

ICT SERVICES AGREEMENT SCHEDULES

SCHEDULE 4.2

COMMERCIALLY SENSITIVE INFORMATION

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Section A

Product Description

1. PRODUCT TITLE

ICT Services Agreement - Schedule 4.2 (Commercially Sensitive Information).

2. PURPOSE OF PRODUCT

To identify the Contractor's Confidential Information that is genuinely commercially sensitive and may, therefore, be exempted from disclosure under the Freedom of Information Act.

3. COMPOSITION

- The schedule sets out a list of the Contractor's Confidential Information that the Contractor and Authority believe will be genuinely commercially sensitive.
- Clause 42 (Freedom of Information) and the schedule state that the Authority will attempt to exempt that Commercially Sensitive Information from duties of disclosure under the Freedom of Information Act.
- The schedule does not alter either parties' general duty of confidentiality under clause 43 (Confidentiality).

4. DERIVATION

Bidder's proposals.

5. RELATED CLAUSES & SCHEDULES

Clauses: 42 (Freedom of Information)

43 (Confidentiality)

6. ALLOCATION

The Authority needs to carefully consider the information and/or categories of information, proposed by the Contractor as being genuinely commercially sensitive. The Authority needs to make an objective assessment of whether the information proposed can be brought within the exemption set out in s 43 of the Freedom of Information Act.

7. QUALITY/REVIEW

Authority expertise: technical, commercial/procurement, financial, legal.

Section B

Guidance

1. INTRODUCTION

- 1.1 Since the Freedom of Information Act ("**Act**") came into force in 2005, the treatment of Contractor's Confidential Information in agreements with the public sector has changed. Authorities are now obliged to disclose information on receipt of an information request from a third party, unless grounds can be established under the Act to withhold the information. This reverses the previous presumption and means that a Contractor's Confidential Information is far more likely to be made public on an application for disclosure.
- 1.2 The provisions of the schedule allow the Contractor to stipulate which information it believes should be treated as exempt from disclosure pursuant to s.43 of the Act because the information is commercially sensitive. The Authority has discretion under s.43 of the Act and clause 42.3 (Freedom of Information) to determine whether the Commercially Sensitive Information identified in the schedule is genuinely sensitive, and therefore exempts the Authority from its general duty to make disclosures to a third party on receipt of a disclosure request.
- 1.3 Clause 42 (Freedom of Information) does not affect the parties general duties of confidentiality under clause 43 (Confidentiality). It should be noted that the duty of confidentiality on the Authority is limited by clause 43.2, which contains a carve out permitting the Authority to make disclosures if the Authority believes it is obliged to make a disclosure of Commercially Sensitive Information under the Act.

2. GENUINELY COMMERCIALY SENSITIVE INFORMATION

- 2.1 The Authority may only apply the exemption in s.43 of the Act to the extent that the information sought for disclosure is genuinely commercially sensitive and that it would not be in the public interest to disclose it. For example, it would be contrary to the public interest to disclose information relating to the Contractor's proprietary material or pricing information. To do otherwise may discourage transactions with public authorities.
- 2.2 Guidance issued by the Lord Chancellor in relation to the Act explains that material that is genuinely commercially sensitive should be identified at the time of entering

into the agreement. Additionally, the parties should seek to identify whether sensitive information might be disclosed at some later date, i.e. to set a duration for the period of confidentiality. This process does not guarantee protection from disclosure but it does provide evidential weight to a claim that the exemption in s.43 of the Act applies.

- 2.3 In completing this schedule the Authority must be careful that bidders do not seek to claim blanket confidentiality, which would defeat the object of the exercise. The information identified in this schedule should be limited to that which would cause genuine hardship or financial loss if it were to be disclosed (based on an objective assessment).
- 2.4 The Contractor should also be made aware that the public interest grounds for making disclosures are wide and may ultimately result in release of its Commercially Sensitive Information. By way of example it may be in the public interest to disclose Commercially Sensitive Information if its release would further public debate, promote accountability or allow individuals or companies to challenge decisions that affect them. This creates very wide grounds on which to permit disclosure and leaves the Contractor at risk. The schedule attempts to negate this risk. However a decision by an Authority not to disclose Commercially Sensitive Information may lead to a challenge by an individual or company who can choose to refer the Authority's decision to the Information Commissioner for an adjudication.

Section C

Pro-forma/Example Schedule

Commercially Sensitive Information

1. INTRODUCTION

- 1.1 Without prejudice to the Authority's general obligation of confidentiality, the parties acknowledge that the Authority may have to disclose Information in or relating to the Agreement following a Request for Information pursuant to clause 42 (Freedom of Information).
- 1.2 In this schedule the parties have sought to identify the Contractor's Confidential Information that is genuinely commercially sensitive and the disclosure of which would be contrary to the public interest.
- 1.3 Where possible the parties have sought to identify where any relevant Information will cease to fall into the category of Information to which this schedule applies.
- 1.4 Without prejudice to the Authority's obligation to disclose Information in accordance with Freedom of Information Act, the Authority will, acting reasonably but in its sole discretion, seek to apply the commercial interests exemption set out in s.43 of the Freedom of Information Act 2000 to the Information listed in the Appendix.

APPENDIX

Commercially Sensitive Information

No.	Date	Item(s)	Duration of Confidentiality