

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2019

Public Authority: Highways England Company Ltd
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested the names of the lead contractors and all subcontractors listed in the tenders submitted as part of the procurement exercise for the National Roads Telecommunications Service 2 contract. Highways England Company Ltd (HE) disclosed the names of the three main bidders but refused to disclose the names of their subcontractors under the exemptions provided by section 43(2) – commercial interests.
2. The Commissioner's decision is that although the exemption provided by section 43 is engaged the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the names of the subcontractors.
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.

Request and response

5. On 10 April 2019 the complainant wrote to HE in respect of the tendering exercise for the National Roads Telecommunications Service 2 (NRTS2) contract and requested information of the following description:

“For each tender received, please could you provide the names of the lead organisation(s) together with the names of any sub-contractors/companies/entities listed within the tender documents as part of the supply chain to deliver the contract?”
6. On 8 May 2019 HE wrote and advised her that information captured by the request was exempt under section 43(2) – prejudice to commercial interests, and that it needed additional time to properly consider the public interest test (as allowed under section 10(3) of the FOIA). HE wrote to the complainant again on 6 June 2019 to say that having now considered the matter fully, it was prepared to release the name of each of the three main bidders, but that it was still refusing to disclose the names of any of their subcontractors under section 43(2).
7. The complainant requested an internal review on 8 June 2019. HE sent her the outcome of the internal review on 5 July 2019. The review upheld HE’s original position.

Scope of the case

8. The complainant contacted the Commissioner on 12 July 2019 to complain about the way her request for information had been handled.
9. The Commissioner considers that the matter to be decided is whether any or all the names of the subcontractors contained in the tender documents submitted by the three main bidders can be withheld under section 43 of the FOIA.

Reasons for decision

Section 43(2) prejudice to commercial interests

10. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person, including the public authority holding it.
11. In order 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 has

to 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.
12. 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. In this case the withheld information relates to a tendering exercise for the award of a contract to provide a particular service. That service being the telecommunications network through which HE monitors roads and so allows the traffic on those roads to be effectively managed. According to the published award notice, the successful bidder was awarded a seven year contract running from 16 March 2018, which was worth nearly £500m.
 13. The Commissioner is satisfied that the tendering of such a contract is a commercial activity in which both HE and those tendering for the contract would have a commercial interest. HE has argued that disclosing the names of the subcontractors could potentially impact on both its own commercial interests and those of the main bidders.
 14. The exemption provided by section 43 can be engaged on the basis that the alleged prejudice would occur, or, the lower threshold; that the prejudice is only likely to occur. It is not absolutely clear which threshold HE are claiming. In its initial letter to the complainant advising her that the exemption was engaged but that additional time was required to consider the public interest test, HE explained that disclosing the information would be likely to prejudice commercial interests. However in later correspondence and in its submission to the Commissioner, HE has appeared more certain that the prejudice would occur. In light of this ambiguity the Commissioner has interpreted HE's position to be that it considers the alleged prejudice would only be likely to occur. Although applying the lower threshold of prejudice makes the exemption easier to engage, less weight is given to the value of maintaining the exemption when considering the public interest test.
 15. Before contemplating the public interest test it is of course necessary to consider whether the exemption is actually engaged. The Commissioner will first look at HE's arguments regarding how disclosure of the information would be likely to prejudice the commercial interests of the bidders.

16. When consider arguments that the interests of the bidders would be affected the Commissioner, based on a number of Tribunal decisions, would not accept arguments presented by a public authority unless the public authority was able to demonstrate that those arguments truly reflected the concerns of the third party in question.
17. From the exchange of correspondence between HE and the complainant the Commissioner understands that tender documentation advised bidders that HE was subject to the FOIA and therefore they should take the opportunity to identify any information they considered to be commercially sensitive in the event of a request being received. The Commissioner understands that none of the bidders did so, or at least no bidder identified the names of subcontractors as being sensitive.
18. Therefore upon receipt of the request HE has consulted with each of the three companies that bid for the contract regarding the requested information. Its submission to the Commissioner includes quotes and summaries from those consultations. All three bidders expressed very firm views that disclosing the names of the subcontractors which they had proposed to use, as identified in their tender submissions, would prejudice their commercial interests.
19. The arguments the bidders presented were also consistent with one another. They argued that the market for providing telecommunications of the type in question is not only a very competitive one, but a specialised one. Putting together a credible bid which provides a solution to the customer's business needs depends on input from subcontractors. Those subcontractors must be of an appropriate quality and reliability. In such a specialised field, the number of suppliers which meet such a demanding criteria are limited. Therefore bidders invest considerable time, effort and money identifying potential subcontractors and developing long term relationships with them. The different bidders refer variously to building alliances, entering numerous agreements and legal formations when developing bids. They all argue that their choice of subcontractors form an intrinsic part of the solution their tenders offer and emphasise the importance of cultivating these supply chains in order to provide attractive bids.
20. It could be argued that once the NRTS2 contract had been awarded, as it had been by the time of the request, the sensitivity of the information would no longer be sensitive. However the Commissioner accepts that although the sensitivity would have waned to some degree, all three bidders are likely to be in competition for other contracts which have similar characteristics in terms of the business solution that is required and the complexity of the contract. This is a point made by the bidders themselves when consulted by HE. It is therefore likely that the bidders will use the same pool of subcontractors when developing future bids. Indeed the bidders have stressed the importance and value in

cultivating long term relationships with their preferred suppliers. Having said all that, the argument is weakened by the fact that neither bidders, nor HE have actually identified any contracts of a similar nature that they are in the process of bidding for, or will be in the near future.

21. Nevertheless the Commissioner accepts that a high performing supply chain is an important element of the solutions the bidders provide in their tenders. Identifying those subcontractors would give some insight into the quality of a bid and the approach taken when seeking to meet a customer's business requirements.
22. There is still the question of the depth of the insight that would be provided by disclosing the names of subcontractors. Although the Commissioner accepts that the presence of a particular company in a supply chain may indicate the approach being taken by the bidder, it is not clear that one could deduce a great deal about the contribution which that supplier was making to the tender offer. It is possible that the presence of a supplier offering very specialist services in the supply chain may provide a more meaningful insight into the tender, than one which offers an array of services or equipment. No attempt has been made by HE, or the bidders to distinguish such suppliers; a blanket approach appears to have taken.
23. Developing their supply chains represents an investment of time and money for the bidders and they would not wish to risk those subcontractors being poached by competitors. The Commissioner considers it telling that all three bidders share the same concern; that if their preferred subcontractors were identified those subcontractors are likely to be approached by their competitors. This reinforces the argument that rivals are likely to take an active interest in the names of another company's suppliers if such information was released. The Commissioner also recognises that the supply chain of the winning bid may be of particular interest.
24. However the Commissioner also considers that the subcontractors would fully appreciate their own worth and unless they were locked into some form of legally binding relationship with the main bidders, they would be free to solicit business from other companies. Therefore there will always be some vulnerability to a supply chain. This may simply emphasise the need for bidders to cultivate the strongest possible relations with subcontractors. The development of such strong working relations with suppliers should make the supply chain less susceptible to the approaches of competitors and therefore mitigate against the risk that suppliers may be poached as a consequence of their names being disclosed in response to this request.
25. The Commissioner also takes the view that if those active in this market have invested time and effort in developing their supply chains, it is

likely this would have included a thorough research of potential suppliers. Therefore it seems unlikely that bidders would be ignorant of the existence of the suppliers which feature in their rivals' tenders, even if they did not know that they had contributed to a rival's bid.

26. HE has also argued that the commercial interests of the subcontractors listed in the unsuccessful bids would be prejudiced by disclosure. The suggestion is that their association with an unsuccessful bid could damage their commercial reputation. The Commissioner does not accept that this would necessarily be the case. With contracts as complex as that for NRTS2 it would be difficult to attribute blame for not securing a contract to any one of the subcontractors, particularly in the absence of other, more critical information, about the solution provided by the tender, or pricing information. Furthermore the Commissioner notes that although one bidder made a vague reference to disclosure prejudicing the commercial interests of its suppliers, this was not developed and is not an argument that other bidders have presented. The Commissioner considers this particular argument is too speculative to accept.
27. It has also been suggested that the subcontractors would not wish to be identified as being party to any particular bid. The subcontractor may have been listed in more than one of the tenders and, it was argued, this may lead to the subcontractors coming under pressure from one of those bidders, if that bidder believed the subcontractor had offered a rival more favourable terms. However HE has not developed this point and there is no evidence that this reflects the concerns of the subcontractors. Therefore the Commissioner is not persuaded by the argument.
28. In respect of HE's own commercial interests, it argues that if it ignored the bidders' concerns over disclosing the information it may deter companies from bidding in future competitions. It has not developed the argument any further.
29. The Commissioner has considered this argument carefully. In the Commissioner's experience many private sector companies instinctively feel uncomfortable with greater transparency of their business affairs and often object to disclosure (it is noticeable in this case that when submitting their tenders, bidders did not identify this information as being sensitive and only raised objections when HE consulted them, after the request was received). Therefore the Commissioner is very wary of accepting an argument that would in effect mean that if a commercial company objected to information being disclosed the public authority would be obliged to respect those concerns and withhold the information. Such an approach would result in private sector companies being able to embargo requests. The Commissioner also notes that when the tendering exercise was advertised in the European Journal, the likely value of the contract was given as being in the range of £300m to

£900m. The contract that was actually awarded was worth nearly £500m. The Commissioner is sceptical that contractors would be easily deterred from bidding for such lucrative contracts, unless of course contracts with bodies subject to the FOIA represented only a negligible proportion of the bidders' business, which the Commissioner does not anticipate would be the case.

30. Nevertheless having accepted there is likely to be some prejudice to the commercial interests of the bidders if the information was disclosed the Commissioner recognises that as a result of its disclosure, bidders could become more cautious in respect of the information they were willing to share with HE. This may make it more difficult for HE to manage contracts. This is likely to prejudice HE's commercial but that prejudice would be only limited.
31. In summary the Commissioner accepts that the selection of subcontractors is an important element of a bidder's ability to deliver a contract. Disclosing the names of subcontractors would reveal something of the approach that bidder took to meeting a customer's needs and increase the potential that some of the subcontractors in the supply chain would be approached by competitors. However, HE has not demonstrated that the level of insight provided by the names of subcontractors would be particularly great. The Commissioner also considers that there is already a risk that subcontractors might be approached by competitors and that bidders would have already taken steps to build the resilience of its supply chain. Therefore the Commissioner does not consider the extent of the likely prejudice to their interests to be as significant as the bidders have argued. Nevertheless the Commissioner finds that the exemption is engaged on the basis that it is likely that disclosing the information would cause some prejudice to the bidders' commercial interests. The Commissioner finds that there is only likely to be a limited prejudice to the HE's own commercial interest as a consequence of its contractors becoming more cautious in respect of what information they provided to it. The Commissioner does not accept disclosing the information is likely to prejudice the commercial interests of the subcontractors.

Public interest test

32. Section 43 is subject to the public interest test. This means that although the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
33. HE has recognised that there is a general public interest in the work of public authorities such as itself being closely examined as this encourages the public authorities to perform its functions in the most efficient way.

34. It has also considered the public interest in there being accountability for the spending of public money. HE has developed the argument by stating that there is a public interest in the work of public bodies being scrutinised to increase accountability and to protect the public purse. It added that if people have a better understanding of how public money is spent, this may give them more confidence in the integrity of the public body and its ability to effectively allocate public funds.
35. The Commissioner considers there is substantial strength in this argument for disclosure. The Commissioner notes that the amount of public money is significant as the contract awarded was worth nearly £500m. The contract relates to an important part of the nation's infrastructure, including the motorway network. This has a major impact on many citizen's daily lives as well as the economy as a whole. There is therefore a very real value in the public being able to understand how money on the project is being spent and in being able to hold HE to account for that spending. However, it is important to have regard for the actual information that has been requested and the extent its disclosure would satisfy that public interest. Although the names of the subcontractors might provide some insight into the contract the information would not in itself reveal much of the details of the competing tenders or the robustness of the tendering process. Nevertheless the list of subcontractors would help knowledgeable commentators take a more informed view on the relative merits of the three bids and the calibre of the subcontractors available. The Commissioner also considers that the withholding of the subcontractors' names would frustrate the compilation of a fuller picture of the tendering process and/or the winning bid, should further information be available or be disclosed in the future.
36. The final public interest argument in favour of disclosure presented by HE is that disclosure would promote competition in procurement. There is a public interest in encouraging competition for public sector contracts. Greater transparency of the tendering process may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help authorities to get value for money. Again the Commissioner considers this to be a strong argument in favour of disclosure. One of the main arguments presented in favour of engaging the exemption, the potential for disclosure to encourage approaches to a rival's subcontractors, can also be seen as a public interest factor in favour of disclosure. Increasing knowledge of the pool and calibre of subcontractors available may improve the scope for innovative solutions to be offered in future procurement exercises and improve the overall quality of the bids on offer.
37. In favour of maintaining the exemption the Commissioner will first consider the public interest in preserving competition between competitors. Having found that disclosing the names of subcontractors

would be likely to provide some level of insight into the solutions offered by each bid and that disclosure would also be likely make those supply chains more vulnerable to approaches by competitors, it is appropriate to take account of the public interest in preventing this potential harm and preserving the operation of the market place. However the Commissioner has found at para 31 that there is only likely to be limited prejudice to the commercial interests of the bidders and this reduces the public interest in preventing the potential harm.

38. The Commissioner will now consider the public interest arguments presented by HE in respect of protecting its own commercial interests. It has argued that there is a public interest in protecting its ability to compete to in a commercial environment. This has only very limited, if any relevance to the information requested as it was not one of the parties competing for the NRTS2 contract.
39. There is more validity in the argument that if commercial partners became wary of sharing information with HE this could frustrate future negotiations or the management of the existing contract. The Commissioner has accepted this argument when considering the engagement of the exemption. However as she found the impact on HE's commercial relations would be only limited, and that therefore any adverse reaction they had to its disclosure would only be limited, the Commissioner finds that the public interest in avoiding that impact is reduced.
40. HE has also argued that there is a public interest argument in avoiding reputational damage or loss of customer confidence. It has said disclosure of the information may cause unwarranted reputational damage to a public authority or another organisation whose information it holds, which may in turn damage its commercial interests through loss of trade. The Commissioner has had difficulty in reconciling these public interest arguments with HE's grounds for engaging the exemption. She recognises the potential for disclosure of commercially sensitive information to damage the confidence that a contractor may have in HE's ability to safeguard other, similarly sensitive, information, but the consequences of this has already been considered in the previous paragraph.
41. In respect of the reputational damage to the bidders, as set out in paragraph 31, the Commissioner is not persuaded there would be any reputational damage to their subcontractors. Therefore the Commissioner does not consider subcontractors would be deterred from continuing to supply goods or services to those bidders because of concerns they may be identified in a future contract.
42. The final public interest argument presented by HE related to the impact disclosure would have on other negotiations. It has argued that

revealing information such as the pricing mechanism can damage the negotiating process; that if an organisation knows how a public authority costs an item or service, that organisation can exploit this for profit or other gain. The Commissioner is not satisfied that this argument is relevant when account is taken of the actual information which is the subject of this request, i.e. the names of the subcontractors of the three bidders for the NRTS2 contract. If sensitive information which did reveal how a public authority assessed tenders or revealed what a public authority was likely to be prepared to pay for a service, had been requested, then the Commissioner could well understand an argument that the complying with the request would potentially have serious consequences. However when engaging the exemption HE have not demonstrated how the requested information provides any significant intelligence on how it scores tenders which a future bidder could exploit. Therefore the Commissioner does not give this argument any weight.

43. It is now necessary to weigh the competing public interest arguments. In doing so it is important to focus on the actual information that has been requested. The Commissioner has concluded that although disclosing the information would provide some insight into the strengths of the alternative bids and may therefore have some impact on HE's relations with bidders, the prejudice caused by disclosure would not be as great as HE claim, particularly as the contract had already been awarded by the time of the request. The limited nature of the information also reduces the value in its disclosure. It would still shed at least some light on the robustness of the tendering process and the quality of the successful bid. The information still provides one piece of the larger picture of the procurement exercise and the successful bid. The contract in question was worth nearly £500m and was for a service that would directly affect millions of citizens using the road network on a daily basis as well as having an impact on the economy.
44. In light of this the Commissioner finds that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure. The public interest favours disclosure. HE are not entitled to rely on the exemption provided by section 43 and is required to disclose the information.

Right of appeal

45. 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

46. 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.
47. 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

Rob Mechan
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