



M/FIPPA and Procurement Key Concepts and Considerations

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Objective

- Provide a better understanding of access to information legislation as it relates to public sector tendering with a particular focus on the tension between protecting sensitive third party information while ensuring compliance with the basic principles of public sector transparency and accountability



Why does M/FIPPA matter in the Procurement Process?


- A broad range of goods and services are provided by suppliers to public institutions
- Increasingly complex outsourcings and other innovative multifaceted procurements are common and the involvement of private sector suppliers is a key consideration for a successful procurement
- Suppliers competing for public sector business are expected to provide commercially valuable detailed information. Knowing what will be done with that information and who has access to it is critical to suppliers



Why does M/FIPPA matter in the Procurement Process?

- The introductory pages of the December 2000 Auditor General of Canada report stated:
 - “Despite the retrenchment and cutbacks of the past decade, spending by the federal government remains at historically high levels - roughly \$175 billion a year. How well this money is spent is clearly of great interest to the taxpayers, who bear the cost, and to the public at large, on whose behalf the spending takes place.”

- The introductory pages of the 2006 IPC Annual Report stated:
 - “I am now calling on government organizations to make the full procurement process much more transparent – releasing information not only about the winning bid, but of all bids. Ensuring the integrity and effectiveness of the procurement process is an essential element of government accountability.”



Why does M/FIPPA matter in the Procurement Process?

- The 1980 Williams Commission Report stated:
 - “....governmental institutions collect substantial amounts of information about the activities of business firms. Some of this information, such as trade secrets, constitutes a valuable asset, and disclosure would impair a firm’s ability to compete effectively in the marketplace. Disclosure should not extend to what might be its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm ...”
- A successful public sector procurement process involves attracting and maintaining supplier participation while ensuring compliance with the basic principles of transparency and accountability



Main Pitfalls

- Promising too much in terms of protecting bidder/supplier information
- Not protecting commercially sensitive bidder/supplier information
- Insufficient contractual governance of personal information
- Knowing which documents created as a result of the procurement process should be under the control of the institution for access purposes



Custody/Control vs. Section 10/17

- Custody/Control is a threshold concept and is typically relevant to the successful bidder
- Section 10/17 of M/FIPPA is a provision typically relevant to all bidders



Custody/Control

- Access rights apply only where the information is under the custody or control of the government institution
- Subsection 4(1)/10(1) of the *Municipal/Freedom of Information and Protection of Privacy Act* states:
 - Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
 - (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15/12 to 22; or
 - (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.



Custody/Control

- **Custody**

- Generally means actual possession of the information for purposes of government business

- **Control**

- Issues arise where a government institution contracts for services provided by an external party
- Specific factual context is key

- Discussion focus will be on control as it is often relevant in the procurement process and is frequently discussed in the case law



Control of Records

- **Factors to consider include:**

- Is there a statutory or contractual right for the institution to obtain, use, regulate or dispose the information?
- Does the content of the information relate to the institution's mandate?
- Did the institution pay for the information?
- Numerous other factors, such as:
 - Integration with other records of the institution
 - Customary practice in relation to records of this nature
 - Intended use of the record



Control of Records Practical Tendering Considerations

- **Typical contractual terms related to Custody/Control:**
 - Focus is on the resulting contract with successful bidder
 - (contrast with s10/17 confidentiality which is more broadly applicable to all bidders)



Control of Records – Contract Terms

- ““Record”, for the purposes of the Contract, means any recorded information, including any Personal Information, in any form: (a) provided by the Ministry to the Supplier, or provided by the Supplier to the Ministry, for the purposes of the Contract; or (b) created by the Supplier in the performance of the Contract; and shall include or exclude any information specifically described in Schedule 1;”
- Schedule will list items included in and excluded from the definition of “Record”
- Consequence of being a “Record”:
 - Governed by M/FIPPA
 - Subject to access request
 - Privacy protection
 - Security measures
 - Control by institution



Control of Records – Contract Terms

FIPPA Records and Compliance

- “The Supplier and the Ministry acknowledge and agree that FIPPA applies to and governs all Records and may require the disclosure of such Records to third parties Furthermore, the Supplier agrees:
 - to keep Records secure
 - to provide Records to the Ministry within seven (7) calendar days of being directed to do so by the Ministry for any reason including an access request or privacy issue
 - not to access any Personal Information unless the Ministry determines, in its sole discretion, that access is permitted under FIPPA and is necessary in order to provide the Deliverables
 - not to directly or indirectly use, collect, disclose or destroy any Personal Information for any purposes that are not authorized by the Ministry
 - to ensure the security and integrity of Personal Information and keep it in a physically secure and separate location safe from loss, alteration, destruction or intermingling with other records and databases and to implement, use and maintain the most appropriate products, tools, measures and procedures to do so



Control of Records – Contract Terms

(Cont'd)


- to restrict access to Personal Information to those of its directors, officers, employees, agents, partners, affiliates, volunteers or subcontractors who have a need to know it for the purpose of providing the Deliverables and who have been specifically authorized by the Ministry Representative to have such access for the purpose of providing the Deliverables
 - to implement other specific security measures that in the reasonable opinion of the Ministry would improve the adequacy and effectiveness of the Supplier's measures to ensure the security and integrity of Personal Information and Records generally , including but not limited to implementing the Privacy Due Diligence Safeguards required by the Contract or other measures that the Supplier may deem appropriate in the circumstances or that the Ministry may further prescribe during contract performance
 - that any confidential information supplied to the Ministry may be disclosed by the Ministry where it is obligated to do so under FIPPA, by an order of a court or tribunal or pursuant to a legal proceeding
- and the provisions of this paragraph shall prevail over any inconsistent provisions in the Contract”



Control of Records – Contract Terms

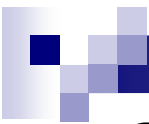
Personal Information and Third Party Service Providers

- IPC Special Report on the Disclosure of Personal Information by the Province of Ontario Savings Office
 - Recommendations regarding the protection of personal information handled by third parties
- Contract clauses regarding third party access to personal information
 - Define scope and use/disclosure of information
 - Application of access/privacy legislation including control
 - Secure storage and handling
 - Process where there is an access request or investigation
 - Designation of privacy officer
 - No intermingling
 - Audit provisions and sanctions
 - End of Contract/termination issues (retention, return of information, destruction)



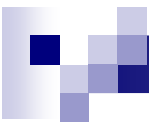
Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)

- Records of the Judicial Appointments Advisory Committee, independent body set up by provincial government to recommend candidates for judicial appointment
- Court of Appeal: Records not controlled by institution:
 - Committee members not employees or officers of the Ministry
 - Set up to provide arms' length recommendations to Ministry
 - No statutory or contractual right to dictate creation or use of documents
 - No statutory or contractual right to possess or dispose of documents, no property right in documents
 - Finally, nothing in the record that allows the conclusion that these documents were in fact controlled by the Ministry



Criminal Code Review Board v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 4072

- Backup audio tapes prepared by a court reporter who was an independent contractor hired by the Board
- Court of Appeal: Records controlled by institution:
 - Sole purpose for creating backup tapes was to fulfill the Board's mandate under of the Criminal Code to keep an accurate record
 - Board had power to limit the use to which the backup tapes may be put and reasonable to expect that the Board would ensure that any records of proceedings would be used solely for the purposes of the Board
 - Board must have access, regardless of who has custody, to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript
 - Institutions cannot avoid the access provisions of the Act by entering into arrangements under which third parties have custody of the Board's records that would otherwise be subject to the provisions of the Act



David v. Ontario (Information and Privacy Commissioner), [2006] O.J. No. 4351 (Div. Ct.)

- Notes of Coulter Osborne, retained to conduct independent review of Toronto's process for selecting a company to renovate Union Station
- Divisional Court: records not controlled by institution:
 - Osborne not an employee or officer of the City.
 - He was to conduct the independent, arms length inquiry and make his report
 - not an agent of the City, couldn't bind City
 - recommendations were not to be binding on anyone.
 - documents were never actually controlled by the City (but in some cases stored in a computer owned by the City, but accessible only to persons involved in the inquiry).
 - the case is very similar to *Walmsley*



Order MO-1251

- Survey forms showing 41 lots noted as having septic tank problems
- Region retains engineering consultant, who retains sub-consultant, who carries out the survey, holds the forms
- Institution (Township) never received records, had no contract with subconsultant, asked for records but was refused
- Institution subject to the access request is Township
- IPC: records controlled by institution:
 - Township has statutory duty to provide sewage services
 - While not a party to contract with consultant, Township is a “client” because it paid half of the costs of the study, and relied on results of the study
 - Region was Township’s agent for purpose of contracting with consultant and consultant was agent of both for purpose of the study
- Township ordered to direct sub-consultant to provide records, “and to take all necessary steps available to it at law to enforce that direction”



Order MO-2416

- Hydrological model and input data, basis for a report submitted to County and Province on proposed land fill site
- IPC: records controlled by institution:
 - County had legal duty to create record (under terms of EA provisional approval), as record was necessary to produce the required report
 - County paid for record, as it was necessary to produce the report
 - Consultant preparing record not at arm's length from County
 - No explicit contractual right to have the record, but an *implicit* right, due to expenditure of public funds
- County ordered to direct consultant to produce responsive records



Order MO-2449

- Consultant refuses to comply with direction to produce records

- IPC asks County:
 - What its position is re consultant's refusal
 - Can County take additional actions, including legal action, to get consultant to comply
 - If County can take additional actions, what actions would it be willing to take voluntarily or if ordered by IPC

- County ordered to immediately take all steps, including legal proceedings if necessary, to obtain the records
 - Reiterates that expenditure of public funds → implicit right to records
 - County's status as client "provides it with significant authority" to compel production of records
 - Consultant not part of the County, but not at arm's length



Protecting Bidder's Confidential Information

- **Three key requirements must all be met to protect requested information:**

1. The information must fall within certain categories
2. The information must have been supplied in confidence to the government institution
3. The disclosure of the information must give rise to certain harms

- **Information must fall within certain categories:**

- Trade secrets
- Scientific
- Technical
- Commercial
- Financial
- Labour relations



Protecting Bidder's Confidential Information

- The information must have been supplied in confidence to the institution
 - This is a two part requirement:
 1. Must have been supplied to the institution
 2. Supply must have been in confidence

- The disclosure of the information must give rise to certain harms set out in four categories:
 1. Disclosure would prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization
 2. Disclosure would 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
 3. Disclosure would result in undue loss or gain to any person, group, committee or financial institution or agency
 4. 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



Practical Considerations for Protecting Bidder Confidential Information

- **Typical contractual terms related to Bidder information (s10/17 of M/FIPPA):**
 - Both the RFP wording for all bidders as well as the resulting contractual provisions with successful bidder are relevant



Bidder Information – Contractual Terms

- **Freedom of Information and Protection of Privacy Act**

- The Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F.31, as amended, applies to information provided to the Ministry by a proponent. 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 Ministry. The confidentiality of such information will be maintained by the Ministry, except as otherwise required by law or by order of a court or tribunal. Proponents are advised that their proposals will, as necessary, be disclosed on a confidential basis, to the Ministry's advisers retained for the purpose of evaluating or participating in the evaluation of their proposals
- By submitting any Personal Information requested in this RFP, proponents are agreeing to the use of such information as part of the evaluation process, for any audit of this procurement process and for contract management purposes. Where the Personal Information relates to an individual assigned by the successful proponent to provide the Deliverables, such information may be used by the Ministry to compare the qualifications of such individual with any proposed substitute or replacement in accordance with the Performance by Specified Individuals Only paragraph of the Form of Agreement. 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 Ministry Contact in accordance with the Bidders to Review RFP section



Bidder Information – Contractual Terms

- **Appendix B – Form of Offer**

- **Disclosure of Information**

- The proponent hereby agrees that any information provided in this proposal, even if it is identified as being supplied in confidence, may be disclosed where required by law or if required by order of a court or tribunal. The proponent hereby consents to the disclosure, on a confidential basis, of this proposal by the Ministry to the Ministry's advisers retained for the purpose of evaluating or participating in the evaluation of this proposal



Bidder Information – OPS Practice

■ Vendor Debriefings

- Include the name, address and total bid price (where applicable) of the successful vendor
- Ministries may also provide the names and addresses of all vendors who participated in the procurement including qualified and disqualified bidders as well as those who submitted “no bid”



Supplied – Contract Information

- IPC will generally find that information contained in contracts is not “supplied”, but rather is negotiated, even where the contract is preceded by little or no negotiation, i.e. as a result of a procurement process
- Endorsed by Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)
- Exceptions:
 - “inferred disclosure” of contractor’s underlying fixed costs:

“If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor’s non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected” [B.C. IPC Order 01-20]
 - “immutable information”

“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”” [B.C. IPC Order 01-39, cited with approval in [Canadian Pacific Railway v. British Columbia \(Information and Privacy Commissioner\)](#), 2002 BCSC 603 (CanLII)]



Supplied – Contract Information

- Context is key: “supplied” information may become “negotiated” information if proposal is accepted
- Important consideration is not whether supplied information was not changed, but whether it *could not* be changed:
 - “...information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) [of B.C. FOI Act] is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but, fortuitously, was not changed” [B.C. IPC Order 01-39]

Order PO-2435

- Per diem rates of consultants contained in appendices to contracts
- Ministry: per diem rates part of proposals and are not negotiated; Ministry either accepts or rejects the proposal in its entirety
- IPC: per diem rates not “supplied”; acceptance or rejection of a consultant’s bid in response to RFP is a form of negotiation
 - per diem rate is not a fixed underlying cost, but is the amount being charged by the contracting party for providing a particular individual’s services.
 - RFP terms were transferred into contract form and agreed to by both parties



Supplied – Bidders' Proposals

- Order PO-2300: “...it is clear that the information contained in the two proposal documents was supplied by the affected party to the Ministry in response to the Ministry’s solicitation of proposals from prospective developers of a long-term care facility. The information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution”




Supplied – Successful Proposals

- Order PO-2637: “The Ministry has acknowledged that the proposal was successful and resulted in an agreement being formed, and that some of the information in the proposal has been included in that agreement. However, in the circumstances of this appeal it is not the agreement that is being sought by the appellant but rather it is the proposal itself. Having closely reviewed the specific information that remains at issue, in my view, the information is not a result of negotiation and cannot be characterized as mutually generated”
- Order PO-2755: “The affected party’s proposal was successful and resulted in an agreement being entered into between the University and the affected party. [...] the information was not a result of negotiation and cannot be characterized as mutually generated. Rather, it represents the contractual terms proposed solely by the affected party. Accordingly, [...] I am satisfied that all of the information at issue in this appeal was supplied to the University for the purpose of section 17(1) of the *Act*” [see also Order PO-2618]
- Order PO-2384: “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 intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed”



Supplied – Scoring Information

- Unless scoring or rating information reveals information supplied by proponents, scoring or rating of proponents' proposals is not considered “supplied” [Order PO-1993, MO-1789]
- Does not matter whether scores are calculated or derived from the information actually supplied, or whether they are based on a subjective evaluation of the information actually supplied
- Does not matter whether the scores could reveal strengths and weaknesses of firms submitting proposals



In Confidence – Effect of Being Notified that M/FIPPA Applies to Submissions

- Notice that submissions are subject to M/FIPPA does not negate proponents' reasonable expectation of confidentiality:
 - "...all third party business entities submitting information to government know or ought to know that the Act could apply and that the government may be compelled to disclose that information in response to a request under the Act. Where there is substantial evidence of a reasonable expectation of confidentiality, as in this case, the mere possibility that the Act could compel disclosure, in the event that the test for exemption under section 17 is not met, is insufficient to neutralize that reasonable expectation. If the opposite were true, it is arguable that the section 17 exemption could never apply, since the onus under part two of the test for exemption could never be met" [Order PO-1688]



In Confidence – Test

- Expectation of confidentiality must have an objective basis
- In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
 - Not otherwise disclosed or available from sources to which the public has access
 - Prepared for a purpose that would not entail disclosure



In Confidence – Response to RFP Notice

Order MO-2283

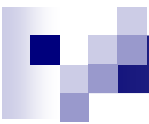
- Request for pre-qualifications, qualifications, and or proposal submitted by a proponent to Oshawa with respect to sports and entertainment facility being constructed in the City of Oshawa
- Proponents advised that City was subject to MFIPPA, asked to identify confidential information and to include it information in separate section of submissions
- Proponents did not request that their submission be held in confidence and no materials were marked or submitted separately
- In the appeal, proponents said entire proposal was submitted with reasonable expectation of privacy
- IPC: Only financial portions of proposal supplied in confidence
 - “Third parties cannot simply ignore direction in RFP to identify those portions of their submission that should remain confidential and then claim to have a reasonable expectation that the entire submission was supplied in confidence”
 - Financial portions of proposal protected on basis that proponents had a reasonable expectation that the City would not disclose financial information contained in the proposal that is not otherwise available to the public



In Confidence – Response to RFP Notice

Order MO-2435

- Request for full copy of the RFP to design and build a recycling facility and the contract entered into by the Region in relation to the RFP
- Successful proponents submitted a joint proposal, including a “Letter of Understanding” prohibiting either company from disclosing the contents of bid to any other party, except the Region and as required by law
- Region had by-law requiring employees to keep proponent pricing information confidential
- Proponents did not request that any part of proposals be held in confidence
- IPC: only pricing information was supplied in confidence
 - Re Letter of Understanding: no bearing on expectation that Region would keep proposals confidential; only that each company expected the other to keep the information confidential
 - Re non-response to notice provision in RFP:
 - if such a notice provision exists in an RFP, [and] if a bidder fails [...] to identify specific information that could reasonably be expected to cause the bidder harm if such information was disclosed, this inaction would normally lead to the conclusion that the bidder did not have a reasonable expectation of confidentiality with respect to this information




Scoring/Rating Information – M/FIPPA s. 7/13

- Scoring of bidders' proposals not “advice” for purposes of s. 7/13, but an objective assessment of factual information [Orders PO-1993, MO-1789]

- Order PO-1993:
 - “I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed”

 - “...rather than the selection panel putting the consultant forward to [senior management] with a recommendation that this party be awarded the contract, it appears that the process is designed such that, once the mechanics of the assessment are completed, based on the application of established criteria, there is no discretionary decision to be made; there is no advice to be accepted or rejected during the deliberative process”



Scoring/Rating Information – M/FIPPA s. 7/13

Order MO-1781

- Technical review team reports, “questions & comments document” to be submitted to selection committee
- Institution: records intertwine factual information with opinion and commentary to assist deliberations of the selection committee
- IPC: Records are not “advice”
 - While more than just scores, technical team’s purpose was to establish the factual basis upon which selection committee’s advice to Council would be made
 - Any course of action that was to be taken in this context was Council's, not the selection committee's, in the sense that it was to decide which proposal it preferred and which proponent the City should enter into contract negotiations with



Practical Considerations

- **Considerations at the Procurement Development stage:**

- Consider the context – does the procurement involve a highly competitive industry or litigious environment
- Consider the type of information likely to be involved
- Type of procurement – Where negotiations are contemplated, product of that negotiation may not be protected
- Tender documents should be clear and informative
 - Identify the applicable access to information legislation and that submitted information is subject to it
 - Consider setting out whether certain information should or should not be submitted
 - Suppliers should be asked to clearly and specifically identify the information submitted confidentially and for which confidentiality should be preserved
 - Explain what will be done with submitted information, for example providing it to employees, agents and consultants for evaluation purposes or potential audits of the procurement process itself



Practical Considerations

- **Where a request for information is received:**
 - Important for the business/procurement team to remain involved in the process and work closely with the FOI Office
 - Supplier whose information is involved should have a clear understanding of the process and what to expect