

White Paper Procurement Conference 2020

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Disclosure of Information Relating to the Winning Bid

“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”?

Coverage

Obligations relating to Standstill

- When do you need to serve a notice
- Contents of a standstill notice
- Characteristics and Relative Advantages of the Successful Tenderer (CRAST)

Feedback

Frameworks

Dealing with Added Value

Other disclosure

When is a Standstill Notice necessary?

Regulation 86

Award of Contracts covered by Part 2 PCRs

- What about below threshold?
- Direct award?
- Contract Modification?

Conclusion of Framework Agreement

Exemptions

Contents of a Standstill Notice

Criteria for award of contract

Reasons for the decision, including the characteristics and relative advantages of the successful tenderer

Score of the recipient of the notice and the successful tenderer

Name of the successful tenderer

Precise statement of when standstill period is expected to end

Date before which the contracting authority will not enter into the contract or framework agreement

Grounds for withholding or not disclosing

Regulations 86(5) and 85(6)

Exemptions

- Direct award
- Only one tenderer
- Call off from framework or DPS

Withholding

- Would impede law enforcement
- Contrary to public interest
- Would prejudice legitimate commercial interests of a particular economic operator
- Might prejudice fair competition

CRAST

Apply basic principles: proportionality, transparency, fairness

“Characteristics” requires sufficient description of the winning bid

“Relative advantages” requires comparison to the recipient’s unsuccessful bid

What else do you need to disclose as part of giving the “reasons”?

Extent of duty to disclose

Is there a duty to disclose the relative disadvantages of the winning tender?

- E.g. Tender for services with price quality scoring of 50/50. Tenderer A submits lowest price (50 marks) but lower quality bid (30 marks). Tenderer B submits high cost tender (30 marks) but with higher quality (45 marks). Tenderer A wins (80 v 75). The only relative advantage of the successful tender is price. Does the contracting authority need to disclose the details of the winning tenderer's quality submission?
- Note that if the 30 marks is an error and Tenderer A should have been awarded less than 25, then despite being lowest bidder, it ought not have won
- Should there be disclosure of this as a characteristic?
- Is the general requirement to give reasons enough (CRAS is merely part of the duty and not the extent of the duty)

Disclosure

The disclosure conundrum - is it better to disclose less or more?

CRAST usually raises more questions than answers

Do you need to respond to further requests for information?

Do I need to postpone end of standstill?

Impact on time limits for challenge

- 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen
- Failure to provide sufficient information may lead to protective challenge or leave the authority with risk of challenge beyond 30 days from the standstill notice

Date of Knowledge

“Knowledge of the basic facts which apparently clearly indicate (although do not necessarily prove) an infringement of the Regulations” (*Sita UK Limited v Greater Manchester Waste Authority [2011] EWCA Civ 156*)

The challenge faced by the bidder (all within 30 days):

- obtain legal advice;
- engage with the contracting authority to ask for further information
- consider if a negotiated settlement could be reached
- seek internal governance approvals
- if necessary, prepare and issue legal proceedings

TCC Guidance Note on Procedures for Public Procurement Cases

Management of Confidential Information

ITT may contain a commitment to keep certain information confidential

Winning bidder may have applied confidentiality condition

Without the confidential information, unsuccessful bidder may not know if there are grounds for starting proceedings

Use of confidentiality ring

Disclosure of Price

Not specifically mentioned in Regulation 86

May be justified to withhold under 86(6)

But use of standard price differential formula means unsuccessful bidder can determine the price of the successful bidder anyway

Feedback

Are interviews a good idea?

No legal obligation to offer verbal feedback

May be hard to resist after CD and CPN

If giving feedback interview

- Carefully script, do not depart from it, insist on questions being put in writing
- Select the right attendees
- Time limit
- Be consistent

Frameworks

Standstill obligations apply to the letting of the framework, not a mini-competition

A voluntary standstill notice after mini-competition disappplies ineffectiveness ground

What goes into the standstill notice upon the conclusion of a framework agreement?

Whose CRAFT information?

- “the tenderer to become a party to the framework agreement” (Regulation 86(2)(ii)(bb))
- Therefore, all tenderers admitted to the framework, not just the highest scoring or lowest scoring of those admitted to the framework

No requirement for a successful tenderer on the framework to receive a standstill notice in relation to the higher scoring tenderers

- However, if call offs are by direct award, “successful” tenderer may wish to challenge a low ranking

Other Rights to Information - Regulation 55

Duty to inform all candidates and tenderers of conclusion of framework, award of contract or admittance to a DPS

This includes grounds for decision not to award or to recommence the procedure or not implement a DPS

On request, duty to respond as soon as possible and in any event within 15 days informing of reasons for:

- Rejection of request to participate
- Reasons for the rejection of tender (this is not limited to CRAFT)
- CRAFT
- Conduct and progress of negotiations and dialogue

Freedom of Information Request

Freedom of Information Act and Environmental Information Regulations

Exemptions

- personal data
- if it was obtained from any other person and the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person
- information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)

Obligation to respond within 20 days (40 days under EIR)

Right to refer to ICO

Other disclosures

Regulation 84 Report

Modification under 72(1)(b) or 72(1)(c)

Direct award under 32(2)(a) if requested

Contract Award Notice

Publication on Contracts Finder (Regulation 112)

Added Value

Added Value is assumed to mean additional benefits offered which are not part of the requirements of the works, supplies or services

Not necessarily the same as Social Value

Added Value response may be requested or arrive unsolicited as part of the tender

Added Value

If the added value is evaluated and scored, it is no different to any other criteria

If the added value is for information only, not part of CRAFT and need not be disclosed under Regulation 86

May be subject to FOI request

If added value is not weighted and scored it cannot form part of the award decision - Regulation 65

If weighted and scored, it must nevertheless be linked to the subject matter of the contract and shall not confer an unrestricted freedom of choice on the contracting authority

Even if relevant, should be ignored if unsolicited