

- 8.4.1 *Including disclosure provisions in the procurement documentation.*
- 8.4.2 Bidders should be made aware in Pre-Qualification Questionnaire and Invitation to Tender documentation that an authority is not able to hold information in confidence unless it is genuinely sensitive in nature and therefore is exempt from release (for example because commercial interests may be harmed²⁵, or its disclosure would constitute an actionable breach of confidence²⁶).
- 8.4.3 Withholding information under certain exemptions (e.g. commercial interests) requires that substantial prejudice is demonstrated – the authority must be able to show that real, actual, significant harm would be caused by disclosure.
- 8.4.4 They should also be aware that the authority will not implicitly accept confidentiality terms, and that any confidentiality markings, whilst being noted, may have little weight if the information is requested (for example if it is apparent that the information is not sensitive).
- 8.4.5 However, an authority should recognise a bidder's legitimate commercial concerns. As such, best practice dictates that a bidder should be asked to identify information it provides to the authority that it believes to be truly sensitive, and to explain why and how long it is likely to remain so. The authority should make clear to the bidder that it cannot be bound by their views, but that they will help inform the authority in determining what information it can and cannot make available on request.
- 8.4.6 The authority should undertake to consult with the bidder if it receives a request for any information previously highlighted as being sensitive, within the identified sensitivity period. The sensitivity of information will vary depending on the timing of the request. For example, information may be sensitive during the tender exercise, but may cease to be sensitive once the contract has been awarded.
- 8.4.7 The bidder should also be consulted if there is any doubt about the information's sensitivity, regardless of the specified period. If the authority considers that information is exempt from release because its release may prejudice the bidder's commercial interests, it must obtain evidence from the bidder to support this view. Of course, the final decision on the release or withholding of information rests with the authority.

²⁵ Exemption under section 33(1)(b) of FOISA, or exception under regulation 10(5)(e) or (f), or regulation 10(5)(c) of the EIRs.

²⁶ Exemption under section 36(2) of FOISA, or exception under regulation 10(d) of the EIRs.

8.4.8 This approach may not be appropriate for all tenders and contracts (for example it may be disproportionate or the volume of tenders/contracts may make it impractical). If so, the criteria applied to contract review which is detailed below ('Reviewing older contracts which came into force before 1 January 2005 for confidentiality provisions') should be considered.