

Ref: CCG October 017 2016

Corporate Services  
NHS Liverpool Clinical Commissioning Group  
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Liverpool  
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Email: [foi@liverpoolccg.nhs.uk](mailto:foi@liverpoolccg.nhs.uk)

9<sup>th</sup> November 2016,

**Re: Freedom of Information Request**

Thank you for your Freedom of Information request that we received on 17<sup>th</sup> October 2016, In relation to our tender process for the Provision of Telehealth Technology Service.

Request/**Response**

- 1) I would be grateful if you could provide a list of the current organisations moving forward to the ITT stage along with their respective scores under an FOI Request.

***The information you have requested is exempt under Section 43 (Commercial Interests) of the Freedom of Information Act and is therefore withheld.***

***In considering your request for the names of the organisations moving forward to the ITT stage and their respective scores we have applied the S43(2) of the 2000 Act, as the disclosure under the 2000 Act would prejudice the CCG's commercial interests, in respect of its ability to obtain bids effectively in a competitive market for these services that reflect best value for money, and quality of services through fair competition.***

**Potential commercial prejudice**

***NHS Liverpool Clinical Commissioning Group (CCG) confirms that information pertinent to the request is held by this organisation; however, the CCG considers that the information required under section 3 of your request remains confidential between the organisation and its providers as well as other parties who participated in competitive procurement processes, and that an exemption S43 (Commercial interests) of the Freedom of Information Act 2000 (the 2000 Act) is engaged. The reasons for this view are set out below.***

## **Section 43 (Commercial interests)**

***In reaching this decision NHS Liverpool CCG has considered the likely prejudice to both the organisation and service providers, and also the public interest in the release of this information, and has had regard to the Information Commissioner's Awareness Guidance 'Freedom of Information Awareness Guidance No 5 – Commercial Interests'. The CCG considers that the detailed information requested is, by virtue of S43(2) of the 2000 Act, exempt information for the purposes of the 2000 Act. The information is exempt information as its disclosure under the 2000 Act would, or would be likely to prejudice the commercial interests of the contracted parties.***

***The CCG considers the disclosure of this detailed information would prejudice the CCG'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. Even if provided in anonymised format the range of likely providers for this service is by nature small and the potential to identify providers is considered high.***

***The CCG further considers that the information sought would, or 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:***

- Any release under the Freedom of Information Act 2000 is necessarily a release to the public, not to any one individual. Disclosure of this information could put these providers at an unfair disadvantage during any service re-procurement.***
- Within these markets, bidders will be aware of other organisations likely to be tendering in the same field. Evaluator comments and scores, even in an anonymised format, could potentially reveal a bidder's identity to a competitor, or expert in the market, which could impact on the bidder commercially and financially should the information be utilised by a competitor in future procurement exercises to recreate a service functionality. Similarly, sub-contracting arrangements/relationships and information pertaining to third parties to a contract (or potential contract) are confidential.***
- Unsuccessful participants have legal rights under European Union Directives on Public procurement and the Public Contract's Regulations 2006 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, but no comparison is required against the performance of unsuccessful or successful parties. Should the CCG release this information it may put itself at risk of legal challenge. If a legal challenge was to be brought because of the sharing of confidential information which should not be disclosed to third parties, this could impact significantly on both the financial and reputational credibility of the CCG.***

- *Disclosure would affect any other similar procurement processes elsewhere; it is likely to provide considerable assistance to competitors in other forthcoming procurements.*
- *PQQ and ITT documents confidential information such as finances, pricing and other confidential and commercial information. To disclose that information would put the bidder at a commercial and financial risk. Redacting documents to eliminate confidential and trade secret information is not possible as the way bidders are required to respond to these documents contain Intellectual Property that if disclosed it can be taken by competitor to obtain an unfair advantage.*
- *Innovation demonstrated within tenders (considered to be a trade secret) would be evident within evaluator comments. If this information was disclosed it could be utilised by potential competitors to develop similar products and services, which again could impact on bidders own innovative and highly developed solutions. It is also noted that evidence of innovation is not detailed in the de-brief reports issued to unsuccessful bidders.*
- *Providers may be deterred from competing in public tenders when they operate mainly in private markets as the effect of the disclosure could affect their public and private business and it may affect the perception of the suppliers by the market.*
- *In turn, this would potentially impact on NHS Liverpool CCG's ability to obtain best value and quality of service through fair competition and potentially impact on budgets set within the CCG and the NHS.*

*The S43 exemption is, however, a qualified exemption and the duty to disclose the requested information arises unless, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The CCG has, therefore considered this question when making our decision.*

### **Public Interest Test**

*NHS Liverpool CCG recognises that there is a public interest in the disclosure of information which facilitates the accountability and transparency of public bodies for decisions taken by them. However, there is also a public interest in the CCG 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 this balancing exercise, the CCG 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 as:*

1. *Release of the information about the organisations' names and scores, even in an anonymised format, would constitute a breach of confidentiality with those providers, potentially creating a lack of trust from current and future providers, thus restricting future competition for tenders which would*

***prejudice the CCG's ability to obtain best value and quality of service. Potentially this could also impact on budgets set within NHS Liverpool CCG and the NHS which is not in the public interest.***

- 2. Bidders often submit tender responses marked as confidential due to their unique content which may imply a trade secret. The NHS Standard Contract established obligations of confidentiality and non-disclosure and the information shall only be used in connection with the provision of the service. Breaching this confidentiality opens up the possibility of legal action against the CCG by providers, or potential providers, which would have financial implications to the public purse.***
- 3. Disclosure of the tender evaluation and bid scoring may provide an indication of the provider's cost model (based on the tendered service by NHS Liverpool CCG). This could increase the risk of collusion between future bidders with the possibility of price setting as a 'ring' which could undermine the integrity and competitive nature of procurement, which is not in the public interest.***
- 4. The number or identity of the bidders is not in the public interest as it may not reflect the market or services provided (depending on the specific circumstances of that specific market or tender).***

We wish to take this opportunity to inform you that a formal complaints and internal review procedure is available to applicants who are unhappy with responses provided to FOI requests. You can formally request an internal review within a reasonable period of time (2 calendar months) from the date this response was issued.

Where you are not satisfied with the decision of the internal review you may apply directly to the Information Commissioners Office (ICO) for a further review of that decision. Generally, the ICO cannot make a decision unless you have exhausted our complaints procedure in the first instance.

The ICO can be contacted at:

Information Commissioners Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF  
[www.ico.gov.uk](http://www.ico.gov.uk)

Should you require any further information, clarification regarding this response or do not feel that your request has been answered as you would expect, please contact us to discuss.

Yours sincerely,

**Customer Relations Lead  
NHS Liverpool CCG**