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Order F14-21

DISTRICT OF MISSION

Caitlin Lemiski
Adjudicator

June 30, 2014

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Summary: The applicant requested proposals submitted in response to a District of Mission RFP for gravel extraction. At the time of the inquiry, no contract had been awarded in response to the RFP. The District withheld the proposals under s. 21(1) of FIPPA. The adjudicator required the District to continue to refuse access to most of the information in the proposals but to disclose information that is publicly available or is of a general nature.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 21(1), s. 22(1)

Authorities Considered: B.C.: Order 03-02, 2003 CanLII 49166; Order 03-15, 2003 CanLII 49185; Order 03-33, 2003 CanLII 49212; Order F13-06, 2013 BCIPC 6 (CanLII); Order F07-15, 2007 CanLII 35476.

INTRODUCTION

[1] This inquiry concerns a request by Allard Contractors Ltd. ("Allard") to the District of Mission ("District") for proposals submitted in response to a Request for Proposals ("RFP") to extract gravel from a District-owned pit. Under the terms of the RFP, the successful proponent would contract with the District for the right to extract gravel for 10 years and make payments to the District based on the amount of gravel extracted. The District received seven qualified proposals, including one from Allard.

[2] After consulting with the proponents, the District withheld all of the proposals under s. 21(1) and portions of some of the proposals under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Allard disputed the District's decision to withhold the proposals, and requested that the Office of the Information and Privacy Commissioner ("OIPC") review the District's decision. Mediation did not resolve the matter and it proceeded to inquiry under Part 5 of FIPPA.

[3] The OIPC invited the proponents to participate in this inquiry. The District adopted the contents of the three proponents who chose to make submissions.

[4] In its submissions to the inquiry, Allard made it clear it is not seeking access to personal information, so I will not consider further the information the District is withholding under s. 22(1) of FIPPA.

ISSUE

[5] The issue in this inquiry is whether the District is required to withhold the proposals because disclosure would be harmful to the proponents' business interests under s. 21(1) of FIPPA.

[6] Under s. 57(1), the District has the burden to prove that s. 21(1) applies to the proposals.

DISCUSSION

[7] **Background**—In 2009, the District issued an RFP to extract gravel from a District-owned pit.

[8] At the time of this inquiry, the RFP to extract gravel had closed but the District had not yet awarded a contract for the services set out in the RFP.

[9] **Preliminary issues**–Allard submits that because two proponents did not make submissions to this inquiry, I should order the District to disclose their proposals. However, the burden to prove that s. 21(1) applies falls to the District, so the lack of a submission from a proponent is not a ground to order release of a proposal.

[10] Allard has offered to disclose its own proposal to the other proponents if I order the District to disclose the proponents' proposals. This offer does not affect whether s. 21(1) requires the District to withhold the proposals; so I have not considered it in reaching my decision.

DISCUSSION

[11] **Records in Dispute**—The records in dispute consist of six proposals the District received. With some variation from one submission to the next as to the emphasis each proponent placed on certain information, the proposals contain the sort of information the District specified in the detailed instructions in the RFP, such as pricing and equipment.

[12] **Harm to Business Interest**—Section 21(1) of FIPPA states in part:

> The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> …
>
> (iii) result in undue financial loss or gain to any person or organization, or…

[13] All three parts of the test must be met in order for the information in dispute to be properly withheld. The principles applied to s. 21(1) have been well established in previous orders.[1] In order for s. 21(1) to apply, a public body must demonstrate that disclosing the information would reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of or about a third party. Next, it must demonstrate that the information was supplied by the third party to the public body, implicitly or explicitly, in confidence. The public body must also then demonstrate that disclosing the information the third party supplied could reasonably be expected to cause one of four kinds of harm set out in subsection (c). This includes a reasonable expectation that disclosing the information could harm significantly the competitive position or interfere significantly with the negotiating position of the third party, or that it could reasonably be expected to result in undue financial loss or gain to any person or organization (ss. 21(1)(c)(i) or (iii)).

[1] See for example, Order 03-02, 2003 CanLII 49166 and Order 03-15, 2003 CanLII 49185.

[14] I will now review each requirement in s. 21(1) as it applies to the present case.

Commercial or financial information of or about a third party

[15] I have reviewed the proposals and conclude that they contain commercial and financial information of or about a third party. The parties do not dispute this issue. The proposals detail the services the proponents intend to provide to the District and the means by which they intend to provide them. For these reasons, I am satisfied that s. 21(1)(a)(ii) applies.

Information supplied

[16] Section 21(1)(b) involves a two-part analysis. The first part is to determine whether the information was "supplied" to the District. The parties do not dispute that the information contained in the proposals was supplied to the District. Consistent with past orders considering similar records,[2] I have concluded that the proposals were supplied to the District.

Supplied in confidence

[17] The second part of the analysis under s. 21(1)(b) is to determine whether the proposals were "supplied, implicitly or explicitly, in confidence". The District submits that the proposals were supplied in confidence. In support, it points to sections in the RFP that direct proponents to submit their proposals in sealed packages and a section of the RFP that states that the District will hold proposals in confidence. Allard disagrees the proposals were supplied in confidence. It says the District has offered no evidence that the proponents actually submitted their proposals in confidence.

[18] I have concluded that the proponents supplied their proposals in confidence. The District required proponents to include a written acknowledgement that they had carefully reviewed the RFP, which included a statement that proposals would be held in confidence, and all of them did this. It also advised prospective proponents that "there will not be a public opening of Proposals received" and that the District "will not disclose or discuss any confidential information of another Proponent".[3] The District provided affidavit evidence that it received all the proposals in confidence.[4] In addition, the three proponents who made submissions all stated that they submitted their proposals

[2] See for example, Order 03-33, 2003 CanLII 49212 and Order F13-06, 2013 BCIPC 6 (CanLII).
[3] Applicant's initial submission, exhibit A, (copy of the RFP) at pp. 7 and 11.
[4] Public body's initial submission, Affidavit of Michael Younie, Director of Development services, at para. 15 on p. 4 (the affidavit was sworn but it did not have an exhibit #, as in, it wasn't exhibit A, *etc.)*.

in confidence. For these reasons, I find the proposals meet the requirement for having been supplied in confidence as required by s. 21(1)(b) of FIPPA.

Reasonable expectation of harm

[19] The third part of the test is s. 21(1)(c). Under this subsection, a public body meets the burden of proving this part of the test if it can establish that at least one of four identified outcomes could reasonably be expected to occur. The subclauses at issue in this case are ss. 21(1)(c)(i) and (iii). They protect information if disclosing it could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party or result in undue financial loss or gain to any person or organization.

[20] **Parties' Submissions**—The District submits that the proposals contain "detailed information about the nature of the services that the proponent would supply and the methods they would use to perform those services".[5] Michael Younie, Director of Development Services for the District, deposed that no contract has been awarded in relation to the RFP and the District may terminate the RFP and reissue one for the same project.[6] The District provided evidence that when staff evaluated the proposals, they set aside 65% of the total possible marks for how much revenue each proponent proposed to generate for the District.[7] Another 25% of possible marks were reserved for information the District categorized as "technical".[8] The District argues that disclosing the proposals would "allow the Applicant to estimate other proponents' pricings in similar projects and thereby gain a significant advantage over its competitors in future RFPs".[9] Mr. Younie deposed that he believes "the interest in the RFP can be attributed to the fact that the District was also exploring the possibility of future aggregate extraction from two tree farm properties owned by the District to the south of the Shaw Pit property".[10] The District submits that disclosing the proposals would provide Allard with "undue knowledge about the practices, procedures, and methods of its competitors that the Applicant may not otherwise have access to. The Applicant could use such information to increase its competitive edge in the industry".[11]

[21] The proponents' submissions about the harm that could reasonably be expected to occur if their proposals are disclosed are consistent with the District's. They submit that it is reasonable to expect that Allard would try to use whatever information it could from their proposals for profit. They submit that the

[5] Public body initial submission, para. 20, p. 4.
[6] Younie affidavit, paras. 18 and 20, p. 5.
[7] Younie affidavit, para. 12, p. 4
[8] Public body initial submission, para. 39.
[9] Public body initial submission, para. 39, p. 9.
[10] Younie affidavit, para. 22.

gravel industry is competitive and that disclosing the proposals would cause them significant harm and undue financial loss.

[22] Allard disagrees. Citing previous orders pertaining to requests for contracts, Allard submits that "having to price services competitively is not a circumstance of unfairness or undue financial loss or gain; rather it is an inherent part of the bidding and contract negotiation process".[12] Allard submits this reasoning applies as much to proposals as it does to contracts.

Significant harm to competitive position: s. 21(1)(c)(i)

[23] In Order 03-33, former Commissioner Loukidelis required a public body to withhold a proposal for internet payment processing services under s. 21(1). In that case, the public body had not yet entered into a contract as a result of an RFP and there was evidence that it intended to reissue the RFP for the same services.[13] The Commissioner identified the competitive nature of the internet payment processing business and the fact that there was evidence that the applicant and the third party proponents were competitors as reasons for his decision. He held that these factors, as well as evidence that the public body intended to reissue the RFP for the same or similar services "heightens the expectation that the applicant or other competitors could be expected to make use in competing in that new RFP, of the commercially valuable insight that the disputed information would give into Global's methods of business, technologies and strategy."[14]

[24] Here, the facts are very similar to those in Order 03-33. The District has not yet awarded a contract. It has provided affidavit evidence that it may reissue the RFP for the same or similar services on nearby properties. The three proponents that made submissions all noted the competitive nature of the gravel industry. The facts of this case make it clear that the parties are direct competitors, as they all submitted proposals in response to the same RFP. Mr. Younie deposed that the District would need to negotiate several requirements with a proponent, such as arranging for road access and delivering utilities to the worksite, before it could enter into a contract. He further deposed that disclosing the proposals to a direct competitor could result in an undue advantage to Allard.[15]

[25] I have read the proposals at issue and have concluded that they contain information that would likely have commercial value to Allard. I am satisfied that release of some of the information could reasonably be expected to harm

[12] Applicant's initial submission at para. 28, p. 9, referring to Order F07-15 at 2007 CanLII 35476, para. 43. (the quote is from the submission, not a direct quote from the order)
[13] Order 03-33, 2003 CanLII 49212, para. 48.
[14] Order 03-33, para. 51.
[15] Younie affidavit, paras. 19 and 21.

significantly the competitive position or interfere significantly with the negotiating position of the proponents because of the value the information in the proposals holds in these circumstances. Some of the information however, could not be reasonably expected to cause significant harm if it was disclosed. This includes information in the proposals, such as copies of the District's RFP and general company profile information, that the evidence before me shows is publicly available.

[26] **Undue Financial Loss or Gain to any Person or Organization**—Allard submits that it is not undue gain to have to price services competitively as a result of viewing contract pricing, and that this reasoning should be extended to disclosure of proposal pricing. In situations where no contract has been awarded and there is evidence that the parties may be invited to compete for the same or similar work, I conclude that the disclosure could reasonably be expected to result in undue financial loss or gain to the proponents. The gain would be undue in this case because the District has yet to negotiate terms with a proponent for the work, therefore it is possible for a competing proponent to use information from another proposal to try and provide a more attractive offer to the District and change the outcome of a competition. It would give a proponent something of financial value for nothing. These circumstances could in turn create a circumstance of undue loss for the proponents.

[27] The Commissioner reached the same conclusion about undue financial loss or gain in Order 03-33:

> [52] As I indicated in Order 00-10, decisions under Ontario's Freedom of Information and Protection of Privacy Act "consistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue" (p. 18). As was the case in Order 00-10, the applicant and other competitors would gain some competitive insight from disclosure of the information in dispute here. That insight would, as in Order 00-10, provide the applicant with an undue gain that would, in my judgement, be an unfair and inappropriate competitive windfall.[16]

[53] I am satisfied that the same information in the proposals that could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the proponents could also reasonably be expected to result in undue financial loss or gain as set out in s. 21(1)(c)(iii) of FIPPA. I am also satisfied that information that I determined could not reasonably be expected to cause harm would not result in undue financial loss or gain because it is either publicly available or of such a general nature that it would not be reasonable to expect that it has monetary value.

[16] Order 03-33, 2003 CanLII 49212, at para. 52.

CONCLUSION

[54] Taking into account all the factors relevant to this case, including the relationship of the parties, the contents of the proposals at issue, and the fact the District has yet to award a contract and may issue future RFPs for the same or similar work, I find that s. 21(1)(c)(i) and (iii) of FIPPA applies to most of the information in the proposals. The exceptions, as I have already set out above, include publicly available information and information that is of such a general nature that it would not be reasonable to expect that s. 21(1)(c)(i) and (iii) of FIPPA would apply.

ORDER

[55] For the reasons given above, I make the following orders under s. 58 of FIPPA:

1. Subject to paragraph 2 below, I require the District to refuse to disclose, in accordance with s. 21(1), the information in the requested records.

2. I require the District to disclose the information highlighted in yellow, as indicated in the copies provided to the District with a copy of this order.

3. I further require the District to give Allard access to this information on or before **August 13, 2014**, and concurrently, to copy me on the cover letter to Allard together with a copy of the records.

June 30, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski,
Adjudicator

OIPC File No.: F12-50466