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Public Sector

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IN THIS ISSUE —

An RFP does not always create Contract A

In *Saskatoon Surgicentre Inc. v. Saskatoon Regional Health Authority* (2017 SKQB 280), the court confirmed that a true request for proposal (RFP) does not create a contractual relationship between an owner and bidder, and that until Contract A is formed, an owner does not have a *heightened* duty of fairness toward a particular bidder based on a previous short-term contract with such bidder.

The Saskatoon Regional Health Authority (SRHA) had entered into a short-term contract with Saskatoon Surgicentre Inc. (SSI) to provide surgical services until it issued a RFP. Later, SRHA issued a RFP respecting procurement of certain medical services. SRHA accepted a proposal, but not SSI's. SSI was aggrieved of the manner in which SRHA dealt with the proposals and alleged that SRHA breached the terms of an implied contract, first recognized as Contract A in *Ontario v. Ron Engineering & Construction (Eastern) Ltd* ([1981] 1 SCR 111) (*Ron Engineering*). SSI argued that the RFP process formed Contract A, and that SRHA breached the contract by failing to act fairly. SRHA argued that Contract A was not formed as the tendering document was a true RFP. The court had to decide whether SRHA and SSI were in a contractual relationship, and if they were, whether the contract was breached.

The court affirmed that whether Contract A is formed depends on the precise language and intention of the tender call. Parties who do not wish to create Contract A may choose to issue a properly drawn RFP. A properly drawn RFP asks parties for expressions of interest, and sets out the owner's intention to consider those expressions of interest and then to undertake negotiations with one or more parties whose proposal(s) appeal to

the owner. To determine whether a RFP is a true request for proposals, the court can consider the following factors: irrevocability of the bid, the owner's intention, the formality of the procurement process, an invitation to negotiate, and the inclusion of terms to be found in Contract B. The court cautioned that simply ascribing the name "Request for Proposal" and including strong exclusionary language in a tendering document does not mean that the court will not find Contract A to exist.

The court concluded that the RFP was a true request for proposals as opposed to a tender call for bids. The RFP was properly drawn to ask proponents for expressions of interest, and set out the owner's intention to consider those expressions of interest and then undertake negotiations with one or more parties. Therefore, Contract A was not formed. The RFP stated that "alternative or innovative proposals are encouraged", illustrating that the final form of the surgical services was flexible and exploratory. Furthermore, the goal of negotiation was expressly and repeatedly stated in the RFP, a clause in the RFP implied exclusion of the formation of Contract A, and the RFP did not include terms to be found in Contract B as SRHA could not author or include unexpected proposals in an attached agreement. In the analysis, the court suggested use of the following language to expressly exclude the formation of Contract A: "Any bids received under this RFP will not attract responsibilities or rights by either SRHA or proponents under a Contract A analysis."

SSI also argued that prior to the RFP, SSI received representations from SRHA that it would be favorably considered in any subsequent long-term contract. The court concluded that no such assurances or representations were made and declined to accept a duty to give favorable treatment to SSI in the subsequent RFP process. The court also held that an owner does not owe a particular bidder a heightened duty of fairness until Contract A is formed.

This case serves as a reminder that a properly drawn RFP will not create a contractual relationship between a bidder and owner. To avoid the formation of Contract A, owners must ensure that a RFP asks parties for expressions of interest or simply issue only a Request for Expressions of Interest (RFEI).

Note that this case also found that SRHA had acted in good faith, and although not expressly set out in the reasons for judgment, treated all bidders fairly and equally. ■

A bid and proposal process is subject to an implied duty of fairness

In *Sedrovic v. British Columbia (Ministry of Environment)* ([2017] BCEA No. 10), the British Columbia Environmental Appeal Board (the Board) dismissed two appeals related to the tender process used for the allocation of additional angler day quota on the Wigam River by the Ministry of Forest, Lands and Natural Resource Operations (the Ministry).

Mr. Sedrovic and Mr. Silverthorne (the appellants), applied for the new angler day quota in response to the tender package provided to all bidders by the Regional Manager of Recreational Fisheries and Wildlife Programs in the Kootenay Boundary Region. Two thirds of the angler days were to be allocated by a bid and proposal, all remaining days were to be allocated by bid only. After completion of the tender process, the appellants were informed that their applications were unsuccessful. They appealed this decision to the Board.

The appellants argued that the Regional Manager breached his duty to ensure that all bidders are treated fairly and equally. They alleged that Regional Manager made a mistake of fact or a material error in considering and scoring the appellants' applications. First, the Board had to decide whether the duty of fairness applied to this particular tender process. The Board confirmed that the tender process used by the Regional Manager is governed by the general principles of the law of contract applying to tenders. Therefore, there was an implied term in the contract to treat all bidders fairly and equally. This term applied to both the bid only, and bid and proposal applications.

When formulating the specifications and requirements applicable to the allocation process, the Regional Manager departed from Ministry policy guidelines with respect to both the offering of the angler day quota, and the allocation breakdown under the bid and proposal process. The appellants alleged that the Regional Manager's decision to depart from Ministry guidelines was either unfair to bidders or otherwise an error. The Board confirmed that a party calling for tenders has the discretion to set its own specifications and requirements. Furthermore, since Ministry policies and procedures do not have mandatory language, a Regional Manager has discretion to adapt and modify them in good faith. The Board held that the Regional Manager had

discretion to depart from policies and procedures, and did so in good faith.

The scoring method adopted by the Regional Manager (for the bid and proposal process) was not disclosed in the tender package. The appellants alleged that failure to disclose the methodology amounted to a breach of the duty of fairness. The Board concluded that the duty of fairness will not be breached as long as the criteria applied is disclosed. The Board found that the tender package fully disclosed the criteria, and it was open for the Regional Manager to adopt a particular methodology for allocating points in connection with those criteria. The bid scoring process was both fair and reasonable.

The appellants further alleged that the tender package was unclear or ambiguous, which resulted in their bid amounts being in error. The Board held that any alleged mistaken assumption by the appellants was in no way caused or contributed to by any lack of clarity in the tender package. In addition, the Board held that no inference of an error could be reasonably drawn based on the bids submitted by the appellants. Lastly, the appellants argued that their score should be adjusted upward as the scoring was not done accurately. The Board held that the appellants' score should not be adjusted as the Regional Manager scored all of the applicants fairly and consistently in accordance with the tender package. The appeal was ultimately dismissed.

This case raises three important points. First, a bid and proposal process is subject to an implied duty of fairness. Second, Ministry guidelines and policies are not binding. Lastly, owners are only required to disclose the criteria used to score a bid, not the methodology. ■

Owners entitled to make non-material corrections and obligated to correct their own errors

In *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)* (2017 FCA 165), the court dismissed an application for judicial review. The court concluded that owners are entitled to correct minor mathematical errors made by bidders and are required to correct their own mistakes to ensure a fair procurement process.

The Minister of Public Works and Government Services Canada (PWGSC) issued an RFP for the provision of various maintenance services. Initially, Francis H.V.A.C. Services Ltd. (Francis Ltd.) was awarded the contract. Francis Ltd. was later informed that PWGSC was seeking termination of the contract, on the grounds that Francis Ltd. was not the lowest bidder. PWGSC stated that Modern Niagara Ottawa Inc. (MNO) was the lowest bidder. At first, MNO was found to be non-compliant but after a re-assessment, MNO was deemed to have submitted a responsive bid.

Francis Ltd. brought a complaint to the Canadian International Trade Tribunal (the CITT) alleging that the contract awarded to it was improperly cancelled and awarded to another bidder after bid repair. Francis Ltd. alleged that PWGSC permitted MNO to engage in bid repair by: (1) correcting MNO's mathematical errors and, in turn, allowing MNO to revise its price; and (2) allowing MNO to verify that it had the required security clearance after the closing date. Francis Ltd. sought cancellation of the contract awarded to MNO and restoration of the contract to it, or in the alternative, the re-opening of the bid process with compensation for its losses. The CITT held that the complaint filed by Francis Ltd. was not valid. Francis Ltd. brought an application for judicial review of that decision. The standard of reasonableness was applied to determine whether the decision of the CITT fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The court held that it was reasonable for CITT to conclude that MNO did not engage in bid repair.

PWGSC mistakenly disqualified MNO from the tender process based on its determination that MNO did not have the required security clearance. The mistake resulted from an error regarding the identity of MNO as a bidder. After the close of the bid, MNO wrote to PWGSC explaining that MNO did have the required security clearance. Upon receiving this explanation, PWGSC re-evaluated MNO's bid and awarded MNO the contract. Francis Ltd. argued that MNO engaged in bid repair when it verified that it had the required security clearance after the closing date. The court held that MNO's bid did not change as a result of the information provided. The only thing that changed was PWGSC's security clearance check. The change came about as a consequence of correcting a mistake in the organization's name and assessing the actual bidder on the basis of the correct entity's record. The court further noted that PWGSC had an obligation to rectify its error by awarding a new contract to MNO to ensure a fair procurement process.

Upon reviewing the bid, PWGSC discovered mathematical errors in MNO's bid and corrected them. MNO made easily identifiable errors while calculating subtotals. The corrections amounted to a nearly two-thirds reduction in the original amounts tendered. Francis Ltd. argued that MNO engaged in bid repair by revising its price and offended the principal of fairness governing the procurement process. The court affirmed that bidders cannot make material corrections or amend their bids after the closing date. Allowing a bid to be modified or altered after the closing date would undermine the bidding process itself, as it would allow a change to be made to a bid at a time when the bids of other are known or could be known. The court held that MNO did not submit any new information after the bid closing date. It was PWGSC who corrected the errors on its own initiative, which it was entitled to do as the calculations did not cast doubt on the total bid price. When PWGSC contacted MNO to ensure that its mathematical corrections accurately reflected the content of the bid, it was not inviting MNO to engage in bid repair. It was merely seeking confirmation that the corrected numbers were accurate. The court affirmed that contracting authorities may seek clarification or explanations to better understand the contents of a bid after the close of a procurement process.

Francis Ltd. further argued that the revisions made to MNO's original bid constituted a new bid; therefore the amendments required signatures in order to be responsive. The court held that it was reasonable for CITT to conclude that the revisions did not require a signature or constitute a new bid.

This case affirmed two important principles of procurement law. First, material corrections or amendments which would result in a material change in the bid cannot be made after the bid closing date. Second, contracting authorities can seek clarification or explanations to better understand the contents of a bid after the closing date, provided that same merely correct mistakes in the bid which do not amount to a true change in the bid price, but rather fix what is already there. This principle is reflected in the new CFTA and CETA where an owner can correct unintentional errors, provided it affords the same opportunity to all bidders. ■

Re-tendering after a non-compliant bid

In *Graillen Holdings Inc. v. Orangeville (Town)* (2017 ONCA 520), the appellants appealed from the dismissal of their action for damages arising out of the respondent town's 2010 tendering process.

In 2010, the town of Orangeville put out a tender for services related to the collection, haulage, storage and disposal services of its biosolids waste. It also entered into an agreement of purchase and sale (APS) with Graillen Holdings Inc. (Graillen) to purchase its lagoons for storage of the biosolids waste. The APS included a termination clause that the town could exercise at its sole discretion after due diligence investigations. The town received bids from Region of Huronia Environmental Services Ltd. (Rohe) and Entec Waste Management Inc. (Entec). Entec's bid proposed a new form of dewatering process which would eliminate the town's need for storage of its biosolids waste. The town awarded the contract to Entec and terminated the APS with Graillen. Graillen brought an action alleging that the tender was improperly awarded to Entec as Entec's bid was non-compliant. Graillen further alleged that the town wrongly exercised the termination clause and thus breached the APS.

In *Graillen Holdings Inc. v. Orangeville (Town)* (2016 OJ No. 2915), the court found that Entec's bid was non-compliant. However, damages were not awarded because Graillen failed to demonstrate that the tender contract would have been awarded to Rohe as the compliant bidder. The trial judge held that in these circumstances, the town would have re-tendered the contract as the tendering process disclosed to them that its preferred option of adopting a dewatering process was viable. Note that the Ontario Superior Court of Justice decision was discussed in Keel Cottrelle's November 2016 Procurement Law Newsletter.

Graillen appealed this decision alleging that the town did not specifically plead that it would have re-tendered had it known that Entec's bid was non-compliant. The Court of Appeal dismissed the appeal. The Court of Appeal concluded that it was unnecessary for the town to specifically plead this in the circumstances of this case. Based on the evidence provided, it was left open to the trial judge to conclude that the town would not have awarded the contract to Rohe, and that the town exercised the termination clause in good faith for legitimate business reasons. Once the town had decided to adopt the dewatering process, the purchase of Graillen's property was no longer required and made no economic sense.

This case serves as a caution that although a judge is open to conclude that an owner would have re-tendered in certain situations, owners should specifically plead this to avoid any issues. ■

Owner must act in good faith when exercising a right under a privilege clause

In *ASI Group Ltd. v. Toronto (City)* (2017 ONSC 3385), the court dismissed a motion for summary judgement and concluded that an owner has the right to cancel a RFQ without awarding a contract if the integrity of the tender process has been compromised.

The City of Toronto issued a RFQ on February 05, 2014 (RFQ #1), in which it requested quotations for diving services at its water treatment facilities. ASI Group Ltd. (ASI Ltd.) was the lowest compliant bidder. However, ASI Ltd. was not awarded the contract because the city cancelled RFQ #1, after a bidder complained of procedural unfairness. Under RFQ #1, the city advised bidders that they were entitled to review previous diving inspection reports and facility drawings. Two bidders, General Diving Contractors Inc. (General Inc.) and ASI Ltd., requested to view the reports and drawings. The city was unable to locate this information prior to the close of the bid.

At the close of the bid, General Inc. wrote to the city and expressed concerns about the procedural fairness of the bidding process. General Inc. complained that bidders were not given access to drawings and previous reports, and that two bidders had an unfair advantage in their knowledge of the city's systems and structures as they previously worked with the city. After consideration, the city decided that the integrity of the tender process had been compromised and decided to cancel RFQ #1. On April 8, 2014, the city issued RFQ #2 and General Inc. was awarded the contract. ASI Ltd. brought an action claiming that the city breached its duty of fairness to them by cancelling RFQ #1 and re-tendering the contract. The city alleged that the integrity of the tender process for RFQ #1 had been compromised and therefore the city had properly cancelled RFQ #1. The city submitted that it had no liability to ASI Ltd. in respect of RFQ #1. Both parties agreed to deal with the issue of liability on a summary judgement motion. The motion was dismissed.

The court concluded that the city had the general authority to cancel RFQ #1 as a result of the privilege clause in RFQ #1. The privilege clause gave the city the right to accept or reject any bids, and the right to cancel the RFQ without awarding the diving services contract. However, the court stated that the authority to cancel a RFQ without awarding a contract is not absolute under a privilege clause, it is subject to the duty of fairness. Therefore to succeed, ASI Ltd. must prove that the city breached its duty of fairness. The court further confirmed that in the procurement context, the principle of good faith underlies and manifests itself in the duty of fairness.

The duty of good faith required the city to determine whether there was a legitimate concern that affected the integrity of the tender process, and if so, to determine a fair and reasonable remedy. The court held that the unavailability of the requested information raised a legitimate concern and affected the integrity of the tender process. Bidders relied on the city's representations to make drawings and reports available, and the water treatment facilities in Toronto were unique, therefore the drawings and reports could have assisted the bidders in developing their bids. The court also held that the concern that some bidders had an unfair advantage was legitimate. This unfair advantage was even greater as the drawings and reports were unavailable. The court concluded that in the circumstances, it was reasonable for the city to cancel RFQ #1 and re-tender. The court noted that re-tendering can be seen as protecting the interests of all parties and as protecting the integrity of the tendering process.

ASI further argued that the city had no jurisdiction to cancel RFQ #1 because General Inc. had waived its right to make procedural objections by submitting its bid without objections, and General Inc. had no standing to object to the process as their bid was non-compliant with the terms of RFQ #1. The court rejected these arguments and held that they were irrelevant to General Inc.'s right to raise procedural issues. The court concluded that the city is the guardian of the integrity of the tender process. If a concern that affects the integrity of the tender process comes to the attention of the city, or is raised by the city itself, the city has an obligation to consider the merit of the concern, and if the concern is legitimate, rectify it.

This case affirms two important principles. First, an owner cannot solely rely on a privilege clause to cancel a tender process without awarding a contract. A privilege clause is subject to the duty of fairness. Second, the principle of good faith underlies and manifests itself in the duty of fairness. ■

Owner can only forgive minor irregularities or non-material defects

In *Maglio Installations Ltd. v. Castlegar (City)* (2017 BCSC 870), the court found that an owner breached the terms of its contract by accepting a bid with a material deficiency.

The City of Castlegar put out a tender for a project to construct three pools for public use and recreation. For the purposes of this case, only the bids made by Maglio Installations Ltd. (Maglio) and Marwest Industries Ltd. (Marwest) were relevant. Maglio's bid complied with all aspects of the invitation to tender. Marwest's bid was deficient as it did not provide the required preliminary construction schedule (PCS). The city overlooked this deficiency and awarded the construction contract to Marwick. Maglio brought an action alleging breach of contract. At issue in the summary trial was whether the deficiency in the Marwest bid was one that the city could forgive. If the deficiency was one that could not be forgiven, the city was in breach of its contractual duty to deal with all bidders fairly and in accord with the material terms and conditions of the invitation to tender.

A clause in the invitation to tender allowed the city discretion to accept non-compliant bids. All parties agreed that the decision to forgive defects was not unfettered; the city could only forgive minor irregularities or non-material defects. The court affirmed the test for non-material compliance as follows: first, the court must assess whether the defect was an important or essential element of the invitation to tender; second, the court must determine on an objective basis whether there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select.

The court concluded that the deficiency was material. The court found that on an objective assessment of the invitations, one could conclude that the PCS was an important and essential term of the contract. The invitation to tender stated that a PCS was required, the PCS occupied an entire page of an appendix, and the city declared that time would be of the essence. The court stated that by definition, a construction schedule is a description of what things will be done within what time frame. An owner who says in an invitation to tender that time is of the essence, cannot later assert that the time frame for construction is somehow a minor or unimportant detail.

The court further found that the PCS would have been substantial in deciding which bid to select, as the time of essence clause strongly suggested that the city was interested in satisfying itself that the bidder could complete the various tasks within the required timeframes. The court concluded that the requirement of a PCS was a material element of the invitation and that there was a substantial likelihood that it would have been a significant factor in the city's deliberations on which bid to accept. The court held that the city's decision to accept Marwest's bid in the face of non-material compliance constituted breach of their contract with Maglio.

This case affirms the principle that despite provisions in tender documents which state otherwise, owners cannot accept bids with material deficiencies or irregularities. ■

Selection of appropriate forum in procurement disputes

In *Les Produits métalliques AT inc. v. Province du Nouveau-Brunswick* (2017 QCCS 627), the court concluded that Quebec was the appropriate forum to deal with an action for damages resulting from a tender call issued by the province of New Brunswick.

The province of New Brunswick (the defendant) placed a call for tenders for the manufacture and supply of snow removal equipment. Produits Métalliques AT Inc. (the plaintiff) was awarded the contract. The plaintiff immediately began to prepare the necessary equipment. A few weeks later, the defendant advised the plaintiff that its contract had been cancelled. The plaintiff brought an action in Quebec claiming damages for loss of profits resulting from the cancellation of the contract and punitive damages. The defendant brought an application for a declinatory exception for lack of jurisdiction raising the following grounds: (1) the province of New Brunswick has sovereign immunity and cannot be sued in Quebec; (2) Quebec courts do not have jurisdiction over the dispute since the conditions in article 318 of the *Civil Code of Quebec* have not been met; and (3) in the alternative, if the Superior Court of Quebec has jurisdiction, it should decline it given that New Brunswick is the most appropriate forum.

The court noted that provincial statutes confirm interprovincial jurisdictional immunity by subjecting provincial government bodies to the *a priori* jurisdiction of their own courts. However, interstate

jurisdictional immunity is not absolute. Interstate jurisdictional immunity is restricted only to sovereign acts, it does not apply to state or sub-state commercial activities. In addition, interstate jurisdictional immunity will not apply to acts which are performed in the context of a state function if those acts can also be exercised by private citizens.

The court concluded that New Brunswick could not hide behind jurisdictional immunity. The nature of the contract between the parties was mainly commercial, and New Brunswick could be compared to private parties as it was looking to purchase equipment or services at the best possible market price, like any other corporate citizen. The court concluded that this was not considered a sphere of state activity because policy decisions to purchase snow removal equipment by way of a call for tenders had already been made; issuing a contract following a tender call was nothing more than a management act.

The court concluded that Quebec has jurisdiction over the dispute under the *Civil Code of Quebec*, as the plaintiff suffered economic injury in Quebec. The plaintiff did not have head offices in New Brunswick and was going to receive its payment in Quebec once the contract had been performed. The court further held that Quebec had jurisdiction because a substantial portion of the obligations in the contract were to be performed in Quebec. The fact that the equipment was to be delivered in New Brunswick could not be a bar to recognizing jurisdiction of the Quebec courts. The court further stated that in light of the costs involved, and the fact that the plaintiff is facing a government entity whose means are in principle unlimited, the interests of justice favour hearing the dispute in Quebec from the perspective of access to justice.

This case suggests that courts will consider access to justice arguments when determining the appropriate forum to hear a dispute. ■

Contract B does not meet the third-party information exemption under FIPPA

In *Order PO-3753; Hospital for Sick Children* ([2017] OIPC No. 146), the Ontario Information and Privacy Commissioner (Commissioner) held that Contract B did not qualify for an exemption under section 17(1) (third party information) of the *Freedom of Information and Protection of Privacy Act* (RSO 1990, c. F.3) (the Act or *FIPPA*) because it is negotiated and not "supplied" to an institution.

The Hospital for Sick Children (the hospital) received a request under *FIPPA* for access to a copy of an identified current contract (the Services Agreement) and associated RFP information for non-emergency patient transfers. The hospital notified the appellant of the request. The appellant contested disclosure of certain pricing components in the Services Agreement. Despite the appellant's position, the hospital issued an access decision granting the requester full access to the Services Agreement. The hospital argued that contracts are negotiated and not "supplied", therefore they do not satisfy the second part of the section 17(1) test.

The appellant appealed the access decision asserting that certain pricing components in the Services Agreement qualify for exemption under section 17(1) of *FIPPA*. The appellant argued that the Services Agreement was not negotiated as the binding RFP did not allow bidders or owners to make changes to the information supplied. The appellant was concerned that disclosing pricing components would cause them undue harm in a competitive market.

The Commissioner noted that in order for section 17(1) to apply, the following test must be met: (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; (2) the information must have been supplied to the institution in confidence, either implicitly or explicitly; and (3) the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) or (c) of section 17(1) will occur.

The Commissioner concluded that the requirements of part one of the section 17(1) test were met, as the Services Agreement contained both commercial and financial information. The Services Agreement contained commercial information because it related to the buying and selling of non-emergency patient transfer services. It contained financial information because it contained pricing information. At issue was the second part of the section 17(1) test. The Commissioner concluded that the second part of the test was not met as the information was not "supplied" to the hospital in confidence.

The Commissioner noted that he was dealing with a request for a finalized performance contract, recognized as Contract B in *Ron Engineering*. The Commissioner affirmed that generally, contents of a contract involving an institution and a third party will not qualify as having been "supplied" for the purposes of section 17(1). Contracts are treated as mutually generated even where the contract is preceded by little or no negotiation. The Commissioner noted two exemptions to this general rule, the "inferred disclosure" and "immutability" exceptions. The inferred disclosure exception applies where information supplied does not appear on the face of a contract but may be inferred from its disclosure. The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. The Commissioner concluded that both exemptions did not apply in this case. The information at issue appeared on the face of the contract, and the terms of the Services Agreement were negotiated through the process of offer

and acceptance, or accepting the pricing components in the bid which were then incorporated into the contract was a form of negotiation.

The Commissioner noted that in order to satisfy the "in confidence" component of part two of the test, the appellant must establish, on an objective basis, that it had a reasonable expectation of confidentiality, implicit or explicit at the time the information was provided. The Commissioner concluded that there was no evidence to support the appellant's assertion of confidentiality of the information contained in the Services Agreement. The hospital did not have a practice of withholding finalized contracts and agreements. The Commissioner did not consider it necessary to consider part three of the section 17(1) test. The appeal was dismissed and the hospital was ordered to disclose the Services Agreement to the requester.

This case confirms that generally, Contract B will not meet the third party information exemption from disclosure under *FIPPA*. In order for Contract B to be exempt under section 17(1), the inferred disclosure or immutability exceptions must apply.

Note: The cases listed below dealt with similar requests under *FIPPA* and came to the same conclusion as *Order PO-3753; Hospital for Sick Children* above.

1. *William Osler Health System (Re),* 2017 CanLII 53379 (ON IPC)
2. *Trillium Health Partners (Re),* 2017 CanLII 51861 (ON IPC)
3. *Kingston General Hospital (Re)*, 2017 CanLII 53377 (ON IPC)
4. *Hamilton Health Sciences (Re)*, 2017 CanLII 53367 (ON IPC). ■

Information in RFQ may be exempt from disclosure under FIPPA

In *Order PO-3764; Ontario (Ministry of Transportation) (Re)* ([2017] OIPC No. 170), found that information in the appellant's request for quotation related to billing and expense amounts, was exempt from disclosure under section 17(1) of *FIPPA*.

The Ministry of Transportation (the Ministry) received a request under *FIPPA* for access to two specified request for quotation (RFQ) documents. The appellant took issue with the Ministry's decision to disclose billing and expense information. The appellant argued that this information qualified for an exemption under section 17(1) of *FIPPA*. The appellant claimed that competition in the construction industry is competitive; only a few companies qualify to present bids to the Ministry and must fight for every point possible to obtain the best overall score. Pricing is a key factor, if not the only factor. The appellant argued that the information which the Ministry intended to disclose would cause irreparable harm to them as it would undermine their competitive position in the market.

As noted above, in order for section 17(1) to apply, the following test must be met: (1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and (2) the information must have been supplied to the institution in confidence, either implicitly or explicitly; and (3) the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) or (c) of section 17(1) will occur.

The first part of the section 17(1) test was met, as the information at issue was both financial and commercial in nature. The information consisted of detailed daily and hourly billing rates, expense rates, pricing break down, and much more.

To determine whether the second part of the s. 17(1) test was met, the Commissioner had to decide whether the information was "supplied in confidence". The Commissioner held that information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. The Commissioner affirmed that unlike the final agreement between a third party and an institution, a proposal is "supplied" to an institution. The Commissioner further noted that the appellant supplied the information with a reasonable expectation of confidentiality. This was evidenced by the confidentiality provision in the RFP which stated that the RFQ proposal is subject to *FIPPA*.

Lastly, the Commissioner found that the third part of the section 17(1) test was met. Disclosure of the withheld information could reasonably be expected to prejudice the appellant's competitive position or cause undue loss to the appellant, as competitors could use the withheld information to underbid the appellant in the future.

This decision confirms that although one of the purposes of *FIPPA* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. ■

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