

# Transparency

**Fionnuala McCredie Q.C.**

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How marked is the **shift in approach to transparency and full disclosure from the outset**, including possible breaches of confidence or prejudicing retenders?

- The current landscape
- Challenges
  - Interested Parties
  - Confidentiality, Confidentiality rings, client access
  - Disclosure in tranches, limitation, pleadings
  - Ongoing procurements
- Breaches of Confidence/Re-tenders
- The Green Paper

- The Courts have made their attitude to a tardy/reluctant approach to disclosure very clear by awards of indemnity costs:
  - **CAF v HS2** [2018] EWHC 311 (TCC)
  - **Serco v SoS for Defence** [2019] EWHC 515 (TCC)
  
- That has led to more disclosure, earlier, but certainly not full disclosure at the outset

# Challenges - Confidentiality



- Whilst confidentiality is no barrier to disclosure it is still a brake on early disclosure as it engages the interests of others (“Interested Parties”) – e.g., the successful bidder, other bidders in a live competition, regulators whose interests and confidential information must be protected
- Confidentiality rings are the solution that the Courts have adopted to balance those interests and are now the norm in procurement cases: But...

# Challenges – Confidentiality Rings



# Challenges – Confidentiality Rings



- Confidentiality rings continue to absorb more time and money than they should:
  - Drafting
  - Structure (Tiers, mechanisms and time to moving material between tiers)
  - Membership
- The involvement of IPs causes significant complication and delay as their consent must be sought on all the above

# Client access to Confidentiality Rings





- This continues to cause delay and serious difficulties for challengers (and CAs) in complex procurements.
- **Coulson J Geodesign v EA [2015] EWHC 1211 (TCC)** para 53

*“It would be wrong to hobble the claimant’s preparation of its case by refusing to allow documents to be disclosed into the confidentiality ring to anyone other than lawyers... all too often, detailed issues arise out of the subject matter of the bids which the lawyers are simply unable to address”*



**SRCL v NHS** [2018] EWHC 1985 (TCC) remains the most helpful guidance on the subject. Fraser J supplemented the relevant factors for procurement cases:

- IPs have the right to make representations before their material is disclosed
- The Court/parties have a range of options to preserve confidentiality and remain consistent with justice
- It is not a solution for a solicitor of the challenger to be required to give primary evidence of fact and if that were a risk, it is a powerful factor in favour of expanding the CR

# Disclosure in tranches



- There is a trend to give early specific disclosure in tranches of documents, A welcome step towards earlier disclosure **but:**
  - Successive disclosure gives rise to new limitation dates with every release
  - That leads to the issue of repeated claim forms, or risk of arguments about the efficacy of limitation agreements
  - Repeated claim forms mean repeated amendments of the pleadings, the need for consolidation etc.
- All considerably increasing costs

- The **2019 Rail Franchising Litigation** [2020] EWHC 1568 (TCC) involved extensive disclosure during live procurements, from which the claimants had been disqualified. When the actions began, two of the three competitions were live
- Disclosure engaged the interests of the remaining bidders, the DfT in the award of current and future franchises and regulators
- Specific disclosure applications (and then standard disclosure) were ordered into individual and then merged CRs
- As trial approaches, the emphasis shifts from protection of confidential information towards the requirement for open justice

# Breaches of Confidence (1)



- There is always a risk of inadvertent breach of confidence in litigation; and that is increased in expedited procurement litigation.
- **Marine Specialised Technology v SoS for Defence** [2019] EWHC 2727 (TCC) concerned an admitted breach of confidence by the MoD in which they disclosed the winning bidder's pricing information

# Breaches of Confidence (2)



- The incumbent Claimant learnt during the re-procurement of its services that the MoD had published its detailed confidential pricing information on a number of public websites over a period of years.
- Claim issued 7.2.19 by a hearing on 9.7.19 the MoD had not been able to provide much information about precisely where the material had been published and by whom it had been viewed.
- Court ordered that the C's experts be permitted to inspect the relevant websites and analytical data and to pay costs on the standard basis, but at a recovery rate of 82%

## Croft House V Durham CC [2010] EWHC 909 (TCC)

- The Claimant sought disclosure in a live procurement for social care services for which the Council had model answers.
- The D argued that if it was required to disclose them, they risked generating a number of indistinguishable bids.

# Re-tenders (2)



- In ordering disclosure, Ramsey J stated *“What is not acceptable is that a party should be precluded from an effective remedy because of concerns that, if the remedy is granted, there may be difficulties in re-running the procurement process.”*
- He commented that if the effect disclosure was to provide tenderers with a better understanding of the Council’s requirements that was not detrimental to a fair and transparent tendering process, which was one of the aims of the regime.

# Transforming Public Procurement - the Green Paper and Transparency



- Legislation to **embed transparency by default** throughout the commercial lifecycle from planning through procurement, contract award **and performance**
- CAs required to disclose procurement and contract data as soon as practically possible and significantly increase transparency in the procurement regime.  
(GP para 165)

# Transparency by default (2)



- CAs required to declare in tender documents when information would be disclosed and justify what, if any, information is to be treated as commercially sensitive, retaining current rules in FOIA, EIRs and DPA
- Suppliers would be able to bid with a better understanding of the expected transparency requirements and the timetable for when data should be released.

GP Paras 165, 167

# Contract Notices and Open Contracting Data Standard



- Many more mandatory notices to be published, for non-competitive contracts and amendments, some of which will require a standstill period, and the publication of an Award Notice at award decision stage for all contracts (GP para 173)
- Potentially a dramatic increase in transparency, shedding light on any amendments at the stage of contracting and during performance and allowing the market to scrutinise variations effectively

- Expedited process, concentrating redress on pre contract measures and capping damages
- Removal of automatic suspension in cases of contracts let competitively in crisis or situations of extreme urgency
- No mandated requirement for debrief letters

- In order to facilitate that policy shift, changes under consideration are:
  - More information released to bidders with the award decision
  - More formal disclosure at an early stage to facilitate the expedited process, maybe during standstill
  - Template for confidentiality rings (hooray)
  - Tender guidance for CA and bidders on what will and will not be released (to try and head off arguments later)

- There has been a shift towards greater transparency, but it has not been seismic and there are many checks and balances in place to guard against breaches of confidence and to maintain the competitive environment (which delay disclosure)
- The reform of procurement law offers opportunities to improve transparency – and if the focus is to be on expedited trials and pre contractual remedies, a lot more information will have to be disclosed, and sooner

# Thank you for listening

**FIONNUALA MCCREDIE Q.C.**  
**[fmccredie@keatingchambers.com](mailto:fmccredie@keatingchambers.com)**