherwise obtained.
 - Once a solicitor has stopped acting, his responsibility to a client from whom he has obtained information applies only in respect of the "confidential" information.

- If a solicitor is acting for two clients (with their consent) he may find himself in a position where, whatever he does concerning the information, he will be liable to one or the other.
- A solicitor who, on discovering the relevant information, properly declines to continue to act for both parties cannot thereby escape liability.

(*Bristol & West Building Society v Mothew* [1998] Ch 1, *Moody v Cox & Hatt* [1917] 2 Ch 71, *Mortgage Express v Bowerman* [1996] 2 All ER 836, *Bristol & West Building Society v Baden Barnes Groves* [2000] Lloyd's Rep. PN788, *Nationwide Building Society v Balmer Radmore* [1999] Lloyd's Rep. PN 241, *Credit Lyonnais v Russell Jones & Walker* [2003] Lloyd's Rep. PN7, *Hilton v Barker Booth & Eastwood* [2002] Lloyd's Rep. PN500.)

22. A contracting authority may have an equivalent fiduciary duty, whether engaged in a competitive dialogue or otherwise, not to disclose information supplied in confidence, even if it is in the public domain. Alternatively, even if there is no fiduciary duty, the courts may be sympathetic to an argument that there is, nevertheless, an appropriate parallel between that duty and a fiduciary duty.
23. If the fiduciary duty to a solicitor's client ends when he no longer acts for that client, then the same may be said of a contracting authority, if a fiduciary arrangement exists. In that case the contracting authority would appear to be able to disclose non-confidential information after the conclusion of the award procedure. The argument is stronger if no fiduciary duty exists.
24. However, that may not be a correct parallel application of the law. *Inline* (referred to above) concerned a (private) tender procedure, in which Kimberley Clark invited UCI to submit a tender for the conversion of a warehouse. UCI employed Inline to prepare a specification. Inline's specification was, in UCI's view, inadequate for the purpose, and Inline was unable to provide further assistance by the deadline for the submission of tenders. UCI employed Dexion to finalise the specification, using Inline's work, and won the tender. Inline claimed breach of confidence in the drawings it had prepared. Inline submitted that they would never have agreed to a competitor, Dexion, using their work.
25. The Court of Appeal approached the matter on the basis of the purpose for which Inline had supplied the information, some of which they held was "confidential". The court agreed that UCI could use Inline's information, but was divided as to the principles on which the decision was based.
26. Mummery LJ concluded that the important point was the scope of the "implied licence" granted by Inline to UCI (the parties agreed that there was a licence). In the absence of any express terms the test is "business efficacy having regard to all the circumstances of the case" (§49). Inline were unable to do the necessary work before the tender submission deadline, and without the Inline work Dexion could not have supplied the specifications in time. The implied licence extended to the use by UCI of Inline's work for the preparation of the tender, and, bearing in mind the deadline, with the help of a third party, if necessary (§51).
27. Sedley LJ's view was that Inline's submission, namely that they would not give permission for a competitor to use their work, was not the right question. The question was, had they put their information forward for the purposes of the bid? UCI had no choice but to bring in a third party. Inline therefore "acquiesced". Sedley LJ preferred the vocabulary of equity (§§58-60).
28. This distinction between "equity" and a "licence" may be critically important in the context of a contracting authority and a tenderer. If the "vocabulary of equity" is relied upon, then acquiescence can apply only to the confidential information supplied, because that is all that equity protects. If, however, the information were supplied to UCI under a *licence*, that

licence might go beyond the supply of the confidential information alone. In this language a tenderer might reasonably claim that the entire tender was supplied to the contracting authority under a licence, or, indeed, a contract, whether express or implied. (The circumstances in which the court held that UCI could disclose the information to a competitor were exceptional, and clearly distinguishable from the normal case.)

29. The line of authorities associated with *Blackpool* and *Harvela Trust* support the proposition that there is a contractual or quasi-contractual agreement between a tenderer and a contracting authority, and on that basis the wider obligation of confidentiality regarding all the information supplied in the tender might reasonably apply. After all the law of equity usually steps in to protect the owner of confidential because of the inadequacy of any other protection. The primary question must be whether there is some agreement, express or implied, in place in respect of *all* the information. In that case Inline's submission that they would not agree that their work could be passed by UCI to a competitor is compelling. It is clear that the Court of Appeal decided the case with both the tight deadline and Inline's refusal to supply further input in mind.
30. This is not a line of reasoning that has been explored more generally. *Jones v LB Tower Hamlets* (no 2) [2001] RPC 23 was a copyright case in which plans, including an ingenious space saving plan, were submitted by an architect, Jones, to a successful tenderer, and planning permission was obtained. Shortly after starting construction, the builder abandoned the works. The project was taken over by the Council, and, the court held, the Council's own architects copied the ingenious solution.
31. Jones' claim was successful in respect of one aspect only of his designs for the development, the others claimed failed for lack of copyright protection. The court found that even if the Council's architects had not copied the earlier plans, some of the plans had been pinned up in the planning department's offices and they must have remembered or heard about this detail, it being so unusual. There was no discussion by the court as to whether the plans had been submitted for a single purpose, for obtaining planning permission, and that therefore a question might arise as to whether there was any "licence" in respect of the use that might be made of *all* the designs, including those which did not have the necessary quality of confidence.
32. Planning applications are in the public domain, but still subject to copyright protection, at least. Unlike patents, planning applications are not made public in order to disseminate information on inventions or designs, but for a much more limited purpose. Interestingly, in the present case, the judge stopped short of disclosing the innovative solution himself, mentioning no more than that it was "a wrap-around bath".

IF THERE IS A CONTINUING OBLIGATION OF CONFIDENTIALITY IS THERE ANY LOSS LEADING TO DAMAGES IF INFORMATION IS DISCLOSED?

33. It is obviously extremely difficult to prove that a contracting authority has passed on an idea to another tenderer, and that the idea was not also the idea of the contracting authority or the other tenderer.
34. If a losing tenderer's solutions are supplied by the contracting authority to the successful tenderer, then it might be said that the losing tenderer has suffered no loss, because it has failed to obtain the contract in any event.
35. If a claim is brought as a contractual or similar claim, then it is unlikely that damages can be obtained. A claim on a *quantum meruit* basis might be sustained, as in *Jones v Tower Hamlets*, in which Jones obtained a fee of £1000 for the ingenious plan, but failed in obtaining the fee of £300,000 he had expected, but had failed to obtain, for the entire work.

36. If the equitable duty applies, the claimant may seek an account of profits. The claimant would not need to show that it should have won, and it would not be restricted to the short limitation period of the procurement Regulations.
37. However a better claim might be made under the Regulations, on the grounds that there has been a post-tender negotiation. If the contracting authority wanted a particular idea, and incorporated it into the final design, perhaps the tenderer whose idea it was could show that it should have won.
38. If confidentiality has not been claimed in an open, restricted or negotiated procedure, then a claim may not be successful, beyond breach of confidence, because of the requirement of claiming confidence set out in the Regulations. Even then a claimant may be able to argue an implied contract or licence point.

For more information on Jennifer Skilbeck, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.