

Disclosing Information to Unsuccessful Tenderers



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We regularly receive calls from contracting authorities asking whether they are obliged to disclose information to unsuccessful tenderers.

Regulation 6 of S.I. No. 130/2010 - European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "*Remedies Regulations*") sets out the information that must be disclosed to candidates and tenderers in the first instance. However, generally the queries that we receive relate to information that is outside of the scope of requirements set out by the Remedies Regulations.

There are no hard and fast rules for a contracting authority to turn to in this instance. However, the courts made it clear in the *RPS v Kildare County Council*¹ case that requests made by unsuccessful tenderers for additional information must be responded to.

The tenderer has 30 days from the day it knew or ought to have known of an alleged infringement to challenge the process in the High Court. Therefore, the information to which it is entitled to should be disclosed as soon as possible by the contracting authority. In *Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust*², the court said:

"...the challenger ought to be provided promptly with the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality".

When deciding whether or not to disclose the information sought, the contracting authority should consider whether the information is confidential or commercially sensitive. Under the Freedom of

Information Act 2014 records that are confidential or commercially sensitive are exempt. Tenderers are generally asked to indicate and justify if any information provided is confidential or commercially sensitive. If the information is deemed by the contracting authority as confidential or commercially sensitive, it should be redacted from any documents that are released.

Disclosing the requested information could do one of two things:

1. confirm to a tenderer that it may have grounds to challenge to process; or
2. serve to reassure the tenderer that the process was fair and compliant.

If a contracting authority does not want to disclose the information, it could raise suspicions regarding the former.

In 2017, the Technology and Construction Court in the UK issued a guidance note on procedures for public procurement cases. Although it has no binding effect in the Republic of Ireland the guidance will likely be of interest to tenderers and contracting authorities alike as to what the pre action stage should look like. The guidance suggests that the TCC is advocating a more open approach to the disclosure of information at the early stage of proceedings.

If in doubt about whether to disclose a request for additional information you should seek legal advice.

¹ RPS Consulting Engineers Ltd v Kildare County Council [2016] IEHC 113.

² Roche Diagnostics Limited v The Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933 (TCC)