

Decision notice

Date: 9 December 2020

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information generated by a tendering exercise undertaken by the Crown Commercial Services. The Cabinet Office relied on section 43 to withhold the requested information from the complainant.
2. The Commissioner's decision is that the Cabinet Office's incorrectly relied on section 43 to withhold disputed requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the disputed withheld information. This information being the suppliers' scores (but not the names of the suppliers) following the conclusion of the procurement process and the fees chargeable to the suppliers for engaging in the procurement process.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Crown Commercial Service (CCS) placed an Official Journal of the European Union¹ (OJEU) advertisement - OJEU number 2019/S 082-195390 - on 23 April 2019 for the provision of services.
6. The OJEU set out the scope and structure of the new offering. The Non-Clinical Temporary and Fixed Term Staff (RM6160) has the following lots:
 - Lot 1: Admin and Clerical
 - Lot 2: Corporate Functions
 - Lot 3: IT Professionals
 - Lot 4: Legal Services
 - Lot 5: Clinical Coding
 - Lot 6: Ancillary Staff
7. No restrictions were placed on the number of lots a bidder could place a bid for. As stated in the OJEU Notice the framework has a maximum value of £2 billion and it also states that CCS will award a Framework Contract to up to 300 bidders.

Request and response

8. On 2 August 2019, the complainant wrote to the Cabinet Office and requested information in the following terms:

"1. Please can you provide the number of bids received in RM6160 by lot, eg "In Lot 1 there were xxx bids received. In Lot 2 there were xxx bids received. "

2. Please can you provide details of the successful suppliers and their scores in each of the lots on the new RM6160 framework, ie "Lot 1 Supplier name XXXXX Score xx.x. Lot 1 Supplier name YYYY Score yy.y" etc. On previous framework awards you have provided a list of scores of the successful suppliers but on this

¹ <https://www.ojeu.eu/>

occasion you only have [provided] successful bidders their own score. As you appear to have awarded many more suppliers than you originally intended it is important for the credibility of the procurement that suppliers can see the scores and also who was in the "extra" places over and above the expected number in each of the lots. As the scores are made up from a number of elements (quality, prices for each of the elements, discounted prices for each of the elements, fixed term contract prices for each line) it is clearly impossible to recreate any individual bidder's pricing from their overall score so it should not be commercially sensitive to divulge this (and indeed it has always been released in the past).

3. Please can you provide details of the median prices for each band for each fee type for each lot, both for day 1 and the discounted rate after 12 weeks, ie "Lot 1 Median Price Band 1 Non-Patient Facing xx.xx/hr, Lot 1 Median Price Band 1 DBS xx.xx/hr, Lot 1 Median Price Band 1 Patient Facing xx.xx/hr" etc. Please can you also provide the median fixed term contract rate per band. This will allow bidders to check their own scores have been calculated correctly. On the last iteration of the framework you provided the average (mean) prices to bidders and so there is precedent for supplying this information without it being commercially sensitive."

9. In the absence of a substantive reply from the Cabinet Office, the complainant complained to the Commissioner on 1 November 2019. Consequently, the Commissioner issued a decision notice² on 26 February 2020 to compel the Cabinet Office to provide its substantive reply to the complainant's request for information.
10. The Cabinet Office responded on 9 March 2020, providing some information within the scope of the request while exempting the remainder under section 43(2) of the Act on the basis that the disclosure of the information would or would be likely to prejudice the commercial interests of any party. The information provided was as per the complainant's first request namely the lot numbers and the number of bids received. The remaining requested information was withheld .
11. On the 11 March 2020 the complainant asked for an internal review of the Cabinet Office on the grounds that it had withheld information and had supplied information that was erroneous.

² FS50887241

Scope of the case

12. The complainant contacted the Commissioner again on 14 April 2020 to complain about the way his request for information had been handled. Given the delays, occasioned by the Cabinet Office, the Commissioner investigated his complaint notwithstanding that the Cabinet Office have not provided the complainant with its substantive reply to his request for an internal review.
13. On 28 September 2020 the complainant confirmed to the Commissioner that (after her involvement) his assertion that he had been provided with erroneous information had now been rectified by the Cabinet Office.
14. On 22 October 2020, the complainant informed the Commissioner that he no longer pursued the issue of being provided with the names of the companies involved. However he still wished to be provided with the remainder of the withheld information. He opined to the Commissioner that this meant the remainder of the withheld information was no longer commercially sensitive as the scores could not be linked to particular companies.
15. The Commissioner considers in light of the above paragraph she has to determine whether the withheld information (excluding the company names) is properly withheld by reference to section 43. This information consists of the suppliers' scores following the conclusion of the procurement process and the fees chargeable to the suppliers for engaging in the procurement process .
16. The Commissioner was provided with, and has viewed, a copy of the withheld information.

Reasons for decision

17. Section 43(2) states that:

'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).'

18. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.
19. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services.

Cabinet Office Submissions

20. The CCS is particularly concerned about the release of the bidder scores in the context of this framework agreement. For suppliers awarded to the framework, the release of their names linked to their individual scores would enable an informal 'ranking' of the framework suppliers. This could have implications not only for the award of individual contracts under the framework agreement (with too much work being awarded to too few of the framework suppliers, which can result in those successful suppliers being stretched to or beyond effective capacity) but could result in loss of business elsewhere, reputational damage or impact to share prices.
21. It should also be noted that as CCS focuses on framework agreement opportunities, this effect may be multiplied in that multiple contract opportunities could be prejudiced through the release of this information that could run for several years, effectively creating a short-term monopoly for those who rank higher. CCS' role as a central purchasing body places the potential prejudice higher than would be the case for, say, a local council in a similar position. Continued prejudice is likely to occur as new contractual opportunities will continue to present themselves over the lifetime of the framework, which is relatively early into its commercial lifecycle with circa 3 years further to run, and therefore future prejudice remains significantly possible.
22. As stated above the Cabinet Office's submissions were made to the Commissioner prior to the complainant explaining that he no longer sought the withheld names of individual companies. Unsurprisingly therefore the submissions from the Cabinet Office are heavily skewed to maintaining the exemption as regards the withholding of company names. Whilst the Commissioner did allow time for the Cabinet Office to refocus its submissions, in light of the complainant now not seeking the company names, it did not avail itself of this opportunity.
23. Once the company names are not sought to be released then the remaining withheld information is essentially a table of scoring which is not linked to any identifiable company. Accordingly, of course, it is not

discernible how the commercial interests of any company will be negatively impacted by releasing this withheld information.

24. The Commissioner, even in the absence of the Cabinet Office's submissions, did consider whether releasing the withheld information would hurt the commercial interests of it or the CCS. However, as above, once it is known that the company names are not sought by the complainant the withheld information appears to lose its toxic ability to hurt the commercial interests of the Cabinet Office or CCS if released .
25. Due to the above the Commissioner finds, in the absence of any persuasive evidence or submissions that commercial harm will ensue on releasing the disputed withheld information, that the exemption is not engaged. The Commissioner therefore orders that the disputed withheld information be released to the complainant. To avoid any doubt, the company names are not included in the Commissioner's order.

Right of appeal

26. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

27. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
28. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Gerrard Tracey
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