

FOI: Access to Procurement Information

Requests for information about large scale public sector procurement projects have become the norm since the Freedom of Information Act 2000 (FOI) came into force over five years ago. Lawyers and information professionals are familiar with the section 43 exemption (commercial interests) which is often used to withhold commercially sensitive information about such projects. However, another less familiar document also needs to be examined.

The FOIA (Civil Procurement) Policy and Guidance document (the OGC Guidance), published by the Office of Government Commerce (www.ogc.gov.uk), relates to requests for civil procurement information under FOI. It contains, amongst other things, a number of working assumptions which provide an initial view for officials who are responsible for responding to FOI requests. Whilst it is not legally binding, the guidance together with recent ICO and Information Tribunal (now re named the First-Tier Tribunal (Information Rights)) decisions must be taken into account before dealing with such requests.

The ICO decision involving the Department of Health (FS50088736 29/01/2009) concerned a request for a copy of an IT contract between the Department and BT (known as the N3 Contract) particularly the legal terms and conditions. The appellant specifically stated that he was not interested in certain information including contract prices and charges and detailed technical specifications accepting that these may be commercially confidential. The Department relied on various exemptions to refuse access including section 43 (commercial interests). It argued that disclosure would harm the commercial interests of the contractor because it would have allowed the contractor's competitors to draw conclusions about the positions it would take in relation to future contracts. The ICO disagreed with this analysis for four reasons:

Firstly, the N3 contract was unique. It was designed to address the unique requirements of a very specific service that was required to be delivered. It would therefore have been significantly different from other contracts the contractor might seek to enter into in the future. As a consequence, it would have been very difficult to draw meaningful comparisons between the N3 contract and other contracts the contractor was seeking to obtain or negotiate.

Secondly, by the time of the request, the contract was already nearly fourteen months old. This is important given the rapidly changing and competitive nature of the field of information technology. It would seem very likely that any tenders submitted, or contracts negotiated, subsequent to the request would have been significantly different in terms of what was contained within them to the provisions contained in this contract.

Thirdly, by the time of the request, parts of the original contract had been renegotiated. Therefore the original agreements would no longer present a true picture of the current contractual obligations of any of the parties.

Finally the ICO noted that the complainant had sought to exclude from his request, information which may be regarded as more likely to be of a sensitive nature such as pricing and financial information and certain technical information.

For these reasons it was felt that disclosure would not prejudice the contractor's commercial interests. The Department also argued that disclosure would harm its own commercial interests. In its view disclosure would have provided commercial providers

with an advantage during active negotiations with regard to other contracts in the same procurement programme. Again the ICO disagreed pointing out that the N3 contract was sufficiently unique that direct comparisons could not realistically be drawn with those other contracts during any renegotiations which might take place.

In coming to this conclusion, the ICO also relied on the comments of the Tribunal in an appeal involving the Department of Health v The Information Commissioner (EA/2008/0018) in November 2008. Here the Tribunal was also called upon to consider the extent to which information in an IT contract should be disclosed.

In reaching its decision the Tribunal went on to place significant reliance on the OGC Guidance, stating it was “...a useful approach to dealing with an information request and in broad terms reflects the approach that we have adopted in our consideration of this contract.” (para 80). The Tribunal made reference to 12 areas within a contract which the guidance indicates should normally be disclosed by a public authority. These are:

- i. Service level agreements
- ii. Product/service verification procedures
- iii. Performance measurement procedures
- iv. Contract performance information
- v. Incentive mechanisms
- vi. Criteria for recovering sums
- vii. Pricing mechanisms and invoicing arrangements
- viii. Payment mechanisms
- ix. Dispute resolution procedures
- x. Contract management arrangements
- xi. Project management information
- xii. Exit strategies and break options

The ICO noted that these 12 areas covered a significant amount of information contained in the present N3 contract with BT

The Tribunal went on to state that it “...would expect the DoH in any future cases of this type to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out.” (para 87)

The ICO further noted that the Department in the present case had not provided it with any specific arguments as to why the general principles contained in the OGC Guidance should not apply in this case and therefore why information should be withheld.

In another Tribunal decision (*Fred Keene v ICO and Central Office of Information* (EA/2008/0097)(14th September 2009)) the appellant requested tender evaluation forms in respect of all those who submitted bids to COI for providing reprographics services. In all there were 14 tenderers and 28 evaluation forms (completed by two evaluators). In response to his request the appellant was given his own company's evaluation information but not of others on the grounds that it was commercially sensitive (section 43).

The Tribunal analysed all the information contained in the evaluation forms. It ruled that section 43 was not engaged either as prejudicing the bidders' commercial interests or those of the COI. It noted that the forms were not an assessment of the bidders' performance or the quality of their work. They did not contain what might properly be regarded as commercially sensitive information; for example, they contained almost no price information or financial data except for limited references to turnover in the "Comments and Notes" section. Such information would, in any event, be publicly available from sources such as Companies House.

The key part of the evaluation form simply contained a score for each bidder, against certain criteria. A number of these criteria were clearly specific to COI. There was no evidence before the Tribunal that as far as reprographic suppliers were concerned, COI's criteria were likely to be the same or similar to other buyers of such services such that any negative assessment by COI would have the prejudicial effect that was claimed. The Tribunal also took account of the fact that as at the date of the request, the disputed information was already two years old and the information on the basis of which the applicants were assessed (for example size of company and client list), may well have changed.

The Tribunal also noted the existence of the OGC Guidance. The working assumption in the guidance, as regards tender evaluation information, is that such information will generally be released in relation to both successful and unsuccessful bidders (including rankings), except where the information is sensitive or there are security concerns (section 4, points 2, 3 & 4). The guidance also indicates that tender information is only to be regarded as sensitive during the actual tender phase. The Tribunal therefore ordered that the requested information be released.

These are important decision for procurement professionals and their advisers. It shows that when receiving requests for procurement information, there must be a careful examination of the contents of documents covered by the requests to ascertain exactly what the prejudicial effect of disclosure will be. Assumptions cannot be made on the basis of the nature of the documents (e.g. contracts or tenders); it is the contents of the documents which are important. Regard must also be had to the OGC Guidance and where it is not followed there must be a good reason why.

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