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Court grants injunction against bidder suspension

In *Four Seasons Site Development Ltd. v. City of Toronto* (2017 ONSC 2687), the Ontario Superior Court of Justice granted an injunction staying a temporary suspension of the applicant's ability to bid on and participate in City of Toronto construction tender calls.

In July 2016, Toronto City Council adopted Chapter 195 of the City of Toronto Municipal Code, effective January 1, 2017. Chapter 195 included a "Supplier Code of Conduct" governing the behaviour of construction contractors. Article 195-13.14 allowed the City's Chief Purchasing Official (CPO) to temporarily suspend a supplier's eligibility to bid on a contract for up to 6 months if the supplier contravened the Supplier Code of Conduct. The Supplier Code of Conduct dealt with issues such as confidentiality and disclosure obligations, but it did not directly address supplier performance requirements. A different component of Chapter 195 detailed the supplier's obligation to maintain satisfactory performance ratings.

The applicant made bids on solicitations and was awarded 7 contracts with the City of Toronto in 2016. The respondent was dissatisfied with the applicant's work on 2 of these contracts. The respondent provided the applicant with written warnings about its poor performance ratings, noting that the applicant could be suspended for these issues.

In February 2017, the respondent's CPO temporarily suspended the applicant from bidding on and participating in tender calls due to the applicant's poor performance ratings. The CPO cited Article 195-13.14 as its authority for issuing the suspension. The written notice relied only on performance related concerns, and did not make any suggestion that the applicant had ever contravened the Supplier Code of Conduct.

The court noted in its analysis that while Toronto City Council could suspend a supplier for performance related concerns, the plain language of Article 195-13.14 made clear that the CPO's delegated authority only allowed it to issue temporary suspensions where a supplier contravened the Supplier Code of Conduct.

The respondent argued that the performance requirements from the applicant's contracts were impliedly codified into the Supplier Code of Conduct. The court found that even if that were true, the applicant could not be retroactively suspended for performance-related breaches that occurred in 2016, prior to the Supplier Code of Conduct coming into force on January 1, 2017. Article 195 required suppliers to certify their compliance with the Supplier Code of Conduct. The applicant never certified compliance because it entered into all of its contracts before January 1, 2017. The court found that unless the supplier has certified compliance, the supplier cannot be found in contravention of the Supplier Code of Conduct.

The court applied the three-part test for injunctions from *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994 CanLII 117): a serious issue to be tried; irreparable harm to the moving party; and, the balance of convenience. The respondent argued that as a public authority, the first part of the test should be replaced with the higher burden of requiring the applicant to establish a strong *prima facie* case. The court found that based on its plain language interpretation of Article 195-13.14, the applicant could establish a strong *prima facie* case showing that the respondent's CPO acted without authority to issue a temporary suspension for performance concerns.

Secondly, the court found evidence of irreparable harm; without the injunction, the temporary suspension would prevent the applicant from bidding on approximately $50 million worth of new City of Toronto solicitations that were soon to close.

Finally, the court found that the balance of convenience favoured granting the injunction. The fact that the respondent would have to consider the applicant's bids did not mean that the respondent would automatically be required to award contracts to the applicant, even if the applicant's bids were the lowest price. The delay that the respondent would experience in having to consider the applicant's bids was outweighed by the more substantial inconvenience to the applicant that would result if the temporary suspension remained in place and prevented the applicant from bidding at all.

The court therefore granted the injunction, staying the temporary suspension and allowing the applicant to bid on the upcoming solicitations. ■

Court finds no duty of fairness owed in the prequalification stage

In *Grascan Construction Ltd. v. Metrolinx* (2017 ONSC 6424), the Divisional Court of the Ontario Superior Court of Justice considered whether it had jurisdiction to judicially review a public sector organization's disqualification of a potential bidder for failing to comply with the requirements of a preliminary qualifications process.

Infrastructure Ontario (Respondents) issued a Request for Qualifications (RFQ) to build and finance an express rail project. The RFQ was a preliminary step intended to identify up to five pre-qualified candidates who could move on to participate in the next stage of the project. One of the requirements of the RFQ was that each candidate submit an accounting firm letter (AFL) from a national accounting and advisory firm by the application deadline.

The Applicants were a team of two relatively small construction companies. The Applicants participated in the RFQ process but failed to submit an AFL by the deadline. Instead, they included a letter from a national accounting firm stating that the AFL was in progress and would be completed in the coming weeks. The Respondents disqualified the Applicants for failing to comply with the requirements of the RFQ.

The Applicants argued that the AFL requirement was fairly new and that the Respondents had not enforced it in the past. They claimed that the Respondents breached a duty of fairness by refusing to exercise discretion to alter the requirement, and that they provided insufficient time for the Applicants to complete their submission. The Applicants argued that strict enforcement of the AFL requirement would have the effect of excluding smaller construction companies.

The first issue for the court to determine was whether it had jurisdiction to judicially review the disqualification decision. The court found that although the Respondent is a public body created by statute, its ability to disqualify candidates is not a statutory power of decision within the meaning of the *Judicial Review Procedure Act*. The Applicants also sought the public law remedy of *certiorari*, which is available only for administrative decisions of a public nature. The Applicants argued that this was a procurement decision made by a crown agency, and it therefore engaged the broader public law interest.

The court disagreed, finding that there is a distinction between the actual bidding process that occurs through a Request for Proposals (RFP) and the preliminary RFQ process that precedes it. The court cited prior case law for the principle that there is no freestanding duty of fairness independent of the contractual duty that arises when bids are received in an RFP. In this case, the Respondents had not yet entered into what is referred to in the procurement process as "Contract A" because an RFP had not yet been issued and none of the candidates had submitted any actual bids for the project. The purpose of this stage was merely to determine the qualifications of potential bidders. The court stated that the "weight of authority supports the position of the [Respondents] that no duty of fairness arises at the stage where potential bidders are prequalified".

While the court could have ended its analysis here, it went on to find that the Respondents committed no wrongdoing or bad faith conduct and would not have breached any duty of fairness owed to the Applicants even if one existed.

The RFQ expressly stated that failure to include an AFL would be grounds for disqualification, and the Applicants provided a written declaration confirming their understanding of this. Every team participating in the RFQ had the opportunity to ask questions or request an extension of the deadline, but the Applicants did neither. Five other candidates were able to satisfy all of the RFQ requirements within the same time restrictions. The Applicants claimed that their AFL took longer because they or their accountants overestimated the extent of information that was required in the AFL, however the court noted that the Applicants could have easily clarified this with the Respondents to ensure they were not expending any more time than necessary. The Applicants knew from past experience that the AFL would be a requirement, so they could have begun the process of obtaining one much earlier than they did. While the Respondents may have waived the AFL requirement in the past, the court found that these past instances were not comparable or relevant to the present RFQ. The Respondents never committed to following any specific RFQ process, as each one had its own terms and conditions.

While the court did not have jurisdiction as it found there was no duty of fairness owed during the preliminary RFQ process, the court also confirmed that such a duty would not have been breached in this case in any event. ■

Court finds that RFP's clear language did not give rise to contractual rights

In *Adlair Aviation (1983) Ltd. v Commissioner of Nunavut, Government of Nunavut and Mark McCulloch* (2017 NUCJ 19), the Nunavut Court of Justice granted summary judgment dismissing an unsuccessful bidder's claim of unfairness in the evaluation process.

The Government of Nunavut (Nunavut) issued a Request for Proposals (RFP) for air ambulance services. The plaintiff was an unsuccessful bidder that submitted a proposal without required information on the use of local labour and firms. Nunavut awarded the contract to another bidder and advised the plaintiff in writing of the reasons why it was not chosen, noting that the missing information had a significant negative impact on the plaintiff's evaluation.

The successful bidder ended up not being able to immediately provide the contracted air ambulance services after it won the contract. As a result, Nunavut contracted with the plaintiff to provide the services in the interim. The plaintiff brought a claim against Nunavut, alleging that Nunavut was biased and awarded the main contract to the successful bidder knowing that it would not be able to provide the required services. Nunavut applied for summary judgment, arguing that it made its decision in good faith based only on the information contained in each bidder's proposal, and that the plaintiff's proposal was incomplete and appropriately rejected.

The Court granted Nunavut's application for summary judgment and dismissed the plaintiff's claim, finding that the plaintiff failed to raise a genuine issue requiring trial. The Court noted that the party issuing an RFP does not have a legal duty to investigate bids or proposals. While the successful bidder ultimately could not deliver the contracted services, Nunavut did not breach a legal duty by failing to investigate the information contained in the successful bidder's proposal.

Furthermore, the Court found that Nunavut's RFP did not create the contractual rights and obligations of a formal tender call. The RFP clearly

stated in plain language that it was not an offer, bidders did not have any legal or equitable rights until a contract was signed, and any ensuing contract would be the result of negotiations between the parties after a preferred proposal was selected. Nunavut reserved the right to contact any bidder for additional information, but it was not obligated to inform the plaintiff about its missing information. It was the plaintiff's responsibility to ensure that all required information was included in its proposal.

The Court also rejected the plaintiff's allegations of bias, finding that the plaintiff provided no evidence of any conflict of interest among the members of Nunavut's evaluation committee. The low score awarded to the plaintiff's proposal was appropriate given that the plaintiff failed to include information that was clearly described as mandatory in the RFP. Since the plaintiff failed to raise any genuine issue requiring trial, the Court granted summary judgment in Nunavut's favour and dismissed the plaintiff's claim.

This case is useful for demonstrating that while an RFP may create the legal and equitable rights associated with "Contract A" in the procurement process, it is possible with clear language to solicit proposals for subsequent discussion and negotiation without making an offer. The case also serves as a reminder that the issuer of an RFP is not legally obligated to investigate the information contained in a proposal, and that unsuccessful bidders will require more than mere suspicion or speculation to demonstrate unfairness in the evaluation process. ■

Court finds that District complied with duty to act fairly, despite bid price disclosure

In *Murray Purcha & Son Ltd. v. Barriere (District)*, 2018 BCSC 428, the Supreme Court of British Columbia held that a District did not breach its duty of fairness in a Request for Proposals (RFP) where the successful bidder indirectly disclosed its price contrary to the RFP's rules.

Murray Purcha & Son Ltd. (Murray) provided the District of Barriere (District) with winter road maintenance services from 2013 to 2016. When the contract ended, the District issued an RFP seeking bids from other private enterprises for these services. The RFP required bidders to submit two sealed envelopes. The first envelope would contain information about how the bidder would provide the required services, while the second envelope would contain the bidder's proposed price. The District would only open the second envelope and look at the price if the bidder received a minimum score on the information contained in its first envelope.

The District received 5 bids in response to its RFP. Two District employees were responsible for evaluating these bids, preparing a report, and submitting a recommendation to District Council members. The Council members accepted the employees' recommendation and awarded the contract to Defiance Enterprises Inc. (Defiance). Defiance's bid had the lowest price and the third highest score. Murray petitioned the Supreme Court of British Columbia seeking an order setting aside the District's decision, alleging among other things that Defiance's bid was non-compliant and that the District relied on undisclosed evaluation criteria.

The Court first found that Defiance's bid was compliant with the RFP. While Murray argued that Defiance failed to include certain mandatory insurance details, the Court found that the wording of the RFP only required bidders to complete an insurance verification form. Defiance completed this form, and the RFP only required the successful bidder to provide additional information after it had been selected by the District.

Murray also pointed to information in Defiance's first envelope that stated it would give 3% of its revenues back to the Barriere community and that "3% of the bid = approximately $4,600". While this information undermined the two-envelope system by allowing the District to calculate Defiance's bid price before opening the second envelope, the Court accepted the District employees' testimony that they did not realize this while they were scoring the bids. Even if the District did calculate Defiance's price from this information, they would have had no way of knowing whether the price was comparatively high or low until they opened the second envelopes of every other bidder. The Court also rejected Murray's argument that Defiance's promise to give 3% back to the community was an improper kick-back to the District. Overall, the Court found that Defiance's bid was compliant and did not raise a perception of unfairness.

Next, the Court considered whether the District relied on undisclosed evaluation criteria and whether it followed its process for evaluating bids. Murray pointed out that Defiance's bid focused on the company's experience moving dirt and did not list any experience plowing snow. The Court however accepted that the District did not distinguish between moving dirt and moving snow, and that it arrived at its scores using only the criteria disclosed in the RFP.

Murray argued that the District adopted the Province of British Columbia's procurement guidelines, part of which stated that at least 3 people must be responsible for evaluating bids. Murray also argued that Council members should be personally involved in evaluating and scoring bids. The Court found that while the District used a policy similar to the BC government's guidelines, it did not actually adopt the guidelines as a whole and was not bound to adhere to them strictly. There was no requirement or expectation that the District use 3 and not 2 employees to evaluate bids. District Council members were given the opportunity to question the 2 employees before accepting their recommendation. To require the entire Council to evaluate and score bids would "cripple the function of municipalities". The Court therefore found that the District followed its process and that Murray's legitimate expectations were not breached.

Finally, the Court concluded that the District's decision was reasonable. The Court stated that it "is not entitled to second-guess the District's process of evaluation or comment on the weight given to the various factors. The reasonableness inquiry is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process". In this RFP, price was the most important factor and weighted at 90% of the overall evaluation score. The District provided a list of reasons why it favoured Defiance's bid over Murray's in addition to the fact that Defiance offered the lowest price, noting that Defiance had four experienced individuals who could provide the required services whereas Murray only had one person. District Council questioned the employees on their reasons and were satisfied with their recommendation. The Court also noted that Murray delayed its petition until after Defiance had already begun providing the services, so setting aside the District's decision now would result in substantial prejudice to the District's residents and the other bidders in the RFP.

The Court concluded that the District met its duty to act fairly to all bidders and dismissed Murray's petition. ■

Court awards damages after government failed to keep contemporaneous records

In *Mega Reporting Inc. v. Yukon* (2017 YKSC 69), the Supreme Court of Yukon awarded damages to an unsuccessful bidder after the government failed to keep contemporaneous records of how it evaluated bids.

The Government of Yukon (Yukon) issued a Request for Proposals (RFP) for court transcription services. The RFP directed bidders to provide two sealed envelopes. The first envelope would contain information about the bidder's experience and performance, while the second envelope would contain the bid price. The RFP stated that the second envelope would only be opened if the bidder received a minimum score for the information contained in the first envelope. The RFP also included a waiver stating that bidders could not claim damages for any actual or alleged unfairness on the part of Yukon at any stage of the RFP process.

Mega Reporting Inc. (Mega) was one of two bidders that submitted proposals. Yukon decided that Mega did not meet the minimum score for experience and performance criteria and therefore did not open Mega's second sealed envelope or consider its price. Mega's bid had a lower price than the ultimately successful bidder. Yukon did not make any contemporaneous notes indicating how it evaluated the bids or what specific score Mega received. It was not until several weeks later that Yukon prepared a document listing Mega's apparent scores and the reasons why it was unsuccessful. Mega brought an application to the Supreme Court of Yukon, arguing that Yukon breached its obligation to conduct a fair, accountable, and transparent bidding process.

The Court noted that while the RFP stated the minimum point scores that would be required for the second envelope to be opened, it did not describe the method that would be used to award these points. Yukon failed to keep any contemporaneous notes about how it evaluated the bids, and it only documented the reasons for its decision weeks later when Mega requested a meeting to discuss why it was not chosen. The individual who produced this document admitted it was based on his memory and did not reflect what actually occurred during the evaluation of Mega's bid. There was also evidence to suggest that Yukon penalized Mega for not providing reference letters, even though the RFP stated that reference letters were not required. The Court concluded that Yukon failed to meet its duties of fairness, accountability, and transparency.

Next, the Court considered whether the waiver included in the RFP barred Mega's claim. The Court followed the three-part test set out by the Supreme Court of Canada in *Teracon Contractors Ltd. v. British Columbia* (2010 SCC 4), although it only considered the third part of the test, namely whether public policy reasons exist that favour not enforcing the waiver. The Court noted that government procurement involves the expenditure of a large amount of public funds. To give effect to the waiver would allow Yukon to represent to the public that it engages only in fair, accountable, open and transparent procurement processes without suffering any consequences for failing to do so. The Court concluded that the waiver should not be enforced.

Finally, the Court accepted that Mega had proven and quantified damages. The Court recognized the possibility that Mega would not have been awarded

the contract in any event and reduced the damages accordingly, however the impossibility of determining the actual likelihood of Mega's success was because of Yukon's failure to keep adequate records and to conduct its RFP process fairly. The Court ultimately awarded Mega $335,844.93 in damages. ■

Tribunal decision highlights the importance of plain language in the procurement process

In *Rockwell Collins Canada Inc. v. Department of Public Works and Government Services* (PR-2017-006), the Canadian International Trade Tribunal (Tribunal) awarded lost profits to an improperly disqualified bidder on the basis that the Request for Standing Offer (RFSO) was ambiguous and misleading.

The case involved an RFSO issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence for the provision of air traffic control radio systems for military bases across Canada. Part of the RFSO described a need for radios with Very High Frequency (VHF) and Ultra High Frequency (UHF) band capabilities. Specifically, the RFSO stated that existing radios were to be replaced by "VHF/UHF multi-channels." A multi-channel was defined as a transceiver capable of transmitting and receiving in the frequency ranges of "VHF and UHF".

The plaintiff bidder was Rockwell Collins Canada Inc. (Rockwell). It interpreted the RFSO as having a mandatory requirement that all proposed radio systems be capable of *both* VHF *and* UHF. After reviewing the bids, PWGSC selected Rohde & Schwarz Canada Inc. (Rohde & Schwarz) for the contract, largely because its bid was less expensive. Rockwell later discovered that Rohde & Schwarz's winning bid proposed radio systems that were only capable of *either* VHF *or* UHF. Rockwell brought a complaint to the Tribunal, arguing that Rohde & Schwarz's bid did not comply with the mandatory requirement for radios capable of both VHF and UHF, and that Rockwell's bid was more expensive only because it complied with the requirement. Rockwell also argued that PWGSC contravened Article 506(6) of the *Agreement on Internal Trade* (*AIT*) by not evaluating the bids in accordance with the preferences laid out in its RFSO.

The Tribunal found that the RFSO language was latently ambiguous and misleading. The definition of "multi-channel" used the words "VHF *and* UHF", which the Tribunal found to be "clearly cumulative, connective, and not alternative". There was also a discussion of the oblique symbol ("/"), which the Tribunal described as inherently confusing and having no set meaning. Rockwell interpreted it to mean "and", while Rohde & Schwarz assumed it meant "or". The Tribunal indicated that the oblique symbol should only be used where it is absolutely necessary and for a clear purpose, but it is generally better to avoid using it at all. The Tribunal also noted that complex technical requirements are no excuse for lack of clarity in the procurement process.

The Tribunal did not fault either of the bidders for failing to seek clarification, noting that the RFSO's language was so unclear that it would have required specialized legal training to even be alerted to the ambiguities. The Tribunal nevertheless held that Rockwell's interpretation was the correct one, and that the RFSO expressed a requirement for *both* VHF *and* UHF.

The Tribunal then found that PWGSC was in breach of Article 506(6) of the *AIT* because it failed to define or follow any criteria for how bids would be

weighed and evaluated. The language in the RFSO stated that the "preferred solution" was for a multi-channel transceiver capable of "VHF/UHF", which the Tribunal interpreted to mean both frequencies. The Tribunal found that a "preferred" solution by definition should have some advantage over a non-preferred solution, but PWGSC treated both bids as being equal and instead considered cost to be the determining factor. The Tribunal called this the "epitome of unfairness" since Rockwell was essentially disqualified for offering the preferred solution that PWGSC specifically asked for.

In determining remedies, the Tribunal acknowledged that Rohde & Schwarz made its winning bid in good faith and in accordance with its honest interpretation of PWGSC's misleading solicitation. As the contract had already been partly performed, the Tribunal found that it was too late to order a retendering process or to award the contract to Rockwell. Instead, the Tribunal awarded Rockwell 50% of its reasonable profits had it been awarded the contract for the RFSO.

This case highlights the importance of using plain language in the course of a procurement process. Compared to "legalese", plain language is more understandable and accessible, and it reduces the likelihood of misunderstandings. As a result, plain language is better for creating a level playing field among bidders. In the words of the Tribunal, "A government institution does no one any favours when it (i) fails to speak clearly, or (ii) fails to properly define its evaluation criteria". ■

IPC orders disclosure of successful bidder's pricing information

In *Regional Municipality of Peel (Re)*, 2017 CanLII 87959, the Ontario Information and Privacy Commissioner (IPC) ordered the disclosure of bidder pricing information submitted in a tendering process.

The Regional Municipality of Peel (Region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) for access to a copy of an identified contract and the related Request for Tender (RFT) information. The Region granted partial access to the requested information, but argued that the remainder was exempt from disclosure under s. 10(1) of *MFIPPA*, which protects third party information. The appellant was one of the successful bidders in the RFT. It opposed the disclosure of a pricing summary document, which compared the pricing components from bidders that participated in the RFT.

The IPC noted that s. 10(1) of *MFIPPA* is an exemption designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Its purpose is to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. For s. 10(1) to exempt the disclosure of requested information, (1) the record must reveal a trade secret or commercial or financial information; (2) the information must have been supplied in confidence; and (3) disclosing the record must give rise to a reasonable expectation of certain specified harms.

The IPC first noted that the pricing summary contained the appellant's commercial information because it related to the buying and selling of transportation services in a tendering process.

For the second part of the test however, the IPC held that the information was not "supplied" in confidence. The provisions of a contract between a government institution and a third party are considered to be "negotiated" and "mutually

generated" information rather than "supplied" by the third party. This is true even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. In this case, the appellant's tender (including its pricing information) became part of the contract between the Region and the appellant when the Region selected the appellant's tender bid. In the IPC's words, "the terms of the tender bid quotation submitted by the appellant effectively became the essential terms of a negotiated contract".

There are two exceptions to the principle that a successful tender is a "negotiated" contract rather than "supplied" third party information. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the government institution. The "immutability" exception meanwhile arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. The IPC held that neither of these exceptions applied since all of the relevant information could be found on the face of the contract, and the appellant failed to explain how disclosing the withheld information would reveal its underlying non-negotiable costs.

Since all three components of the test need to be satisfied in order for the s. 10(1) exemption to apply, the IPC did not need to consider the potential harms under the third part of the test. The IPC dismissed the appeal and ordered the Region to disclose the requested pricing summary information.

This case provides guidance for institutions that receive access to information requests for documents relevant to the procurement process. While the s. 10(1) exemption protects some third party information, the terms contained in a successful bidder's tender become "negotiated" information and fall outside the scope of the exemption once the institution accepts the tender and enters into a performance contract with the successful bidder. ■

Sask. IPC orders school board to disclose bidder info due to wording of RFQ's confidential provisions

In *Board of Education of the Regina Roman Catholic Separate School Division No. 81 (Re)*, 2017 CanLII 80046, the Office of the Saskatchewan Information and Privacy Commissioner (IPC) ordered the Regina Roman Catholic Separate School Division No. 81 (Board) to disclose evaluation tables containing bidder qualification information and point scores.

The Board issued a Request for Qualification (RFQ) for computer equipment. After the Board awarded the contract to the successful bidder, one of the unsuccessful bidders (Applicant) submitted an access to information request seeking information submitted by other bidders. The Board provided a blank evaluation chart with added notes explaining how point scores were calculated, but it withheld the original documents on the basis of several exemptions in Saskatchewan's municipal privacy statute, the *Local Authority Freedom of Information and Protection of Privacy Act* ("*LA FOIP*").

The IPC first considered whether the information was exempt from disclosure under s. 16 of *LA FOIP.* These exemptions generally protect certain information used by public bodies for policy making. The IPC found that these exemptions did not apply, largely because the Board already

released its method of calculating point scores. The scores themselves did not add anything in terms of policy making or deliberations among local authority officers or employees.

Next, the IPC found that the exemptions in s. 17 of *LA FOIP* did not apply. These exemptions protect information where disclosure could reasonably be expected to interfere with contractual negotiations or result in undue benefit or loss to a person. In this case, the information was being requested after the Board already awarded the contract to the successful bidder. As a result, there were no longer any negotiations to interfere with. The Board also failed to provide any evidence that undue benefit or loss would occur as a result of disclosure.

The IPC then considered whether s. 18 of *LA FOIP* applied. This section exempts from disclosure commercial or financial information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party.

The IPC accepted that there was commercial or financial information involved, because the qualification information requested could reveal bidder prices.

The IPC also accepted that the information was "supplied" by third parties to the Board. In this case, the requested information would allow the Applicant to make accurate inferences about other bidders' underlying pricing information.

The IPC concluded however that the final requirement of this exemption, namely that the information be supplied "in confidence", was not satisfied. The RFQ contained 3 references to confidentiality, however these did not assist the Board. The first provision on confidentiality referred to the wrong statute, which does not apply to the Board. The second provision only placed confidentiality obligations on bidders dealing with Board information, not the other way around. The third provision explicitly stated that the Board would keep bidder information confidential, but only "until the completion of the evaluations and awarding process". The RFQ therefore clearly demonstrated that the expectation of confidentiality no longer existed.

The Board also argued that the information was protected by solicitor-client privilege under s. 21 of *LA FOIP*, but the IPC found that there was no evidence suggesting that any of the requested information was legal advice or legal services.

After finding that the claimed exemptions did not apply and that the requested information generally did not reveal anything more than what the Board had already disclosed, the IPC ordered the Board to provide the Applicant with a complete copy of the original evaluation tables including bidder qualification information and the specific point scores awarded.

The IPC concluded by making some recommendations to the Board for future access to information requests. Specifically, the IPC noted that the Board should provide a copy of the original requested document with the claimed exemptions for any redactions indicated on the document itself. This would allow a requester to understand how much information is being withheld and why. The IPC recommended that the Board update its policies to reflect these best practices. ■

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