



25 April 2019

Dear ,

ATISN 13096 – AS – Property Consultancy Framework

Thank you for your request which I received on 5 April 2019 about the NPS Property Consultancy Framework tender.

A copy of the information captured by your request is enclosed:

- Annex 1 – List of Bidders and Welsh-Based Status
- Annex 2 – Proposed Successful Suppliers

I have decided that some of the information is exempt from disclosure under section 43(2) of the Freedom of Information Act and is therefore withheld. The reasons for applying these exemptions are set out in full at Annex 3 to this letter.

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: Freedom.ofinformation@gov.wales

Please remember to quote the ATISN reference number above.

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.



You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

Annex 3 – Reasons for Withholding Information

I have decided to withhold the following information:

Information being withheld	Section number and exemption name
Scores awarded for all criteria and sub-criteria and total scores for all bidders across all Lots.	Section 43(2) – Commercial Interests

This Annex sets out the reasons for the engagement of section 43(2) of the Freedom of Information Act (FOIA) and our subsequent consideration of the Public Interest Test.

Engagement of section 43(2) (Commercial Interests) of the FOIA

Section 43(2) of the FOIA reads “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)”

The Welsh Government confirms that information pertinent to the request is held by this organisation; however, the Welsh Government considers that the information required remains commercially sensitive between the organisation and its providers as well as other parties who participated in the competitive procurement processes, and that the s43(2) exemption is engaged.

In reaching this decision, the Welsh Government has considered the likely prejudice to both the National Procurement Service (NPS) and service providers, and also the public interest in the release of this information.

The Welsh Government considers the disclosure of this detailed information would be likely to prejudice the NPS’s commercial interests in respect of its ability to obtain bids in a competitive market for these services that reflect best value for money as competition is likely to be reduced as bidders will be reluctant to bid for work as a result of disclosure.

The Welsh Government further considers that the information sought would be likely to prejudice the commercial interests of the potential providers if identified from the response in respect of their ability to participate effectively within an open market.

The following points are pertinent to the comments above:

- Unsuccessful participants have legal rights under the Public Contract’s Regulations 2015 to challenge decisions made by public authorities in respect of tender awards, and are entitled to obtain information relating to the evaluation of their own performance against the characteristics and relative advantages of the winning bidder, but no such comparison is required against the performance of other unsuccessful parties. Should the Welsh Government release this information it would likely be putting itself at risk of legal challenge. If a legal challenge was to be brought because of the sharing of commercially sensitive information which should not be disclosed to third

parties, this would be likely to impact significantly on both the financial and reputational credibility of the Welsh Government.

- Guidance from the Information Commissioner's Office states that commercial interest "relates to a person's ability to participate competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent". Information about the procurement of goods and services by a public authority is usually considered as commercially sensitive.
- Providers would likely be deterred from competing in public tenders due to this disclosure. As the re-procurement for these services is due to commence soon, this would likely prejudice NPS's commercial interests in obtaining the best value and service quality from the process.
- Disclosure of this information would be likely to prejudice the subsequent negotiations with other third parties based on a similar transaction. As the NPS intends to re-procure this agreement in the near future on a similar basis, this would be likely to have an impact on the bids received as bidders may use the information they are not usually privy to in order to amend their bids and to distort market competition and would be likely to prejudice NPS's commercial interests.
- The use of NPS Agreements is not mandated amongst its customer organisations and NPS relies on providing a value-driven, quality service provision to ensure customer organisations utilise the agreements as a matter of choice. To disclose this information would be likely to prejudice NPS's commercial interests as it is self-funded through supplier rebates based on spend through their agreements to cover their administration costs.
- Any release under the FOIA is necessarily a release to the public, not to any one individual. Disclosure of this information would be likely to put these providers at an unfair disadvantage during any service re-procurement, particularly as the initial process was annulled and the planned re-procurement is due to begin shortly. Within these markets, bidders will be aware of other organisations likely to be tendering in the same field. Evaluator scores would be likely to impact on the bidder commercially and financially should the information be utilised by a competitor in future procurement exercises.
- Disclosure would be likely to affect any other similar procurement processes. It would be likely to also provide assistance to competitors in other forthcoming procurements.
- This disclosure would likely be in detriment of the commercial strategy of each supplier bidding for the contract and will give an indication of the level of competition in the market that ultimately would likely prejudice the capacity for the authority to obtain best value for money.

Public Interest Test

Public Interest Arguments in Favour of Disclosure

- There is a public interest in the disclosure of information which facilitates the accountability and transparency of public bodies for decisions taken by them, particularly in relation to the spending of public money.

Public Interest Arguments in Favour of Withholding

- Release of the detailed information about the tender evaluation and bid scoring, even in an anonymised format, would likely constitute a breach of commercial interest of those providers, which would likely lead to lack of trust from current and future providers, thus restricting future competition for tenders. This would likely prejudice the National Procurement Service's ability to obtain best quality of service and value, potentially impacting on budgets set across the wider public sector which is not in the public interest. The Welsh Government should not allow the potential for public services to be delivered at higher costs due to undertaking procurement processes that will not achieve best value.
- Bidders often submit tender responses marked as commercially sensitive due to their unique content which may imply trade secret. The Welsh Government Invitation to Tender established obligations of non-disclosure. Breaching these obligations opens up the possibility of legal action against the Welsh Government by providers, or potential providers, which would be likely to have high financial implications to the public purse. It is not in the public interest to spend public money on legal representation to defend any legal action that is taken against the Welsh Government as a result of the disclosure of this information.
- Disclosure of the tender evaluation and bid scoring would be likely to provide an indication of the provider's cost model based on the tendered service and also would be likely to increase the risk of collusion between future bidders with the possibility of price setting resulting in the undermining of the integrity and competitive nature of procurement, which is not in the public interest.
- The bid content and performance of individual bidders does not affect the public as the process was annulled and the services will not be performed. The information released contains details of the suppliers who participated and who would have been successful if the process had not been annulled. The positioning of unsuccessful bidders and information regarding their individual scores would not further this public interest. The Welsh Government should not allow the future re-procurement of these services to be compromised by the release of this information.

Balance of Public Interest Test

The Welsh Government recognises that there is a public interest in the disclosure of information to ensure the accountability and transparency of public bodies' actions

and decisions. However, there is also a public interest in the Welsh Government being able to work within competitive markets where that results in a financial or resource benefit which is put to the wider public interest. Having undertaken the balancing exercise, the Welsh Government has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information having regard to the effect that the disclosure of the information would not be in the public interest.