

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2017

Public Authority: Ministry of Defence

Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) asking for the price of the winning tender in relation to a particular contract. The MOD withheld the requested information on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the information falling within the scope of the request is exempt from disclosure on the basis of section 43(2).

Background

2. The request which is the focus of this decision notice concerns a MOD tender, SSP/00135, which sought bids for the manufacture and supply of a scalable body armour system.
3. The MOD's evaluation process of the tenders submitted comprised three phases. Only the two highest placed bidders at the end of phase two were taken through to the third phase. Following the completion of this evaluation process the MOD awarded the contract in December 2016 to the winning bidder. However, as part of this process the MOD concluded that neither of the two bidders considered at the third phase of the assessment of the original tender met the criteria in respect of the 'level 2 requirement' of the tender. Therefore, the contract awarded in December 2016 did not cover this requirement.
4. Instead the MOD re-ran the competition for the outstanding Level 2 requirement as a 'Revise & Confirm' exercise which allowed all of the

original bidders, ie not just the two taken through to the third phase, to revise their original solutions.

5. The complainant's request which is the focus of this complaint concerns the price of winning bidder for levels 1 and 3 of the contract which was awarded in December 2016.
6. It is relevant to note that the complainant has previously submitted a request to the MOD in July 2016 seeking details of the MOD's assessment of the various bidder's tenders, including details of their pricing. The MOD withheld this information on the basis of section 43(2) (commercial interests) of FOIA. The Commissioner upheld the application of this exemption in a decision notice, FS50657134.
7. As will become apparent from the complainant's submissions summarised below, it is also relevant to note that the complainant's company submitted a bid for this contract which was not successful.
8. The tender in question was conducted under the Defence and Security Public Contracts Regulations 2011¹ (DSPCR). Under the DSPCR the MOD is obliged to provide unsuccessful tenderers with the characteristics and relative strengths of the successful tender once the tender is awarded. However, regulation 33(11) of the DSPCR provides details of the circumstances when information can be withheld, two of which are if:
 - Information would prejudice the legitimate commercial interest of any economic operator;
 - Might prejudice fair competition between economic operators.

Request and response

9. The complainant submitted the following request to the MOD on 17 March 2017:

'May I know be formally notified of the price of the winning contract for levels 1 and level 3 given the contract has been formally awarded.'

¹ <http://www.legislation.gov.uk/uksi/2011/1848/made>

10. The MOD responded on 24 May 2017 and explained that it held the requested information but it considered it to be exempt from disclosure on the basis of section 43(2) of FOIA.
11. The complainant subsequently asked for an internal review of this decision. The MOD informed him of the outcome of the internal review on 3 July 2017. The review upheld the application of section 43(2) of FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 3 July 2017 in order to complain about the MOD's decision to refuse to disclose the requested information on the basis of section 43(2) of FOIA.

Reasons for decision

Section 43(2) – commercial interests

13. 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).'

14. In order for a prejudice based exemption, such as 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 applicable interests within the relevant exemption;
 - 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 which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be

a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

15. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The MOD's position

16. The MOD emphasised that the contract placed in December 2016 only related to three of the four elements of the tender. The fourth element, Level 2 Ballistic Armour, could not be placed at the time and thus the tenderers entered into a further competition. Consequently, at the point that the complainant submitted his request in March 2017 there remained an active competition in respect of this tender despite the placement of the contract in December 2016.
17. Consequently, the MOD argued that the commercial sensitivities of the requested information had not diminished over time.
18. More specifically, the MOD argued that the disclosing data about the original pricing would have undermined the integrity of the follow-on Level 2 competition by disclosing data about the winning bidder which would give other bidders a clear insight into that particular bidder's approach to pricing. This was because the Level 2 plate was the middle member of the range and the MOD explained that it was likely that reverse engineering of the Level 1 and Level 3 prices is possible with the aid of unit numbers. The MOD argued that disclosure of the withheld information would therefore be likely to harm the commercial interests of the winning tender not only in relation to the ongoing tender but also in respect of the similar competitive exercises in the future. This was because the withheld information would weaken the company's position in this competitive environment by revealing information of potential usefulness to competitors and potential customers.
19. In reaching this conclusion the MOD emphasised that the market in question is a highly specialist and competitive one and it is very likely that the same companies will compete against each other in similar competitive exercises in the future. In the MOD's opinion this increased the risk of prejudice occurring if the information was disclosed. Furthermore, the MOD suggested that it was possible that the unit price offered to the MOD could be lower than a tenderer would offer to other customers. Therefore the public release of this information could place a

tenderer at a disadvantage when competing for other contracts either within the UK or overseas.

20. The MOD confirmed that it had consulted with the company in question and it had been stated that it did not wish this information to be released.
21. Furthermore, the MOD argued that if it were to release the withheld information prior to the award of the tender, it is possible that it could be seen to be influencing the competition by publishing information that could help other tenderers which would be damaging to the MOD's commercial reputation. As a result, the MOD argued that companies could be deterred from sharing commercially sensitive information with the MOD in future if they are unsure about whether their information would be protected and this could in turn affect the MOD's ability to secure best value for taxpayer's money.

The complainant's position

22. As set out in the previous decision notice, FS50657134, the complainant drew the Commissioner's attention to a decision of the Court of Justice of the EU (CJEU), *Veloss International SA & Attimedia SA v European Parliament Case T-667/11*, (the 'Veloss case'). The Veloss case concerned an application by an unsuccessful bidder, Veloss, in a tendering exercise run by the European Parliament for Greek translation services. Veloss applied to the CJEU for an annulment of the decision not to award it the contract and for compensation for the loss of opportunity and damage to its reputation. As part of its application, Veloss alleged non-compliance with the Financial Regulation which concerns procurement in relation to the award of works, services and supply contracts by the EU institutions, bodies and agencies. Veloss claimed that the Parliament had not provided it with information that it was required to provide in the context of the tendering process in question and thus it had not complied with the particular provision of the aforementioned Financial Regulation.² The CJEU concluded that the Parliament had not provided the applicant with the name of the successful tenderer or any information about the characteristics and relative advantage of the successful tender and it had therefore failed to comply with its obligations.

² Specifically, Article 100(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002, on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1)

23. The complainant argued that the *Veloss* decision was relevant to the previous FOI request he had submitted to the MOD on 7 July 2016 (which was the subject of decision notice FS50657134) and indeed relevant to the request which is the subject of this present complaint. In the complainant's opinion the effect of the *Veloss* decision meant that the MOD should have disclosed the price of the winning tender for the level 1 and level 3 contract.

The Commissioner's position

24. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
25. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of section 43(2) has the potential to harm the commercial interests of the company which won the contract in respect of the level 1 and level 3 contract. In reaching this decision the Commissioner appreciates that the contract in respect of those aspects of the tender had been awarded. However, she is persuaded by the MOD's submissions that the pricing of the level 1 and level 3 aspects of the tender are directly relevant to the procurement process in respect of the level 2 part of the tender. Given that the procurement process in respect of the level 2 aspect of the tender remained live and ongoing at the time of the complainant's requests, the Commissioner accepts that disclosure of the withheld information could harm the commercial interests of the company which secured the contract in December 2016 by revealing to its competitors details of its pricing strategy in such tenders.
26. Furthermore, the Commissioner accepts that the disclosure of withheld information may cast doubt on the ability of the MOD to protect commercial sensitive information and/or conduct a tender exercise objectively. In the Commissioner's view it is plausible to see both outcomes as having the potential to impact on the commercial interests of the MOD.
27. With regard to the third criterion, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to the various companies in question if the withheld information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant. The market is a specialist and competitive one and it is likely that the same companies will complete against each other in similar competitive exercises. In the Commissioner's view, this increases the risk of prejudice occurring to the winning company's commercial interests if the withheld information was disclosed.

28. The Commissioner has therefore concluded the section 43(2) is engaged in respect of the information falling within the scope of the complainant's request.
29. With regard to the complainant's reliance on the *Veloss* case to support his position, in the Commissioner's opinion the only way in which the *Veloss* decision could potentially impact on the MOD's reliance on section 43(2) of FOIA is if the case placed some obligation on the MOD, under UK procurement legislation, to provide the requested information, ie the price of the winning tender in respect of levels 1 and 3 of the contract to interested parties. The rationale behind this view being that if the MOD was already obliged under procurement legislation to disclose the withheld information to interested parties, it would potentially be harder for the MOD to argue that disclosure of the same information under FOIA would result in prejudice to the winning bidder's commercial interests.
30. However, for the same reasons as set out in the previous decision notice, FS50657134, the Commissioner does not accept that the *Veloss* case places any obligation on the MOD under UK procurement rules, to provide other tenderers with details of the winning tender. In essence, the Commissioner's reasoning behind this opinion is that the *Veloss* case involved an EU institution, namely the European Parliament, and the application of different legislation, namely the Financial Regulation applicable to the general budget of the European Communities. There are therefore significant differences between the circumstances of the *Veloss* case and the information which is the focus of the request. In the Commissioner's view these differences mean that the principle behind the *Veloss* decision cannot simply be read across to the MOD and its obligations under UK procurement rules. It follows that as the *Veloss* case does not place any obligation on the MOD in terms its procurement rules, then the *Veloss* case does not need to be taken into account when considering whether the MOD is entitled to rely on section 43(2) of FOIA in relation to the disputed information. Moreover, the Commissioner notes that under DSPCR if the MOD disclosed the withheld information it would appear to be in breach of these regulations.

Public interest test

31. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. The complainant explained that he needed the withheld information in order to clearly and fully understand the basis of the MOD's decision to award the level 1 and level 3 aspects of the contract to the company

which it had. The complainant emphasised that the pricing of the tenders was one of the key aspects on which the bids were assessed. Furthermore, the complainant explained that he had significant concerns about the manner in which the MOD had conducted this procurement process. In particular the decision to re-run the competition for the level 2 aspect of the tender and allow companies to be involved in the process who had already failed an essential ballistic safety test during the first round of procurement process. The complainant emphasised that the manner in which this procurement exercise was conducted supported his view that the public interest favoured disclosure of the information in order to aid the transparency of the MOD's decision making processes.

33. In the previous case, FS50657134, the complainant drew the Commissioner's attention to a recent decision by the High Court in the case *Energy Solutions Ltd V Nuclear Decommissioning Authority (NDA)* which concerned a complex procurement process conducted by NDA. The complainant emphasised that the court was highly critical of the NDA's processes during the procurement exercise in particular that it was 'wholly lacking in transparency, in breach of the obligations of transparency upon [the NDA]'. The complainant alleged that there were striking similarities between the failings by the NDA as identified by High Court and the processes followed by the MOD in relation to the tender which is the subject of his complaint. He also emphasised that the MOD had continually refused to provide him with any meaningful information that would allow him, or the public, to evaluate whether the tender process was conducted in a fair manner.
34. The MOD argued that there was a very strong public interest in safeguarding the commercial interests of the UK government as well as its suppliers. The MOD explained that in accordance with DSPCR the complainant had been provided with a written de-briefing comparing his company's evaluation with that of the winning bidder. Furthermore, the MOD emphasised that it had gone over and beyond the normal requirements and provided the complainant with information in excess of that normally given in a formal de-brief because of his company's previous contract arrangements and his constant requests to numerous parties. With regard to the allegations made by the complainant in relation to the procurement process, the MOD informed the Commissioner that it had written to the complainant and answered the points he had raised and stressed that he had produced no evidence to substantiate his serious allegations.
35. The Commissioner recognises that there is weighty public interest in the MOD being transparent about decisions upon which contracts are awarded. Such transparency will obviously be more directly helpful to parties who have a particular interest in the tender process in question, but the Commissioner accepts that more broadly such transparency could improve the wider public's confidence in the MOD's tendering

processes and potentially provide re-assurance that these processes are being conducted fairly. In the circumstances of this case, the Commissioner recognises that the complainant has raised a number of concerns about the manner in which the MOD has conducted this procurement exercise, concerns which in the complainant's view have been exasperated by his inability to access the necessary information at the appropriate points in the process to allow him to understand the MOD's decisions. It is not for the Commissioner to adjudicate on the validity or otherwise of the complainant's criticisms of the MOD's handling of this tender process. However, the Commissioner acknowledges that disclosure of the winning price of the tender in respect of levels 1 and 3 would have provided an additional level of insight into the procurement process if it had been disclosed in response to the complainant's request of 17 March 2017.

36. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have submitted tenders for public sector contracts. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that the government's own commercial interests are not undermined. The Commissioner has also taken into account the fact that at the point the complainant submitted his request the tender process in question was not yet completed given the ongoing competition in relation to the level 2 aspect of the tender. Given the cumulative weight that should be attributed to protecting the commercial interests of both the MOD and tenderers, and given that this aspect of tender process remained ongoing at the time of the request, the Commissioner is satisfied that in relation to the complainant's request of 17 March 2017 the public interest favours withholding the information and maintaining section 43(2) of FOIA.

Right of appeal

37. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF