

# TABLE 3:

## COMMERCIALLY SENSITIVE AND NONSENSITIVE CONTRACTING INFORMATION

Type of contracting information	Typically sensitive	Typically not sensitive	Comments
NUMERICAL FIGURES CONCERNING NEGOTIATED TERMS	✓		These may include escalation rates, underperformance rates, insurance and indemnification amounts, etc. The key is that the rates need to have been negotiated. Disclosing such rates can give away sensitive information about the risk both the government authority and the contractor are willing to take, and it can prejudice future negotiations of both parties.
DETAILS OF FINANCIAL MODELS	✓		This is mainly relevant to large infrastructure projects and PPPs. Such financial models are required for the purpose of evaluation and due diligence, and typically include sophisticated pricing breakdowns, giving insight into the way in which revenue is generated and how the project is financed. The actual model (or parts of it), including formulas and inputs, is typically considered commercially sensitive.
OUTCOMES OF FINANCIAL MODELS		✓	The results or outcomes of financial models should be disclosed so that the public knows how much the government is paying and how much it will receive in relation to a project.
NON-NEGOTIATED INDEMNIFICATION AMOUNTS		✓	In some projects indemnification amounts are standardized terms based on the size of the project. Typically, pre-qualification or evaluation criteria include a pass/fail at required minimum levels of indemnification amounts.
INDEMNIFICATION CONTRACT CLAUSES		✓	Indemnification clauses in the contract are not commercially sensitive.
RECORDS OF NEGOTIATIONS	✓		Records of contract negotiations between the contracting authority and the contractor are typically commercially sensitive.
RECORDS OF NEGOTIATIONS WITH THIRD PARTIES	✓		Records of negotiations between the contractor and third parties (such as subcontractors) are typically commercially sensitive.
NON-NEGOTIATED INSURANCE TYPES AND THRESHOLDS		✓	In some projects required insurance amounts are standardized terms based on the size of the project. Typically, pre-qualification or evaluation criteria include a pass/fail at required types and minimum levels of insurance.
DETAILED COSTING/ PRICING STRUCTURE	✓		This does not refer to the market price (which is typically public knowledge and therefore not commercially sensitive), but it refers to a breakdown of what it costs for the contractor to make a product or supply a service. It includes profit margins, detailed line-item pricing, and overhead rates.
UNIT PRICES		✓	Where a contract is made up of a combination of different goods or services, the price of each of the goods or services is typically not considered commercially sensitive.
TOTAL PRICE/COST OF CONTRACT		✓	The total price/cost of a contract is not commercially sensitive.

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<b>PROFIT MARGINS</b>	✓		<i>Profit margins is one of the elements of a cost breakdown of the product or service. Where a service or product price is made up of a combination of different elements, then the individual elements are typically commercially sensitive information.</i>
<b>OVERHEAD RATES</b>	✓		<i>Overhead rates are one element of a cost breakdown of the product or service. Where a service or product price is made up of a combination of different elements, then the individual elements are typically commercially sensitive information.</i>
<b>METHODOLOGY AND APPROACH</b>		✓	<i>These may include a detailed description of product or service innovation or a detailed description as to how the company will meet tender requirements. In complex IT or infrastructure projects, for example, contracting authorities need to know in detail how the contractor is proposing to efficiently and cost-effectively deliver the project. This may include information about how certain software is used, how the company is going to apply lessons learned from past and similar projects, etc. Typically, some, but not all, of this information is commercially sensitive. For example, some information about the method or approach of delivery can be commercially sensitive information as it may compromise the contractor's future tender negotiations, but not all of this information typically is. Some information about past projects is typically commercially sensitive information (depending on the project details), but not all.</i>
<b>SUBCONTRACTING ARRANGEMENTS AND SUBCONTRACTOR NAMES</b>		✓	<i>Contractors are typically required to indicate which companies they are going to be subcontracting in order to deliver the project. This is important for the contracting authority to know, in particular where significant contract value rests with subcontractors. Contracting authorities may clarify subcontracting arrangements and supply chain management capabilities of the contractor to ensure the project will be delivered on time and within budget. Only in exceptional circumstances are subcontracting arrangements considered commercially sensitive information. Note that recent supply chain disclosure initiatives and legislation aimed at tackling modern slavery (in California, France and the UK, for example) have made subcontracting arrangements publicly available information. Some companies in the garment sector (including Nike, Timberland, and Puma) have voluntarily disclosed their supply chain, without any commercial harm, while previously these companies argued that their supply chain was commercially sensitive information. In Australia, under the Commonwealth Procurement Rules 2014, contractors are required to disclose the names of subcontractors.</i>
<b>PRICING IN THE SUPPLY CHAIN</b>	✓		<i>Information on how much a contractor pays to obtain the goods or services they sell, or how they decide what price(s) to bid is typically considered commercially sensitive information.</i>
<b>INFORMATION ABOUT ONGOING LITIGATION THAT IS NOT IN THE PUBLIC DOMAIN</b>	✓		<i>Pre-qualification or evaluation criteria may require the bidder to indicate whether they are currently involved in court cases or litigation in relation to non-performance or other contract-related issues. The bidder is required to provide details about the circumstances of such cases. Information concerning ongoing litigation not in the public domain is confidential and sensitive. Disclosing such details may prejudice ongoing investigations.</i>
<b>PAST COURT CASES IN THE PUBLIC DOMAIN</b>		✓	<i>Pre-qualification or evaluation criteria may require the bidder to indicate whether they have been in the past involved in court cases or litigation in relation to non-performance or other contract-related issues. The bidder is required to provide details about the circumstances and outcomes of such cases. Details of past court cases and litigation are public knowledge, and provide useful information to the government and the taxpayer. Therefore, past court cases that are in the public domain are not commercially sensitive information.</i>
<b>PLANNED MERGERS AND/OR ACQUISITIONS THAT ARE NOT YET IN THE PUBLIC DOMAIN</b>	✓		<i>Bidders are sometimes required to indicate whether there are plans for mergers and acquisitions that might affect them, or a planned merger or acquisition might be an essential part of the solution the bidder is proposing for delivery of the project. In any case, plans for mergers and acquisitions that are not in the public domain are commercially sensitive information.</i>
<b>TRADE SECRETS</b>	✓		<i>Trade secrets are commercially sensitive information.</i>
<b>ANY INFORMATION THAT IS IN THE PUBLIC DOMAIN</b>		✓	<i>Information in the public domain is never commercially sensitive information.</i>

# TABLE 3:

Type of contracting information	Typically sensitive	Typically not sensitive	Comments
<b>PERFORMANCE INFORMATION UNDER CURRENT CONTRACT</b>		✓	<i>Performance information is not commercially sensitive information.</i>
<b>PAST PERFORMANCE INFORMATION</b>		✓	<i>Past performance information is not commercially sensitive information.</i>
<b>BUSINESS AND INVESTMENT PLANS</b>	✓		<i>These plans typically detail how the contractor expects to generate a financial return from the project. Such details can be considered commercially sensitive information.</i>
<b>WINNING BIDDER'S PROPOSAL</b>		✓	<i>Except for the commercially sensitive parts in proposals, the winning bidder's proposal is not commercially sensitive information once the tender period has closed. Most contracts include the winning bidder's proposal as an annex to the contract.</i>
<b>UNSUCCESSFUL BIDDER'S PROPOSAL</b>		✓	<i>Except for the commercially sensitive parts in proposals, unsuccessful proposals are not commercially sensitive information once the tender period has closed.</i>
<b>PERFORMANCE AND FINANCIAL GUARANTEES</b>		✓	<i>Performance and financial guarantees are not commercially sensitive information.</i>
<b>KEY PERFORMANCE INDICATORS / PERFORMANCE METRICS</b>		✓	<i>Key performance indicators and performance metrics for measuring project performance are not commercially sensitive information.</i>
<b>CLAUSES THAT DESCRIBE HOW INTELLECTUAL PROPERTY RIGHTS ARE TO BE DEALT WITH</b>		✓	<i>Clauses that describe how intellectual property rights are to be dealt with are not commercially sensitive information.</i>
<b>PAYMENT ARRANGEMENTS</b>		✓	<i>Payment arrangements under the contract are not commercially sensitive information.</i>
<b>LIQUIDATED DAMAGES</b>		✓	<i>Contracts generally include a provision for the contractor to pay liquidated damages to the contracting authority in the event that the contract is breached, for example when the contractor fails to complete the works by the date set out in the contract. Liquidated damages are not penalties, they are predetermined damages set when a contract is entered into, based on a calculation of the actual loss the client is likely to incur if the contractor fails to meet the completion date. They are generally set as a fixed daily or weekly sum. Liquidated damages are not commercially sensitive information.</i>
<b>INCENTIVE MECHANISMS</b>		✓	<i>This can include plans for managing underperformance, the structure of rewards for early delivery, etc. Incentive mechanisms are typically not commercially sensitive, except for any negotiated financial amounts they may contain.</i>
<b>THE CONTRACT</b>		✓	<i>Except for information in the contract that is agreed between contractor and government authority to be commercially sensitive, the contract is not commercially sensitive information. The government authority and the bidder cannot agree to keep the whole contract confidential based on commercially sensitive grounds.</i>
<b>RISK OF SIGNIFICANT HARM TO THE ENVIRONMENT OR TO THE HEALTH AND SAFETY OF PEOPLE</b>		✓	<i>The contracting agency should disclose any risk of significant harm to the environment or to the health and safety of people in relation to a project, as this information is in the public interest.</i>