

DRS 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.

Please note that references below to Capita and Capita Group incorporate the interests of Re (Regional Enterprise) Limited (“Re”) as the contracting entity for the DRS contract, as well as the interests of the wider Capita group of which Re is part.

Section 22

Schedule 3 – References to suppliers

References to particular suppliers have been withheld on the grounds that the supplier position has yet to be finalised. We aim to publish this on review in 6 months.

Schedule 3 – Appendix C, p4 - Legal Resources

This refers to an outstanding commercial and legal issue. It is expected that this will be resolved by Jan 2014, at which point this will be published.

Schedule 22 – Third Party Contracts

Information withheld as it lists specific vendors and contract values that are still in the process of being novated to Capita. 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 in 6 months' time, at which point this schedule will be published.

Schedule 34 - Rows 378-381, 384-386 - Transition Plan

References to particular suppliers have been withheld on the grounds that the supplier position has yet to be finalised. We aim to publish this on review in 6 months.

Schedule 36 – Tier 3

References to particular suppliers have been withheld on the grounds that the supplier position has yet to be finalised. We aim to publish this on review in 6 months.

Schedule 39 – draft contract for works at cemetery

This schedule has been redacted as publication at this stage would prejudice Capita's commercial interests as early information on the scope of works and pricing target would have an impact on the tender process, by enabling suppliers to adopt a position in the procurement exercise which may not realise best value. This could be released once the works have been contracted.

We therefore consider that the qualified exemption set out in Section 22 (Information intended for future publication) subsection 1 applies to the information set out above. 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

Clause 5.7 g h & i

Clauses 46.10, 46.10A and 46.10B

Releasing this information to the market would be likely to prejudice Capita's commercial interests as it would compromise negotiations Capita may be involved in for similar contracts.

The redacted information reflects Capita's risk appetite. By publishing this information customers and potential partners would be aware of the amount of financial exposure that Capita carried which would undermine Capita's ability to negotiate.

Clauses 74.2, 74.3.3, 74.5.1, 74.6.3, 74.7.2, 74.10.4, 74.15.1, 74.18.2 – Interface with NSCSO contract

The publication of the arrangements entered in to would prejudice Capita's interests in similar tenders where Capita is not the partner contractor by establishing a precedent for the extent of reliance which is acceptable in a similar opportunity, where the position agreed here reflects a position specific to this contract

Schedules

Schedule 1

Definitions of Fee Reduction Law And Conflict of Interest definitions

Releasing this information to the market would be likely to prejudice Capita's commercial interests as it would compromise negotiations Capita may be involved in for similar contracts.

The redacted information reflects Capita's risk appetite. By publishing this information customers and potential partners would be aware of the amount of financial exposure that Capita carried which would undermine Capita's ability to negotiate.

Employment Price Index

Publishing the outcome of the commercial negotiation on this issue would be likely to prejudice the commercial position of both Capita and the council as it would influence and pre-empt ongoing negotiations

Guaranteed Income, Guaranteed Income Cap, Guaranteed Income Recalculation

These items are all linked within the contract. They reflect the outcome of specific negotiations relating to the Capita contract which demonstrate the extent of guarantee provided by Capita and the associated protection agreed for specific items as stated within the contract.

Releasing this information to the market would be likely to prejudice Capita's commercial interests as it would compromise negotiations Capita may be involved in for similar contracts.

The recalculation amount reflects the amount of risk taken by Capita in response to changes in law. By publishing this information, in the event of a change in law arising, customers would be aware of the amount of financial exposure that Capita carried which would undermine Capita's ability to negotiate.

Service Provider Share

Within Local Authorities legislation is constantly changing and this often leads to considerable work to amend processes and systems within services in order to comply with the legislation changes.

Capita negotiated a commercial position in which it has taken on some of the risk and the costs up to a set value over the term of the contract or for any one change.

Where Capita acts as an outsourcer and provider of managed services and the event that there was such a change in law, Capita has to enter discussions with suppliers of the systems and services it uses commission projects, upgrades and configuration work necessary on behalf of its customers to ensure compliance.

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 Capita would bear. Further, as any change has to be agreed and this may involve quotes from 3rd party suppliers, advance notice of this provision would adversely influence pricing submissions to the detriment of Capita and the council.

Termination Guaranteed Income Cap and Termination Guaranteed Income Payment

Publishing the outcome of the commercial negotiation on this issue would prejudice Capita's commercial position as it would influence future similar contracts and would therefore limit Capita's ability to compete effectively with other potential suppliers when submitting tenders.

This arrangement is not common market practice and reflects a position agreed specifically with Barnet under this arrangement. Releasing this information to the market would prejudice Capita's commercial interests as it would lead potential future contract partners to attempt to incorporate this approach, which would not be commercially feasible for Capita in every case.

Schedule 2

General & KPIs - information relating to the calculation of penalties for underperformance.

The calculations reflect a commercial position which, if shared with the market place, would be likely to be prejudicial to Capita's ability to negotiate future contracts, causing prejudice to its commercial interests.

Allocation of Underperformance Points

This reflects the amount of risk Capita is willing to take on each service area and each individual KPI. If this information were to be published, it would prejudice Capita's commercial interests in future negotiations on similar contracts

Schedule 4

Definition of Service Provider Profit and Overhead, KPI value example, 25, 27B.8, 30.2.2, 30.3.1, 30.4, last row of Appendix A, Appendix F, Appendix G financial values, Appendix I, Appendix J

Our experience within the public sector is that competitors are typically very close in their pricing and savings. To provide price and cost information would prejudice Capita's ability to remain competitive other suppliers in the many bids that we are engaged in.

In addition, the information contained in the schedule in relation to our pricing, savings and guarantees could be market sensitive and the release of this information may therefore contradict the protocols of Capita Group in managing compliance with exchange requirements and investor confidence.

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

The publication of more detailed pricing and cost bases will also undermine Capita's ability to negotiate with suppliers and sub-contractors for the DRS contract providing them direct information about the investments which have been costed, and margin and overhead rates. This would give them the information required to set a price in line with the financial model rather than an improved offer.

Schedule 25

This schedule incorporates significant areas that were developed and negotiated by Capita to reflect its commercial submission and the related risks. Provisions relating to termination are highly commercially sensitive as they reflect the extent of exposure Capita have in the event of a termination. As such, release of this information would be likely to have a prejudicial impact on Capita's commercial interests as 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.

Joint Venture Agreement

Clause 4.3

This clause relates to Capita's interests in other ongoing commercial contracts, and therefore publication of this information would introduce uncertainty for Capita customers. As this uncertainty would be likely to lead to work being given to competitors rather than Capita disclosure would be likely to prejudice Capita's interests.

Clause 25

Release of this information would enable competitors to understand Capita's underlying costs and profit expectations, which would prejudice Capita's commercial interests by giving competitors greater insight into Capita's bid approach.

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.

Section 44

The council contends that the withheld parts of the of the contract as set out by the table below 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. 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 24 which states the following:

24 24Information and Confidentiality

- 24.1 *The parties agree that the provisions of this Agreement shall, subject to clause 24.2, not be treated as Confidential Information and may be disclosed without restriction.*
- 24.2 *Clause 24.1 shall not apply to provisions of this Agreement designated as Commercially Sensitive Information and listed in Schedule 21 (Commercially Sensitive Information) to this Agreement which shall, subject to clause Error: Reference source not found, be kept confidential for the periods specified in that Part.*
- 24.3 *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 officers, representatives, advisers 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 Capita Group without payment for their services. The information contains 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 and these are included in the following table which sets out the extent of the redactions under section 44:

Schedule	Clause number	Redacted	Capita view
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1		Definition redacted in full	<i>This is a unique commercial offer which remains subject to negotiation. The information contained here would provide competitors with information on Capita's underlying commercial models, cost base and charges in 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.</i>
3		Redactions on page 1&2	<i>These references have been withheld as they relate to a proposal made in strictest confidence. In publishing this information would be likely to contravene market requirements for a listed company such as Capita. Confidentiality was a critical consideration in making this offer in our specifically developed material.</i>
3		References to elements of the Capita operating solution and growth objectives	<p><i>References to the way in which Capita proposed to deliver and transform elements of the services have been withheld on the basis that this information was provided for evaluation purposes, and was therefore provided with the expectation of confidence to preserve Capita's competitive advantage. The way in which services are evaluated, transformed and delivered for the future is directly evaluated as part of considering contract opportunities such as this, and therefore sharing these confidential elements would contradict the expectation that this bid sensitive material would not be published. It was not updated or altered from the bid evaluation material to the contract schedule.</i></p> <p><i>Further, disclosing this information would give competitors a reference point as to the way in which Capita delivers its operating solution, which would improve competitor position and would therefore prejudice Capita's commercial interests.</i></p>
3	HR & OD SIDP	Joint Employment	<i>References to the process to be followed relating to the joint employment position should be withheld on the basis that the process is ongoing and disclosure at this stage would be directly prejudicial</i>
3	HR & OD SIDP	Illustrative example of restructuring	<i>This was provided in confidence to illustrate a possible approach to the teams in DRS. There is an established process which will be followed in reviewing the team structures</i>

			<i>and the release of this would be misleading at this stage</i>
3	HR & OD SIDP	Introduction	<i>This text describes the dialogue process and therefore was provided as part of that confidential process, in circumstances giving rise to an expectation of confidence.</i>
3	HCC SIDP	Works schedule	<i>Information relating to the specification for works and the associated pricing has been withheld on the basis that this was provided in confidence, and was not intended to be published. Publication would prejudice Capita's commercial interests as early information on the scope of works and pricing target would have an impact on the tender process, by enabling suppliers to position themselves to exploit the need of Capita and the council to commission the works and therefore to exploit the maximum possible price. This could be released once the works have been contracted.</i>
3		Strategic Planning SIDP	<i>Capita has invested in analysis and design for new ways of working in order to gain competitive advantage in bidding for and winning new Local Government Partnerships. Releasing details of solutions we have developed will enable competitors to find and adopt those same approaches in their bids, reducing competitive advantage. The information was imparted in circumstances giving rise to an expectation of confidence.</i>
3		Regeneration SIDP	<i>Capita has invested in analysis and design for new ways of working in order to gain competitive advantage in bidding for and winning new Local Government Partnerships. Releasing details of solutions we have developed will enable competitors to find and adopt those same approaches in their bids, reducing competitive advantage. The information was imparted in circumstances giving rise to an expectation of confidence.</i>
4	Redaction in definitions and clauses 28 & 31		<i>Refers to a unique commercial offer which remains subject to negotiation. The information contained here would provider competitors with information on Capita's underlying commercial models, cost base and charges in 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</i>

			<i>the market in current live bids.</i>
25	Appendix	Illustrative Example	<i>While the example is marked as illustrative, it reflects confidential financial information which will be understood by competitors and publication would provide competitors with a greater understanding of our approach to contracts such as this, which would therefore prejudice our position. See above explanation for Schedule 4 and Schedule 25</i>
28	Entirety		<i>This schedule was developed by Capita to address a contract consideration and reflects a detailed approach within Capita to manage conflict of interest considerations. This forms part of the Capita business systems and therefore was provided in confidence as part of the evaluation process, and should not therefore be disclosed.</i>
33		Addendum	<i>This text describes the dialogue process and therefore was provided as part of that confidential process, in circumstances giving rise to an expectation of confidence.</i>
36	General	Remedies	<i>Where specific financial amounts are set out in the column headed Remedy, these should be withheld from publication as they reflect the amount of risk and the value of the activity which the parties have agreed to. Therefore release of this information would give competitors valuable information as to the nature of Capita's solution and Capita's risk appetite, which are key influences in a successful bid. Further, as many of these commitments rely on support and engagement with 3rd parties, providing those parties with awareness of the potential financial penalty which Capita may suffer in the event that the commitment was not delivered. Therefore publishing this information would prejudice Capita's commercial interests. As this schedule was provided to summarise the commitments made by the service provider, these values were provided in the expectation that they would be treated confidentially.</i>

36	General	General	<i>Information which relates to specific commercial developments proposed by the service provider have been withheld. These commercial development ideas were provided by the service provider during the dialogue process and therefore were confidential in nature. Also, early information regarding specific commercial ideas before they are implemented in the market place would be identified by competitors who would be likely to implement some of the ideas themselves, thereby taking market share away from the service provider. This would therefore be prejudicial to Capita's and the Authority's commercial interests</i>
37		Summary - Commercial Development Plan	<i>Information which relates to specific commercial developments proposed by the service provider should be withheld. These commercial development ideas were provided by the service provider during the dialogue process and therefore were confidential in nature. Also, early information regarding specific commercial ideas before they are implemented in the market place would be identified by competitors who would be likely to implement some of the ideas themselves, thereby taking market share away from the service provider. This would therefore be prejudicial to Capita's and the Authority's commercial interests</i>
37		Summary	<i>Information which relates to specific commercial developments proposed by the service provider should be withheld. These commercial development ideas were provided by the service provider during the dialogue process and therefore were confidential in nature. Also, early information regarding specific commercial ideas before they are implemented in the market place would be identified by competitors who would be likely to implement some of the ideas themselves, thereby taking market share away from the service provider. This would therefore be prejudicial to Capita's and the Authority's commercial interests</i>
Joint venture agreement	Schedule 3		<i>This information was provided confidentially by Capita. It reflects all live bid prospects that Capita is managing at present, and was developed by Capita and provided to the council in confidence. The bid pipeline is a key strategic asset for an organisation such as Capita, whose market prospects are heavily influenced by bid information. Indeed,</i>

			<i>this pipeline information is likely to be seen as market sensitive and therefore publication may be a breach of exchange regulations.</i>
Joint venture agreement	Schedule 6		<i>Capita's profit margin should be removed from this table as this is confidential and market sensitive information. Further, sharing this information would enable competitors for work in Barnet and beyond to undercut Re, and therefore would prejudice the commercial interests of the business. See response to Schedule 4 above</i>

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 individuals that have been redacted from schedules 2, 3, 6 18 and 37. 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 some are likely to have changed roles/left in the intervening time making contact impractical.