

# CON·STRUCT

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## WHEN FOIPPA MEETS TENDERING, BIDS AND THE DISGRUNTLED BIDDER

Procurement processes can range from the routine purchase of office supplies to the occasional tender for a high value capital project. Along this spectrum, your organization is likely to have its own practices and procedures for conducting the process, such as those for documentation, communication, evaluation, vendor selection and notification. In addition to the legal implications that tendering and contract law may have on your process, such as the duty to be fair, open and transparent in the case of tendering, local government owners must remain mindful of their legal obligations for disclosure and protection of information under the Freedom of Information and Protection of Privacy Act (FOIPPA).

The intersection of tendering and FOIPPA can be seen where, for example, an unsuccessful bidder seeks disclosure from a local government of information related to a completed procurement process, such as bid amounts, reference checks, compliance assessments, evaluation categories or scoring weights.

Section 13(1) of FOIPPA authorizes a public body to withhold information where it would reveal advice or recommendations developed by or for a public body, the rationale being that effective decision-making processes require the provision of full and open advice. However, a public body must not refuse to disclose certain types of information specified in section 13(2), such as factual material and appraisals. Where, for example, staff have prepared reports containing information and recommendations about bidder selection the information contained in the report may be withheld. In contrast, the information in a report that is strictly factual, such as reference checks, may not be withheld.

Section 17 of FOIPPA authorizes a public body to withhold information where disclosure could reasonably be expected to result in harm to the financial or economic interests of the public body. For each category of information at issue, the public body needs to conduct an assessment of "harm". This assess-

ment should be made with regard to contextual factors: the competitiveness of the market for the particular good or service being procured (less competitive market/greater harm because prices may be higher); the repetitiveness of the procurement (repeat procurement/greater harm because of potentially increased costs); and, the timeframe for additional procurement (purchasing soon/greater harm because pricing and market conditions may not have changed).

Section 21 of FOIPPA requires a public body to withhold information where disclosure could reasonably be expected to result in harm to the business interests of a third party. A public body must refuse to disclose the information if: 1) it is information "of or about a third party"; 2) is supplied in confidence and; 3) disclosure may be harmful to the business interests of a third party.

The information must apply, among other things, to commercial or financial information of or about a third party. Most records within a bid are, by nature of the tendering process, associated with buying and selling of goods or services, so will likely meet this test. The scores given to a bid would also likely be information "of or about a third party" notwithstanding that such information is generated by the public body. In contrast, the evaluation categories developed by staff and the scoring weights attributed thereto may not meet the test, as this information is generated by the public body and is not sufficiently "about" the bidder.

The information must be "supplied", implicitly or explicitly, "in confidence" by a third party. While a bid clearly is "supplied" by a third party, the scoring is internally generated by the public body, and therefore not "supplied" within the meaning of FOIPPA. Whether information is "confidential" needs to be assessed with regard to its content and purpose and the cir-

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cumstances under which it was compiled. An express confidentiality clause in the bid, for example, supports the finding of confidentiality; so too does a confidentiality clause in the tender documents. The general practices of a public body may support or refute confidentiality: is the practice to keep bid information confidential until all bids have been reviewed or until the work contract is finalized? Are results regularly reported during open council meetings?

Lastly, "harm" may consider, among others factors, whether disclosure may negatively effect the competitive position of the bidder or cause undue financial loss to another party.

Although local governments are required as part of tendering to conduct their processes in a fair, open and transparent manner, they should be mindful of their obligations under FOIPPA as to whether bid information should be disclosed.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.



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Sonia is a founding partner of Civic Legal LLP, and practises in the areas of procurement, construction and land development, with a particular focus on tendering law, procurement fairness, construction contracting and use of standard form construction contracts. Sonia routinely provides advise on structuring and administering public tenders and competitive RFPs, managing contractor performance and lien issues and securing land tenure.

She practised as a professional engineer for 10 years and worked on civil and geotechnical design and construction projects in British Columbia and abroad. She provides legal advice with practical insight by drawing upon her unique professional understanding of construction and engineering projects.

Sonia keeps a watchful eye on technological disruptions to the construction industry, and how these may impact the traditional relationships between parties, such as with the use of BIM technology and smart contracts.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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