



MAPLES
GROUP

Weighing up all the practical scenarios, how much of the winning bid should you divulge, especially around 'added value' which could be a competitive advantage?

Mary Dunne

2020

Article 21 of the Public Sector Directive (Art 39 of Utilities Directive)

Confidentiality

Unless otherwise provided in this Directive
or in the national law to which the contracting entity is subject,.....
the contracting entity shall not disclose information forwarded to it by
economic operators
which they have designated as confidential,
including, but not limited to,
technical or trade secrets
and the confidential aspects of tenders.

Reg 21 Public Contracts Regulations 2015 (Reg 22 of Scottish Regs)

Confidentiality

- 21.—(1) A contracting authority shall not disclose information which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.
- (2) Paragraph (1) is without prejudice to—
 - a) any other provision of this Part, including the obligations relating to the advertising of awarded contracts and the provision of information to candidates and tenderers set out in regulations 50 and 55 respectively;
 - b) the Freedom of Information Act 2000(1);
 - c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

Article 55 of the Public Sector Directive (75 of the Utilities Directive)

Informing applicants for qualification, candidates and tenderers

- 55 (3) Contracting entities may decide to withhold certain information referred to in paragraphs 1 and 2, regarding the contract award, the conclusion of the framework agreement or the admittance to a dynamic purchasing system is to be withheld where its release would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of a particular economic operator, public or private, or might prejudice fair competition between economic operators.
- 55 (2)(c)the characteristics and relative advantages of the tender selected, as well as the name of the successful tenderer or the parties to the framework agreement.

Article 48 of the Public Sector Directive

Competitive Dialogue

48 (3) (In accordance with Article 39, contracting entities shall not reveal to the other participants solutions proposed or other confidential information communicated by a participating candidate or tenderer in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

Article 49 of the Public Sector Directive

Innovation Partnerships

49 (6) In the procurement documents, the contracting entity shall define the arrangements applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting entity shall not, in accordance with Article 39, reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

Varec SA v Belgium (C-450/06)

The principal objective of the Community rules... is the opening up of public procurement to **undistorted competition**

- In order to maintain that objective it is important that CAs do not release information relating to contract award procedures which could be used to distort competition
- Contract award procedures are founded on a relationship of trust between the CAs and participating bidders.
- Bidders must be able to communicate information to the CAs in the procurement without fear that the CA will communicate to third parties information which could be damaging to them.
- In a judicial review, the Court assumes the obligations with regards to the CA's duty to respect the confidentiality of information

Varec SA v Belgium (C-450/06)

- Adversarial principle means that as a general rule parties have a right to disclosure
- It may be necessary for information to be withheld from the parties to preserve fundamental rights of a third party/safeguard an important public interest
- The protection of business secrets is a general principle
- The maintenance of fair competition in the context of award procedures is an important public interest
- The right of access must be balanced against the right of other bidders to the protection of their confidential information and business secrets

Case Law

***Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC); [2013] C.I.L.L. 3360; [2013] 4 WLUK 409 (QBD (TCC))³**

Subject to issues of proportionality and confidentiality, the general position should be that a challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality. This ties in with the short time limit that applies to bringing procurement challenges and the "date of knowledge" test that triggers the commencement of this time limit

***Bombardier Transportation Ltd v Merseytravel* [2017] EWHC 575 (TCC); 171 Con. L.R. 241; [2017] 3 WLUK 609 (QBD (TCC))**

- The dispute related to a tender process undertaken by the defendant, Merseytravel, for the award of contracts forming the Merseytravel Rolling Stock Programme. Bombardier Transportation Ltd (the claimant) made a bid which was unsuccessful. The claimant made various allegations against the defendant regarding the conduct of the competition.
- In February 2017, the solicitors of another unsuccessful bidder wrote to Mr Justice Coulson in his capacity as head of the Technology and Construction Court ("TCC") notifying him that, when they had sought to obtain copies of documents relating to these proceedings, they were informed that the whole court file had been marked "private" and that non-parties would not be allowed access. Coulson J made further enquiries and learned that all public procurement claims were being marked as "private" and third party access being routinely denied. Separately the claimant made an application for an order pursuant to Civil Procedure Rule 5.4C that the particulars of claim and its confidential annexes should not be provided to third parties.

***Bombardier Transportation Ltd v Merseytravel* [2017] EWHC 575 (TCC); 171 Con. L.R. 241; [2017] 3 WLUK 609 (QBD (TCC))**

- Mr Justice Coulson first addressed the fact that court files for public procurement disputes are routinely marked as confidential. He made clear that the starting point for all civil claims is the principle of open justice. Unless there is a good reason why not, all civil claims should be heard in open court and all documents on the court file should be publicly available. Procurement disputes should not be treated as "private" due solely to the fact that they are procurement disputes. He recognised, however, that a balance must be struck between open justice and confidentiality in this context and that particular difficulties can arise in procurement disputes.

“Where necessary to protect confidential information the Court may, if requested, make an order restricting inspection of the Court files. Requests to restrict inspection should only be made where necessary. Any member of the public may seek an order from the Court varying any such restrictions. Consideration should be given to providing appropriately redacted pleadings for the Court file so as to permit public access to them.”

***Bombardier Transportation Ltd v Merseytravel* [2017] EWHC 575 (TCC); 171 Con. L.R. 241; [2017] 3 WLUK 609 (QBD (TCC))**

- Coulson J went on to note that use of confidentiality rings are also common and that it may sometimes be necessary for parts of a procedural trial, which deal with the confidential elements of a tender (whether that of the claimant or that of the successful bidder), to be heard in private, referring to *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* 2 by way of example.

***Geodesign Barriers Ltd v Environment Agency* [2015] EWHC 1121 (TCC) (QBD (TCC))**

- High Court ruling by Mr Justice Coulson that a claimant is entitled to an order for early specific disclosure of rival bids and additional evidence of evaluation scoring, even though its case was prima facie weak.
- On April 29, 2015, Coulson J. handed down a stimulating ruling on an application for early specific disclosure in an unusual case concerning the award of a contract for flood defence installations. The judge was surprised by the defendant authority's paucity of documentary evidence relating to the two-stage selection and evaluation of tender submissions and, even though the claimant was scored sixth out of ten participants in the relevant process, decided that in order for it to properly evaluate the strength or otherwise of its claim it required sight of the bid documents put forward by higher scoring unsuccessful tenderers, as well as such further evidence as existed in respect of the manner in which the authority's team of evaluators reached its decisions on initial selection (against mandatory specifications) and ultimate award evaluation.

***Geodesign Barriers Ltd v Environment Agency* [2015] EWHC 1121 (TCC) (QBD (TCC))**

Coulson J. reprised the reasoning from his own test laid down in *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust*,⁷ pursuant to which the principal question was whether:

"... always subject to issues of proportionality and confidentiality, the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality

Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform

Irish Court of Appeal

- Word Perfect sought discovery of nine categories of documents which it argued were relevant and necessary to enable it to fairly and properly challenge the award decision. The documents sought related to the evaluation of specific award criteria, the successful tenderer's tender and associated clarifications, the evaluation of the successful tender, the evaluation of Word Perfect's tender and the failure to observe a standstill period.
- The Court of Appeal overturned the High Court decision in all material respects, concluding that all nine categories of discovery ordered by the High Court were not in fact relevant and necessary for the fair and proper determination of the issues in the proceedings. Word Perfect initiated legal proceedings challenging the outcome of a mini-competition for a contract for the provision of translation services.

Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform

- The Court of Appeal recited with approval the key principles that guide the Irish Courts in relation to discovery in public procurement cases, as summarised by the Court in *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury Management Agency and Minister for Education and Skills 2*:
 1. The primary test is whether the documents are relevant to the issues between the parties. Once that it is established, it will follow in most cases that their discovery is necessary for the fair disposal of those issues.
 2. Relevance is determined by reference to the pleadings.
 3. Documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties to the proceedings.
 4. An application for discovery must show it is reasonable for the court to suppose that the documents contain relevant information.
 5. An applicant is not entitled to discovery on speculation.

Word Perfect Translation Services Ltd v The Minister for Public Expenditure and Reform

6. In certain circumstances an order for discovery which is too wide-ranging may be an obstacle to the fair disposal of proceedings rather than the converse.
7. The crucial question is whether discovery is necessary for "disposing fairly of the cause or matter".
8. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent, in addition to ensuring that no party is taken by surprise by the production of documents at trial.
9. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties.

Freedom of Information Act 2014 (Ireland)

UK FOI legislation follows the same principals as the Irish legislation but the refs here are to the Irish legislation.

FOI Act seeks to strike a balance

- There is a basic right of access to information
- That basic right is subject to appropriate exemptions
- Public interest override

Freedom of Information Act – Basic Right to Information

1. Legal right to access records within the possession or control of public bodies
2. Legal right to obtain reasons for decisions of public bodies which materially affect the person
3. Legal right to have personal information amended where it is incomplete, inaccurate or misleading

Freedom of Information Act – Exemptions

- Deliberations of Public Body (Section 29) –will apply during process, but unlikely to apply after decision is made
- Negotiations of Public Body (Section 30)
- Legal Professional Privilege (Section 31)
- Confidentiality (Section 35)
- Commercial Sensitivity (Section 36)

Freedom of Information Act – Public Interest Test

Arguments against disclosure

- To enable public bodies to make informed decisions and maintain confidentiality of proceedings where deliberative processes or other negotiations ongoing
- To protect the integrity of decision making processes which could be contaminated by future release
- To avoid the premature release of information which could be misleading to the public
- To protect the legitimate business interests of third parties and to ensure that they are not unduly impeded in the pursuit of their business or disadvantaged vis-à-vis their competitors
- To protect the bargaining power of the public body in commercial negotiations

Freedom of Information Act – Public Interest Test

Arguments in favour of disclosure

- Right of public to have access to information
- Reveals reasons for decisions of public bodies, improves transparency and accountability
- Encourages value for money in use of public funds
- Need for public to be better informed and more competent to comment on public affairs
- Information makes valuable contribution to debate on an issue
- Balancing democratic control of citizens against control of Government

Freedom of Information Act – Means of obtaining information

- Freedom of Information Access request –section 12
- Request for reasons for decision/information regarding acts of public bodies affecting the person –section 10
- No automatic exclusion of FOI solely because there is or has been a tender process or a separate way of obtaining information (letters to bidders and debriefing sessions etc.)
- FOI Central Policy Unit Notice No. 5 of FOI and Public Procurement – Public bodies are not in a position to give guarantees of confidentiality

Freedom of Information Act – Relevant Information Commissioner Decisions

Confidentiality and Commercial Sensitivity

- During a tender process -reasonable to assume that information is confidential and will be maintained in confidence (*Henry Ford & Sons limited, Nissan Ireland and Motor Distributors Ltd and the OPW; Mark Henry and the OPW*)
- After completion of tender process -relationship of vendor and purchaser -no mutual understanding that the tender price would be maintained in confidence. (*Henry Ford & Sons Limited, Nissan Ireland and Motor Distributors Ltd and the OPW*)

Freedom of Information Act – Relevant Information Commissioner Decisions

Confidentiality and Commercial Sensitivity

- Unsuccessful Tenderers -pricing information can still be subject to a confidentiality obligation. (*Mark Henry and the OPW*)
- In circumstances where confidentiality obligations apply, pricing information can still be provided on a “disassociated basis” (*Mark Henry and the OPW*)
- Hourly and daily fee rates regarded as commercially sensitive (Mr X and the Department of Education and Skills)

Freedom of Information Act – Relevant Information Commissioner

Confidentiality and Commercial Sensitivity

- Information Commissioner not convinced that the disclosure of the successful tender price would be likely to result in commercial enterprises refusing to tender in the future (Henry Ford Sons Limited, Nissan Ireland and Motor Distributors Ltd and the OPW Mark Henry and the OPW)
- Significant public Interest in public bodies obtaining value for money and in openness about expenditure of public funds, though not absolute (Eircom plc, Mark Henry, Dept of Agriculture and Food etc)

GDPR and Data Protection Acts 1998 - 2018

Must be considered in the context of tenders with particular reference to:

1. CVs
2. References

Practical Examples

1. Price
2. Experience / References
3. CVs
4. Methodology
5. Added Value



MAPLES
GROUP

The Maples Group provides clients with comprehensive legal, fund, fiduciary, regulatory and compliance and entity formation and management services.

[maples.com](https://www.maples.com)