

Procurement and freedom of information

One of Browne Jacobson's advisors fills us in where she recently came across a situation that reminded me of the importance of procurement and freedom of information (FOI) officers in an organisation working together.

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I recently came across a situation that reminded me of the importance of procurement and freedom of information (FOI) officers in an organisation working together. This isn't always as straightforward as you might think. FOI and procurement are covered by entirely different legislative regimes and officers will often sit in different parts of an organisation. Most of the time, that's fine. However, once in a while something will happen that requires those two teams to work in a very co-ordinated fashion. Ultimately, it's the responsibility of the procurement officers and lawyers to bring the FOI team in.

What am I talking about? A procurement challenge of course! As many of you will know, when a letter comes in from a disgruntled, unsuccessful bidder, it's all hands to the pump! Firstly, as I always say to clients, don't panic, just because the bidder has written a 5 page letter, it doesn't mean that there is any merit in the many words. So take a deep breath, call your lawyers and logically work through the points to be sure that you can defend them all. When you're taking a 5 minute break from the long list of issues, give your FOI colleagues a call. If the bidder has taken legal advice (or if it's just a savvy bidder) it will also be planning to use the FOI regime as another way to get information out of your organisation, so you and your colleagues need to be co-ordinated.

Under the [Public Contracts Regulations 2015](#) a contracting authority is limited in the information that it is required to disclose to an unsuccessful bidder. [Regulation 86](#) requires your organisation to supply the following:

- The award criteria
- The reasons for awarding the contract to the successful bidder, including the 'characteristics and relative advantages of the successful tender' and the score for the successful and unsuccessful bidders
- The name of the successful bidder
- Precise information about when standstill will end.

This information does not need to be in a particular format. It must be sufficient that the contracting authority is complying with the EU Treaty principles of proportionality, mutual recognition, transparency, non-discrimination and equal treatment. It is very much in your hands as to the level of detail that is given to bidders. Obviously, if you don't give the level of detail that bidders find helpful then they will come back and ask for more but you remain in control, certainly until proceedings are issued.

A freedom of information request on the other hand, is always to be handled from the assumption that everything should be disclosed unless there is a relevant exemption. It is therefore, easy to see how information can be disclosed that could help an unsuccessful bidder with a procurement challenge that wouldn't be sent in response to an informal challenge under the Public Contracts Regulations. It is also worth remembering that an FOI request can come from a wider pool, there is not the same restriction to economic operators that there is under the Public Contracts Regulations.

It's worth thinking about timings. Under [Regulation 92 of the Public Contracts Regulations 2015](#), the usual time period for starting proceedings is 30 days from the date of knowledge or assumed knowledge of the potential breach. Under the Freedom of Information Act 2000 (FOIA), a public body has 20 working days to respond to a request. Your organisation wants to avoid providing information that would support a complaint of an unsuccessful bidder before the 30 day period under the Public Contracts Regulations has passed. For example, if the standstill letter has raised a suspicion that some of the award criteria have not been properly scored, then if a full list of the

evaluators' comments is released under an FOI response before the 30 day period has ended then the unsuccessful bidder has further ammunition to bring a formal challenge. If the information was provided more than 30 days after the standstill letter then unless it raises wholly new issues, it cannot be used against you.

A well drafted invitation to tender (ITT) will include wording saying that your organisation is subject to the FOIA (and Environmental Information Regulations but I'm not going to mention them again in this article). It will also tell bidders that simply because they mark something as 'confidential' does not mean that it won't have to be disclosed through an FOI request. However, it is useful as a guide to what may or may not meet the (qualified) exemption for commercially sensitive information under the [FOIA](#).

There are a number of exemptions that may be applicable under the FOIA. Without going into detail, these are (a non-exhaustive list):

- S43 – commercial interests
- S41 – information provided in confidence
- S36 – prejudice to the effective conduct of public affairs
- S40 – personal information
- S22 – information intended for future publication
- S31 – law enforcement (in limited circumstances).

Discuss with your colleagues what the tender documents say, as well as any concerns you have about disclosing any of the information that the FOI request is asking for. Look through the procurement documents, correspondence, scoring comments, etc and decide what could be prejudicial to your organisation. You can then assess with your FOI colleagues, the extent to which any of this is covered by an exemption. You can also agree timescales for responding and ensure that your response under the Public Contracts Regulations is sent first and that any FOI response is supportive of that.

It is not always possible to hold back all the information that you would like to. However, with a co-ordinated approach at least nothing is going to come as a surprise. Where you believe that something prejudicial may be disclosed through the FOI response then you can make a more informed decision about how to approach the procurement challenge.

True story: a client of mine complained about the outcome of a procurement. They received very short, unhelpful responses, clearly delaying tactics to get past the 30 day challenge window. They had previously submitted an FOI request to ask specifically about conflicts of interest on the evaluation panel. A very late FOI response came through about 5 days before the end of the 30 day window, including an email saying that there had been concerns about the strength of an ethical walls agreement at one of the other bidder organisations. Very helpful for my client, a total failure to co-ordinate responses at the contracting authority.

If you would like to discuss training for your FOI teams on the procurement regime and how to co-ordinate the two regimes, please contact us.

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