



Procurement Policy Note – Information sharing in Government procurement exercises

Action Note 01/14

03 February 2014

Issue

1. With the increasing shift towards the Government operating as a single intelligent customer, there is an increasing need for Central Government Departments including their Executive Agencies and Non Departmental Public Bodies to share procurement information (i.e. information provided during the procurement process and prior to entering into contract) which may historically have been considered as confidential (e.g. pricing) or may be expressly designated as confidential by suppliers.

2. This Action Note sets out the action that should be taken:

- to ensure that procurement information can be shared within Government and in particular with the Cabinet Office and HM Treasury; and
- to protect Government's rights in the event of a dispute settlement agreement.

Timing

3. Immediate.

Dissemination and Scope

4. The contents of this Action Note apply to all Central Government Departments including their Executive Agencies and Non Departmental Public Bodies (In-Scope Organisations). Please circulate this document within your organisation, drawing it to the attention of those with a purchasing role.

Action

5. All In-Scope Organisations should:

- apply the recommendations detailed in Annex A and amend their standard documentation as required. Annex A also provides sample drafting; and
- ensure that their current contracts contain a standard Confidentiality clause which allows information to be shared across government. (An example based on the latest Model Contract for Services is attached at Annex B).

Contact

6. Enquiries about this Action Note should be directed to the Service Desk 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk.



Background

7. The Government is determined to act as a single intelligent customer in order to improve its commercial operations and secure good value for public money. The ability of Central Government Departments and other relevant organisations within Government to share information with each other and with the centre is increasingly important for this to work effectively.

8. The issue addressed by this Action Note is in relation to procurement information such as information supplied during the bidding process and before any contract has been entered into. Government contracts should contain a standard Confidentiality clause which allows information to be shared across government. In-Scope Organisations should ensure that the right to share information across Government is protected through the inclusion of these clauses.

9. Regulation 43 of the Public Contracts Regulations 2006 (PCR) provides that “a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential”. While In-Scope Organisations may be separate contracting authorities they are nevertheless operating as part of Government and in many cases are undivided parts of the Crown. That means that for the purposes of sharing information, In-Scope Organisations are to be regarded as part of a single Government ‘customer’ and not in a relationship of third parties.

10. Provided that the information is being shared for a proper purpose, considerations of confidentiality should not be a barrier to sharing tender, contract and supplier performance information between Central Government Departments including their Executive Agencies and Non Departmental Public Bodies. The purpose of the confidentiality provisions in the PCR is to protect bidders from the risk of having their commercial prices or trade secrets seen by competitors. It would not be reasonable for a supplier to regard information as subject to barriers of confidentiality within Government.



ANNEX A: DETAILS OF ACTIONS TO TAKE AND SAMPLE DRAFTING

The following actions must be taken to facilitate the sharing of information between In-Scope Organisations including the Cabinet Office and HM Treasury.

1. Contracting on Behalf of the Crown:

Central Government Departments and all other bodies which are part of the Crown should enter into contracts expressly on behalf of the Crown. The following sample drafting should be used:

In contracts, the definitions clause should include words similar to this –

“In this Agreement, the Authority is acting as part of the Crown”.

Alternatively the name of the Authority can be followed by the appropriate words, like this –

BETWEEN:

(1) [NAME OF THE AUTHORITY] OF [] acting as part of the Crown (“**Authority**”); and
[name of supplier]

2. Information Sharing:

In-Scope Organisations should include in tender documents a note of explanation, stating explicitly that information, including tender prices, may be shared with other In-Scope Organisations and in particular with the Cabinet Office and HM Treasury for their lawful and proper purposes. The following sample drafting should be used:

2.1 A note for inclusion in tender documents.

“All Central Government Departments and their Executive Agencies and Non Departmental Public Bodies are subject to control and reporting within Government. In particular, they report to the Cabinet Office and HM Treasury for all expenditure. Further, the Cabinet Office has a cross-Government role delivering overall Government policy on public procurement - including ensuring value for money and related aspects of good procurement practice.

For these purposes, the Authority may disclose within Government any of the Contractor's documentation/information (including any that the Contractor considers to be confidential and/or commercially sensitive such as specific bid information) submitted by the Contractor to the Authority during this Procurement. The information will not be disclosed outside Government. Contractors taking part in this competition consent to these terms as part of the competition process.”

2.2 Proposed wording to be included in bona fide tendering certificate issued as part of the ITT

“We agree that the Authority may disclose the Contractor's information/documentation (submitted to the Authority during this Procurement) more widely within Government for the purpose of ensuring effective cross-Government procurement processes, including value for money and related purposes”.



3. Dispute Settlements:

Where there is a dispute with a supplier, and a settlement is proposed, all In-Scope Organisations must ensure that:

- the settlement is not described as being in the course of business as usual;
- any confidentiality clause permits sharing the details of that settlement and the performance of the supplier under the relevant contract with other In-Scope Organisations including the Cabinet Office and HM Treasury; and
- any statement that there is no admission of liability should avoid saying that the supplier is not at fault.



ANNEX B: EXAMPLE OF HOW INFORMATION SHARING IS COVERED IN A STANDARD CONTRACT CLAUSE:

21.6 The Authority may disclose the Confidential Information of the Supplier:

- (a) on a confidential basis to any Central Government Body for any proper purpose of the Authority or of the relevant Central Government Body;
- (b) to Parliament and Parliamentary Committees or if required by any Parliamentary reporting requirement;
- (c) to the extent that the Authority (acting reasonably) deems disclosure necessary or appropriate in the course of carrying out its public functions;
- (d) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in Clause 21.6(a) (including any benchmarking organisation) for any purpose relating to or connected with this Agreement;
- (e) on a confidential basis for the purpose of the exercise of its rights under this Agreement, including the Audit Rights, its step-in rights pursuant to Clause 30 (*Step-In Rights*), its rights to appoint a Remedial Adviser pursuant to Clause 29 (*Remedial Adviser*) and Exit Management rights; or
- (f) on a confidential basis to a proposed Successor Body in connection with any assignment, novation or disposal of any of its rights, obligations or liabilities under this Agreement,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Authority under this Clause 21.