

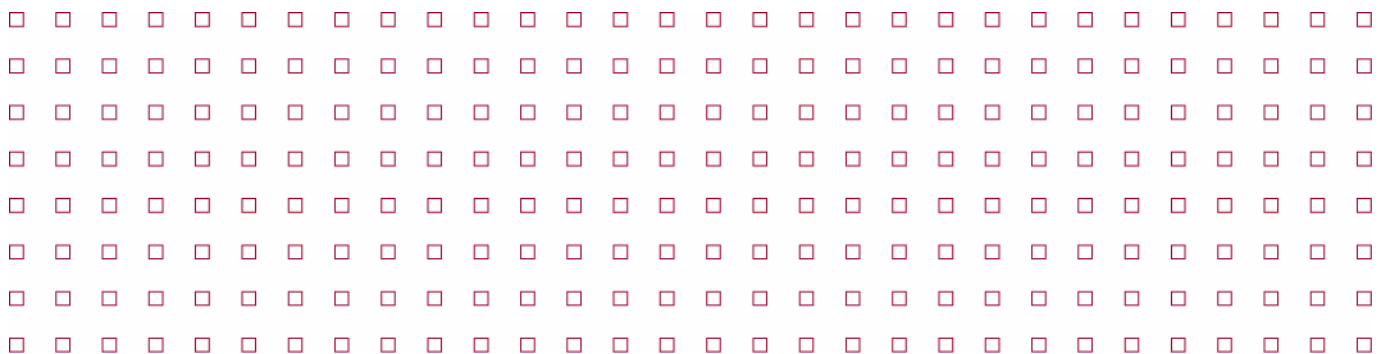


Freedom of information guidance

Working assumptions – procurement

Annex B – worked examples

20 November 2008



Contents

The worked examples are drawn from the Office of Government Commerce’s ‘freedom of information (civil procurement) policy and guidance’, available at www.ogc.gov.uk.

The following worked examples illustrate how the working assumptions may work in practice. It is not feasible to offer examples of all possible situations, but those offered demonstrate some of the rationale underlying the working assumptions while highlighting where exceptions may be relevant. It must be emphasised that the examples are intended to be generic and the outcomes should therefore not form the basis of the decisions in a particular ‘real’ case (i.e. they are not taken from case law and should not be considered as ‘precedent setters’). The term ‘provisional decision’ is used to describe the initial outcome of the decision process, which will always be subject to any escalation mechanism or referral to the Ministry of Justice Clearing House.

Example 1	1
Example 2	2
Example 3	4
Example 4	5
Example 5	7
Example 6	9

Example 1

Information requested: Price quoted in all tenders received for procurement of a licensing system.

Timing of request: Prior to contract award.

Working Assumption: Not to be released

Discussion

In this example, all the four bidders have made clear in their tenders that release of pricing information would damage their commercial interests. Additionally, the Office of Government Commerce policy says that the release of any tender information during the selection and award stages would prejudice the procurement process, delaying the procurement exercise and possibly requiring retendering. This would lead the authority to incur greater expense, and hence prejudice its own commercial interests. The Freedom of Information Act requires the same treatment of information requests regardless of the identity of the requester. Hence it is possible that a bidder (or potential bidder) would receive the information and this could affect bids submitted in terms of either content or price, reducing the value for money achieved.

Weighing these factors, the authority decides that the section 43 exemption applies and that there is a strong public interest in non-disclosure. As no public funds have yet been committed, the counter-balancing public interest in disclosure is weak and the authority therefore decides to withhold the information.

Provisional decision:

Withhold, citing section 43.

Example 2

Information requested:

Total price of awarded contract for a licensing system, together with a full price breakdown for every element.

Timing of request: Post contract award, within first year of implementation.

Working assumption:

Total price – Generally disclose.

Price breakdown – Not to be released

Discussion

In this example, the tender was conducted as an Official Journal of the European Union exercise and the policy, in line with EU Procurement Directives, is that the total contract price should be disclosed. The supplier argued during contract negotiations that it considered the total price confidential, as its disclosure may prejudice a bid for a similar system it was submitting elsewhere. Although there may be rare examples where there is a strong public interest in not disclosing the total price (e.g. where sales to foreign governments are involved), there are no such considerations in this case. The authority rejected the supplier's stance as the slight commercial harm that the supplier might suffer was insufficient to justify an exemption, and in any case was outweighed by the strong public interest, on transparency grounds, in disclosure.

Close inspection is needed of the price breakdown to assess the prejudice to the supplier of releasing detailed information. The supplier said during contract negotiations that all price breakdown information is confidential. The authority decides, after consultation with the supplier, that the prices of the top-level deliverables can be released (e.g. total hardware price, total support price, total training price, etc).

However, the authority decides that any further level of breakdown would reveal information that is likely to damage the supplier's commercial interests (e.g. price of individual workstations would reveal bulk-buy arrangements negotiated by supplier, training breakdown would reveal day rates for training consultants, etc).

The authority judges that the public interest in disclosing this information is not outweighed by the public interest in upholding the supplier's concerns.

Provisional decision:

Disclose total contract price and top-level breakdown.

Withhold detailed price breakdown, citing section 43.

Example 3

Information requested:

Technical details of a new patient monitoring network within a PFI (Private Finance Initiative) hospital, together with the approach to determining the amount of monitoring to be provided in the NHS wards, compared to the private wards.

Timing of request:

Post contract award, within first year of implementation

Working assumption:

Generally disclose, except for trade secret information

Discussion

In this example, the supplier has asked for both types of the information requested to be treated as confidential, as both cases raise issues related to trade secrets. The operating software underlying the network is a proprietary product of the company and releasing any details would provide advantage to competitors. The algorithms used to determine the monitoring required are likewise proprietary, but have been in use for some years and similar algorithms are generally available.

The authority decides that in both cases section 43 is relevant. It is judged that there is little public interest in disclosing technical details of the network, when weighed against the public interest in protecting the supplier's position, and that therefore these should be withheld. However, the harm that the supplier would suffer from releasing details of the algorithms is outweighed by the public interest in being reassured that the approach used is equitable.

Provisional decision:

Withhold technical details of network, citing section 43

Disclose algorithms for monitoring.

Example 4

Information requested:

The incentive mechanism included in the contract for the refurbishment of government offices over a four year period, together with the value of any sums recovered in years 1-3.

Timing of request:

Post contract award, in fourth year of contract.

Working assumption:

Incentive mechanism - Generally disclose

Sums recovered – Not to be released

Discussion

The incentive mechanism provides for sums being recovered if the refurbishment slipped against the agreed project plan. Sums recovered would be based on a percentage of the relevant stage payment, with the percentage increasing in defined increments determined by the number of days slippage. The supplier wants the incentive mechanism to be confidential, as it feels that revealing its financial risk would affect its share price and harm its commercial interests. It is also concerned that disclosing actual sums recovered by the authority would likewise affect its market position, until its accounts are officially published.

The authority acknowledges that in both cases s43 is relevant. However, incentive mechanisms are a key element for managing risk and performance, and there is a strong public interest in opening such mechanisms to scrutiny. In this case, revealing all the details of the incentive mechanism could enable the sums recovered to be deduced. As the degree of harm to the commercial interests of the supplier would be greater if actual sums were revealed, which is not outweighed by the public interest in disclosure, it is decided that limited details of the mechanism should be disclosed (e.g. remove one of the calculation elements).

As the commercial sensitivity of sums recovered reduces significantly once accounts are published, the supplier acknowledges, after consultation, that the sums for years 1 and 2 can be disclosed, but withheld for year 3.

Provisional decision:

Disclose incentive mechanism and sums recovered for years 1 and 2, with some information removed.

Withhold sums recovered for year 3, citing section 43.

Example 5

Information requested:

Total amount of money spent by the authority with supplier X over the last 10 years, broken down into price per contract and scope of the work in each case.

Timing of request:

Immaterial

Working Assumption:

Generally disclose

Discussion

The authority only holds information covering the last eight years. Its response is therefore limited to data covering eight years. Releasing the total sum spent does not significantly harm the supplier's commercial interests and there is a strong public interest in disclosure.

The price per contract has been made available on the authority's website for the past three years and under the Freedom of Information Act the authority is not obliged to supply information already publicly available (exemption section 21, 'Information accessible to applicant by other means'). Contract prices earlier than the three years (back to eight years) are not commercially sensitive and the authority decides these should therefore be disclosed.

The scope of the contracts has likewise been publicised for the past three years. However, there have been a number of exceptions where the contract has related to work for law enforcement agencies and these have not been published. Exemption 31 (law enforcement) is considered to apply in these instances and the authority considers that the public interest in disclosure is outweighed by the public interest against disclosure. These are excluded from the information to be disclosed, making it clear that the list is not complete for the reasons stated.

Provisional decision:

Inform requester that information older than eight years is not held.

Withhold contract prices and scopes for the last three years, citing section 21, but direct requester to where information is already available.

Withhold the scopes for certain contracts not already published, citing section 31

Disclose total money spent with supplier over eight years

Disclose contract prices and scopes not already published in last eight years (excluding those covered by section 31).

Example 6

Information requested:

The reasons for choosing supplier Y to undertake a new road building programme.

Timing of request:

One year after contract award

Working Assumption:

Generally disclose

Discussion

The procurement exercise involved a full selection and award process, including the production of an Evaluation Strategy (ES), Evaluation Plans (EPs), Evaluation Models (EM) and an Evaluation Report (ER). An Evaluation Moderation meeting was held to refine the evaluation scores for the award phase. To answer the request, while avoiding releasing information not within scope of the request, the authority decides to respond by compiling a dossier of relevant information. The information chosen comprises the following:

- overall procurement procedure, drawn from the ES
- selection criteria for the PQQ phase, drawn from the EP for the phase
- EM template used for the PQQ phase
- ER for the PQQ phase, with the following removed:
 - entrants' names (to anonymise information)
 - all information relating to an entrant's financial status
 - all information relating to an entrant's previous performance
 - any other information agreed as commercially sensitive.

Note that although information is made anonymous, the losing entrants may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders.

- selection criteria for the award phase, drawn from the EP for the phase
- EM template used for the award phase
- ER for the award phase, with the following removed:
 - losing bidders' names (to anonymise information)
 - all price information for losing bidders
 - price breakdown information identified as sensitive by winning bidder
 - information identified as commercially sensitive by losing bidders
 - information agreed as commercially sensitive with winning bidder.

Note that although information is made anonymous, the losing bidders may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders. Note that in some cases, information is removed that has been identified as sensitive by the supplier, but not necessarily agreed as sensitive by the authority. To save time, the authority judges that the information in question is not strictly needed to properly meet the request and therefore consultation with all losing bidders is not needed; they pragmatically 'err on the side of caution'. Likewise, the policy indicates that losing bidder prices are not generally disclosed and again, prices are not needed to demonstrate 'due process' in this case.

- a summary of the overall findings of the evaluation moderation meeting (minutes were not kept of the meeting).

Provisional decision:

Disclose compiled dossier of information