

*The TCC guide to public procurement claims:
confidentiality rings/disclosure*

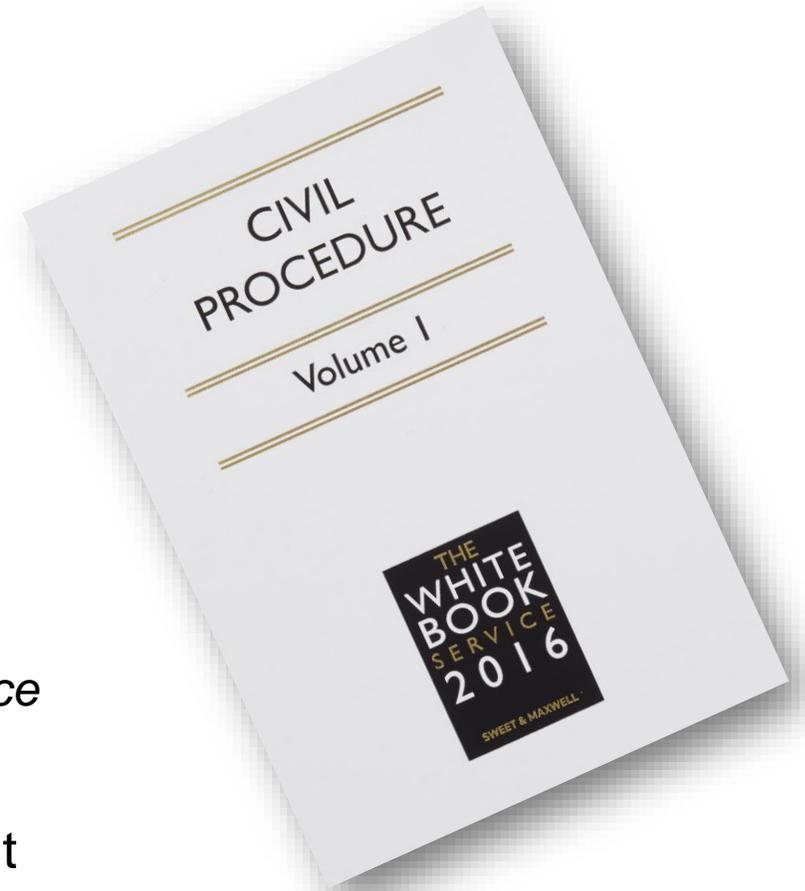
Alex Shattock

Disclosure in civil proceedings

- CPR Part 31 sets out the rules requiring disclosure in legal claims

31.6 *Standard disclosure requires a party to disclose only–*

- (a) the documents on which he relies; and*
 - (b) the documents which –*
 - (i) adversely affect his own case;*
 - (ii) adversely affect another party’s case; or*
 - (iii) support another party’s case; and*
 - (c) the documents which he is required to disclose by a relevant practice direction.*
- Slightly different test in JRs: disclosure can be applied for but shouldn’t really be necessary due to duty of candour (see *Tweed v Parades Commission*)



Disclosure in procurement challenges

- Disclosure is a very important, and very sensitive, issue in procurement challenges
- When representing an unsuccessful bidder in a procurement challenge, there will usually be only **limited information** available to you
- You will know (by definition) that your client has lost the tendering competition, and you will know the content of your client's bid
- You may not know a great deal about how the bid was evaluated, and you will know even less about your client's competitors' bids
- You may not even know the identity of the other bidders, let alone their pricing structure or other technical components



Disclosure in procurement challenges

- TTC Guidance Note (see next slide), para 2:

“Public procurement cases, particularly those involving claims which seek to set aside the decision to award the contract in question, raise singular procedural issues and difficulties.

The claimant commonly feels that it has insufficient evidence or documentation fully to particularise its case or otherwise prepare for trial, while the short limitation and mandatory standstill periods mean that proceedings are necessarily issued hastily.”

- However, the information you need to win is likely to be commercially sensitive



Appendix H to the Technology and Construction Court Guide

- The Technology and Construction Court Guide, second edition, fourth revision, was published on 17 June 2019
- Somewhat confusingly, it is dated 9 February 2015 in the footer to each page (apart from the contents list, which is dated 30 April 2014)
- **Appendix H provides a detailed guide to public procurement litigation in the Court (“the TCC Guidance Note”)**
- Very helpful and should always be in your pocket for procurement claims!
- Provides useful pointers on one way around the disclosure problem in procurement challenges: confidentiality rings



Confidentiality rings

Confidentiality rings

- A confidentiality ring comprises persons to whom documents containing confidential information may be disclosed on the basis of their undertakings to preserve confidentiality.
- Need to determine (1) who should be admitted to the ring and (2) the terms of the undertakings
- If no agreement, the court must decide!

Confidentiality rings: overview

- TCC Guidance Note, para 2:

“The provision of pleadings and documentation on disclosure often gives rise to serious difficulties in connection with confidentiality, particularly where there is a real risk that there will have to be a re-tendering process. Confidentiality rings will often need to be set up by agreement or order.”

Para 35: “It is highly desirable that any confidentiality ring is established as early as feasible. Agreements or proposals for confidentiality rings, their scope and limitations should be put before the Court at the first CMC or application for specific disclosure, whichever is earlier, with explanations as to why they are justified”

Confidentiality rings: undertakings

- Undertakings will preclude the use of the relevant material other than for the purposes of the proceedings and prevent disclosure outside the ring
- They will also contain provisions controlling the terms on which confidential information must be stored and the making of copies, and requiring the receiving person to either return or destroy the documents in question, or render them practically inaccessible, at the conclusion of the proceedings.
- Additional undertaking may be required e.g.
 - requiring inspection of documents at a defined location (as can apply to normal disclosure),
 - limiting the involvement of a recipient of a document in any re-procurement of the contract which is the subject of the litigation,
 - limiting the role which a recipient can play in advising their party in the future and/or participating in competitions for other similar contracts

The two-tier confidentiality ring

- Confidentiality rings are potentially a minefield if a company employee wishes to be admitted to a confidentiality ring which is intended to receive sensitive competitor info
- In those circumstances a “two-tier” CR can be set up with different levels of disclosure to different participants, distinguishing between e.g. company employees and external representatives. Employee representatives may also have access to some but not all of the material disclosed into the ring (for example, technical material but not pricing information).
- Under an alternative form of two-tier ring, the external representatives of a party in the first tier may apply for an employee representative in the second tier to have access to a particular document or documents, whether in open form or partly redacted.



Case law

Key case: *SRCL Limited v The National Health Service Commissioning Board* [2018] EWHC 1985 (TCC):

- Summarises the approach to be taken re: confidentiality rings, e.g. no disclosure of other bidders' confidential info without hearing their representations first
- Particular issue in that case regarding what happens when there is a dispute of fact over material disclosed into a confidentiality ring, and only the parties' lawyers are part of the ring
- when resolving such disputes, *"It is not a solution to an objection by a contracting authority (or another bidder) to assume that a party's solicitor acting in the litigation should and can be called to give primary evidence of fact in that party's favour."* – moreover, usually undesirable due to own-interest conflict e.g. having also given legal advice on the claim
- A cautionary tale against using only your lawyers in confidentiality rings! We are not, as a rule, ideal witnesses... Perhaps the two-tier CR should be the default?

Case law

Marston Holdings Limited v Ministry of Justice (HM Courts & Tribunal Service) v Jacobs, Excel Civil Enforcement Limited [2018] EWHC 3168 (TCC)

- Endorsed the approach in *SRCL* and emphasised a two stage process- is disclosure necessary? *then* is a confidentiality ring needed? (No need to consider confidentiality rings if disclosure not actually necessary in the circumstances)

Bombardier Transportation Ltd v Merseytravel [2017] EWHC 575 (TCC)

- The TCC Guidance Note should be followed
- *“merely because the case in question is a procurement dispute is no reason for the case to be labelled as “private”, with all of the documents on the court file being kept secret and not made available to non-parties”*
- Open justice still a principle of the TCC! CRs will only be used where necessary

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.