

Question: Is it compulsory for a Council to Declare Schedule of Rates pricing following a tender process?

Answer: Unless a council believes there is very good reason to withhold the successful tenderer's pricing information, then it should be released. However, we believe an argument could be mounted to substantiate that the disclosure of the tenderers' schedules of rates need not be disclosed on the basis that doing so "would place the contractor at substantial commercial disadvantage with its competitors both at the time of entering the contract and at any later date when there would be an effect on future competitive arrangements." (ref. M2000-11 Disclosure on Information on Government Contracts with the Private Sector-Schedule 3).

Schedules of Rates are different to lump sum prices in that schedules of rates are often called for some specific period of time (rather than just for one project), and provide a competitor with more detailed components of pricing than can be obtained from a lump sum price. The cost components of a lump sum price are not easily determined by a competitor and a lump sum price reflects market pricing at a particular point in time, not an on-going period of time.

Like so many things, it's difficult for the legislation and guidelines to cover every scenario and be absolutely specific in guidance. Below are extracts of some relevant points from associated guidelines and memorandum with further LGP commentary.

Disclaimer: The above comments are based on the practical experience of LGP's staff and cannot be taken to be a legal opinion that could be relied upon in Court. For further advice, you might contact your Council's lawyers or alternatively contact the New South Wales Division of Local Government ph 4428 4100 to discuss.

Extracts and further commentary:

Background:

The Tendering Guidelines for NSW Local Government (s3.18, page 56) provide the following comments.

Council must make information on the outcome of the tendering process publicly available by displaying, in a conspicuous place, the name and amount of the successful tender or a notice stating that none of the tenders were accepted.

Discussion

Information relating to unsuccessful tenders remains confidential, unless otherwise specified in the conditions of tendering, agreed by the tenderer, or required by legislation. Councils should consider adopting the advice in Premier's Memorandum 2007-1 *Public Disclosure of Information arising from NSW Government Tenders and Contracts*, which outlines the minimum information that should be disclosed and gives guidance on what should remain confidential. The Memorandum can be found on the Department of Premier and Cabinet's website at www.dpc.nsw.gov.au.

At first glance, it seems councils should declare the accepted tender price, but there is a further reference to the Premier's Memorandum 2007-1, extracts of which are below. In M2007-1, it seems the need to declare tender prices is only compulsory for contracts > \$150,000, but regardless, there is the overriding requirements

of the Freedom of Information Act (FOI) (*see below*.) FOI allows for some confidential information to be withheld. (This position is also addressed by the GIPA Act.)

Tender information disclosure requirements

Agencies must ensure that information is disclosed as follows:

Tender Type	Level of disclosure	Basis of disclosure
For all public calls for tender, expressions of interest or other such public calls which may result in a contract with the private sector.	As a minimum: <ul style="list-style-type: none">- a concise description of the proposed works, goods or services the subject of the tender call;- the date responses to the tender call close and where responses are lodged; and- location of the tender call documents. The names and addresses of all entities which submit responses.	Routine public disclosure at the time tender calls are advertised. Routine public disclosure within 7 days of the date tender calls closed.

Contract information disclosure requirements

The FOI Act requires the routine disclosure of contract information as follows:

Contract size and type	Level of disclosure	Basis of disclosure
Class 1 contracts All government contracts with estimated value \$150,000 or above).	The information set out in schedule 1.	Routine public disclosure within 60 days after the contract becomes effective.

Confidential information

None of the disclosure obligations contained in the FOI Act, or the requirements for disclosing tender information or a copy of a contract or information relation to a contract under these guidelines, require the disclosure of:

- the commercial-in-confidence provisions of a contract (as defined in schedule 3);
- details of any unsuccessful tender;
- any matter that could reasonably be expected to affect public safety or security; or
- information which would be exempt from disclosure if it were the subject of an application under the FOI Act.

Where such confidential information is withheld, the agency must inform the requesting person that access to that information may be sought in accordance with the FOI Act. This will enable a person seeking the information to have the appeal rights available under the FOI Act.

SCHEDULES OF DISCLOSURE FOR CONTRACTS

SCHEDULE 1

(Section 15A(2) FOI Act)

The schedule 1 information required to be disclosed is as follows:

- (a) The name and business address of the contractor;*
- (b) Particulars of any related body corporate (within the meaning of the Corporations Act 2001 of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract;*
- (c) The date on which the contract became effective and the duration of the contract;*
- (d) Particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract;*
- (e) The estimated amount payable to the contractor under the contract;***
- (f) A description of any provisions under which the amount payable to the contractor may be varied;*
- (g) A description of any provisions with respect to the renegotiation of the contract;*
- (h) In the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed; and*
- (i) A description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.*

SCHEDULE 3

(definition of 'commercial-in confidence' provisions in section 15A(14), FOI Act)

Commercial-in-confidence information which is not to be disclosed is as follows:

- The contractor's financing arrangements;
- The contractor's cost structure or profit margins;
- The contractor's full base case financial model;
- Any intellectual property in which the contractor has an interest; or
- **Any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.**

Prepared: 4 March 2013

Authorised: PGS