ORDER MO-1811

Appeal MA-030396-1

City of Vaughan

BACKROUND AND NATURE OF THE APPEAL:

The City of Vaughan (the City) placed advertisements in local newspapers inviting proposals from general contractors for the construction of a 23,500 square metre multi-use facility in the City. The project, a joint venture between the City and the York Region Catholic School Board, was limited to general contractors who had completed similar institutional projects at a value not less than $30,000,000. The proposal call required contractors to complete and submit a "CCA Document No. 11", the Canadian Standard Form of Contractors Qualification Statement for Building Construction (the qualification statement). The qualification statement contains banking and bonding information, key company personnel who would be involved in the project, and a list of the contractor's previous major projects and their total construction dollar value.

Four contractors submitted proposals and a successful bidder was chosen.

The City received a request under *the Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a member of the media for the qualification statements of the various contractors who bid on the project.

The City identified the four responsive records and denied access to them on the basis of the exemption in section 10(1) of the *Act* (third party commercial information).

The requester (now the appellant) appealed the City's decision. In his appeal letter, the appellant raises the possible application of the public interest override in section 16 of the *Act*.

During mediation, two contractors consented to the disclosure of their qualification statements, and the City provided a copy of these two records to the appellant.

Further mediation was not successful and the appeal was transferred to the adjudication stage. I started my inquiry by sending a Notice of Inquiry to the City and to the two contractors who did not consent to the disclosure of their qualification statements (the affected parties). All three parties responded with representations. I then sent the Notice to the appellant, along with the representations of the City and the relevant portions of the representations of the two affected parties. The appellant also submitted representations, which were in turn shared with the City and the affected parties. Both affected parties responded with a final set of representations, but the City did not.

RECORDS:

The records consist of the qualification statements submitted by each of the affected parties. Record 1 (affected party 1) is 10 pages in length, and Record 2 (affected party 2) is eight pages.

DISCUSSION:

THIRD PARTY INFORMATION

General principles

Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the City and/or the affected parties must satisfy each part of the following three-part test:

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 City 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) and/or (c) of section 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

I have decided to deal first with the harms component of section 10(1).

Part 3: Harms

General principles

To meet this part of the test, the City and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

The City submits:

> … Disclosure of the [past] project value and annual volume of business may offer insight into how a competitor came to calculate the total price for a specific project, knowing how many potential bidders there are in the industry who could compete for a project at a specific time period. Knowing the value of past-awarded contracts by a specific contractor could put them at a competitive disadvantage as competitors could submit lower bids for similar sized projects if they felt that the contractor would submit similar pricing for future projects. Disclosure could prejudice the competitive position of the contractors.

Affected party 1, the successful bidder, also takes the position that its competitive position would be negatively impacted by the disclosure of its qualification statement form:

> Bidding for various construction jobs is highly competitive. Bids are kept secret by each construction company who often bid against each other on many different projects in a given year. If other construction companies knew [affected party 1's] total sales for example, or their bonding limits, they could use the information to undercut or underbid [affected party 1] on other projects.

Affected party 2, one of the unsuccessful bidders, submits that disclosure would result in competitive harm:

> … In particular, the information with respect to the contractors' [Workers' Compensation Board] or [Workers' Safety and Insurance Board] rating, their

> bonding and insurance arrangements, past project works and financial strengths and weaknesses, could reasonably be expected to prejudice their competitive position in the provision of contracting services to clients such as [the City] and the York Region Catholic School Board. This type of information is not normally widely-known in the construction industry and its disclosure, in light of the very competitive nature of the construction industry, could reasonably be expected to result in significant harm to the construction firm to which it relates.

In its reply representations, affected party 2 acknowledges that the appellant is only seeking access to the total value of the work performed under prior contracts and their completion dates, but contends that this:

> … provides useful information to its competitors about [affected party 2's] resources and capabilities. [Affected party 2] further submits that the disclosure of this type of information may reveal weaknesses, which ultimately might lead to competitive harm to [affected party 2].

In his representations, the appellant makes it clear that he is not interested in receiving "information in the [qualification statements] such as financial institution information, or bonding company information that might be deemed confidential". This type of information appears in section 4 titled "Financial References" on page 1 on each record and, based on the appellant's representations, I will remove these portions of the records from the scope of the appeal.

The appellant takes issue with the claim that the information he seeks is sensitive or that its release would be prejudicial. He points out that he has already received the comparable records for the two other bidders, and provides the links to various websites of contracting companies that list past projects and dollar values. He submits:

> It is not enough to just say that the information is sensitive and its release prejudicial. Such submissions as to harm are purely speculative and indeed are inconsistent with the routine publication of the cost of public sector projects. For example: Take a look at the websites for [the 2 contractors who consented to disclose their qualification statements] and you will see that such information (including the cost of the completed project) is routinely displayed and a matter of pride. Institutions such as school boards, hospitals and municipalities routinely release the "value" of a construction project, the name of the contractor and when it was started or expected to be completed. I do not understand the secrecy here. If this were an issue of the dollar value of construction projects that someone is bidding on, that would be a whole different matter. If companies such as [the 2 contractors who consented to disclose their qualification statements] feel confident enough to post such information on their websites, I submit that it is strong evidence there is no harm.

> …
>
> This is historical data relating to specific projects and unique to those projects. We submit that the release of this historical data cannot reasonably be expected to compromise the contractor's position in future bids or give any advantage to its competitor. This is historic data, of a very general and often public nature, and that is routinely disclosed at any rate.

I find that the City and/or the two affected parties have not provided the necessary detailed and convincing evidence to establish a reasonable expectation of competitive harm through the disclosure of the qualification statements of the two affected parties. The appellant has agreed not to pursue access to banking and bonding information, where different considerations might apply, and has instead restricted his request to a list of past projects completed by each of the two contractors and their total value. As the appellant points out, this information is historic, and I am not persuaded that there is any reasonable possibility that a competitor could use the bottom-line total value of these past projects in a way that could prejudice the competitive position of the affected parties in a future selection, as required in order to fall within the scope of the section 10(1)(a) harm. While I can accept the City's and the affected parties' position that construction projects of this nature are highly competitive, it simply does not follow that disclosing the particular information at issue in this appeal, which, as the appellant points out, is frequently made public by either the public institution or the contractor, would compromise the interests of either affected party in bidding on future contracts of this nature.

Therefore, I find that the harms component of section 10(1)(a) has not been established.

Section 10(1)(b): similar information not being supplied

The City submits that if the qualification statements are disclosed, fewer bidders would bid on future projects, resulting in higher costs to the City. The City also expresses concern that, given the affected parties' expectation that these statements would not be disclosed, it "may be exposed to liability from those third parties who may wish that the information pertaining to them continued to be confidential".

The City further submits:

> … It is in the public interest that institutions be able to fully access [sic] the merits of tenders supplied to it for projects that will be funded by the taxpayers. This includes the ability of the City to contract and receive information in confidence regarding past work performed by the bidders.

Affected party 1 points to a risk that the City will receive fewer bids for future projects if the qualification statements of the contractors are disclosed, and submits that if the City is unable to protect this type of information from disclosure, companies would provide less information "thus undermining the City's ability to make decisions based on full and complete facts".

Affected party 2 make similar submissions:

> … [C]ontractors like itself would restrict the submission of documentation or opt not to provide the information requested in the qualification process if the information they provide is to be disclosed to their competitors. This would limit the qualification review and eliminate the competitive process.

The appellant points to the fact that information similar to that which is found on the qualification statements is currently publicly accessible on web sites administered by the City and contractors, including the affected parties, who are involved in large-scale public sector construction projects. He submits:

> … that such information is routinely and publicly available, whether it's the cost of a school, a hospital or a jail. What I want to know is what [the two affected parties] submitted as their list of completed construction projects.

Again, I am not persuaded that disclosing the specific information that is at issue in this appeal could reasonably be expected to result in similar information no longer being supplied to the City in the context of future construction projects. Construction companies doing business with public institutions such as the City understand that past work experience on similar scale projects is often an important part of a competitive selection process, and it is simply not credible to argue that the City would be provided with less information of this nature in future. The qualification statement is a requirement set by the Canadian Standards Association and would appear to be a widely accepted component of any competitive selection process of this nature. The fact that other participating contractors have agreed to disclose their qualification statements also supports my conclusion that the harms in section 10(1)(b) are not present. While different considerations might apply to other information forming part of a contractors competitive bid for a project, the information at issue in this appeal is a high-level, bottom-line cost figure for past work, and I do not accept that its disclosure could reasonably be expected to have any impact on a contractor's willingness to provide the City with similar information in future.

Therefore, I find that the harms component of section 10(1)(b) has not been established.

Section 10(1)(c): undue loss

The City submits:

> … The contractors could suffer an undue loss if they felt that they could no longer bid on City of Vaughan projects due to the disclosure of their third party commercial and financial information. The number of successful bids and contracts awarded to a contractor could be reduced. As a result, their profits would be reduced, which would in effect be an undue loss to their company.

The affected parties essentially rely on their section 10(1)(a) submissions to support the harms component of section 10(1)(c) as well.

For the same reasons outlined in my discussion of the section 10(1)(a) harms, I find that the City and/or the affected parties have not provided the necessary detailed and convincing evidence to establish a reasonable expectation that the affected parties would suffer undue loss should their qualification statements be disclosed.

The appellant's submissions that the two other bidders have agreed to disclose their qualification statements, and his ability to find similar information through searches on the internet, supports my finding that the harms component of section 10(1)(c) is not present with respect to the specific information at issue in this appeal.

In summary, I find the evidence of harm provided by the parties resisting disclosure in this appeal is speculative and does not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)*. Therefore, part three of the 3-part test for exemption under section 10(1)(a), (b) and/or (c) has not been established. Because all three parts of the test must be established, I find that the qualification statements of affected parties 1 and 2 (subject to the severance of section 4 "Financial References" on page 1 of each statement) do not qualify for exemption and should be disclosed.

In light of my finding under section 10(1), it is not necessary for me to deal with the public interest override submissions.

ORDER:

1. I order the City to disclose the qualification statements of affected parties 1 and 2 (subject to the severance of section 4 "Financial References" on page 1 of each statement) to the appellant by **August 18, 2004** but not before **August 13, 2004**.

2. In order to verify compliance, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: July 13, 2004
Tom Mitchinson
Assistant Commissioner