



Scottish Information
Commissioner
www.itspublicknowledge.info

Decision Notice 208/2024

Pre-Qualification Questionnaire related to Islay ferry procurement

Authority: Caledonian Maritime Assets Ltd
Case Ref: 202200773

Summary

The Applicant asked the Authority for documents related to an unsuccessful tender bid. The Authority withheld the information because it considered it to be commercially sensitive. The Commissioner investigated and found that the Authority complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 30(c) (Prejudice to effective conduct of public affairs); 33(1)(b) (Commercial interests); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 27 May 2022, the Applicant made a request for information to the Authority. He asked for the completed Pre-Qualification Questionnaire (PQQ) filled out by Ferguson Marine as part of the bidding process over the Islay ferry procurement.
2. The Authority responded on 16 June 2022. It withheld information under section 33(1)(b) (Commercial interests and the economy) of FOISA, on the basis that disclosure would, or would be likely to, prejudice both Ferguson Marine's ability to compete for future projects and the Authority's ability to attract organisations to bid for future projects.

3. On 16 June 2022, the Applicant wrote to the Authority requesting a review of its decision. He argued that other questionnaires had been published before, therefore precedent had been set.
4. The Authority notified the Applicant of the outcome of its review on 13 July 2022. The Authority upheld the original decision without modification.
5. On 13 July 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant disagreed with Authority's decision to withhold the information and re-iterated his view that a similar questionnaire was published previously under FOI. He provided the Commissioner with a copy of this previously published questionnaire.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 3 August 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant.
8. On 7 August 2022, and in line with section 49(3)(a) of FOISA, the Commissioner invited the Authority to provide its comments. In the comments provided, the Authority indicated that it was also withholding the information under section 30(c) of FOISA, in addition to section 33(1)(b).
9. The case was subsequently allocated to an investigating officer.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 33(1)(b) – Commercial interests

11. Section 33(1)(b) of FOISA, provides that information is exempt information if its disclosure would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority). This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
12. There are a number of elements an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to establish:
 - (i) whose commercial interests would (or would be likely to) be harmed by disclosure,
 - (ii) the nature of those commercial interests and
 - (iii) how those interests would (or would be likely to) be prejudiced substantially by disclosure.
13. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers the commercial interests of a third party would (or would be

likely to) be harmed, it must make this clear. Generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.

The Applicant's submissions

14. The Applicant argued that the information he was seeking, a PPQ submitted by Ferguson Marine, should be disclosed. He contended that a similar questionnaire had been published by Ferguson Marine previously, and therefore precedent had been set. He argued that the Authority and Ferguson Marine were sister companies involved in the building, procuring and ownership of Scotland's ferry fleet.

The Authority's submissions

15. The Authority submitted that, contrary to the statement made by the Applicant, it was not a "sister" company. It noted that the tender that the Applicant referred to, which was published by Ferguson Marine previously, was a successful tender and was published under exceptional circumstances following the ship yard going into administration. The Authority explained that the Rural Economy and Connectivity Committee's (REC Committee) Inquiry into construction and procurement of ferry vessels in Scotland, was held in 2019, and therefore there was a heightened level of public interest in that particular contract, which may have contributed to Ferguson Marine's decision to release the details of the successful tender.
16. The Authority maintained that disclosing information relating to unsuccessful bids in a tender process would cause substantial prejudice to itself and to third parties bidding for contracts. It submitted that there was no precedent in the public sector, for even disclosing the names of unsuccessful bidders. The Authority explained that this case was unusual in that the name of the unsuccessful bidder was placed into the public domain by parties associated with Ferguson Marine. Given this public disclosure, the Authority took the decision to confirm that it did hold information falling within the scope of the request.
17. The Authority acknowledged that it may be appropriate to disclose information about bidders that make it through to a second round in some cases, or that organisations themselves may decide to make this information public. However, it contended that there was no precedent for releasing information about companies that do not make it through the first round of a procurement process.
18. The Authority argued that all of the information it was withholding was particularly sensitive. It noted that the information relates to an unsuccessful tender in a highly competitive global market and to disclose this information would have a significant impact not only on the organisation that submitted the PQQ, but also to those who are considering tendering for future work. The Authority maintained that it was vital that it did not take any action that would deter potential participants from engaging in future procurement exercises.
19. The Authority argued that it required healthy competition to ensure it was able to select goods and services, such as vessels and major port infrastructure projects, that represent the best value for public money. It noted that while the industry is highly competitive, it is often highly specialised work and therefore the number of potential bidders is limited. It submitted that publication of this type of information is highly likely to deter other companies from bidding, significantly compromising the Authority's ability to ensure best value for money.

20. The Authority stated that there were reputational issues associated with suppliers not being awarded contracts. It further commented that there was little doubt that the Authority's views and decisions about an organisation's ability to construct a vessel would be taken into account by others when they were deciding to procure the build of new vessels. It argued that disclosure would therefore distort the market and have a very real impact on the ability of unsuccessful bidders to win other work. The Authority submitted that disclosure would also reveal commercial information to other organisations that they would not otherwise have access to.
21. The Authority argued that unsuccessful bidders would be adversely affected due to their "tenders being open to the public". In conjunction with media reporting, it submitted that customer and investor confidence in the unsuccessful bidder could decline. Furthermore, it noted that if similar tenders were run in the future, disclosure of this information would mean that potential bidders would have access to another company's bid. The Authority submitted that not only would this be commercially damaging to the unsuccessful bidder, it would be highly likely to result in the Authority being unable to achieve the best possible value for money.
22. The Authority also argued that if unsuccessful tenders were published, it would struggle when going to the market for suppliers, as there would be a fundamental issue with trust. The Authority argued that there was no expectation (from the bidders) that information would be placed in the public domain if they were unsuccessful, there was no precedent for it and it very difficult to see what the public interest was. The Authority argued that it could not disclose information that would substantially prejudice future tendering exercises. It commented that the shipbuilding market was hugely challenging, and any disclosure is highly likely to result in companies being unwilling to submit bids in case they are unsuccessful and their losing bid is published.

The Commissioner's findings on section 33(1)(b)

23. Having considered the Authority's submissions, the Commissioner is satisfied that the interests identified by the Authority are commercial interests for the purposes of this exemption. The information sought is part of the competitive procurement process relating to the supply of a vessel, or vessels, for the delivery of ferry services.
24. The Commissioner recognises that participants in a tendering process must provide commercially sensitive information to the Authority, in order to demonstrate that it is best placed to win and execute the contract that is being offered. The information provided in a PQQ will be commercial in nature and will contain information specific to each bidder. The Commissioner accepts that this information will not be publicly available and will be provided only for the consideration of the Authority.
25. The Commissioner accepts that the Authority has identified commercial interests relating to itself and its ability to operate and award tenders for vessel construction, which could be adversely impacted should disclosure of the withheld information dissuade companies for bidding for contracts in future.
26. The Commissioner also accepts that Ferguson Marine, as an organisation that bids for contracts to build ferries, has commercial interests which would be harmed by disclosure of its unsuccessful PQQ in this particular tender process.

27. Having identified these commercial interests, the Commissioner must consider whether they would, or would be likely to, be prejudiced substantially by disclosure of the withheld information.
28. The Commissioner accepts that disclosure of this information, particularly given it relates to an unsuccessful bid, would result in full details of that bid being released, and that such disclosure would cause commercial harm to the bidder who failed to secure the contract. He considers that disclosure would give other competing companies an insight into how Ferguson Marine structures its tenders, and would reveal its strengths and weaknesses. He also accepts the Authority's argument that this negative coverage would hamper Ferguson Marine's ability to successfully obtain contracts from other sources, and could deter potential investment (indeed, it may result in existing investment being withdrawn). The Commissioner is therefore satisfied that disclosure would prejudice substantially the commercial interests of Ferguson Marine.
29. The Commissioner also acknowledges that there is a real risk that companies will not bid for tenders if they consider it likely that the Authority will disclose details of unsuccessful bids to the public (and to their competitors). If fewer companies bid for contracts, then the Authority will not be provided with a wide range of options and may have to award contracts to bidders that do not offer best value (as they will know they will have fewer competitors). If this occurred, the Commissioner is satisfied that it would prejudice substantially the commercial interests of the Authority.
30. In all the circumstances, the Commissioner is satisfied that disclosure of the information requested by the Applicant would, or would be likely to, prejudice substantially the commercial interests of Ferguson Marine and other potential bidders by allowing competing organisations and investors to view and consider unsuccessful bids. He considers that disclosure would reveal commercial information to other organisations that would not otherwise be accessible, and this would hamper Ferguson Marine's ability to win tenders in the future. The information contained in the PQQ is commercially sensitive, and is not information that any commercial entity would choose to make public.
31. The Commissioner is satisfied that disclosure would also damage the ability of the Authority to operate in a competitive environment. He accepts that trust and good relationships with industry partners are essential to the Authority in enabling it to deliver its functions.
32. Accordingly, in this case, the Commissioner is satisfied that the exemption in section 33(1)(b) of FOISA is engaged in relation to all of the information that is being withheld.

Public interest test

33. Section 33(1)(b) is subject to the public interest test in section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 33(1)(b) was relevant to the withheld information, he is now therefore required to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
34. The Applicant did not provide any public interest arguments.

The Authority's submissions on the public interest

35. The Authority argued that there was a significant public interest in maintaining competition in public contract tenders for the benefit of consumers of public services (to ensure the selected provider is capable and suitably qualified to provide the service) and for the benefit of

taxpayers (to ensure the selected provider can provide a cost-effective service). It submitted that it was essential that the Authority did not prejudice the tender process and that it maintained a position of being able to obtain best value for money.

36. While the Authority recognised that there was a public interest in ensuring that tender awards were conducted fairly and transparently, it argued that this interest was met by disclosing (where requested) information about how decisions are made and how the winning supplier provided best value for money during that tendering process. It insisted that there was little public interest in disclosing any information about unsuccessful bidders, and that the public interest lay in withholding the information.

The Commissioner's view

37. The Commissioner has considered all of the arguments and facts in this case. The Commissioner acknowledges the general public interest in transparency and accountability, and in particular he considers that the very substantial sums of public money involved mean that there is an argument for disclosure.
38. However, the Commissioner is also of the view that disclosure of the information in question would give competitors a valuable insight into commercially sensitive information about Ferguson Marine, thus giving them an unfair commercial advantage.
39. The Commissioner considers that there is no public interest in placing a particular company at a commercial disadvantage, simply as a result of having entered into a commercial tendering process with a public body to provide a service. Having reviewed the withheld information, the Commissioner is satisfied that disclosure of this information would have a detrimental impact on Ferguson Marine's ability to compete and win contracts fairly, in a competitive market.
40. Furthermore, the Commissioner considers that disclosure of the information would hamper the Authority's ability to run tender exercises and award contracts, as future bidders would be less willing to share commercial information with the Authority for fear that unsuccessful bids would be released into the public domain. If the Authority could not attract bidders for future tenders, it would severely limit its ability to obtain best value as it would be forced to choose from a smaller pool of applicants, who would have less incentive to offer a competitive bid. The Commissioner is satisfied that reducing the Authority's ability to achieve best value would not be in the public interest.
41. As noted above, the Commissioner has already acknowledged the submissions made by the Authority in support of maintaining the exemption, and he has already concluded that disclosure of the withheld information in this case would, or would be likely to, prejudice the commercial interests of Ferguson Marine and the Authority.
42. Having balanced the public interest for and against disclosure, the Commissioner concludes that, in all the circumstances of the case, the public interest in maintaining the exemption in section 33(1)(b) outweighs that in disclosure of the withheld information under consideration here.
43. The Commissioner therefore finds that the Authority was entitled to apply section 33(1)(b) of FOISA, to the withheld information.
44. As he has found the information to be wholly exempt under section 33(1)(b) of FOISA, the Commissioner is not therefore required to consider the application of section 30(c) of FOISA.

Decision

The Commissioner finds that the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

David Hamilton
Scottish Information Commissioner

24 September 2024