

HDO Annex 8

Guidelines for redaction of bid

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1 Introduction

It is prescribed in section 7-3 of the Norwegian Regulation on Public Procurement (The Procurement Regulation) that the Norwegian Freedom of Information Act applies for public access to tender and procurement protocols. The Norwegian Act on the right of access to documents in public sector entities of May 19, 2006 No. 16 (The Norwegian Public Administration Act) is intended to strengthen the right of access to case documents in public administration. There exists a right for the general public to acquaint themselves with the content of all supporting documents in public sector entities. Exemption from the access to all documents requires a basis in the law itself or any other law or regulation provided with basis in law.

There are three considerations that give the reasons for the principle of the right to require access to case documents in public administration; 1) Consideration to democracy, 2) Consideration to control, and 3) Consideration to legal safeguards. Section 1 of the Freedom of Information Act provides a clarification of the considerations behind the principle of freedom of information, and this provision should form part of the background for presenting a request for access.

The purpose of this guide is to provide guidance to suppliers who have been given the opportunity to respond by delivering a redacted version of their tender before other suppliers are given access to the tender. The guide seeks to highlight which information in the tender will be covered by the exemptions and which can be redacted.

2 General Rule

The general rule regarding requests for access is specified in section 3 of the Freedom of Information Act, where it is specified that: "*Case documents, protocols, and similar registers for the body are open for access unless otherwise stated in law or regulation with basis in law*". This applies not only to incoming documents arriving at the body, but also to documents produced by the body itself. It is further determined that "everyone" may require access to such documents. This means that anyone can request access to documents in enterprises. This means that access may also be requested on behalf of others. Although the law is relatively new, the general rule is that access to all documents shall be assessed according to the rules of the new law, regardless of how old the document is.

The Freedom of Information Act does not require public sector entities to publish documents on their own initiative, but the law gives anyone who wants it the right to familiarize themselves with the documents. Anyone who wants to make use of this right must themselves take the initiative to direct a request for access to the public sector entity that has the document.

3 Exceptions from the general rule

The Freedom of Information Act section 23 states that "*Exceptions may be made from access for tenders and protocols under the regulations that are stated according to the Act of 16 July 1999 No. 69 about public procurement, until the choice of supplier is made.*" After the supplier has been chosen, the tender will be available in full to the general public, but the parts of the document containing confidential information shall be excluded from access. The administration shall therefore refuse access to information that is subject to a duty of confidentiality by law or pursuant to law, jr. section 13 first paragraph. We would inform you that it may be punishable by law to give out information that is subject to a duty of confidentiality.

In the following, an explanation will be provided as to what information is considered to be "confidential," and which therefore shall be exempt from public disclosure.

3.1 Confidential information

Confidential information is exempt from the right of access. Confidential information will be "*technical devices and methods as well as operating or business conditions which it will be of competitive importance to keep secret out of consideration for those to whom the information refers*", cf. Act of 2 October 1967 on processing in public administration cases (The Norwegian Public Administration Act) section 13 first paragraph no. 2.

In other words, the provision stipulates both the nature of the information – it should be about business/industry information – and any impact it may have on the competition that the information is released. In order for the information to be subject to confidentiality, it must result in financial loss or reduced profit for the business if it becomes known, either directly or by the fact that competitors can exploit the information. In other words, confidentiality prevents business/industry information, that may have consequences for the competitive relationship between the bidders, from being released to others. This applies regardless of whether the recipient will or can use them in their own business, gives them to others or does anything else that actually poses a risk of loss.

There will be not be a basis for keeping information secret that is commonly known in the industry or available elsewhere. For example, if the information has been discussed in reports and the info is deemed to be commonly known in the relevant industry, the information will not be subject to confidentiality. The usual right of access under the Freedom of Information Act will apply. It will be a different case if the information deals with technical devices, business strategies and similar practices that can be used outside the industry. The scope of confidentiality will vary depending on the type of business activity involved. For example, if there is information that others might use in a similar way in their own business activity – including manufacturing methods and new products under development – we are within the core area of the duty of confidentiality.

Information on total prices and pricing models are not considered to be confidential, unless there are "*special circumstances that necessitate this*". Details of the sub-prices, unit prices and similar details of a tender may be regarded as trade secrets as these are considered to be part of the bidder's "business relationship" that it will be of "competitive importance" to keep secret.

Information that can generally have an adverse effect on a business - such as information on financial position, administrative conditions, production capacity, production quantity, etc. – normally falls outside the duty of confidentiality.

The Contracting Authority has a duty to undertake an independent assessment of what is to be considered confidential information, but can be helped to a great extent by input from the supplier.

4 Redacting of information in tenders

The bidder is obliged to ensure that the redacted version is designed in such a way that the redaction cannot be removed by the recipient.