

NSCSO Contract – Refusal Notice

We are withholding some elements of the Contract as we consider that the following exemptions apply to it.

Section 22

- Information is exempt if it is intended for future publication

Section 43 (Prejudicial to commercial interests) subsection (2)

- Information is exempt if its disclosure under would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Section 44 – Prohibitions on Disclosure

- Information is exempt if there is an existing statutory bar to the disclosure of information by a public authority.

Section 22

Schedule 24 – 3rd party Contracts

The appendix to this schedule has been withheld as it lists specific vendors and contract values that are still in the process of being either novated to Capita or transferred to a managed status. Release of this information might prejudice the commercial position of the Council or Capita until all commercial agreements have been secured. We estimate that this process will be complete by Jan 2014, at which point this schedule will be published.

We therefore consider that the qualified exemption set out in Section 22 (Information intended for future publication) subsection 1 applies to the information requested. It is reasonable to refuse disclosure until publication as there is a planned programme for publication.

In applying this exemption, we have had to balance the public interest in withholding the information against the interest in favour of disclosure.

Factors in favour of disclosure

Documents will be made public in any event
Public interest in scrutinising mechanics of the council

Factors in favour of withholding

Documents will be made public in any event, and disclosing in an ad hoc way will pre-empt planned publication.

Disclosure in advance of publication would be likely to negatively effect ongoing negotiations, potentially damaging the commercial interests of the parties involved.

In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 43(2)

In addressing the commercial interests and the prejudice that would or would be likely to occur the council has consulted with the Capita Group, and has asked them to explain and justify what prejudice could be caused, how and how likely this would be.

The council is relying upon the lower threshold of likelihood that disclosure 'would be likely' to have a prejudicial effect.

The party whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed is the Capita Group.

The harm that would be likely to be caused to Capita Group is that they would be likely to lose business and therefore income. This would include ongoing and future negotiations related to this agreement and bids and negotiations Capita Group are involved in for similar contracts.

Their methodology, know-how and pricing structures would be widely known, allowing plagiarism by competitors who are competing for business from other local authorities. This would be likely to lead to Capita Group being unsuccessful in obtaining tenders or losing business to competitors. This loss of business would be harmful to their commercial interests. The link between the disclosure and harm is that knowledge of the information would allow competitors an advantage over Capita Group in pricing tenders which would be likely to lead to Capita Group being unsuccessful in gaining business.

Capita have submitted their views about the detriment that they would be likely to suffer if the information were disclosed:

Main contract body

Definitions

Capita...requires that this is not made public in order to avoid fettering its ability to deliver the contract and its obligations and negotiate successfully on behalf of the Council in the event of a dispute, renewal or contract extension.

Clause 14.6

In the event that the liability accepted by Capita under this clause was made public Capita's ability to negotiate with suppliers and obtain value for money would be hampered by their knowledge of the level of cost that we would bear

Schedules

Schedule 4 – Payment Mechanism

The redacted information set out in Schedule 4 contains current information that is relevant to other bids that Capita is currently negotiating and competing for. To publish information making public the basis of Capita's underlying cost, costing assumptions, margin and overhead would provide Capita competitors with information that would allow them to undercut Capita and undermine their ability to win bids on price.

Competitors are typically very close in their pricing and savings. To provide price and cost information to underpin the Service Delivery plan detail would prejudice Capita's ability to remain competitive against other suppliers in the many bids that they are currently engaged in.

In addition, the information contained in the schedule in relation to pricing, savings and guarantees would be likely to, if released, damage both shareholders and investor confidence in Capita exposure to have to pay on guarantees, Capita profit levels and Capita's cost basing. The City is always sensitive to information on Capita's capital outlay and cash position and all press announcements at Barnet since January 2013 in relation to the contract and price have to be cleared by the Capita PLC press office as a result. To now reveal the cost model, investment and commercial risks would undermine this work and contradict the protocols of Capita Group in managing investor confidence to ensure the stability of the shares.

The information contained in the Appendices to Schedule 4 in relation to volumes, day rates and pricing assumptions is current and the further release of this would undermine our ability to bid, compete and negotiate with our suppliers. As our opportunity to win and deliver projects in Barnet is also not exclusive, publication of these rates and approaches also undermines our ability to win this work as it directly advises our competitors and the Councils other advisors of our pricing allowing them to undercut us.

The publication of more detailed pricing and cost bases will also undermine our ability to negotiate with our suppliers and sub contractors for the NSCSO contract providing them direct information about the investments we costed and margin and overhead rates and giving them the information required to set a price in line with that rather than negotiate an improved offer.

Schedule 27 – Compensation on Termination

These are figures and levels of payments negotiated under the contract and specific to Capita as they formed part of the evaluation around the financial terms termination. During the dialogue Capita also agreed to waive a number of other payments on termination to meet the Councils evaluation.

Capita is currently engaged in wide ranging bids across the public sector and payment on termination is a feature in all of the public sector bids and in line with OGC and other guidance. In the event that the Council publishes this information, our competitors will have sight of information that will allow them to undercut Capita's commercial position and therefore our ability to win new business.

The Public Interest Test.

Factors in favour of disclosure

1. It is in the public interest for the Council to be open and transparent, especially with regard to a unique and wide-ranging contract such as this.
2. There is a general public interest in facilitating the accountability of public authorities for decisions they take, and also allow individuals to understand decisions made by public authorities and how public money is spent.
3. The council has a fiduciary duty to its residents to spend council money properly.

Factors in favour of withholding

1. It is not in the public interest for the council to disclose information that would be likely to damage the commercial interests of a company, as this could lead to financial problems for the company and or loss of jobs, which is not in the public interest.
2. It is not in the public interest for commercially sensitive information about one company to be released, when the same category of information relating to others companies is not so released, thus putting one company at a commercial disadvantage.
3. It is not in the public interest for information to be released which could negatively influence ongoing and future negotiations associated with this contract, as this would be likely to have an adverse effect on value for money for the council and by extension the people of Barnet.
4. The withholding of the exempt sections will not negatively affect accountability, as the council has full and proper mechanisms in place for this, and there are sufficient statutory methods for the public to be involved in ensuring accountability, for example the Overview and Scrutiny process, councillors involvement, and the Audit Commission Act process.

The weighting of the factors.

The factors in favour of disclosure all have considerable weight, particularly in the case of factor 1. The council has acknowledged this and has released data which in other circumstances could well be seen to fall under the exemption under section 43, but which the balance of the public interest found in favour of disclosure.

With this in mind, the council has only withheld information in which it was felt that there was a considerably strong public interest argument in favour of withholding. The weighting of the factors is not a numerical calculation. However, it was considered that the cumulative weight and strength of the factors in favour of withholding outweigh those in favour of disclosing. Therefore in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

S44

Section 44

- **Schedule 2: method statements and appendices.**
- **Schedule 35: Service Provider commitments**

The council contends that the withheld parts of the mission statements under schedule 2 of the contract are exempt under section 44 of the Freedom of Information Act.

The council believes that the information is exempt as it falls within the Public Contracts Regulations 2006 - and in particular Regulation 43. The Public Contracts Regulations apply to this contract, and the tender was advertised in the OJEU.

In order for information to fall within regulation 43 it must be:

- Forwarded to the public authority by the tenderer.
 - The information was forwarded to the council by the tenderer. These were not documents jointly produced by the council and Capita – it was solely produced by Capita and submitted by them to the council as part of their bid for the contract;

and

- Reasonably designated by the tenderer as being confidential.
 - The information has been designated by the tenderer as being confidential. Please see the emails from NSL attached. The council believes that the designation, in respect of the withheld information is reasonable. The council believes that in respect of the information withheld there is a duty of confidence.

This is stated in the contract at clause 39 which states the following:

39 ***Information and Confidentiality***

- 39.1 *The parties agree that the provisions of this Agreement shall, subject to clause 39.2, not be treated as Confidential Information and may be disclosed without restriction.*
- 39.2 *Clause 39.1 shall not apply to provisions of this Agreement designated as Commercially Sensitive Information and listed in Parts 1 and 2 of Schedule 23 (Commercially Sensitive Information) to this Agreement which shall, subject to clause **Error! Reference source not found.**, be kept confidential for the periods specified in those Parts 1 and 2 of Schedule 23 (Commercially Sensitive Information).*
- 39.3 *The parties shall keep confidential all Confidential Information received by one party from the other party relating to this Agreement and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.*

The council also believes there is a common law duty of confidence in relation to this information:

- The information was imparted in circumstances giving rise to an expectation of confidence. Information submitted in a procurement exercise which contained financial information and detailed methodology is sensitive material and would be expected to be treated as confidential.
- The information has the necessary qualities of confidence. It is not available by other means, and is substantive and not trivial. The information cannot be obtained publically, or from NSL without payment for their services. The information contained detailed methodology for provision of a service including detailed costing.
- Unauthorised disclosure would be detrimental to the economic operator. The ICO guidance states that whilst one can never say with certainty what impact a disclosure in future would have, if a public authority can show that disclosing the information would or would be likely to be detrimental it should be regarded as confidential (subject to the other tests being made out).

Capita have submitted their views about the detriment that they would be likely to suffer if the information were disclosed:

Appendix 1 of the Finance Method Statement

The material contained in Appendix 1 relates to a proposition offered by Capita and developed outside the requirements specification as a unique proposition and one that was deemed to be a “trade secret” for the purposes of Schedule 23 commercially sensitive information.

The content...relates to the specialism that Capita has within its Sector business around Local Authority Finance and the ability to apply the considerable knowledge and expertise there to release additional savings to the Council as a result of financially re-engineering the way that the Council has its debt and borrowing policies going back over 10 years.

This information is current and part of the Sector market propositions in the market today. To provide this information to the public will allow competitors within the Financial advice market to understand what we do and more specifically it is something that Capita's typical top 5 competitors would not have the capability or expertise to do, giving them insight into our value added services to partnerships in Local government.

Procurement method statement - page 14

The information contained here would provide competitors with information on Capita's underlying commercial models, cost base and charges for Gainshare procurement arrangements, which is an area where Capita are actively bidding for similar work in authorities across the UK. To provide this information to competitors would provide them with the ability to undercut Capita in the market in current live bids.

Schools method statement – Appendix 1

The Schools service is provided on a traded service as a buy-back by schools. The market is very competitive and councils that we provide services to and partnerships such as CSG are facing an average of 10% year on year reductions in schools income. There are many small and niche providers in the market and Capita has to compete to keep the schools against them when they have a lower cost base.

Capita is still competing to retain customers. Publication of this material now would allow competitors to undercut Capita and take services away from Capita and the Council.

Transformation Method statement – p91-92

the transcript of a video produced during the bid outside the requirements of the bid and dialogue process and is unique to Capita.

This video is still used as a promotional representation of our proposition...and is being actively promoted in the market to other clients and

other bids currently. As such this is relevant and current as a transformation method used in competitive situations.

Releasing this to the market would allow competitors to copy the ideas and the approaches and weaken Capita's potential to win new business by proposing this innovative idea.

All other redactions in Customer Services, Transformation, Finance and Estates method statements

During the competitive dialogue Capita process Capita presented a document in relation to potential new sites within the Borough that could be used to locate a new Council face to face services and set of offices. These redactions regard a regeneration opportunity to deliver new businesses and facilities

The publication of the location and plans would have an impact on the commercial visibility of the proposition and will reduce the benefits that Capita could offer the Council as it will undermine landlord negotiations and disposal strategies.

The council believes that unauthorised disclosure would be detrimental to Capita Group (the economic operator).

There is no overriding duty of a public interest defence against a breach of confidence.

Schedule 40 - Managing Agent

This Schedule has not yet been legally entered into and may occur at a future date under the provisions of Schedule 15 Special Projects or as a contract change. To publish the information now would allow competitors to bid against Capita for this work (as projects are non exclusive) and to bid on a basis of knowledge.

The managing agent concept and solution is a live and current market proposition and publishing our pricing and guarantees now would undermine Capita's competitive position.

Section 40(2) – Personal Data

We consider that the absolute exemption set out in Section 40 (Personal information) subsection 2 applies to the names of staff that have been redacted from schedule 4 Appendix 5. Personal Information is governed by the Data Protection Act 1998 and is defined as any *data which relate to a living individual who can be identified) from those data, or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.* The withheld information is exempt

because disclosure would contravene the first data protection principle which requires that personal data is processed fairly and lawfully. Disclosure of the requested information would breach this principle and in particular the requirement of fairness because these individuals would have a reasonable expectation of privacy and do not expect that the council would disclose their names or contact details in response to a freedom of information request. The council's redaction policy states that officers' names and contact details under the level of Assistant Director will generally not be released. All of the posts redacted are under the equivalent of Assistant Director level. It is not practicable to contact all the individuals to ask their views on release, and due to the current changes at the council and the CSG some are likely to have changes roles/left in the intervening time making contact impractical. Section 40 also applies to the redactions in appendix 11 of schedule 4, where the names of individuals and private addresses have been redacted.