

EIR Request (received 28 March, follow up 05 April) - Reference: DFI/2019-0153

Copies of legal correspondence referred to in a letter from the Department to FP McCann Limited, dated 21 March 2019, regarding the Department's intention to award Term Contracts for Asphalt Resurfacing 2017 (2019) ARW1, ARS2, ARW4 and ARW2.

28 March 2019

We have been passed a copy of your correspondence dated 21 March 2019.

We note the Department's acknowledgement that it must treat all economic operators equally and without discrimination and act in a transparent and proportionate manner.

On behalf of our client we are surprised at the decision purportedly taken by the Department. There are a number of issues that arise however, as a preliminary point, we would ask that you share the legal correspondence referred to in your letter dated 21 March 2019 in light of the contractual duty owed to our client as a participant in this tender exercise. Upon receipt of the correspondence and reasoning from the Department as to why, in particular, it felt there was a need to terminate this tender exercise.

5 April 2019

We acknowledge receipt of your letter dated 4 April 2019 and note that you request clarification on the basis of our request for the passing legal correspondence referred to in your letter dated 21 March 2019.

We do not take issue with the two references to the provisions within the instructions that relate to the ability for the procuring body to reserve its position on the award of any contract as a result of the procurement. However:

1. There is an implied contract between your organisation and our client as a bidder for this suite of contracts.
2. You will appreciate that our client was the successful bidder for one of the contracts, namely ARW2.
3. You gave an assurance in your letter dated 21 March 2019 that you would treat all economic operators equally and respect the obligations of transparency and proportionality. You have indicated that you are in receipt of legal correspondence which has resulted in the view being taken by the Department that the tender price assessment process would not identify the most economically advantageous tender. We have no line of sight in relation to that assessment. The parties who challenged the contractual process may well have. This is neither equal nor transparent.

4. Our client, as successful bidder for ARW2 is unaware of the pricing structures of the other bidders. Those who were unsuccessful in relation to this proposed contract have been made aware of our pricing structure but we are not aware of those other bidders' pricing submissions. That is not equal treatment nor transparent.
5. You have also not indicated the basis on which this perceived flaw affected the contract that should have been awarded to our client. No articulation has been forthcoming as to why the decision was taken that this purported flaw, in relation to which our client has no knowledge, had to have the outcome of the contract not being awarded. That is not transparent and may well be disproportionate. We reserve our position on this until detail is provided.

We would be grateful if you could respond to the original request to comply with the obligations that rest with you and you explicitly recognised in your correspondence dated 21 March 2019.

Response (issued 17 April 2019)

Thank you for your letter of 28 March 2019 and subsequent letter of 05 April 2019 and e-mail of 12 April 2019.

You have requested sight of the legal correspondence that the Department received, in relation to its intention to award the above contracts.

Your letter has been considered to be a request for information under the terms of the Environmental Information Regulations 2004 (EIR). I have conducted a test of the public interest and also taken legal advice and I am content the following exceptions to the sharing of such information do apply;

- (i) Regulation 12(5)(b): the course of justice and inquiries. This exception includes protection of legal professional privilege for confidential legal advice, and discussions about such legal advice;
- (ii) Regulation 12(5)(e): confidentiality of commercial or industrial information. This exception protects the legitimate economic interests of both the Department and of third parties. The legitimate economic interests may include items such as commercially sensitive rates submitted as part of a tender competition. Disclosure of such information, which is neither trivial nor in the public domain, would clearly damage the

Department's ability to achieve value for money and would undermine the economic interests of the third party contractors; and

- (iii) Regulation 12(5)(f): interests of the person who provided the information to the public authority. Information was voluntarily provided to the Department by third parties, who have provided this information on the basis of a reasonable expectation that it would be treated in confidence. The information, being neither trivial, nor in the public domain, satisfies the Common Law requirements for establishing a duty of confidence on the Department.

In this case therefore I am satisfied that the public interest in favour of withholding the information outweighs the public interest in disclosure.

The Department is obliged to consider for release all information that it holds relating to the subject of the request, which can include information provided by third parties. In this instance, the third party has invoked the following exemptions from disclosure of the legal correspondence under the Freedom of Information Act 2000 (FOI);

- (i) s41(b): information provided in confidence
- (ii) s42 (1): legal professional privilege, and
- (iii) s(1) & (2): commercial interests.

I am content that the above FOI exemptions claimed by the third party mirror the above exceptions under EIR and therefore that the public interest in favour of withholding the information outweighs the public interest in disclosure.