



Early Full Disclosure

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White Paper Conference

The Questions



- Is there a shift towards full disclosure from the outset, following *Serco v SoS for Defence*?

- How do you advise clients about possible breaches of confidence or prejudicing retenders?

Themes



- TCC Guide
- Recent cases
- Interested Parties
- Retenders, repeat procurements and competition
- Confidentiality rings
- Redaction
- Prevention and preparation

➤ Pre-Action, the parties:

- should act reasonably and proportionately in providing one another with information, taking account any genuine concerns re confidentiality (their own or of third parties)
- Consider the use of confidentiality rings and undertakings at the pre action stage
- The authority is strongly encouraged to disclose the key decision materials at an early stage where relevant to the complaint made

Para 7

Recent cases

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Roche v Mid Yorks



- Unsuccessful tenderer knows he has lost, but the reasons for failure are in peculiar knowledge of Authority
- **Challenger ought to be provided promptly with 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

- Most likely to succeed where what is sought is material that demonstrates how the evaluation was actually performed and therefore by C lost

- Balancing C's lack of knowledge of what actually happened with the need to guard against a fishing exercise to shore up a weak claim

In practice



- Is there a Particulars of Claim to base the application on?
- Coulson J (ahtw)

“Applications to extend time for the service of the particulars of claim in a procurement dispute are rare... it is certainly not the sort of application that this court should encourage. In my view, in the present case, CEMEX embarked on a risky course when it chose to apply for more time to serve its pleading linked to the provision of extensive documents rather than doing the best it could on the information available to it.

Cemex v Network Rail [2017] EWHC 2392 (TCC)

Serco v MOD I



- Award decision 18.6.19. On 22.6.19 Serco sought disclosure of evaluation records and documents evidencing decisions taken in the evaluation

- MoD did not give disclosure. Serco issued an application in November 2018, heard on 28.2.19

Serco v MOD II



- MoD conceded the application on the day before hearing and sought costs in case
- Held – there were no sensible grounds for the Defendant to have refused disclosure - documentation should have been disclosed in July 2018 if not late June 2018.
- Indemnity costs awarded, to the last penny

MST v MoD I



- MST are an incumbent supplier to the MoD. They tendered in a successor competition.
- Shortly before the award decision was announced MST discovered that its confidential pricing information on the previous contract had been published by the MoD on a number of different websites
- They notified the MoD of that fact in Jan 2019 and asked the MoD whether their competitors had in fact accessed that material to their detriment

MST v MoD II



- Proceedings including a procurement challenge were issued on 7.2.19 and 24.4.19
- The MoD admitted the breaches of confidentiality but gave only limited disclosure of the extent of access to the website pages
- MST's application for disclosure and inspection of website records was heard on 9.7.19
- The Judge held there was a common interest in knowing as soon as possible whether the publication of the information had any real consequences

MST v MoD III



- Order for disclosure and inspection of website records by MST's experts subject to confidentiality undertakings under the supervision of the MoD
- MST sought indemnity costs
- Held: In the context of a procurement case and admitted breach the MoD should have dealt with the issue more quickly. While the case was close to the line, there was no deliberate obstruction or obfuscation. It was not an indemnity costs case.
- MST got 82% of their costs

Disclosure and Applications to Lift



➤ *Alstom v London Underground*

- No general principle that ATL will be heard in advance of disclosure
- If serious issue is in dispute and CA is refusing disclosure, Court will be astute to ensure that the CA is not seeking to gain unfair advantage by withholding documents
- If the matter comes before the court before the disclosure application and ATL is heard, the safest course may be to fix the specific disclosure application first in any event

2017 EWHC 146 (TCC)

The First Answer

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- Is there a shift towards full disclosure from the outset, following *Serco v SoS for Defence*?
 - Yes, early disclosure of *Roche* material
 - Before the hearing of an application to lift or a strike out

A Balancing Act

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The winning bidder

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TCC Guide - the winning bidder



- Interested Party has a wider meaning in procurement claims than in CPR Part 54
- Includes winning bidders, sector regulators, competitions authorities and sub-contractors
- An interested party (IP) may apply to become a full party to proceedings
- Its interests can usually be considered and addressed by the Court without that being necessary

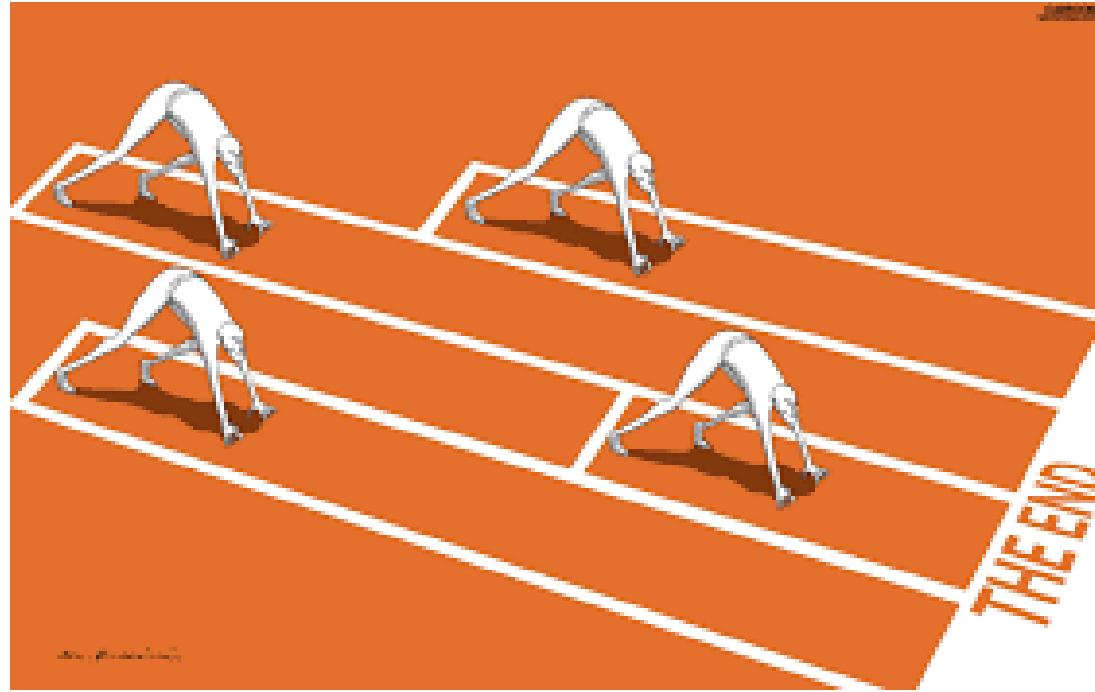
TCC Guide - the winning bidder



- C and D should take steps to ensure that IP is on notice of matters that affect its interests
- It needs to apply to be represented
- Most usual interventions are in respect of disclosure of confidential information relating to their bid and its evaluation and in response to ATL
- IPs may be involved all the way to, and at, trial
- They may be ordered to pay, or recover, costs

TCC Guide paras 51 61

Competition: re-runs, tight markets and repeat procurements



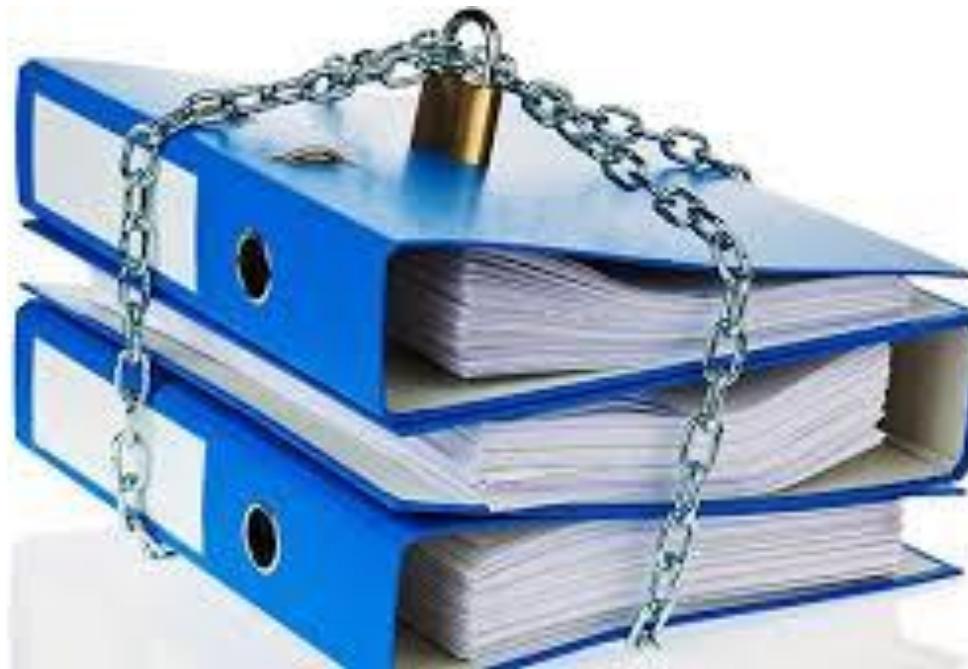
- The principal objective of the Community rules... is the opening up of public procurement to undistorted competition
- In order to maintain that objective it is important that CAs do not release information relating to contract award procedures which could be used to distort competition
- Contract award procedures are founded on a relationship of trust between the CAs and participating EOIs.

- Those EOIs must be able to communicate information to the CAs in the procurement without fear that the authorities will communicate to third parties information which could be damaging to them.
- In a review, the review body (i.e., the Court) assumes the obligations with regards to the CA's duty to respect the confidentiality of information
- 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 EOs to the protection of their confidential information and business secrets

Confidentiality

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Confidentiality

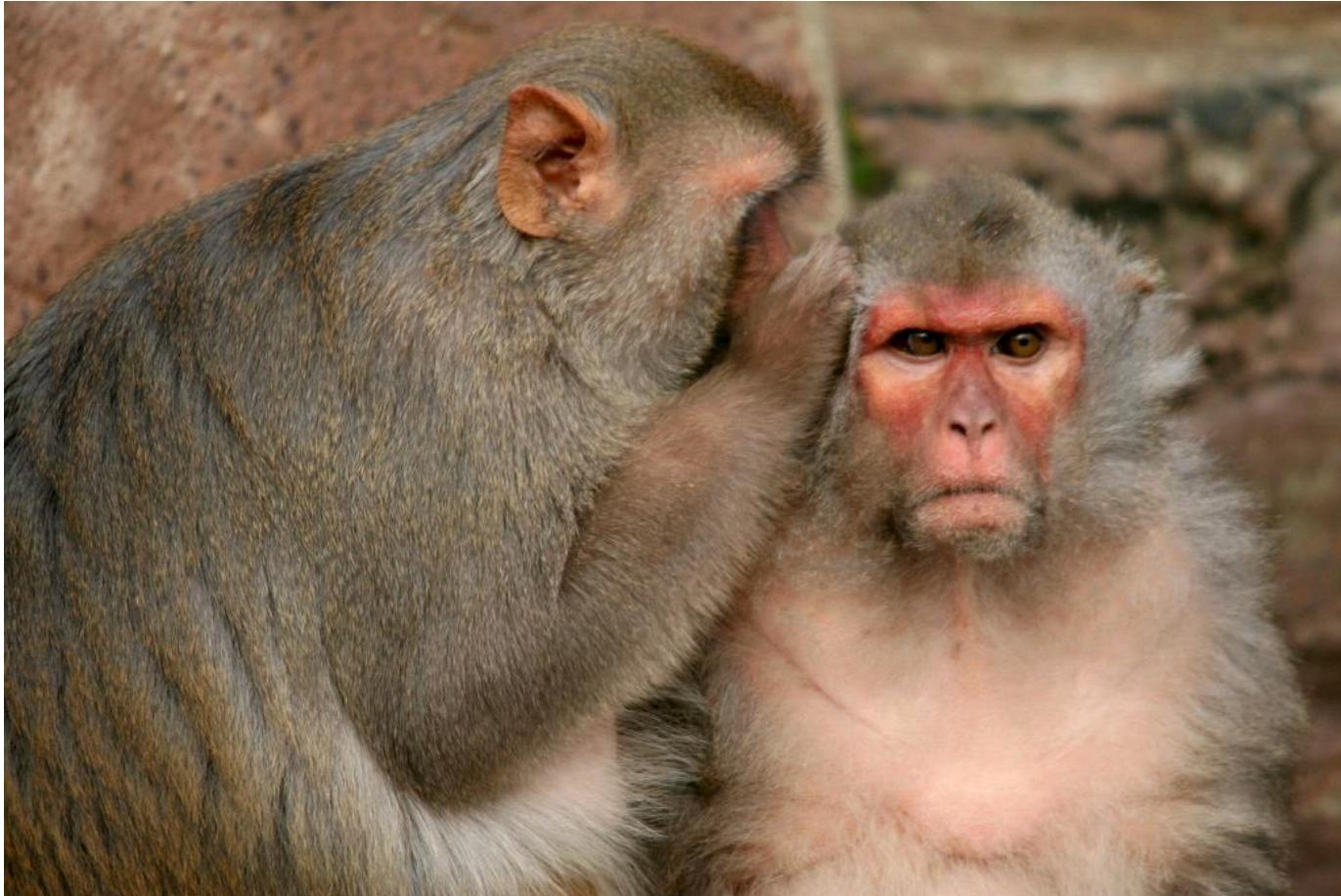
A CA shall not disclose information forwarded to it by an EO and designated by that EO as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders

Regulation 21



Confidentiality rings

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- Coulson J (as he then was)
 - “I consider that issues as to **the precise make-up of confidentiality rings are self-evidently not proper matters for the court** and classically matters for the parties to sort out and agree.”
 - Where highly confidential information is concerned “**it is usual for outside advisors or assessors to sign an undertaking that they would not be involved in future procurements in this area.** The time period in the proffered version of the undertaking in this case **is three years... I confirm that in my view it is reasonable”**

Confidentiality Rings - SRCL - relevant factors



- SRCL v NHSE factors
 - **The inherent desirability of at least one representative of each party within the ring**
 - The nature of the confidential information and whether it needs to be considered by people with technical/expert knowledge
 - No order for disclosure of third party information without giving that party the right to make representations to the court
 - There are a range of options available to preserve confidentiality and be consistent with the challenger's rights and the administration of justice

Redaction - TCC Guidance Note



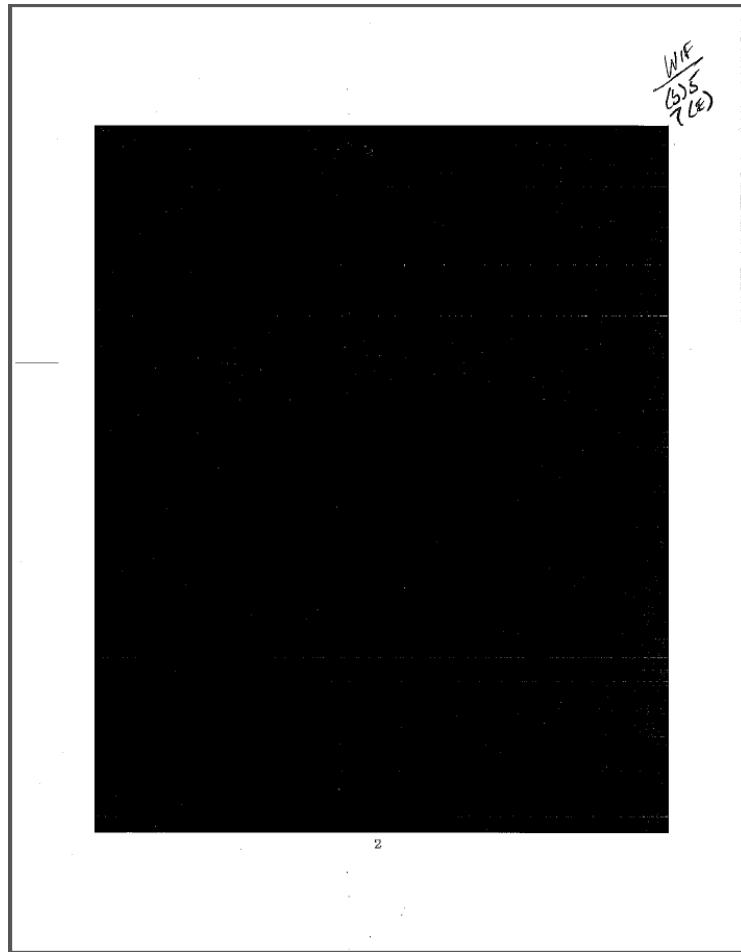
- Redaction on grounds of privilege or confidentiality
- Schedule justifying redaction (para 32)

Document Title	
Location in Document	Reason for assertion of confidentiality
Page 15, paragraph 4.2	The deleted material relates to ABC Limited's confidential costs and prices The information is in the nature of a business secret

- Copy for the Court in unredacted form with redactions indicated

Redaction in practice...

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The second answer



- How do you advise clients about possible breaches of confidence or prejudicing retenders?
 - **Confidentiality rings** are the solution developed by the Courts to balance the requirement for a fair trial with the requirement to protect business secrets and prevent distortion of competition
 - **Undertakings** from members of confidentiality rings
 - **Redaction** for legal privilege, relevance
 - Tiered approach

Discipline; or Regulation 84...

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Regulation 84



- 84 (7) Document the progress of procurement procedures
- 84 (8) Sufficient to justify decisions taken in all stages of the procedure
 - Communications with EOs
 - Internal Deliberations
 - Preparation of procurement documents
 - Dialogue or negotiation
 - Selection and award

Be Prepared!

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Be prepared...



- Review adequacy of the Reg 84 documents and the process as procurement proceeds – early warning
- Documents that record the procurement actually undertaken;
- As part of the Award Decision process, consider what documents the losing bidder(s) need to see to understand the evaluation process undertaken and get them ready, **because if there is challenge you will have to disclose them** subject to appropriate protections and the rights of the IP



Thank you for listening

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