

6.0 Public Disclosure of Commercially Sensitive Information

6.1 Findings

6.1.1 Views from business

1. Details of construction projects are published on a monthly basis and made available to public, including “Commercially Sensitive Information” (particular reference to monetary figures or values, i.e., project value). Disclosure of such information may compromise competitiveness of contractors;
2. The sharing of information with third party breaches the contractor’s non-disclosure agreement (NDA).

6.1.2 Views of the regulators

1. CIDB informs that the information published in CIDB’s “Monthly Construction Project Register” and the “Construction Statistics Quarterly Bulletin” is to assist sub-contractors, building material suppliers, and professionals. The information shown in the Register provides opportunities for sub-contractors, suppliers, engineers to find new jobs. Sub-contractors will be able to offer their expertise to the master contractors for future projects.
2. CIDB informs that the value shown in the Construction Project Register is not the final contract value as the final contract value will be determined after negotiations;
3. AGC views the disclosure of project value as part of the government’s transformation program to strike a balance between government and the private sector on transparency of government projects and in combating corruption;
4. AGC added as the government is promoting transparency, if the information is non-sensitive and does not contravene the contract’s Non-Disclosure Agreement (NDA), and then there should not be any issue to publish the information.
 - Regulators suggested to identify what is defined as sensitive information in the context of the NDA;
5. AGC informs that any terms in the NDA which conflict with the provision in the relevant Act, then the Act prevails;

6. Regulators believe that in general, information sharing benefits consumers. There should not be issues in publishing information to the public domain;
7. MyCC suggested that the publication of a total contract sum (aggregated amount) should not be regarded as a cartel issue, even there is an indirect cartel, if the benefits outweighs the disadvantages, then there should be no issue to share the information;
8. BNM finds the data collected by CIDB useful as it uses the data for its economic review;
9. MyCC (Malaysia Competition Commission) views that:
 - information transparency increases competitiveness, better pricing for consumers
 - on the other hand, disclosure of information could also be perceived as promoting price fixing practices (members of a cartel would not dare to deviate from an agreed price range);
 - If information is aggregated, it may not be regarded as commercially sensitive; and
 - elements of information sensitivity may differ from industry to industry, i.e. public disclosure of information on the price of specialized equipment may be seen as commercially sensitive in the construction sector but in other industries it may readily be accepted.

6.2 Discourse

Companies in the construction industry have raised concerns with regards to the information published in the “Construction Project Register”. Part of the information published may constitute “commercially sensitive information”. Disclosure of commercially sensitive information especially pricing and cost of a project may compromise competitiveness of contractors. The basis for competitiveness is the uncertainty of pricing.

Figure 1: Example of contract details published in the monthly Project Register of CIDB

Bil	Butiran Kontraktor	Gred	Butiran Projek	Kategori
1	Nama : SIEMENS MALAYSIA SDN. BHD. No Pendaftaran : 0320090513-GE123510 Alamat : LEVEL 1 RECEPTION, CP TOWER NO. 11, JALAN 16/11, PUSAT DAGANG SEKSYEN 16 46350 PETALING JAYA SELANGOR Telefon : 03-7952 5555 Fak : 03-7956 1936 Alamat Emel :	Asing	Tajuk Projek : Design, Supply, Installation And Commissioning of LV Switchgear Equipment. Sektor : SWASTA Tarikh Awad : 26-07-2013 Tarikh Mula : 26-07-2013 Tarikh Siap : 15-12-2013 Nilai Projek : RM4,650,080.00 Nama Klien : BIOCON SDN BHD	BUKAN KEDIAMAN

Source: Construction Industry Development Board

An undesirable impact of this disclosure of the value of projects is that in future the real cost of projects may be undervalued and may result in contractors using lower quality products which may be detrimental to the general public.

And as the Competitive Act 2010 (CA 2010) has been enforced, the information provided may contravene the CA 2010. MyCC in its Competition Act 2010: A Guide for Business handbook states:

Box 6: Excerpts from Competition Act 2010: A Guide for Business handbook

Exchanges of commercially sensitive information between competitors commonly give rise to competition concerns. **The exchange of information may take place in many forms and could be communicated directly or indirectly through a third party, such as a trade association or manufacturer.** The element of uncertainty that normally exists between competitors may be removed by the exchange of information.

If the information exchanged relates to pricing, it is likely to infringe the CA 2010.

Examples of the types of pricing information that will infringe the law if exchanged include:

- Future intended prices
- Costs
- Discounts, rebates or allowances

Where the information relates to non-pricing matters, it may still infringe the CA 2010. Examples of the types of non-pricing information which may infringe the law if exchanged include:

- Sales data
- Capacity information
- Demand data
- Market shares
- Investment plans

Information that is unlikely to give rise to competition concerns if exchanged includes:

- Historical data (that is no longer relevant);
- Aggregated data (provided it cannot be broken down to identify data belonging to an individual enterprise).”

Source: Malaysia Competition Commission

But MyCC views that generally the disclosure or sharing of information enhances transparency which promotes competitiveness providing better pricing to consumers. MyCC opined that “commercially sensitive information” differs from one industry to another.

The information provided may also be a breach of the confidentiality clause of the standard Department of Public Works construction works contract or any other private construction works. The box below shows an excerpt of the *Standard Form of Design and Build Contract PWD Form DB (Rev. 2007)* and *Standard Form of Contract to Be Used Where Bills of Quantities Form Part of the Contract*.

Box 7: Excerpts from Department of Public Works Standard Contract Form

68.0 CONFIDENTIALITY

68.1 This Contract and all such drawings, records, data, books, reports and all matters pertaining hereto shall be considered as confidential matter and shall not be disclosed to any third party without prior written mutual agreement, save and except where

- (a) disclosure of such information is necessary for the purposes of raising finance to undertake the obligations of the Contractor under this Contract;
- (b) disclosure of such information is made to the Contractor's consultants, auditors or advisers;
- (c) **disclosure of such information is required by law or by any government agency or for the performance of any obligations under this Contract;** or
- (d) the information has entered public domain.

68.2 ***Where information has been disclosed to third parties pursuant to clause 68.1, the Contractor undertakes to ensure that such third parties shall not disclose the information to any other third party.***

68.3 The restrictions contained in this clause shall survive the termination of this Contract and shall continue to bind both Parties without limit in point of time.

Source: Public Works Department

As CIDB is a government agency, clause 68.1 (c) is in effect and the contractor is obliged to provide the relevant information. But clause 68.2 essentially prohibits any third party to disclose or publish the information that was provided.

6.2.1 Impact on business

Businesses lose out as it affects their competitiveness when competing companies are privy to their costing. Businesses are contravening their non-disclosure agreement or confidentiality clause of their contract. This may cause their clients to lose confidence in the contractor.

6.2.2 Impact on regulator

Government agencies involved in the construction of buildings and infrastructure may lose out by not getting value for money for the construction job as contractors may under-cut each other and this may result in contractors using lower quality materials products.

6.3 Options for resolution

1. No change to current practice

The publication of contract details in the monthly “Construction Project Register” does not help meet the intention of assisting subcontractors, professionals, material suppliers and manufacturers to identify potential projects. The published contract detail also has the potential to facilitate price fixing.

While aggregated and disaggregated data contribute to transparency, the disaggregated data also reveals commercially sensitive information. In most foreign countries, it is not a normal practice to reveal commercially sensitive information because of the adverse effects on the successful tenderer.

2. Determine “Commercially Sensitive Information”

Determine what constitutes “commercially sensitive information” in the construction industry and **not publish publicly** this type of information. However, aggregated data could continue to be published. This would provide useful information for researchers and policy makers without revealing sensitive commercial information.

3. Contract details can only be accessible to paying customer

Information of contract details is **not to be published publicly but information may be accessible for a fee**. But this may still have an adverse effect on price fixing.

6.4 Recommendations

It is in the best interest of all stakeholders in the construction industry, that “commercially sensitive information” is clearly determined and this type of information not publically published. Thus, Option 2 (Determine “Commercially Sensitive Information”) is recommended.