Office of the Information & Privacy Commissioner for British Columbia

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Order F15-44

# CITY OF KELOWNA

Ross Alexander
Adjudicator

August 21, 2015

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**Summary**: An applicant requested records relating to City of Kelowna tendering processes for a construction project at a park. The City disclosed most of the information in the responsive records, but it withheld some information on the basis that it is exempt from disclosure under s. 13 (advice or recommendations), s. 17 (disclosure harmful to the financial or economic interests of the City) and s. 21 (disclosure harmful to the business interests of a third party) of FIPPA. The adjudicator determined that the City was authorized to refuse to disclose all of the information withheld under s. 13 and that it is required to refuse to disclose some of the information withheld under s. 21. The adjudicator ordered the City to disclose the remaining information to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13, 17 and 21.

**Authorities Considered: B.C.:** Order F14-57, 2014 BCIPC 61 (CanLII); Order F14-37, 2014 BCIPC 40 (CanLII); Order F14-17, 2014 BCIPC 20 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F14-37, 2014 BCIPC 40 (CanLII); Order F10-34, 2010 BCIPC 50 (CanLII); Order F15-39, 2015 BCIPC 42 (CanLII); Order F14-04, 2014 BCIPC 4 (CanLII); Order 01-39, 2001 CanLII 21593 (BC IPC); Order F10-28, 2010 BCIPC 40 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order F13-20, 2013 BCIPC 27 (CanLII); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F13-17, 2013 BCIPC 22 (CanLII).

**Cases Considered:**
*John Doe v. Ontario (Finance)*, 2014 SCC 36; *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII);

*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

## INTRODUCTION

[1] This inquiry relates to an applicant's request for records about City of Kelowna (the "City") tendering processes for a construction project at Stuart Park (the "Project"). The applicant is Arlo Construction Ltd. ("Arlo"), an unsuccessful proponent that bid to complete construction work for the Project.

[2] The City responded to Arlo's request by releasing most of the responsive records. However, it withheld some information on the basis that it is exempt from disclosure under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). It is withholding information on the basis that disclosure would reveal advice or recommendations developed by or for the City (s. 13), that disclosure would be harmful to the financial or economic interests of the City (s. 17), or that disclosure would be harmful to the business interests of a third party (s. 21).

[3] Arlo made a request to the Office of the Information and Privacy Commissioner ("OIPC") to review the City's decision to deny access to the information. Mediation did not resolve the matter, and Arlo requested that this matter proceed to inquiry under Part 5 of FIPPA.

[4] Arlo and the City each provided materials for this inquiry. A number of third parties were also invited, since most of the withheld information is their bid pricing information for the Project. None of the third parties provided submissions, but the principals of three of them provided affidavit evidence as part of the City's materials.

## ISSUES

[5] The issues in this inquiry are:

a) Is the City authorized to refuse access to information under s. 13 of FIPPA because disclosure would reveal advice or recommendations?

b) Is the City authorized to refuse access to information under s. 17 of FIPPA because disclosure could reasonably be expected to be harmful to the financial or economic interests of a public body?

c) Is the City required to refuse access to information under s. 21 of FIPPA because disclosure could reasonably be expected to be harmful to the business interests of a third party?

[6] The City has the burden of proof to demonstrate that Arlo has no right of access to the withheld information, pursuant to s. 57(1) of FIPPA.

## DISCUSSION

[7] **Background –** The City issued an invitation for design, tender support and contract administration services for the Project, a redevelopment of Stuart Park in downtown Kelowna. Urban Systems Ltd. ("Urban Systems") was the successful proponent, and it entered into a contract with the City to provide these services. Part of this work involved providing the City with a construction budget for the Project.

[8] The City also issued an invitation to tender for construction services for the Project.[1] Urban Systems advised the City regarding this tendering process, including by developing construction estimates for the City to determine its budget. The City received four bids, and Arlo was the lowest bidder. However, all of the bids were higher than the budgeted estimate that the City and Urban Systems had developed for the Project. The City decided to cancel this tendering process, redesign the Project with the City to complete some of the construction work, and then proceed with a second tendering process for the revised scope of work. Urban Systems prepared a revised budget for this revised scope of work.

[9] The City issued a second invitation to tender for the revised scope of work. The City received five bids, including one from Arlo. Greyback Construction Ltd. ("Greyback") was the lowest bidder of the revised tendering process, and it was awarded the construction contract.

[10] **Information in Dispute –** The information in dispute is portions of correspondence, budgets and pricing lists. The correspondence is either between City staff, or between Urban Systems and City staff. Most of this correspondence relates to the Project budget and costs. There is pricing information in relation to Urban System's work, as well as pricing information from the proponents who bid on the construction work. The pricing information contains price estimates, proponents' bids, details of the bids (such as unit pricing for approximately 125 categories of goods and services), and the average unit prices of all of the proponents.

*Policy advice or recommendations – s. 13*

[11] The City is withholding portions of twelve pages of emails between City staff, or between Urban Systems and City staff, under s. 13.

[1] The project is a multi-phased project. The tender was not for all phases.

[12] Section 13 of FIPPA authorizes public bodies to refuse to disclose policy advice or recommendations, subject to specified exceptions in s. 13(2). Section 13 states in part that:

> (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> …
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> …

[13] In determining whether s. 13 applies, it is first necessary to establish whether disclosing the information "would reveal advice or recommendations developed by or for a public body or a minister". If so, it is then necessary to consider whether the information at issue is excluded from s. 13(1) because it falls within any of the categories of information listed in s. 13(2) of FIPPA.

[14] As the Supreme Court of Canada stated in *John Doe v. Ontario (Finance)*, the purpose of exempting advice or recommendations from disclosure "is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice."[2] The British Colombia Court of Appeal similarly stated in the *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)* that s. 13 of FIPPA "recognizes that some degree of deliberative secrecy fosters the decision-making process."[3]

*Positions of the Parties*

[15] Arlo submits that s. 13(1) does not apply because the information in dispute is a technical study within the meaning of s. 13(2)(i). It also submits that the City has not demonstrated that there would be any harm if the information about the City's tendering decision is disclosed and made subject to public scrutiny, since the related decisions have already been made by the City.

[16] The City submits that all the information withheld under s. 13 is advice or recommendations within the meaning of s. 13(1), and it does not fall under s. 13(2)(i) because it does not include anything that could possibly be considered a "study". The City also submits that it properly exercised its discretion in deciding to withhold this information.

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[2] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

[3] *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) at para. 105.

Section 13(1)

[17] I will first consider whether disclosing the withheld information would reveal advice or recommendations developed by or for a public body within the meaning of s. 13(1). All of the information withheld under s. 13 – including the information originating from Urban Systems – was clearly developed by or for the City. That leaves the issue of whether disclosure would "reveal advice or recommendations".

[18] Section 13(1) applies to information that would directly reveal advice or recommendations if disclosed. Further, previous orders have stated that s. 13(1) also applies if disclosure would enable an individual to draw accurate inferences about advice or recommendations.[4]

[19] The disclosure of some of the information withheld under s. 13(1) would clearly reveal advice or recommendations because the withheld information is advice or recommendations developed for the City in relation to the City determining its construction budget.[5] There is also one excerpt in an email between City staff that would enable an individual to draw accurate inferences about advice or recommendations,[6] so I find that this excerpt would also reveal "advice or recommendations" under s. 13(1).

[20] There are four other excerpts contained in emails that I find also reveal advice or recommendations. Two of the four excerpts are emails from the principal of Urban Systems to the City's Manager of Parks and Building Projects (the "Project Manager") regarding the revised budget for the Project. The withheld information sets out Urban Systems' methodology for how it determined the estimated construction costs and contingency amounts that Urban Systems was recommending that the City adopt as its budget for the revised Project. The City adduced evidence that this information was calculated by Urban Systems and provided to the City for the purpose of advising the City employees who were responsible for deciding whether to proceed with the second tendering process, and that this information was integral to the decision-making process. The other excerpts are emails between different levels of City management discussing this information and other cost estimates in the context of deciding whether to proceed with a second tendering process. I find that all of this information reveals advice or recommendations that were either developed by the City or for the City (by Urban Systems) as part of the City's decision-making process regarding the Project.

[4] Order F14-57, 2014 BCIPC 61 (CanLII) at para. 14.
[5] Pages 1, 43, 44, 59, 60, 61.
[6] This excerpt is at pp. 4 and 58.

[21] In summary, I find that all of the information the City is withholding under s. 13 is advice or recommendations developed by or for the City within the meaning of this provision.

Section 13(2)

[22] The City cannot withhold information under s. 13(1) if s. 13(2) applies to that information. The applicant submits that s. 13(2)(i) applies in this case. This provision states that a public body must not refuse to disclose "a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body".

[23] The applicant submits that the withheld information is a "technical study". The City replies by submitting that the withheld information does not include anything that could possibly be considered a "study". It adds that any reference to a "cost estimate" must be in the context of a study in order for s. 13(2)(i) to apply.

[24] In Order F14-37, Adjudicator Flanagan interpreted s. 13(2)(i) to mean that the record being considered must be a technical or feasibility study in order for s. 13(2)(i) to apply.[7] I agree with this interpretation. In this case, the record at issue is not a study. It is correspondence that references sums in relation to a cost estimate. I therefore find that s. 13(2)(i) does not apply. Further, I find that none of the other provisions in s. 13(2) apply to this information.

*Exercise of Discretion (s. 13)*

[25] The applicant suggests that the City should be able to demonstrate that disclosing the information it has withheld could reasonably be expected to result in harm before it can withhold the information under s. 13(1). However, s. 13 is not a harms-based exception to disclosure, and there is no requirement for the City to prove that harm would result from disclosure before it can properly decide to withhold the information under s. 13.

[26] As stated in Order F14-17, relevant considerations for public bodies to consider when exercising their discretion to refuse access under s. 13 are factors such as: the age of the record; its past practice in releasing similar records; the nature and sensitivity of the record; the purpose of the legislation; and the applicant's right to have access to his or her own personal information.[8] In this case, the Deputy City Clerk provided evidence of what she considered in making the decision to withhold the information under s. 13, which generally align with these factors. Based on my review of the materials, I am satisfied that the City

[7] Order F14-37, 2014 BCIPC 40 (CanLII) at paras. 62 to 64.
[8] Order F14-17, 2014 BCIPC 20 (CanLII) at para. 52.

has properly exercised its discretion whether to withhold the information under s. 13.

[27] In conclusion, I find that the City is authorized to withhold all of the information it is withholding under s. 13 of FIPPA. I will now consider whether s. 17 applies to the information that I have not already determined the City may withhold under s. 13.

**Section 17**

[28] The information the City is withholding under s. 17 is the following:

- Urban Systems' estimate of construction costs, with a pricing breakdown of those costs, for the first tendering process.[9]
- The proponents' average bid prices for each of the requested goods and services for the first tendering process.[10] There are approximately 125 different categories of items.
- Urban System's estimate of the total Project costs, including the estimated cost of construction resulting from the tendering process, the projected cost of the parts of the construction that the City was going to do itself, the City's other projected costs in relation to the Project (including Urban Systems' fees), and the Project contingency amounts.[11] There is also a detailed breakdown of the estimated construction costs, or budget, for the revised tendering process.[12] There are both initial[13] and updated[14] versions of these records.
- Details regarding Urban Systems' fees.[15]

[29] Section 17 relates to disclosure harmful to the financial or economic interest of a public body. It states in part:

> **17**(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> …

[9] Records at p. 2.
[10] Records at pp. 5 to 19.
[11] Records at pp. 24, 34, 47, 63, 64 and an excerpt on p. 46.
[12] Records at p. 26 to 32 and 36 to 42.
[13] Records at pp. 24 and 26 to 32.
[14] Records at pp. 44, 36 to 42, 47, 63, 64 and an excerpt on p. 46.
[15] Records at p. 33.

> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[30] The issue under s. 17 is whether disclosure "could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy". Sections 17(1)(a) to (f) are examples of this harm, but disclosing information that does not fit into these enumerated examples may still constitute harm under s. 17(1). As for how to interpret ss. 17(1)(a) to (f), former Commissioner Loukidelis stated in Order F08-22 that:

> The intent and meaning of the listed examples are interpreted in relation to the opening words of s. 17(1), which, together with the listed examples, are interpreted in light of the purposes in s. 2(1) and the context of the statute as a whole.[16]

[31] The standard of proof for s. 17 is whether disclosure could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as requiring a reasonable expectation of probable harm from disclosure of the information.[17] It is a middle ground between what is probable and that which is merely possible. A public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach this standard. The determination of whether the standard of proof has been met is contextual, and the quantity and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[18]

[32] The City submits that much of the work required by the City in relation to the Project is common to the type of project the City will be undertaking in future park or building projects. The City states it is withholding information that would disclose the cost estimates and budget information because disclosure would provide Arlo and other proponents with a benchmark for this type of work for future park or building projects. It also submits that it would disclose Urban

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[16] Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43.
[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[18] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para 94 citing *F.H. v. McDougall*, 2008 SCC 53, at para. 40.

Systems' methodology in preparing project estimates. The City submits that proponents could inflate their bids if the City's construction estimates turn out to be higher than what the proponents might ordinarily bid, and it is preferable to the City if they bid based on their costs plus an amount for profit. The City is also withholding the Project contingency amount for similar reasons. Moreover, the City submits that if proponents are aware of the City's internal contingency allowance – thus the degree of financial risk the City is taking – they will use this information as a benchmark for bidding on future projects. Further, the City submits that there would not be a level playing field in future bidding if information is disclosed to Arlo but not its competitors, and, if so, the City would not be meeting its requirement to treat all bidders fairly and equally.

[33] Arlo submits that none of the information falls under s. 17. It states the City only says contractors "could" submit higher prices, and that the City has not shown a direct connection between disclosure of the information and resulting harm. It further points out that the City published its budget amount for the revised tendering process, in hopes that contractors would give the City prices that were less than the budget. Arlo states that disclosure of the City's benchmarks, budgets and unit price estimates may result in lower bids. Moreover, it submits that the situation here is similar to those in Order F14-36 and Order F14-37, where it was determined that s. 17 does not apply. In short, Arlo submits that the City's arguments are no more than bald assertions that are not sufficient to discharge its burden of proof. It also submits that the unit prices from the first tendering process are out-of-date because the decrease in value of the Canadian dollar compared to the US dollar greatly changes the unit prices.

[34] In my view, the issue of whether s. 17 applies in this case turns to a large extent on whether there is a reasonable expectation that disclosure of the information withheld under s. 17 will result in proponents submitting higher bids to the City for future projects (thus resulting in the City paying higher prices). If so, s. 17 would apply because there would be financial or economic harm to the City from paying higher prices. Other than this, however, I find that there are no other grounds for which disclosure of the withheld information could reasonably be expected to result in harm within the meaning of s. 17. For example, I am not satisfied that there would be financial or economic harm to the City if the City discloses the withheld information to Arlo but it does not disclose the information to other proponents. For example, the City could elect to provide the information to other proponents if desired.

[35] In Order F14-37, Adjudicator Flanagan found that procurement processes are inherently competitive, and that many factors influence proponents' bids and the overall competitiveness of a procurement process. In that case, the City of Vancouver submitted that the disclosure of reports (including cost estimates) about the condition of a bridge would harm the city within the meaning of s. 17

because it would reveal cost estimates and recommendations for future work. Adjudicator Flanagan stated the following:

> In relation to s. 17(1)(f), the City says that releasing the reports reveals cost estimates and recommendations for future work, which would provide potential bidders with pricing estimates and preclude unbiased and fair bids in any RFP, ultimately harming the City. I do not accept this argument. First, any RFP process is inherently a competitive process, so cost estimate information does not preclude bidders from submitting a bid that gives them the best chance of being the successful proponent. As noted above, many factors influence proponents' bids and the overall competitiveness of an RFP process. Arguably, the release of the reports will assist in obtaining fair bids, because having multiple informed bidders is the best way to assure the competiveness of the RFP bid process...[19]

[36] I agree with the above quote, in that procurement processes are inherently competitive, so the disclosure of budgets and cost estimates do not ordinarily result in harm within the meaning of s. 17. However, there have been circumstances where s. 17 has been found to apply to such information.[20]

[37] In this case, there were two procurement processes for which Urban Systems developed cost estimates. Based on my review of the records, it is apparent that the component pricing used to make these estimates – and the methodologies for how they were determined – are not the same for each procurement process. The City's position is that s. 17 applies to information for both procurement processes, as it will provide a benchmark for future park or building projects.

[38] In my view, s. 17 does not apply to information regarding the first tendering process because the information is outdated, so it will not allow proponents to predict the City budget or construction estimate for future park or building projects. Arlo – which is one of the proponents bidding to the City for this type of work – submits that the unit prices from the first tendering process are out-of-date because the Canadian dollar has decreased in value in relation to the US dollar, which greatly changed the unit prices. Neither the City nor the other proponents refute this exchange rate point.[21] Further, based on my review of the records, I find that there are meaningful differences between the City's construction estimates and the proponent's actual bid prices for the first and revised tendering process that are not attributable to the differences in the scope of the work. In my view, this indicates that the information in relation to the first tendering process is obsolete. Given these factors, plus the passage of time,

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[19] Order F14-37, 2014 BCIPC 40 at para. 31.
[20] For example, Order F10-34, 2010 BCIPC 50 and Order F15-39, 2015 BCIPC 42 (CanLII).
[21] I note that there are proponents who state that they anticipate that they will use their same pricing from the tendering process for future bids, but this evidence is in relation to the revised tendering process (in December 2013) but not the first tendering process.

I find that the information regarding the first tendering process is outdated and therefore could not reasonably be expected to result in financial harm to the City, so s. 17 does not apply.

[39] The information withheld under s. 17 also includes the subtotal and total construction estimate amounts for the revised tendering process. I find that this information does not have sufficient detail to enable proponents to use it to accurately forecast the budget for future projects. Therefore, disclosure of this information could not reasonably be expected to result in harm to the financial or economic interests of the City. I therefore find that s. 17 does not apply to this information.

[40] The withheld information also contains unit prices for approximately 125 items in the City's construction estimate for the revised tendering process. I find that proponents may be able to use this granular information to predict the City's construction estimates or budgets for upcoming projects – assuming that the unit pricing remains relatively unchanged. However, as I will explain below, even if the unit pricing remains relatively unchanged, I find that disclosure of this unit price information could not reasonably be expected to result in harm within the meaning of s. 17.

[41] For most bidding processes, there will not be a reasonable expectation of harm to a public body if the proponents know its construction budget or estimate, since the proponents are still going to compete against each other to be awarded the contract regardless of the budget amount. However, the City explains that a limited number of companies offer similar construction services, and that the tendering processes for the Project (in which the City received four bids in the first tendering process and five bids in the revised tendering process) were more competitive than for other parks projects.[22] In addition, the Project Manager further states that the City undertakes construction in its numerous parks on a regular basis, and that much of the construction work for the Project is the same type of work that will be required for future park projects.

[42] In my view, the fact that the proponents' bid prices decreased when the City published its budget for the revised tender process is strong evidence that there is competition for this type of City project.[23] The City submits that publishing the budget in the second invitation to tender does not have any relation to harm under s. 17 because the Project was redesigned. I disagree. The City does not explain in detail how the Project was redesigned, and it is apparent to me based on my review of the unit price quantities for the respective

[22] Affidavit of the Project Manager at para. 11.

[23] While I cannot quantify the extent to which bid prices decreased, in part due to changes in the scope of the work and the exact form of information that is before me, it is apparent to me that unit price information decreased in many instances from the first tendering process to the revised tendering process.

tendering processes that many elements of the Project remained the same. The City does not provide an alternative explanation for why the bids for the first tendering process were "significantly higher"[24] than the budget while it received lower bids for the revised tendering process. Further, it does not provide evidence about the City's practice regarding the disclosure of budget amounts to potential proponents regarding other City parks or construction projects. Absent such explanations, in my view the fact that the bid prices significantly decreased when the construction budget was disclosed strongly suggests that there is a competitive market for City projects similar to this one, and that companies bidding on such projects are trying to outbid their competitors rather than guess the maximum price the City will pay for the proposed work. Further, this finding is consistent with the Project Manager's evidence that he anticipates that Arlo will use its competitors' bid amounts (*i.e.* the pricing information that is withheld under s. 21) to underbid its competitors in future park or building construction projects.[25] In any event, given the time that has passed since the revised tendering process, this information is likely outdated. For the reasons above, I find disclosure of this unit price information could not reasonably be expected to result in harm within the meaning of s. 17.

[43] In addition to the unit price information, the City specifically opposes disclosure of the contingency amounts that are built into the City's construction estimates. The City submits that this information discloses the methodology that was used in preparing the budget and reveals its internal contingency allowance. The City explains that the contingency allowance shows the degree of financial risk the City takes with respect to parks building projects, and that proponents could use this information as a benchmark when bidding on future projects. The City submits that if proponents are aware of the City's contingency amount, they could build this into their bids, resulting in higher total bids.

[44] I am not satisfied that disclosure of the contingency information could reasonably be expected to result in harm to the City under s. 17 of FIPPA. The contingencies are financial reserves in place in the event that there are changes to the scope of work from what is stated in the invitation to tender.[26] Since the contingency amount relates to unanticipated changes to the scope of work, it is not apparent to me how this information is relevant with respect to the City evaluating proponents' bids (that are based on the scope of work), or to the proponents in deciding their unit prices for the specified scope of work. I am therefore not satisfied that disclosure of the information about contingencies will impact future bids in any way, let alone that such disclosure could reasonably be expected to result in harm to the City under s. 17 of FIPPA.

[24] Affidavit of the Project Manager at para. 9.
[25] Affidavit of the Project Manager at para. 34.
[26] I note that the successful proponent, Greyback, will only be paid for the actual work it provides, based on the agreed unit prices: The contract between the City and Greyback, including Article 3.

[45] The last type of information withheld under s. 17 is details of Urban Systems' fees regarding the Project. It is not apparent to me how disclosure of information regarding Urban Systems' fees regarding the Project could reasonably be expected to harm the financial or economic interests of the City, so I find that s. 17 does not apply to this information.

[46] In summary, I find that s. 17 of FIPPA does not apply in this case.

**Section 21**

[47] The City is withholding the following types of information under s. 21:

a) The amount charged to date by Urban Systems, projected future costs for Urban Systems and its consultants (including pricing breakdown information) (the "Fee Information");[27]

b) Information in an email containing updated information about Urban Systems' fees (the "Email Information").[28]

c) The bid prices for all of the proponents for the revised tendering process (the "Bid Information"). There are approximately 125 different categories of prices for the Bid Information.[29]

[48] Section 21 of FIPPA requires public bodies to refuse to disclose information that could reasonably be expected to harm the business interests of a third party. Section 21(1), which sets out the three-part test that must be met for the section to apply, states in part:

> The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
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> …
>
> (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,

[27] I note that this price breakdown information is not as detailed or granular as the pricing breakdowns for the construction work that was subject to the tendering processes.
[28] Records at p. 33.
[29] Records at pp. 49 to 57.

> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization,
>
> …

[49] The standard of proof under s. 21 is the same as it is under s. 17.

[50] The City submits that s. 21 applies to all of the information withheld under s. 21. No third parties provided submissions in this inquiry. However, the principals of Urban Systems and two of the unsuccessful proponents provided sworn evidence opposing disclosure of their information under s. 21 (which are part of the City's materials). They make similar arguments to those made by the City. The applicant submits that the materials before me do not establish harm under s. 21(1)(c).

***Commercial or financial information – s. 21(1)(a)***

[51] Section 21(1)(a) applies to, among other things, commercial or financial information of or about a third party. Commercial information relates to a commercial enterprise, but it does not need to be proprietary in nature or have an independent market or monetary value. It suffices if the information is associated with the buying, selling or exchange of the entity's goods or services.[30] In this case, the withheld information is the Bid Information, Email Information and Fee Information. I find that this information is commercial information "of or about a third party" within the meaning of s. 21(1)(a).

***Supplied in confidence – s. 21(1)(b)***

[52] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence by a third party. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied "in confidence".

*Supplied*

[53] In determining whether the information was supplied, it is necessary to consider the content and not just the form of the information.[31]

[30] Order F14-04, 2014 BCIPC 4 (CanLII) at para. 9 citing Order F05-09, 2005 CanLII 11960 at para. 10.
[31] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para 158.

[54] In this case, the Bid Information was provided by proponents in response to the tendering process. I find that this information was clearly supplied by the parties. Whether the Email Information and Fee Information were supplied, however, requires a more in depth analysis. The records in relation to the Email Information and Fee Information were generated by Urban Systems at a time when there was a contract in place between the City and Urban Systems regarding Project work.

[55] Previous orders have stated that contractual terms are not usually supplied because they are "negotiated", even when there is little or no overt negotiation giving rise to the terms in a contract. However, there are exceptions to contractual information being negotiated, which Adjudicator Iyer explained in Order 01-39 as follows:

> Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
>
> …
>
> The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of "supplied", CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will allow readers to learn the terms of the original bid will not shield the contract from disclosure.[32]

[32] Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

[56] I adopt this approach from Order 01-39, which was upheld on judicial review and has been cited in numerous orders.[33] For the terms of a contract to be supplied within the meaning of s. 21(1)(b), the information must be immutable (*i.e*., a fact that is not susceptible to change) or enable accurate inferences about confidential information that was supplied by a third party and is not expressly contained in the contract.[34]

[57] Most of the Fee Information is not expressly listed in the contract between the City and Urban Systems, however – absent evidence to the contrary – I presume that all of these amounts are based on the agreed pricing in the contract. In Order F14-58, it was determined that the information in invoices a contractor provided to a public body was negotiated rather than supplied because the invoiced amounts were supplied pursuant to the terms of an agreement.[35] Similarly, I find that the Fee Information was negotiated rather than supplied because these estimates and charges were pursuant to an existing contract between Urban Systems and the City. Therefore, this information was not supplied under s. 21(1)(b) of FIPPA.

[58] The Email Information contains updated information about Urban Systems' fees, which Urban Systems says discloses its ongoing approach to fees.[36] However, unlike with the Fee Information, the withheld Email Information is not negotiated. I find that it was supplied by Urban Systems to the City within the meaning of s. 21(1)(b).

[59] I will now consider whether the information that was supplied to the City (*i.e.,* the Bid Information and the Email Information) was supplied in confidence.

*In Confidence*

[60] For s. 21(1)(b) to apply, the information must be supplied, explicitly or implicitly, in confidence. This test for "in confidence" is objective, and the question is one of fact. Evidence of a third party's subjective intentions with respect to confidentiality is not sufficient.[37] As stated in Order F13-20, the determination of whether information is confidential depends on its contents, its purposes and the circumstances under which it was compiled.[38]

[61] The City submits that the withheld information was supplied in confidence under s. 21(1)(b). In support of this position, the City provided its "Freedom of

[33] For example, Order F10-28, 2010 BCIPC 40 (CanLII).
[34] Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 45 and 50.
[35] Order F14-58, 2014 BCIPC 62 at paras. 25 to 29.
[36] Records at p. 33.
[37] Order F13-20, 2013 BCIPC No. 27 at para. 22.
[38] Order F13-20, 2013 BCIPC No. 27 at para 27; Also see Order 01-36, 2001 CanLII 21590 at para. 27.

Information and Protection of Privacy Policy and Procedures Manual", which states that:

> Tenders submitted to the City in response to a call for bids or request for proposals are available to the public, except for information regarding unit pricing, employment histories and other confidential third party business information. Section 21 of the *Act* recognizes that the release of such information could potentially harm the company's business interests and provide access to personal information of their employees. Unit pricing is considered proprietary information belonging to the third party. This information is therefore "blacked out" or severed prior to disclosure by the FOI Coordinator.

[62] The City further states that its policy is to receive the unit prices that are set out in proponents' tender bids in confidence and to not release this information. It opens the bids received in response to invitations to tender in public, but its policy is to only announce the total tender price of the bids received and not the unit prices. The City's Project Manager also deposed that his expectation is that the proponents who provided bids in relation to the Project were providing their fee and bid information in confidence.

[63] In addition to the City's evidence, the principals of three proponents deposed that they believed they submitted their unit pricing or fee estimate to the City in confidence. Further, Arlo does not dispute that this information was supplied in confidence.

[64] For the above reasons, I find that the Bid Information was supplied in confidence. I also find that the Email Information was supplied in confidence due to the evidence of the City's Project Manager and Urban Systems' principal that their expectations were that Urban Systems was providing this information to the City in confidence. Therefore, I find that s. 21(1)(b) applies to this information.

***Reasonable Expectation of Harm from Disclosure – Section 21(1)(c)***

[65] I will now consider whether disclosure of the Bid Information and the Email Information could reasonably be expected to result in harm to third parties pursuant to s. 21(1)(c).

[66] There must be a reasonable expectation of harm from disclosure within the meaning of s. 21(1)(c) in order for s. 21 to apply. Section 21(1)(c) states in part:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> ...
>
> (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 ...

[67] The City submits that disclosing the information at issue would result in harm to third parties in accordance with ss. 21(1)(c)(i) and (iii).

[68] The Project Manager's evidence is that the works associated with the Project are not unique, and that the City will require this same type of work for other future park and building projects. The City also submits that it is concerned that Arlo will use this information to try to underbid its competitors for future projects, and that it will undermine the level playing field.[39] The City states that the Bid Information is unit pricing, the disclosure of which would harm the third parties in future competitive bid processes.

[69] Two of the third parties who provided evidence in this inquiry are the principals of Arlo's competitors. They state that the unit prices in their Bid Information are not unique to the Project, and they anticipate that they will use that same pricing from the revised tendering process for future bids to the City and for other municipal clients. They state that their unit pricing is based on their expertise and experience in the industry, and their bottom line. Further, one of them also noted that his company's pricing information was the result of preferential pricing that suppliers and subcontractors provided to his company in confidence. The third parties also state that there are a limited number of companies that offer similar construction services, so the market is very competitive.

[70] Urban Systems states that the Email information explains Urban Systems' ongoing approach to fees during the life of a project, and that competitors could use this to their advantage in future bid processes.[40]

[71] Arlo submits that the City and the third parties have not met the burden of proof with respect to harm under s. 21. Arlo also points out that the affidavits of the third parties refer to the revised tendering process, and that they do not expressly oppose disclosure of the first tendering process (which is the information that Arlo is most interested in).

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[39] City's initial submissions at para. 71; Affidavit of the Project Manager at para. 34.
[40] Records at p. 33.

Bid Information for the First Tendering Process

[72] Arlo and the City make a number of submissions regarding the Bid Information for the first tendering process. However, there is no information withheld under s. 21 that is Bid Information in relation to the first tendering process. Therefore, it is not necessary for me to address this information.

Bid Information for the Revised Tendering Process

[73] The City is withholding the unit pricing for Arlo, Greyback (*i.e.* the successful proponent), and three unsuccessful proponents regarding the revised tendering process. It is clear that disclosing Arlo's own unit prices to Arlo will not result in a reasonable expectation of harm under s. 21(1)(c). Therefore, I find that the City cannot withhold this information under s. 21.

[74] Further, Greyback's unit prices became the pricing terms of the contract between Greyback and the City.[41] While I determined that this information was supplied in relation to Greyback's bid under the revised tendering process, this same unit price information is negotiated information in the context of the contract (*i.e.*, it is not supplied information within the meaning of s. 21(1)(b)). Therefore, since s. 21 does not apply to this information in the contract, I find that there is no reasonable expectation of harm arising from disclosure of this same information in the City's records that are at issue here.

[75] The remaining Bid Information is the unit prices, and the totals and subtotals of those unit prices, from the three unsuccessful proponents (other than Arlo).

[76] As previously stated, the unit price information is detailed, as it contains specific unit pricing for approximately 125 categories of goods and services. The evidence is that the Project works are not unique, and that the third parties intend to use this unit pricing for future projects, so disclosure of this information may result in Arlo being able to forecast and undercut its competitors' future bid prices. Further, there are a limited number of companies that offer these types of services, which in my view increases the prospect of a competitive advantage to Arlo and harm to its competitors. I also note that the procurement process is an invitation to tender, where the successful proponent is usually chosen based on price rather than a request for proposals where the successful proponent is ordinarily chosen based on an evaluation of a number of different categories. In my view, this increases the prospect of harm from disclosing the pricing information. For these reasons, I am satisfied that disclosure of the unit pricing

[41] The City provided a copy of the contract to me at my request. Further, even without reviewing the contract, absent evidence to the contrary, I would have found that this is the same information given its context as the bid pricing as part of a tendering procurement process that gave rise to a contract between the parties.

information for the three unsuccessful proponents (other than Arlo) could reasonably be expected to harm significantly a third party's competitive position, or result in undue financial loss or gain, within the meaning of ss. 21(1)(c)(i) and (iii).[42]

[77] The total and subtotal information for the unit pricing for the three unsuccessful proponents includes subtotals for the main scope of work and for optional work, the total tender prices, and the GST amounts. While this information discloses the third parties' total bid prices for the scope on the Project, in my view it is not sufficiently detailed for disclosure to enable accurate forecasting of the third parties' bids for future projects. I therefore find that there is no reasonable expectation of harm under of ss. 21(1)(c)(i) and (iii) arising from disclosure of this information.

The Email Information

[78] The Email Information explains Urban Systems' fees regarding the Project, which Urban Systems states would disclose its "approach to fees". It states that competitors could use this information to their advantage in future competitive bid processes. However, Urban Systems does not elaborate how its competitors could use this information in future bidding processes or negotiations, and it is not apparent to me how competitors could use this information to their advantage. Based on the information before me, I am not satisfied that disclosure of the Email Information would disclose its "approach to fees", let alone that there would be a reasonable expectation of probable harm arising from Urban Systems' competitors copying or using this information. I therefore find that s. 21(1)(c) does not apply to the Email Information.

Conclusion under s. 21

[79] In summary, I find that s. 21 applies to the unit price Bid Information for the three unsuccessful proponents, and that the City is required to withhold this information from Arlo. However, I find that s. 21 does not apply to the other Bid Information, the Email Information or the Fee Information, so the City is required to disclose this information to Arlo.

[42] Records at pp. 49 to 56. I further note that there is one item that is listed as a "subtotal" in the Records on p. 53 that I find to be a "unit price" for the purpose of this analysis because it is the subtotal of one unit price. For clarity, I find that s. 21 applies to this information for the three unsuccessful proponents (other than Arlo).

## CONCLUSION

[80] For the reasons given above, under s. 58 of FIPPA, I order that the City is:

a) authorized to withhold the information it is withholding under s. 13 of FIPPA;

b) required to give access to the applicant for the information it is withholding under ss. 17 or 21 of FIPPA, subject to paragraph (a) above and paragraph (c) below, by **October 5, 2015** pursuant to s. 59 of FIPPA. The City must copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant; and

c) required to withhold the information I have highlighted in a copy of the records that will be provided to the City, pursuant to s. 21 of FIPPA.

August 21, 2015

**ORIGINAL SIGNED BY**

Ross Alexander, Adjudicator

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