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**Title: The UK Freedom of Information Act (2000) and Procurement
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The UK Freedom of Information Act (2000) and Procurement

The UK Freedom of Information Act 2000 is now fully in force. What impact will this have on public sector procurement? Already there are a number of issues that are causing concern amongst procurement professionals and their advisers.

Contractors' Compliance

The Act applies to public authorities. This covers approximately 100,000 public sector organisations. It does not mention contractors, partners, PFI companies and arms length management organisations (ALMOs). So does this mean that these types of organisations are not covered by the Act?

Section 5 contains a provision allowing the Secretary of State to designate "Additional Public Authorities". Before he can do this, he has to be satisfied that each organisation:

- a) Exercises public functions, or
- b) Provides contracted out public authority functions

So far, there has been no order designating additional public authorities. According to the DCA this will happen around January 2006.

However, the right of access applies to information which is held not necessarily owned by the public authority. If a public authority holds information about a contractor it may be accessible from the public authority. So what exemptions may be relevant when considering such a request?

Legal Obligations Exemption

Section 44 of the Act provides:

“information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it

- (a) is prohibited by, or under any other enactment,
- (b) or it is incompatible with any Community obligation...”

Paragraph b of this exemption may apply to some information received during a procurement process conducted under the EU Procurement Rules. These rules apply to procurement carried out by most UK public sector organisations where the value of the contract is over certain thresholds (depending on whether goods, services or supplies are being sought) There are several references to confidentiality of information in the Public Works Contract Regulations 1991 (SI 1991/2680), the Public Services Contract Regulations 1993 (SI 1993/3228), and the Public Supply Contract Regulations 1995 (SI 1995/201) (all as amended). All three sets of regulations contain provisions relating to the information to be included in the Contract Award Notice and the information to be provided to an unsuccessful bidder on request. They also provide that information may be withheld where the disclosure would be contrary to the public interest or would “prejudice the legitimate commercial interests of any person or might prejudice fair competition between suppliers.”

The above provisions suggest that up to and including the evaluation process, all the information provided by tenderers, to the public authority, is of a confidential nature. Beyond the evaluation process, the provisions of the Act will govern what a public authority is obliged to disclose (although the EU regime has its own disclosure provisions known as "de-briefing"). "Legitimate commercial interests" are not defined in the regulations, and would need to be considered in the light of general EC Treaty requirements of fairness of treatment, and transparency which arise under the requirements for effective provisions which act in a non-discriminatory manner.

Personal Information Exemption

Certain information supplied by bidders as part of a tender may be of a personal nature (e.g. bidders' employee's CVs) and would therefore be exempt from disclosure under the Data Protection Act 1998. Section 40 of the Freedom of Information Act contains an exemption for personal information. However as far as third party information is concerned, it is a qualified exemption so there may be a case where the public interest in disclosing outweighs the individual's privacy rights.

Breach of Confidence Exemption

Section 41 of the Act provides an absolute exemption where the disclosure of the information will constitute an actionable breach of confidence. Breach of confidence is a very tightly defined area of law. Just because a public authority has signed up to a confidentiality clause, or marked documents as confidential, does not make it a breach of confidence to disclose. It must be:

1. Information which has the necessary quality of confidence
2. Imparted in circumstances imposing an obligation of confidence

3. There is unauthorised use of the information to the detriment of the party communicating it

Commercial Interests Exemption

Section 43 of the Act allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice the commercial interests of any person (including the public authority).

Trade secrets are defined by caselaw. The classic example is the recipe for Coca Cola. The second part of this exemption is probably more useful. For example if the public authority were to disclose the precise details of a winning tender to losing bidders this may have an adverse impact on the successful company and also effect the authority's future negotiating position.

It is important to note that section 43 is a qualified exemption. Therefore the public interest in disclosure has to be considered. So what kind of commercial information may be withheld under this exemption? Cases from other jurisdictions seem to suggest that the overall price paid for goods or services is not confidential. The public have a right to know how their money is being spent. Details of working methods and specifications may also be disclosable as being less confidential. However the precise profit or loss on a particular item may be more confidential for a contractor.

The Information Commissioner states that in balancing commercial interests with the public interest the following factors need to be considered:

- Accountability of public money being spent

- Protection of the public from unsafe products or rogue traders or practices
- Circumstances in which the information was received

Timing is also an important factor to be considered when deciding whether to release information. Information about a contract let out ten years ago may not be confidential as the market may have moved on.

The Code of Practice

There is a Code of Practice on Discharge of Public Authority Functions under Part I of the Act. The most relevant points from this code, in terms of confidentiality clauses in contracts, are set out below:

- Authorities cannot 'contract out' of their obligations under the Act.
- Where exceptionally, it is necessary to include non-disclosure provisions in a contract, an option could be to agree with the contractor a schedule to the contract which clearly identifies information which should not be disclosed. Authorities will have to take care when drawing up any schedule as its contents could still be overridden by the Act.
- It is for the public authority to disclose information pursuant to the Act, and not the private sector contractor.

Conclusion

The Freedom of Information Act 2000 is going to lead to a massive increase in requests for information about public authority procurement and contracts. There is no blanket exemption for commercial confidentiality. Each request will have to be

examined on its own merits and the provisions of the Act applied. Procurement professionals and those advising them have to be ready for the culture change of transparency which the Act is designed to introduce. The new public sector mantra is "Secrecy out; openness in"

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References

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Websites

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