

Freedom of Information and Procurement

By Ibrahim Hasan and Hazel Moffat

The Freedom of Information (Scotland) Act 2002 (the Act) comes into force on 1st January 2005. It will establish a right of access to all recorded information held by a Scottish public authority, subject to some exemptions. Anyone anywhere can make a request for information under the Act. So what impact will this have on public sector procurement? Already there are a number of issues which are causing concern amongst procurement professionals and their advisers.

Contractors' Compliance

The Act applies to Scottish public authorities. This covers approximately 30,000 public sector organisations including the usual suspects such as local authorities, the NHS, schools, colleges, universities, fire and government bodies. The Act does not mention contractors, partners, PFI companies and arms length management organisations (ALMOs). So does this mean that these types of organisations are not covered by the Act?

Section 5 contains a provision allowing the Scottish Ministers to designate "Additional Scottish Public Authorities". Before doing so, they have to be satisfied that each organisation:

- a) Exercises public functions, or
- b) Provides contracted out public authority functions

So far, there has been no order designating additional Scottish public authorities although the Scottish Executive has started to give thought to this matter. We suspect that it will happen soon and top of the list will be highways maintenance contractors, housing management companies, leisure trusts and PFI providers.

Just because the Act does not currently apply to outsourced companies and partners does not mean that all information held about them is inaccessible. The right of access applies to information which is held, not necessarily owned, by the public authority. If a public authority holds information about a contractor it will be accessible, subject to the exemptions discussed below.

The exemptions are classified as either "qualified" or "absolute". If an exemption is qualified an authority must decide firstly whether the exemption applies, and secondly, whether the public interest in disclosing the information outweighs the public interest in maintaining the exemption. If the exemption is absolute, then this public interest test does not apply.

So what exemptions may be relevant when considering whether to disclose information under the Act about contractors and partners relationships with public authorities, details of contracts and tendering information etc?

Legal Obligations Exemption

Section 26 of the Act provides:

"information is exempt information if its disclosure by the Scottish public authority (otherwise than under this Act) :

- (a) is prohibited by, or under any other enactment,
- (b) or it is incompatible with any Community obligation..."

This exemption may apply to some information received during a procurement process conducted under the EU Procurement Rules. There are several references to confidentiality of information in the Public Works Contract Regulations 1991 (SI 1991/2680), the Public Services Contract Regulations 1993 (SI 1993/3228), and the Public Supply Contract Regulations 1995 (SI 1995/201) (all as amended).

All three sets of regulations contain provisions relating to the information to be included in the Contract Award Notice and the information to be provided to an unsuccessful bidder on request. They also provide that information may be withheld where the disclosure would be contrary to the public interest or would ‘prejudice the legitimate commercial interests of any person or might prejudice fair competition between suppliers.’ The regulations on services and supply also refer to confidentiality of information and state that ‘a contracting authority shall comply with such requirements as to confidentiality of information provided to it by a service provider as the service provider may reasonably request’.

The above provisions would suggest that up to and including the evaluation process, all the information provided by tenderers, to the public authority, is of a confidential nature. Beyond the evaluation process, the provisions of the Act will govern what a public authority is obliged to disclose (although the EU regime has its own disclosure provisions known as ‘de-briefing’). ‘Legitimate commercial interests’ are not defined in the regulations, and would need to be considered in the light of general EC Treaty requirements of fairness of treatment, and transparency which arise under the requirements for effective provisions which act in a non-discriminatory manner.

It should be remembered that the Contract Award Notice requires publication of the name of the successful tenderer and the overall contract price; but it has always been accepted that the make up of the contract price (e.g. the rates for specific aspects of the services) are confidential and need not be disclosed.

Personal Information Exemption

Certain information supplied by bidders as part of a tender may be of a personal nature (e.g. bidders’ employee’s CVs, if these are not already in the public domain) and may therefore be exempt from disclosure under the Data Protection Act 1998. Section 36 of the Freedom of Information (Scotland) Act contains an exemption for personal information. However as far as third party information is concerned, it is a qualified exemption so there may be a case where the public interest in disclosing outweighs the individual’s privacy rights.

Breach of Confidence Exemption

Section 36 of the Act provides an absolute exemption where the disclosure of the information will constitute an actionable breach of confidence. Breach of confidence is a very tightly defined area of law. Just because a public authority has signed up to a confidentiality clause, or marked documents as confidential, does not make it a breach of confidence to disclose. It must be:

1. Information which has the necessary quality of confidence
3. Imparted in circumstances imposing an obligation of confidence
5. There is unauthorised use of the information to the detriment of the party communicating it

It should be noted that, whilst this exemption is absolute, there is an inherent public interest test in the breach of confidence doctrine. My own view is that it will be very rare for a public authority to be able to claim that disclosing information about a tender/contract will be an actionable breach of confidence.

Commercial Interests Exemption

Another more useful exemption (in the procurement context) is in section 33. This allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice substantially the commercial interests of any person (including the public authority).

Trade secrets are defined by caselaw. The classic example is the recipe for Coca Cola. This exemption may cover the information held by a public authority about the special unique way a service is delivered or widgets manufactured.

The second part of this exemption is where disclosure of the information would prejudice substantially the commercial interests of any person including the public authority. For example if the public authority were to

disclose the precise details of a winning tender to losing bidders this may have a substantially adverse impact on the successful company and also effect the authority's future negotiating position.

It is important to note that this exemption is a qualified exemption. Therefore the public interest in disclosure has to be considered even where there may be substantial prejudice. So what kind of commercial information may be withheld under this exemption? Cases from other jurisdictions seem to suggest that the overall price paid for goods or services is not confidential. The public have a right to know how their money is being spent. Details of working methods and specifications may be disclosable as being less confidential. However the precise profit or loss on a particular item may be more confidential for a contractor.

The Scottish Information Commissioner, Kevin Dunion, states that in considering commercial interests and the public interest the following factors need to be considered:

- Accountability of public money being spent
- Protection of the public from unsafe products or rogue traders or practices
- Circumstances in which the information was received
- FOI competition issues

The UK Information Commissioner, Richard Thomas, warns against arguing that disclosure of information may lead to fewer contractors wanting to do business with public bodies. The alternative view is that they may just see it as a cost of doing business with the public sector and it may lead to more competition and better understanding of the requirements of public authority customers.

Timing is also a crucial factor to be considered when deciding whether to release information. Information about a contract let out ten years ago may not be confidential as the market may have moved on. Whereas during the tender process a lot of information if disclosed is more likely to substantially harm the contractor's commercial interests.

There is no hard and fast rule on what is or is not commercially sensitive information. It depends on the nature of the information, the timing of the request and the circumstances. Certainly public authorities will not be able to hide behind the confidentiality clauses in their contracts.

The Code of Practice

There is a Code of Practice on discharge of functions by public authorities under the Act. This is available from the Scottish Executive's website (www.scotland.gov.uk). The most relevant points from this code, in terms of confidentiality clauses in contracts, are set out below:

- Authorities cannot 'contract out' of their obligations under the Act.
- Authorities should reject confidentiality clauses as proposed by contractors, wherever possible. Where exceptionally, it is necessary to include non-disclosure provisions in a contract, an option could be to agree with the contractor a schedule to the contract which clearly identifies information which should not be disclosed. Authorities will have to take care when drawing up any schedule as its contents could still be overridden by the Act.
- Authorities should not agree to hold information 'in confidence' which is not in fact confidential in nature. They should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of the authority's functions and it would not otherwise be provided.
- Any acceptance of such confidentiality provisions must be for good reasons and capable of being justified to the Scottish Information Commissioner.
- It is for the public authority to disclose information pursuant to the Act, and not the private sector contractor. The authority may wish to protect from disclosure, by appropriate contractual terms,

information which the authority has provided to the contractor which would clearly be exempt from disclosure under the Act. Apart from such cases, authorities should not impose terms of secrecy on contractors.

PFI and Outsourcing Contracts

The biggest area of demand for information under the Act is likely to be about PFI contracts and outsourced public authority functions. There is still a lot of debate as to whether PFI is the best model for delivering public services. Unions, politicians and disgruntled workers are likely to ask for information about these contracts. Recently the Institute of Public Policy Research (IPPR) has backed calls for more openness in PFI contracts with councils in England (see Local Government Chronicle 4th June 2004). A survey carried out by IPPR showed that just half of English councils' PFI documents were made available on request as opposed to ninety per cent for the NHS.

The Office of Government Commerce guidance ("Standardisation of PFI Contracts") recommends that as much information in the contract as possible should be placed in the public domain. Only information which is specifically identified as commercially sensitive by the parties, for legitimate reasons, should be excluded. Although this guidance is specific to PFI projects, the same principles can be applied more generically to other types of contracts.

Conclusion

Public authorities must take a proactive approach to the Freedom of Information (Scotland) Act and its application to information about procurement and contracts. They must enter into a dialogue now with bidders and contractors to decide which material should be treated as confidential and/or commercially sensitive, and apply the public interest test if necessary. Authorities should be ready to negotiate with bidders to define the scope of information to be treated as confidential and should agree time limits on the period of time the information should remain classified as such.

The Freedom of Information Act (Scotland) 2002 is going to lead to a massive increase in requests for information about Scottish public authority procurement and contracts. There will be no blanket exemption for commercial confidentiality. Each request will have to be examined on its own merits and the provisions of the Act applied. Procurement professionals and those advising them have to be ready for the culture change of transparency which the Act is designed to introduce. The new public sector mantra is "Secrecy out; openness in!"

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