

XXXX

Via Email:

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Our Ref: FOI 8140

13 October 2011

Dear XXXX,

Thameslink Freedom of Information Request

Thank you for your recent request for information about the Thameslink Programme. I am writing to confirm that the Department for Transport has now completed its search for the information which you requested.

You asked two separate questions:

1. *'Regulation 23 of The Public Contracts Regulations 2006 and Regulation 26 of The Utilities Contracts Regulations 2006 state quite categorically that companies convicted of certain offences (including bribery and corruption) shall not be selected as contractors unless there are overriding requirements in the general interest so to do.'*

As Siemens has been convicted of corruption, can you please advise me what overriding requirements in the general interest were taken into account when selecting them as preferred bidder (in preference to Bombardier) for the supply of new trains for the Thameslink project.'

Regulation 26 of the Utilities Contracts Regulations 2006 sets out criteria for the rejection of economic operators. Regulation 26 (2) states " In any case where an economic operator or its directors or any other person who has powers of representation, decision or control has been convicted of an offence described in paragraph (1), a utility may disregard the prohibition described there if it is satisfied that there are overriding requirements in the general interest which justify doing so in relation to that economic operator."

In its submission to the Transport Select Committee the Department said:

"As part of the process for the pre-qualification of bidders for the Thameslink Rolling Stock Project the Siemens plc accreditation submission was received on 9th June 2008. The submission included a specific reference to investigations concerning its parent company Siemens AG and certain of its then current and former employees regarding allegations of public corruption. The submission also identified the steps the company has taken to address these issues.

Following consideration of Article 26 of The Utilities Contracts regulations 2006 and OGC guidance, the Department asked Siemens plc for further information and assurances.

On receipt of this information the Department satisfied itself that the individuals involved in the allegations were not and would not be involved in Siemens plc or any aspect of the Thameslink procurement exercise and consequently Siemens plc was not excluded.

The Thameslink ITT contains the requirement for Bidders to notify the Department of any changes to the information provided to the Department as part of the pre-qualification process. No relevant notifications have been received since the issue of the ITT.

Siemens AG continue to disclose progress of on-going investigations on a quarterly basis on their Global website.”

In order to clarify your particular concern, Siemens plc is the entity bidding for the Thameslink contract. Although the Department was informed about allegations relating to Siemens AG, it satisfied itself that neither Siemens plc had been convicted of an offence, nor were there any directors or any person with powers of representation, decision or control who had relevant convictions within Siemens plc. Therefore regulation 26(2) of the Utilities Contracts Regulations 2006 was not relevant to Siemens plc, and it was not necessary to consider any overriding requirements in the general interest pursuant to that regulation. The award of preferred bidder status was made in accordance with the criteria set out in the ITT.

Legal advice obtained by the Department regarding this issue is being withheld in reliance on exemption section 42 of the Freedom of Information Act 2000 (the “Act”), under which legal advice received is exempt from disclosure to protect the confidential relationship between lawyers and their clients. This exemption applies because there is an important public interest in a person (including a public authority) being able to consult his or her lawyer in confidence.

In applying the exemption under section 42 we have had to balance the public interest in withholding the relevant information against the public interest in disclosure. The attached annex A to this letter sets out the exemption in full and details why the public interest test favours withholding the information.

2. *‘By generic description in Regulation 3 of The Public Contracts Regulations 2006, by inclusion in Schedule 1 of the same regulations, and by being specifically listed in Directive 2004/18/EC dated 31 March 2004, the Department for Transport is a contracting authority; consequently, there is a statutory requirement for the DfT to undertake all of its procurement in accordance with The Public Contracts Regulations 2006.*

Therefore, can you please advise me why both the Thameslink trains and Intercity Express Programme procurement exercises have been undertaken using The Utilities Contracts Regulations 2006, and not by those which they are obliged to use by law.’

"In its submission to the Transport Select Committee the Department said:

The question has been raised in the press as to whether we have used the correct procurement Directive for the new Thameslink trains.

As explained earlier the procurement is being conducted by the Department to facilitate the Thameslink Train Operating Company (First Capital Connect) to enter into a suite of agreements to take on lease and to pay for the benefit of the trains for a fixed period. The Department will enter into related arrangements including the provision of a commitment to lease the trains for an agreed period through a section 54 undertaking.

The Utilities Contracts Regulations 2006 (Utilities Regulations) apply to procurement by a utility. A 'utility' is defined as *"a relevant person specified in one of the Parts of Schedule 1 carrying out an activity in that Part"*. Part Q of Schedule 1 includes any relevant person involved in *"The provision or operation of a network providing a service to the public in the field of transport by railway."* Train Operating Companies running passenger rail services fall within this definition.

The use of the Public Contracts Regulations 2006 was considered but these Regulations exclude the seeking of offers in relation to a proposed public contract where the contracting authority is a utility within the meaning of regulation 3 of the Utilities Contracts Regulations 2006(b) and that contract is for the purposes of carrying out an activity listed in any Part of Schedule 1 to those Regulations in which the utility is specified.

Therefore, as the purpose for which the trains are being procured is a utility purpose, and the contracting party is a utility the Department concluded that the procurement should be governed by the Utilities Regulations.

It is also worth noting that it is usual for the procurement of rolling stock to be conducted by train operating companies in accordance with the negotiated procedure under the Utilities Regulations, and that rolling stock manufacturers, finance lessors and other relevant market players are accustomed to the use of this procedure."

The same procurement Directive was used for the Intercity Express Programme.

If you are unhappy with the way the Department has handled your request or with the decisions made in relation to your request you may complain within two calendar months of the date of this letter by writing to the Department's Information Rights Unit at:

Zone D/04
Ashdown House
Sedlescombe Road North
Hastings
East Sussex TN37 7GA
E-mail: FOI-Advice-Team-DFT@dft.gsi.gov.uk

Please see attached details of DfT's complaints procedure and your right to complain to the Information Commissioner.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely,

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Your right to complain to DfT and the Information Commissioner

You have the right to complain within two calendar months of the date of this letter about the way in which your request for information was handled and/or about the decision not to disclose all or part of the information requested. In addition a complaint can be made that DfT has not complied with its FOI publication scheme.

Your complaint will be acknowledged and you will be advised of a target date by which to expect a response. Initially your complaint will be re-considered by the official who dealt with your request for information. If, after careful consideration, that official decides that his/her decision was correct, your complaint will automatically be referred to a senior independent official who will conduct a further review. You will be advised of the outcome of your complaint and if a decision is taken to disclose information originally withheld this will be done as soon as possible.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex A

Exemption in full

42 Legal professional privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Public interest test factors for disclosure

Public interest in ensuring that decisions have been made on the basis of good quality legal advice.

Public interest test factors against disclosure

Public interest that Thameslink decisions are taken in a fully informed legal context where necessary, and that the Minister is fully cognisant of both the strengths and weaknesses of any relevant position.

Public interest in protecting the relationship between a client and their lawyer.

Decision

There is a very substantial public interest maintaining the confidentiality of legal professional privilege material in order to protect the quality of the Government's decision making, and to ensure that it receives full and properly recorded advice which can be relied on. Government's willingness to seek frank legal advice is essential in upholding the rule of law.

In view of the above, the Department is of the view that the balance of the public interest is clearly against disclosure of the relevant information.