Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4220

Appeal MA20-00560

Rainy River District School Board

June 24, 2022

Summary: The Rainy River District School Board (the board) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the request for proposals (RFPs) for a specified project (the project). Following a third party notification, the board granted full access to responsive records. The third party (the appellant) appealed the board's decision. While the board disclosed additional portions of the records to the requester with the appellant's consent during mediation, the requester continued to seek access to the remaining withheld portions of a bid rate form. In this order, the adjudicator allows the appeal in part. She finds that two portions of the withheld information are exempt from disclosure under section 10(1) (third party information), but she finds that another portion of the withheld information is not exempt under section 10(1) and orders the board to disclose the non-exempt portion to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1).

Orders Considered: Orders MO-2193 and PO-3764.

OVERVIEW:

[1] The Rainy River District School Board (the board) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified request for proposal (RFP) for a project (the project) as follows:

> RFP [specified number] [specified project] submitted general contractor(s) rate bid form, supplemental bid rate form, schedule and proposed staff. (All tender forms)

[2] Following a third party notification of the successful bidder, the board issued a decision granting full access to the responsive records to the requester.

[3] The third party (appellant) appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant consented to the disclosure of portions of the responsive records that the board subsequently disclosed to the requester based on this consent. After reviewing the records, the requester advised that they were pursuing access to all remaining portions of one of the records, the bid rate form. The appellant informed the mediator that it does not consent to the disclosure of additional portions of this record, as it believes these portions should be withheld under section 10(1) (third party information) of the *Act*.

[5] As mediation did not resolve this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[6] As the adjudicator assigned to this appeal, I decided to conduct an inquiry into this matter. I began by inviting the appellant to make representations in response to a Notice of Inquiry, setting out the issues and questions raised by this appeal. I received representations from it (including an affidavit), which I then shared with the requester and the board, when inviting representations from them in response to the Notice of Inquiry. While I received representations from the requester, the board did not submit any representations. I then sought and received reply representations from the appellant followed by sur-reply representations from the requester. The representations of the parties were shared with one another in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In this order, I allow the appeal, in part, and find that two portions of the withheld information are exempt from disclosure under section 10(1). However, I uphold the board's decision to disclose another portion of the withheld information to the requester, which is not exempt under section 10(1) of the *Act*, and order it to disclose the non- exempt information to the requester.

RECORD:

[8] The record at issue is the board's bid rate form, as completed by the appellant and submitted as part of its bid submission in response to the board's RFP (the bid rate form). The withheld portions are under the subheading "Unit Price" on page three (appellant's unit prices) and the subheading "List of Sub-contractors", which lists the

name of subcontractors (subcontractors' names) and the amount for the specified divisions/sections of the project (subcontractors' prices) on pages four and five (together referred to as the information at issue).

DISCUSSION:

[9] The sole issue in this appeal is whether section 10(1) applies to the information at issue. Section 10(1) states:

> 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, if the disclosure could reasonably be expected to,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continues to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[10] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.1 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.2

[11] For section 10(1) to apply, the institution and/or the third party 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 institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part one: Does the information at issue reveal commercial or financial information?

[12] For the reasons that follow, I find that the information at issue consists of commercial and financial information and therefore, it meets part 1 of the test.

[13] The types of information listed in section 10(1) have been discussed in prior orders. Those types of information with relevance to this appeal are:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[1] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[2]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[3]

Representations of the parties

[14] The appellant submits that the information at issue is commercial and financial information because it consists of the price at which the appellant would carry out the project (the appellant's unit prices), and the names of various subcontractors (the subcontractors' names) it would use and the prices for each of their respective scopes of work (the subcontractors' prices). It explains that it submitted a completed bid rate form in response to the board's RFP, which relates to the buying, selling or exchange of services and contains information about its commercial operations. It also explains that the information at issue relates to the payment of proposed services[4] and the subcontractors' prices constitute financial data related to the budgets and operating costs for the project.

[15] The appellant refers to the following orders:

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[1] Order PO-2010.
[2] Order P-1621.
[3] Order PO-2010.
[4] Order MO-3791 at para. 51.

- Order MO-3791, which found that a bid is "commercial information" because it relates to the provision of services;[5]
- Order PO-1722, which found that a list of subcontractors included in a bid tender made in response to a tender call was "commercial information"; and
- MO-2906, which found that the list of subcontractors in a stipulated price bid submitted in response to a tender process was "commercial information".[6]

[16] The requester did not directly address this part of the test in its representations.

Analysis and findings – the information at issue is commercial and financial information

[17] I have reviewed the information at issue. I agree with the appellant and find that it consists of commercial and financial information.

[18] The information at issue is comprised of the appellant's unit prices, the subcontractors' names and the subcontractors' prices and is contained in the appellant's successful bid rate form for a commercial contract with the board for the project. The information at issue relates to the appellant's provision of construction services to the board, which is commercial information, and it also relates to the payment for the provision of these services, which is financial information.

[19] Accordingly, I find that the information at issue reveals *commercial information* and *financial information*, as defined in section 10(1) of the *Act*, and part one of the three-part test is satisfied.

Part 2: Was the information at issue supplied in confidence?

[20] For the reasons below, I find that the information at issue meets part 2 of the test.

[21] The requirement that the information was *supplied* to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7] Information may qualify as *supplied* if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[22] In order to satisfy the *in confidence* component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was

[5] At para. 51.
[6] At para. 16.
[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

provided. This expectation must have an objective basis.[9]

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure.[10]

Representations of the parties

[24] The appellant submits that it supplied the information at issue to the board with a reasonable expectation of confidentiality because it was submitted to the board as part of its bid submission. The appellant explains that the board had no other way of, or reason for, having the information at issue apart from the appellant's supplying it to the board as part of the bidding process. It refers to Order MO-3791, which found that the provision of information in this manner is considered a *supply* to an institution.[11]

[25] The appellant also submits that it held a reasonable and objective understanding that the bid process was both implicitly and explicitly confidential. It refers to the terms and conditions of the RFP process, which included the following clause:

> 3.5.2. A proponent should identify any information in its proposal or any accompanying documentation supplied in confidence for which confidentiality is to be maintained by the Board. The confidentiality of such information will be maintained by the Board, except as otherwise required by law or by order of a court or tribunal. The Board is subject to the *Municipal Freedom of Information and Protection of Privacy Act*. Proponents are advised that their proposals will, as necessary, be disclosed, on a confidential basis, to advisers retained by the Board to advise or assist with the RFP process, including the evaluation of proposals. If a proponent has any questions about the collection and use of personal information pursuant to this RFP, questions are to be submitted to the RFP Contract.

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[9] Order PO-2020.
[10] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[11] At para. 59.

[26] Despite this clause, the appellant did not specifically identify any information in its bid submission as being confidential. However, it submits that confidentiality of the information at issue is both implicit and explicit, and that it did not need to be specifically identified in its bid submission.

[27] The appellant submits that the above clause indicates that proposals "will, as necessary, be disclosed on a confidential basis, to advisers retained by the [b]oard…." It submits that this means, notwithstanding the reference to the *Act*, that the board explicitly indicated that bid submissions would be handled confidentially and that the appellant relied on this. It further submits that such language explicitly affirms the appellant's expectation that the information was supplied in confidence.

[28] The appellant also submits that it only supplied the information at issue to the board as part of the bidding process and not to others outside the bidding process. The appellant further submits that the information at issue is not disclosed outside of the bidding process or available from sources to which the public has access. In addition, it submits that it is normal commercial practice to treat competitive proposals as proprietary and confidential.

[29] The appellant also refers to previous IPC orders, which have acknowledged that given the competitive nature of particular industries, it would be reasonable for an organization submitting specific proprietary information to do so with an expectation of confidentiality.[12] The appellant submits that the construction industry is one such competitive industry, in which contractual relationships depend on the exchange of proprietary information and safeguards to ensure that proprietary information remains as such.[13]

[30] The appellant submits that the above principle is also followed in the findings of Adjudicator Hale below:

> I further find that, in the context of the normal practices of the construction industry, information pertaining to hourly rates and unit prices are submitted with a reasonably-held expectation that they will be treated in a confidential manner by the project managers and property owners. This finding is in keeping with a number of previous orders which have held that pricing information is generally considered to have been submitted on a confidential basis when determining whether it is properly exempt from disclosure under section 10(1) or its provincial equivalent. [Orders P-166, P-610, M-250, PO-1696 and MO-1471]
>
> Accordingly, I find that the pricing information relating to unit prices and hourly rates […] were supplied to the Region with a reasonable

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[12] Order P-655.

[13] See Order MO-2176 at paras. 45-47.

> expectation that they would be treated in a confidential manner.[14] (emphasis by appellant)

[31] The requester submits that as a taxpayer, he should be able to see all costs of the project because the government is publicly funding it and information of this nature should be transparent to the public. It explains that, in the past and with other school boards, it would have been able to see all the bid submissions at closing. It also claims that in a typical year, "the tender[15] would have been opened publicly and all the results disclosed;" however, because of the COVID-19 pandemic, the protocols changed and for public health considerations, it was a private opening. In addition, the requester submits that the names of the subcontractors and their rates should be public as these subcontractors will eventually be issued subcontracts for these stated amounts and normally, such information is "disclosed on public tenders that use public funding."

[32] In reply, the appellant submits that the RFP process was private and confidential, as they always are. It submits that at most, the board publicly announces the bidder to whom the contract was awarded and even then, it only publicizes the contract price and not any of the other details and the public would not know if the bid was compliant.

[33] In addition, the appellant submits that the requester incorrectly claims that the subcontractors' names and prices are "disclosed on public tenders that use public funding." It submits that this is not the case because the details of a contract are not publicly disclosed – what is disclosed is the name of the successful bidder and the total contract price.

[34] In sur-reply, the requester submits that the type of process used by the board should not be determinative of whether the full contents of the bids should be disclosed in this appeal. It also submits that disclosure of the bids can be done by viewing or reading out the results, or by providing the interested party with a copy of the full submission.

Analysis and findings – the information at issue was supplied in confidence

[35] I find that the appellant supplied the information at issue in confidence to the board.

[36] The information at issue is included in the appellant's bid rate form, as part of its successful bid submission in response to the board's RFP, which the appellant prepared and submitted to the board. Accordingly, it is reasonable to find that it was *supplied* for the purposes of section 10(1) because the board had no other way of (or reason for) having that information apart from the appellant's supplying it to the board as part of

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[14] Order MO-1536-F at paras. 20-21.

[15] While the requester refers to a tender bid and process in its representations, the appellant correctly points out that the contract was awarded following an RFP process. In sur-reply, the requester admits this.

the board’s bidding process.

[37] The terms and conditions of the RFP process includes a clause asking proponents to identify any information supplied in confidence. I note that the appellant did not identify any such information to the board in its bid rate form. I also note that such a clause may weigh against finding that the information at issue was supplied *in confidence*, especially if a proponent does not identify any information supplied in confidence.

[38] Nevertheless, this confidentiality clause also indicates that the bid submission is subject to the *Act*. Given that the *Act* explicitly protects the confidential informational assets of third parties, this clause supports an expectation of confidentiality regarding the appellant’s bid rate form. As found in Order PO-3764, “[The confidentiality clause] is an expression of the [institution]’s intent to maintain the confidentiality of the proposal, and it is reasonable for the appellant to rely on it.”[16]

[39] Moreover, given that the board received the information at issue from the appellant as part of a bidding process, I am satisfied that the information at issue was provided with a reasonable, objective expectation of confidence. The information at issue – namely, the appellant’s unit prices, the subcontractors’ prices and the subcontractors’ names – is not the type of information that can be negotiated in the context of an RFP process, nor is it generally known to other parties. Similarly, I accept that the appellant supplied the information at issue to the board as part of the bidding process, and not to others outside of the bidding process or to the public in general. It is also reasonable to accept that others would not readily know this type of information. I am willing to accept the appellant’s position that given the competitive nature of the construction industry, it would be reasonable for the appellant to have submitted specific proprietary information with an expectation of confidentiality.

[40] Therefore, I find that the appellant *supplied* the information at issue *in confidence* to the board. Accordingly, the information at issue meets part 2 of the test.

Part 3: Could disclosure of the information at issue reasonably be expected to result in the harms in section 10(1)?

[41] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[17]

[42] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness

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[16] At para. 31.
[17] *Accenture Inc.* v. *Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616; *Ontario* (*Community Safety and Correctional Services)* v. *Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674; *Merck Frosst Canada Ltd.* v. *Canada (Health*), [2012] 1 S.C.R. 23.

of the consequences.[18] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[19]

Representations of the parties

Sections 10(1)(a) and (c) - Prejudice to competitive position and undue loss/gain

[43] The appellant submits that the harms contemplated by sections 10(1)(a) and (c) could reasonably be expected to transpire if the information at issue were disclosed, and that such disclosure could be expected to have a negative effect on the appellant's competitive position in the market and cause undue loss to it and gain to its competitors. It submits an affidavit in support of this position.

[44] As described in its affidavit, the appellant submits that disclosure of the information at issue could allow competitors to develop solutions that are unfairly competitive compared to those proposed by the appellant, resulting in undue loss to it and undue gain to its competitors. Specifically, it submits that its competitors could use the information at issue to undercut the appellant's prices and negotiating position in future procurements. It also submits that its expertise and assessment of costs, in which it has invested significant time, effort and resources to develop, will be used against it to gain an unfair competitive advantage and, in turn, jeopardize the appellant's competitive position. It further submits that it could be expected to suffer significant losses to revenue due to the exploitation of the information at issue by its competitors.

[45] The appellant submits that:

> [The appellant] is only one of three general contractors in Thunder Bay with the infrastructure, resources and manpower to price and bid for projects of the same scale as the…[p]roject. Opportunities like this are hard to come by in Thunder Bay. Projects that are worth more than $20 million only come up maybe once every four years and we face stiff competition each time.

[46] In response, the requester submits that this project dealt with a publicly issued request funded by public tax dollars. As a taxpayer, the requester submits that it is of interest to know that the process has been followed fairly and how/where the money is being spent. It submits that the level of detail provided in the record would not cause harm to the appellant – unless there is a misrepresentation, or it does not follow

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[18] *Ontario* (*Community Safety and Correctional Services*) v. *Ontario* (*Information and Privacy Commissioner*), cited above.
[19] Order PO-2435.

through as per its written statements. The requester explains that some of this information has already been released, and it should not be problematic to disclose the remaining information at issue in this appeal.

<u>Appellant's unit prices and subcontractors' prices</u>

[47] According to the appellant, the appellant's unit prices and the subcontractors' prices reveal its unit prices, as well as its overall methodology of pricing, which is integral to the success of its business and could be described as its "secret sauce."

[48] In support of this, it refers to the following reasons set out in Order MO-3791:

> The city argues that the harms contemplated by sections 10(1)(a) (competitive position) and 10(1)(c) (undue loss) can reasonably be expected to transpire if the unit pricing of the company were disclosed. The city submits, and I find, that it is reasonable to believe that the <u>disclosure of that unit pricing to the public could be</u> <u>expected to have a negative effect on the company's competitive position in the</u> <u>market and cause undue loss to the company</u>, and that such an outcome would not reflect the goals and objectives of *MFIPPA*. Therefore, I will be upholding this aspect of the city's decision.
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> …<u>The company objects to the disclosure of one of the pages containing unit pricing</u> <u>in its entirety</u>. It is one of the three pages containing unit pricing, but it also contains the total "base bid" price, and other explanatory pricing information. The company objects to the disclosure [of] the whole page <u>because it reveals its</u> <u>"methodology of pricing."</u>"
>
> I find that the remaining part of the page in question (that is, the non-unit pricing, as distinct from the unit pricing withheld by the city) meets Part 3 of the test for the same reasons I found that the unit pricing meets Part 3. I find that it is reasonable to expect that the remaining information on this page could have a negative impact on the company's competitiveness and that there is a reasonable possibility of undue losses.
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> Therefore, <u>I find that the page</u> specified by the company as <u>detailing its "methodology of pricing"</u> meets Part 3 of the test. Since this information meets all three parts of the test under section 10(1), it <u>is exempt from disclosure</u> and I will be ordering the city to withhold it.[20] (emphasis by appellant)

[49] It also refers to Order PO-3764, where "a reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing,

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[20] At paras. 79-82.

material variations and bid breakdowns was contained in the proposal."[21] It submits that the information at issue in this appeal relates to pricing and bid breakdowns and disclosure of this information would cause prejudice to it.

[50] In its affidavit, the appellant submits that:

> Our unit prices, being the prices we charge to carry out works using our own forces, are the product of decades of finetuning [*sic*]. These unit prices are generally stable across projects, so if the unit prices for this [p]roject are publicized, it effectively discloses our unit prices for all other projects and clients.
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> Another part of [the appellant]'s competitive advantage are the prices we have been able to secure to engage the services of certain tradespeople (or subtrades)
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> ….
>
> If [the appellant]'s unit prices as well as the…. prices for our subtrades become public, competitors will be able to undercut our position in the market and jeopardize our relationships and negotiations with those subtrades. This is particularly of great concern because we carry on business in such a small market. For most subspecialties, there are no more than three or four subtrades offering those services in [name of city].
>
> [The appellant] cannot stay competitive if a subtrade does not price us anymore, as that would leave us with only the choice between one or two prices for a certain scope of work from the remaining subtrades operating in [name of city].

[51] The requester submits that disclosure of the information at issue would not harm the appellant's competitive position. It explains that pricing was submitted based on a set of documents and addenda that all proponents were issued through the tender portal, and unless there were unsolicited alternates contained in the successful submission, all proponents were bidding with the same documents with the same set of rules.

[52] The requester also submits that one would expect that pricing would fluctuate from one bid submission to another, as parties like the appellant would likely use other methodologies and mark-up rates, which are not disclosed in the bid submission or in the information at issue. It also submits that parties may decide to alter mark-up rates between unit prices, separate and itemized prices to suit what they perceive to be the deciding factors in their evaluation. While some prices may be the same, the requester

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[21] At para. 48.

submits that there will be pricing that varies between bids, regardless of the documents provided. Overall, the requester submits that there is no reason to redact the information at issue because it is likely that these rates will be used in future change orders for the project.

Subcontractors' names

[53] In its affidavit, the appellant explains that its relationship with the majority of its subcontractors goes back 15 to 20 years and that it uses and depends on the same trades repeatedly. It also submits that disclosure of the subcontractors' names could jeopardize its relationships and negotiations with these subcontractors, because there are very few subcontractors offering certain services in its market. It explains that it cannot stay competitive if a subcontractor does not agree to be part of a proposal because there would then only be one or two other subcontractors from which it could get prices for certain scopes of work. It also explains that competitors will be able to unfairly poach its subcontractors when competing for projects in future processes.

[54] It also submits that information relating to subcontractors has been found to satisfy the exemption in section 10(1) of the *Act* with reference to Order MO-2193.[22]

[55] In response, the requester submits that if the bid rate form was completed honestly, these subcontractors will eventually show up on site as part of the project. It explains that it has been the past practice of some parties to not fully complete this form by naming "own forces" (when they have no experience or capacity to complete the project), or to switch out named subcontractors after submission for other subcontractors who have submitted late prices that are cheaper. It also explains that this practice of swapping out named subcontractors to the successful bidder's advantage (after processes have closed) is not "secret sauce." The requester submits that this is unethical and price shopping. Overall, it submits that, except for nefarious motives, there is no reason why the names of the subcontractors and their prices should not be shared publicly.

Section 10(1)(b) - Similar information no longer supplied

[56] The appellant also submits that disclosure of the information at issue could undermine the confidential nature of the RFP process, whereby industry competitors are asked to compete on a confidential basis with the expectation that the information they provide will not later be exposed to competitors and used against it to its detriment in other business competitions. It submits that fewer companies could be willing to participate in future processes involving the board because they will weigh the costs and benefits of making RFP submissions and could conclude that the costs of disclosure outweigh the benefits of participation. As a result, the appellant submits that the board, the public and other stakeholders could be harmed by the reduction in the number of

[22] At para. 60.

qualified, expert and costs-effective proposals being supplied to the board, all of which could result in increased long-term costs to the public.

[57] The requester did not specifically respond to the above submission.

Analysis and findings

[58] With the exception of the information at issue, I note that the board has disclosed the appellant's bid rate form to the requester, including such information as total base bid, HST amount, alternate price additions and deductions, and additional price additions. All that remains at issue are the appellant's unit prices and subcontractors' prices, and its subcontractors' names.

Appellant's unit prices and subcontractors' prices

[59] On my review of the evidence and representations before me, I find that the appellant's unit prices and the subcontractors' prices meet the *harms* part of the test for exemption under section 10(1) of the *Act*.

[60] A number of IPC orders have considered the application of section 10(1) (and its provincial equivalent at section 17(1)) to unit pricing information of a successful bidder, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of the successful bidder. These orders have found a reasonable expectation of prejudice to a competitive position where information relating to pricing, material variations and bid breakdowns was contained in bid submissions.[23]

[61] I accept the appellant's evidence that it operates in a small, competitive market and that its unit prices are generally stable across projects. In light of this, I also accept the appellant's representations that disclosure of the appellant's unit prices and the subcontractors' prices could reasonably be expected to prejudice the appellant's competitive position or cause undue loss to the appellant and undue gain to its competitors because its competitors could use these prices to underbid the appellant in future bidding processes.

[62] I find that disclosure of the appellant's unit prices and subcontractors' prices and the appellant's representations establish the harms in sections 10(1)(a) and (c). Accordingly, as I have found that all three parts of the test have been met for the appellant's unit prices and subcontractors' prices, this information is exempt under section 10(1) of the *Act*. Therefore, I will not be upholding the board's decision to disclose this information.

Subcontractors' names

[63] On my review of the evidence and representations before me, I find that the

[23] Orders P-166, P-610, PO-1932, M-250 and MO-3246.

subcontractors' names do not meet the *harms* part of the test for exemption under section 10(1) of the *Act*.

[64] The appellant submits that the disclosure of the subcontractors' names could reasonably be expected to result in harm to its relationship with them, which in turn could harm the appellant's competitive position in the construction industry and could lead to undue loss and gain. It relies on Order MO-2193 to support this position. In that appeal, the names of certain subcontractors along with other commercial information were found to fall within the section 10(1)(a) exemption. Given my finding above that the other withheld information, namely, the appellant's unit prices and the subcontractors' prices, is exempt from disclosure in this appeal, it is my opinion that the finding in Order MO- 2193 is less helpful in determining whether subcontractors' names only are exempt under section 10(1).

[65] Previous IPC orders have considered the application of section 10(1) of the *Act* (and its provincial equivalent at section 17(1) to the names of subcontractors in bid submissions.[24] I note that in these orders, the third party information exemption was not upheld with respect to lists of subcontractors' names on the basis that the parties did not establish a reasonable expectation of harm.

[66] It is my view that the relationship between the appellant and the subcontractors could already be known in the industry given the small marketplace referred to by the appellant and the timing of the project. Moreover, if these parties have worked together for a long time, it is reasonable that those in the industry and even the public may already know about these relationships. In any event, it is difficult to see how knowledge of such relationships could result in the harms contemplated by section 10(1).

[67] I find that the appellant has failed to draw a sufficient nexus between disclosure of the subcontractors' names and the loss of contracts or business. I also find that the appellant has failed to provide evidence of a reasonable expectation that one or more of the harms in section 10(1) could occur if the subcontractors' names were disclosed. Therefore, the subcontractors' names are not exempt under section 10(1) of the *Act* and should be disclosed.

[68] While disclosure of the subcontractors' prices together with the subcontractors' names could result in the harms contemplated by section 10(1), I do not agree that the disclosure of the subcontractors' names alone without prices could result in the harms contemplated by section 10(1).

[69] Accordingly, as not all three parts of the test have been met for the subcontractors' names, this information is not exempt under section 10(1) of the *Act*. Therefore, I will uphold this aspect of the board's decision and dismiss this part of the

[24] Orders M-602, P-166, P-610, PO-1722 and MO-2906.

appellant's appeal.

ORDER:

1. I uphold the board's decision to disclose the subcontractors' names only and I order the board to disclose only this information to the requester by **August 2, 2022** but not before **July 27, 2022.** I have provided the board with a copy of two pages of the record, highlighting this information in yellow. To be clear, only the information that is highlighted in yellow should be disclosed to the requester.

2. In order to verify compliance with Order provision 1, I reserve the right to require the board to provide me with a copy of the record disclosed to the requester.

Original Signed By: June 24, 2022

Valerie Silva
Adjudicator