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Public Sector

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Further analysis of exemptions under MFOIPOP

As a follow-up to the article in the May 2007 Procurement Law Newsletter analyzing the exemptions under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M-56, following is an analysis of recent Orders relating to the exemptions under sections 6(1)(b) (substance of a closed meeting), 10(1) (third party information) and 11(c) and (d) (prejudice to economic and other interests).

Section 6(1)(b) and (2)(b) – Closed Meetings and the Exception to the Exemption

Under section 6(1)(b), a public institution may refuse to disclose a record where:

A council, board, commission or other body, or a committee of one of them, held a meeting;

A statute authorizes the holding of the meeting in the absence of the public; and

Disclosure of the record would reveal the actual substance of the deliberations of the meetings.

Section 6(2)(b) provides an exception to the exemption under section 6(1)(b). Under s. 6(2)(b), a head shall not refuse to disclose a closed meeting record if:

"*The subject matter of the deliberations has been considered in a meeting open to the public*"

In Order *MO-2335, Re City of Ottawa*, the appellant sought access to a report tabled at a closed meeting of City Council regarding a contract between the City of Ottawa and a company to operate and manage the Ray Friel Recreation Complex. The report met the criteria under section 6(1)(b). The appellant argued, however, that the report had been tabled twice at City Council meetings that were not closed to the public. The appendix of the report contained newspaper articles discussing the Complex. After reviewing the confidential submissions of the City, the Commissioner found that the subject matter of the deliberations was not considered in a meeting open to the public. Even though the newspaper articles partially discussed the subject matter of the records, there was a greater level of detail and information in the records which was not provided in the articles. The subject matter of the deliberations, namely the City assuming operation of the Complex, had not been considered in a meeting open to the public. As a result, the record was exempt from disclosure.

Section 10(1) – Third-Party Information

Section 10 is a mandatory exemption. Its purpose is to limit disclosure of confidential information of third parties which could be exploited by competitors and is held by the government. To qualify for the exemption under s. 10(1), the institution and/or third party must satisfy each of the following:

The record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The information must have been supplied to the institution in confidence, either explicitly or implicitly; and

The prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in the section will occur.

In *Order MO-2323, Re City of Toronto*, an expert report was supplied in order to enable discussions on a project, but which would ultimately form part of the site plan application and therefore be part of the public record. Such report may be supplied in confidence under the second part of the test. A religious society (the "Society") had supplied an architectural report to the Heritage Preservation Services in the City of Toronto's Planning Department to enable discussion of the heritage aspects of the building. It was supplied with the knowledge that if the report did become part of the site plan, it would then be available to the public. The Commissioner accepted that the Society had supplied the report on a confidential basis and had a reasonable expectation that the report would remain confidential subject to it becoming part of the application. The Society had failed, however, to provide evidence to establish a reasonable expectation of harm. The document was therefore accessible. The Commissioner ordered disclosure as there was no evidence of a reasonable expectation of harm.

Section 11(c) and (d) – Economic Interest

The purpose of the exemption under section 11 is to enable discretionary protection of certain economic interests of institutions. A public institution may refuse to disclose a record that contains:

"*(c) Information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution; or*

(d) Information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution; or

(f) Plans related to management of personnel or the administration of an institution that have not yet been put into operation or made public."

In determining whether there is a risk of the harm contemplated in s. 11(d), the IPC will consider the current reality. In *Order MO-2304, Re City of Toronto*, the City of Toronto decided to stop releasing the individual cheque numbers and specific amounts of stale-dated cheques, as had previously been done, on the recommendation of its Accounting Services due to increased incidents of fraudulent activities. The City argued that with technological advances in copiers, lasers and scanners, it is no longer necessary for criminals to have a cheque in order to commit cheque fraud. In the Commissioner's opinion, the City had provided detailed and convincing evidence that disclosure of individual cheque numbers and amounts could reasonably be expected to be injurious to the City's financial interests. The Commissioner recognized that "*we now live in a world in which the financial and banking information of individuals and corporations is more readily accessible due to the increased sophistication of criminals to gain access to electronically stored information coupled with technological advances in copiers, lasers and scanners. In effect, it is no longer necessary to hold a cheque to commit cheque fraud.*" In addition, the situation of stale-dated cheques is quite different from that of cheques which will eventually

be cashed by the intended recipient. It is much easier for a fraudulently cashed stale-dated cheque to go unnoticed.

The Commissioner also accepted the City's argument that disclosure of such information would be disclosure to the world. Once the information was released into the public domain, there would be no way to limit or control the use of the information for illegal purposes. The City had acted prudently and proactively to safeguard against fraud. Therefore, the information was not accessible. The Commissioner denied access to the severed portions of the record.

The Commissioner will only ensure that the discretion of public bodies exercised under section 11 is used properly, it will not replace their decision. In *Order MO-2305-f, Re Hamilton-Wentworth District School Board*, the Commissioner accepted that the Hamilton-Wentworth District School Board had exercised its discretion properly after it submitted a list of factors it had considered in coming to its decision not to release the information requested. The applicant sought documents related to the condition of the secondary school gym floors. The Board denied access to two reports. The Commissioner ordered the Board to release the two reports, except an Appendix to one of the reports, to the applicant and to re-exercise its discretion with regard to the Appendix. The Board complied with the Order, releasing both reports and re-exercised its discretion to disclose the information in the Appendix, except for information in one column entitled "Renewal Year". The Board submitted that it considered:

1. The purposes of the *Act*, including that information should be made available to the public and exemptions from access should be limited and specific;

2. The specific wording of the relevant sections of the *Act*;

3. That the records did not relate to the appellant's personal information;

4. The nature of the information and sensitive nature of the material redacted from the record;

5. A determination as to whether disclosure will increase public confidence in the operation of the institution; and

6. That certain information, even though otherwise possibly exempt from disclosure, has previously been released to the public.

The Commissioner found that the Board had exercised its discretion properly, by taking relevant factors, and not irrelevant factors, into account, and did not issue a further Order.

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Legal processes must be followed for contesting construction of mega-projects

In *British Columbia Transmission Corp. v. Lemoignan*, [2008] B.C.J. No. 1462, the British Columbia Supreme Court reinforced that persons taking issue with construction projects must follow the legal processes in place for expressing disapproval or challenging plans. While it recognized the community's concerns surrounding the construction of a public utilities project, the court also understood

the benefits provided by mega projects to the broader community.

Extensive representations regarding the project had been made to the BC Public Utilities Commission and the environmental assessment authorities. An appeal was taken to the Court of Appeal. The Court of Appeal heard the objections of some residents related to the processes undertaken and approvals granted. In the end, the Transmission Corporation was given legal authority to proceed with the project.

The Court held that even where community members disagree with the lawful result that is obtained, they are bound by such processes. The community had been given a full opportunity to participate in the decision-making process. The Transmission Corporation had been authorized to proceed with the project. While the community members may not agree with the result, they cannot interfere with that which has lawfully been done. For any disputes that the community had with the way that the project was being carried out or any contravention of the law, the community's remedy was now with the police. It is the duty of the police to protect all citizens, individual or corporate, from wrongdoing or harm.

The principal concern and duty of the court was to ensure the safety of the public and of the workers. The court ordered an injunction against further interference with the project. Any one not complying with the Court's order would be subject to criminal sanction.

Court reconfirms importance of clear, unambiguous bids

In *Maystar General Contractors Inc. v. Newmarket (Town)*, [2008] O.J. No. 1793 ("*Maystar*"), the court examined the issues of price uncertainty in a tender bid, amendments to a tender bid, and the possibility of accepting a non-compliant bid. In this case the plaintiff was successful in its suit against the Town of Newmarket for breach of contract arising out of the plaintiff's submission of a compliant bid in response to the Town's call for tenders in respect of a project to construct a recreation facility.

The Town of Newmarket had received four bids in response to the tender notice. The instructions to bidders in the tender documents included, but were not limited to, the following terms:

- bids would be checked by staff to ensure correctness of arithmetic extension calculations;
- unit price stipulated would govern in cases of obvious errors in the extended price;
- the bidder's intent would be considered in cases of obvious or patent errors; and
- the owner reserved the right and absolute discretion to accept a bid even if it was not the lowest or to reject a bid even if it was the lowest.

The instructions to bidders further provided that each bidder was to submit a completed Bid Form in the format provided which set out a bid price for the provision of all materials and work performance, a separate amount for GST, and a total cost which

totalled the above-mentioned stipulated price and GST.

In accordance with the Instructions to Bidders, the bidders and total bid price for each bid were read aloud in public at the bid opening. The project architect then provided a tender analysis and recommendations, noting that Bonfield's bid contained two arithmetic errors: the GST calculation and the total of the stipulated price and GST. Once corrected, Bonfield's tender became the lowest. The Town accepted Bonfield's bid on the tender recommendations of the project architect and manager.

Maystar, claiming for breach of contract and damages, submitted that Bonfield claimed a price which was uncertain and therefore not capable of acceptance. Maystar further argued that the Town impermissibly amended Bonfield's bid by revising Bonfield's GST and total bid price amounts contrary to the tender terms, and that Bonfield's contact with the Town prior to acceptance amounted to impermissible negotiation of the tender.

The Town's responses to these claims were as follows: first, that Bonfield's price was not uncertain; second, that the corrections of GST and total price were mere "arithmetic extensions" permitted by the tender terms (either specifically or by implication); and finally, that the communication between Bonfield and the Town did not amount to a negotiation because it was unsolicited and had no bearing on the acceptance of the Bonfield bid. In the alternative, if the bid was non-compliant the Town could still accept it given the wording of the tender documents.

The court cited *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.), for the principle that a submission by a contractor of a tender bid compliant with the terms and conditions of the call creates a unilateral contract between the contractor and the owner referred to as Contract A. This case and subsequent Supreme Court of Canada decisions had established that Contract A's terms and conditions are governed by the express terms and conditions, and potentially also the implied terms and conditions in the tender documents. It is an implied term of this contract that the owner will only accept a compliant bid (see *M.J.B. Enterprises Ltd. v. Defense Construction (1951) Ltd.*, [1999] 1 S.C.R. 619) and that the owner has an obligation to treat all bids "fairly and equally" (see *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 (S.C.C.)). The test for compliance is not strict compliance but rather substantial compliance. Substantial compliance means that all "material" terms and conditions of the tender have objectively been complied with. Price is not only material but essential. An offer which is uncertain as to price therefore cannot form the basis of a binding contractual relationship.

The court concluded that Bonfield's bid was uncertain largely on the basis that there was not one but two errors, with the result that it was not possible to determine, from reviewing the bid form, where the error lay and what the stipulated price actually was. The reactions of the Town consultants and staff further confirmed the uncertainty in the Bonfield bid price. Had the price been certain, they would not have requested confirmation of the bid price from Bonfield. Further, the manager who concluded that the price was certain arrived at this conclusion by applying case law which did not rightfully apply to these facts. He incorrectly thought that *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723 (*"Bradscot")* would apply.

In *Bradscot* one issue was whether the bid price whose tender was accepted was

uncertain. The court explained that unlike this case, in *Bradscot* the bid forms were different and the error was found to be superfluous as it merely summarized information in separate governing sections. In contrast, in this case the provisions for GST and total price were important components of the tender and in no way superfluous. A further distinguishing factor in *Bradscot* was the absence of an oral public reading of figures at the tender opening.

The court found similarities between the nature of the error in the Bonfield bid with that in *Ottawa (City) Non-Profit Housing v. Canvar Construction* (2000), 3 C.L.R. (3d) 55, a case involving an action by the city for breach of contract against a contractor for failure to enter into a construction contract following acceptance of the contractor's tender. In that case, the contractor advised the city of an error in the bid prior to the opening of the bids. The contractor had further requested an adjustment of the price or withdrawal of the tender, both of which the city refused to grant. While the city was successful at trial, the Court of Appeal dismissed the city's action. The Court of Appeal found a clear error in respect of price which prevented the creation of contractual relations (Contract A) and therefore enabled the contractor to withdraw its bid. The court found that the type of error in the *Canvar* case was the same as that in the case at hand – an error on the face of the bid form which led to an uncertain tender price. In each case the tender was non-compliant and thus incapable of acceptance. The reasoning is that it would be inappropriate to hold that an owner can accept a tender which the bidder can otherwise withdraw from.

The court concluded that any clarification of this uncertain price would constitute an amendment not permitted under the bid terms, on the basis of the following: errors in non-compliant bids cannot be rectified by subsequent communication; the instructions stated that amendments would not be accepted or considered; and the clear and straightforward language necessary to permit an owner to accept a non-compliant bid was not present in these bid documents.

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Funding concerns do not negate finding of bid shopping

Receiving bids that are two to three times over budget will not negate a finding that re-tendering was for the purpose of bid shopping where it is obvious that the second tender was issued in order to get a better price. In *Amber Contracting Ltd. v. Halifax (Regional Municipality)*, [2008] N.S.J. No. 282 (S.C.), the Court accepted that the City had legitimate funding concerns but the project was of a high priority and, therefore, the funds were available. Further, emails between City employees made it clear that the purpose of the re-tender was to get a better price.

The City called for tenders for the construction and upgrade of a sanitary pumping station. The City had retained consulting engineers to design and estimate the cost of the pumping station. City council approved the budget for this project based on this estimate. As a usual term, a condition was that the tenders would be opened in public and the results published. Three bids were received; including the plaintiff's which was the lowest. All of the bids were approximately two or three fold in excess of the approved budget.

The City decided to cancel the tender. Despite the cancellation, the City continued to negotiate with the plaintiff in an attempt to reach an acceptable price. Cost-savings suggested by the plaintiff were considered inadequate by the defendant. The decision

was eventually made to re-tender. The City contended that this decision was made due to funding concerns. Emails between City employees responsible for the project, however, made it clear that the decision had been made in order to get a better price. The project was of sufficient priority that the funds could have been, and in fact subsequently were, approved.

Approximately seven months later, the City issued another tender for the project with plans and specifications that were substantially identical to the previous tender. Four bids were received. The City awarded the tender to the lowest bidder, who had not bid on the first tender. The plaintiff was the second lowest bidder.

The Court found that the City had engaged in bid shopping to the detriment of the plaintiff and the construction industry. The City had breached its duty of fairness to the plaintiff. The plaintiff was awarded the lost profits.

This case also emphasizes how the Court will examine motive to determine whether an agency acted in good faith. Further, internal communications can be detrimental to an agency and it is important to remind all staff that such communications are accessible and can prejudice the position of the agency.

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Absence of conflict of interest does not need to be specified in tender documents

The requirement that a bidder have an absence of conflict of interest on a project for tender does not need to be explicitly stated. In *Serco Facilities Management Inc. v. Defence Construction Canada*, [2008] F.C.J. No. 912 (C.A), the Court held that the absence of a conflict of interest, or the right to reject a bid for conflict, did not have to be identified in the tender documents as a requirement of the procurement, an evaluation criterion or an evaluation methodology.

Defence Construction rejected Serco's bid for conflict of interest. Serco had assisted in preparing the solicitation documents. Serco complained to the Canadian International Trade Tribunal. The Tribunal held that the criteria that Defence Construction used to disqualify Serco were not clearly identified in the solicitation documents. The Tribunal held that Defence Construction had, therefore, breached the *Agreement on Internal Trade*. Defence Construction appealed to the Federal Court of Appeal.

The Court held that a conflict of interest, along with safety, financial stability of the bidder and creation of a monopoly to the public detriment, are legitimate and relevant commercial considerations that the tendering party could, and in the public interest should, take into account under a rejection clause. The absence of a conflict as a requirement or part of the evaluation of bids need not be identified in the tender documents. As Serco was involved in preparing the tender documents, its complaint to the Canadian International Trade Tribunal should have been dismissed.

Any contractor assisting with the preparation of the tender or RFP documents should be precluded from bidding. This should be part of the initial retainer. A difficult question arises as to whether a contractor can provide such assistance on the understanding the contractor can also bid. This is risky for the agency and not consistent with the principles set out in *Serco*.

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