



Working Group on Commercial Confidentiality in Government Contracts

Draft Principles 1.0

This document is a working draft for public discussion. It should not be taken as reflecting the agreed position of the members of CGD's Working Group on Commercial Confidentiality in Government Contracts. After consultation and further discussion, the Working Group will produce a consensus set of principles. Working Group members serve in a personal capacity.

When government entities and public bodies enter into contracts and agreements with external partners there is a public interest in the full terms of these contracts being disclosed, with any redactions being clearly justified. This increases trust, competition, value for money and quality in government contracting with benefits to government, private sector and civil society alike. Unnecessary variance of practice in relation to publication, and redaction creates uncertainty for firms and reduces the amount of information in the public domain.

Fair competition depends on various documents and information being disclosed (and sometimes protected) at different stages in the contracting process. However the contract itself, after it is signed, is a critical document which details the legally binding terms agreed by the public agency. Access to the terms of this agreement is critical for assessing value for money, monitoring later performance of the contract and supporting competition. This justifies specific transparency policies for public contracts which go beyond the general application of freedom of information laws.

Within the principle of transparency in the public interest, there are legitimate reasons why information should be exempted from publication for reasons of *personal privacy*, *national security* or *commercial sensitivity*. These principles seek to provide guidance on consideration of commercial sensitivity.

Commercial confidentiality, commercial sensitivity or commercial secrecy?

These terms are often used interchangeably but relate to different concepts. Confidentiality can cover any information which parties have agreed to protect (i.e through confidentiality clauses). Commercial or trade secrets are established as a matter of law, with criteria based on economic harm to the party whose secret is made public or stolen. Commercial sensitivity is broader than trade secrets and concerns information whose disclosure would be likely to prejudice the commercial interests of any person or entity.

These principles can be applied to all kinds of government contracts, including procurement, sales, concessioning, leases, insurance, loans and grants.

THE PRINCIPLES

- 1. Full contract publication should be the norm – redaction should be the exception, supported by a public interest justification.** Wherever possible, governments should undertake full, proactive contract publication. Most contracts should be publishable without redaction, and this may be established as a condition for tendering for all contracts, or for particular sectors (such as extractives and public-private partnerships) or contract types. The burden of proof regarding public interest in redaction should be on those seeking to withhold information from the public.
- 2. Government contracting processes should be designed for transparency.** The design of procurement and other contracting systems and contract models should take into account the impact on commercial sensitivity concerns and aim to reduce uncertainty about publication and the need for redaction. Contracts and tendering processes can be designed to specify outputs without including information on specific processes or technologies used to deliver them. In cases where requests for tenders specify how goods and services are to be delivered, contracts frequently contain little more than this (already public) information and delivery price. Blanket confidentiality clauses are not justified.
- 3. There should be an enforcement system for ensuring that contracts and contract information is in fact disclosed in practice and in a usable form.** Publication might be required for contracts to be legally valid (and thus enforceable). E-procurement systems might automatically publish contracts or deny payment if contracts are not available, or procurement committees might be instructed to deny final approval until publication. Legal processes to protest and dispute contract awards are other important safeguards.
- 4. Where there is not up-front requirement for full publication of the contract, any redaction for commercial sensitivity should be based on a robust application of the public interest test.** The public interest test weighs up the public interest on both sides: information should only be redacted if the public interest in maintaining confidentiality is greater than the public interest in publication (because contract confidentiality might significantly increase the number and quality of bids and/or improve value for money, for example). Applying this test to individual pieces of contract information is the most flexible level of transparency. The ability and necessity of applying this case-by-case approach reflects factors including institutional capacity, contract types, and levels of trust needed.
- 5. The ‘public interest test’ should take into account the economic benefits of the sharing of commercial information, such as more competitive public contracting, as well as the broader case for the public’s right to know.** Exemption to disclosure on the basis of public interest test requires demonstrating: (i) evidence of significant potential financial harm to the contracting firm (or agency); (ii) that it is reasonable to believe this harm could be avoided through redaction of contract text (including that it is unlikely this information could be accessed through other channels); (iii) that the harm will have sufficient impact on the market for involved goods and services to materially negatively affect value for money to government; and that (iv) this negative impact on value for money clearly outweighs the benefits of access to the information for government, market and citizens.
- 6. It is particularly important that the pieces of information needed to judge value for money are disclosed.** The fundamental aim of transparency is to ensure government resources are well used. This requires citizens and competing firms to be able to know what has been bought, sold, leased or otherwise exchanged, and at what price. Publication guidelines may mandate that information on price, other evaluation criteria, technical conditions, technical specifications and documents confirming compliance with the qualification criteria should not be kept confidential. Failing a blanket mandate,

redaction of information needed to judge value for money should require an overwhelming public interest case.

7. **Governments should issue clear guidance to public entities, agencies and firms on the issue of when contract information may be exempted from publication on the basis of commercial sensitivity to set clear expectations and reduce uncertainty.** This can include model contracts which specify publication, and guidelines specifying classes of information that will not be considered confidential. Guidelines from information regulators on the public interest case for redaction should be principles based rather than mechanical and exhaustive. Where redaction may be allowed guidance should be based on an empirical analysis of harm to competition or innovation specific to particular forms of information and contracts.
8. **When a case by case redaction approach is used, only the contracting party that claims potential direct financial harm from a specific release of information should be able to request redaction of information.** Usually, this party will be the contracting firm. In those cases, the contracting agency should determine which of that information (and only that information) it is in the public interest to keep confidential under a commercial confidentiality exemption public interest test. There may be cases where the contracting agency, rather than the contracting firm, seeks a commercial confidentiality exemption. In those cases, a separate government body (potentially the Freedom of Information authority) should act as arbiter of the legitimacy of that claim.
9. **When a case by case redaction approach is used there should be a clear process and time limits for determining what is redacted in individual contracts, why, for how long, and with what appeals process.** Contracting firms should normally be requested to delineate which information likely to appear in the contract they view as both commercially sensitive and likely to pass a public interest test at the time of bid submission or as soon as practicable thereafter before the contract is agreed. They should also provide an argument as to why this is the case. Regarding any information redacted, there should be a clear, publicly available explanation available as to why the redaction was requested and why it was granted. The request for redaction, and the granting of the exemption to publication should include a time limit on how long the information will be considered to be commercially sensitive this redaction limit should be included in the contract. This could be until the end of the contract or for some specified period afterwards. There should be a system for ensuring that Information is disclosed once the exemption has expired. Ideally this would be an automatic process, but it may depend on a user re-requesting the information. Members of the public should also be able to appeal redactions if they believe that the public interest test has not been satisfied.
10. **Redaction on the grounds of commercial confidentiality should be grounds for increased scrutiny through other oversight mechanisms.** In cases where the public's ability to compare contracted terms to outcomes is limited by redaction, there is an enhanced role for oversight mechanisms that can preserve commercial confidentiality, including government audit/public accountability bodies.