Canadian Law Update

Critical Trends

The Procurement Office

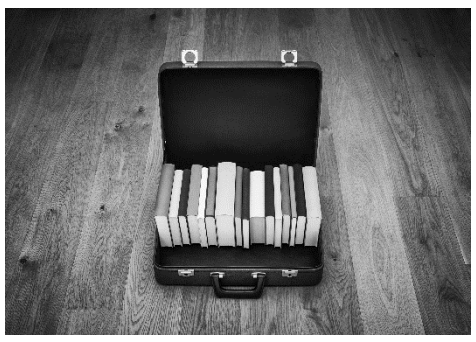
Focus on Debriefings and Confidentiality

Feature Case Study

Tribunal Warns Against Cursory Debriefs

Transparency Standards

In its May 2018 determination in *Renaissance Aeronautics Associates Inc. v. Department of Public Works and Government Services,* the Canadian International Trade Tribunal rejected the complainant's allegations of unfair advantage, but criticized the government's minimalistic approach to satisfying its debriefing duties. The case dealt with a Request for Proposals for the Department of Defence for the provision of aircraft repair courses. The complainant challenged the process, arguing that the evaluation criteria gave an unfair advantage to a competing community college since it was publicly funded and could, among other things, outbid it on price. The Tribunal rejected these grounds of complaint, finding no evidence of bias on the part of the government evaluators and finding that the complainant failed to prove its allegations. The Tribunal did however criticize the government for its delayed and minimalistic approach to providing the complainant a debriefing. While the Tribunal ultimately rejected the unfair advantage allegations and held that the government met its trade treaty debriefing duties, it also found that more proactive disclosures could have prevented the bid protest or, at minimum, reduced the scope of that protest.



Lessons Learned: Purchasing institutions should carefully consider their overall debriefing strategies since properly conducted debriefings can serve as a preventative measure for reducing downstream bid protests.

Senior-Level Infractions: The court ruled that the councillor lacked the authority to unilaterally decide to disclose the confidential information, even if such disclosure was only to his own lawyers, and warned that the unauthorized disclosure exposed the municipality to the risk of litigation.

Feature Article

Elected Official Subject to Confidentiality Rules

Municipal Councillor Breaches Confidentiality Code

In its October 2022 decision in *Fallis v. Orillia (City)*, the Ontario Superior Court of Justice – Divisional Court dismissed a municipal councillor's judicial review application that sought to overturn an integrity commissioner's ruling. That prior ruling found the councillor in breach of a municipal code of conduct for disclosing confidential information about a public procurement process. By way of background, while personally seeking external legal advice, the councillor shared closed session documents and internal legal advice relating to a request for proposals for a waterfront development project. The councillor was found in breach of the municipal code of conduct by the integrity commissioner, who recommended that the city council suspend the councillor's pay for 30 to 44 days.

While the councillor brought a judicial review application challenging the integrity commissioner's report, the court denied the councillor's legal challenge. The court found that the disclosure of legal advice provided to municipal council was a breach of the municipal code of conduct. The court also found that the disclosure of information about the bidding process was also a breach of that code. As this case illustrates, public officials, including elected officials, should avoid disclosing confidential information relating to a public procurement process. While elected officials may exercise an oversight function in relation to a public institution, that oversight role typically remains subject to the confidentiality duties that apply to the entire institution.

Training Retreats

Leveraging Lessons Learned

Procurement Training Office

We will be hosting our in-person Strategic Procurement Retreats each October and May at our new training centre.

Governance 2.0

Policy-Protocols-Templates

Procurement Law Office

We are pleased to announce our new 2.0 Policy and Protocols and 5.0 Annotated RFx Templates.

RFx Drafter v. Training

Software or Deeper Learning

Procurement Advisory Office

Orbidder 2.0 goes head-to-head with our 5.0 Annotated RFx Templates and Platinum Training Program.

Paul Emanuelli

Court Rules Government Met Disclosure Duties in Challenged Debriefing

Supplier's Argument that CFTA Required Further Information Rejected

In its February 2021 decision in *Xerox Canada Ltd. v. Service New Brunswick*, the New Brunswick Court of Queen's Bench denied a motion seeking the production of contract documents after determining that the government had already provided sufficient disclosures during its debriefing process with the applicant.

Provincial legislation prohibited the disclosure of the evaluation scoring sheets, rankings, or other information that could prejudice the competitive bidding process. However, the applicant argued the *Canadian Free Trade Agreement* required further disclosures as part of a bid protest process. The court disagreed, finding that the government had already disclosed the required information during its debriefing process.

The court ruled that it did not have the power to authorize further disclosures in the judicial review proceedings. As this case illustrates, the level of required disclosure for evaluation and award records may vary depending on the specific legislation that applies to the procurement. That level of disclosure may also vary depending on the nature of the legal proceedings under which a procurement process is being challenged.

In this case, the court found that the information provided by the government during a debriefing process satisfied the applicable disclosure duties and that the rules that applied to judicial review proceedings in New Brunswick did not require the disclosure of further information. (see Recent Rulings Protect Confidential Bidder Information)

Privileged Information: Notwithstanding the high level of transparency that applies to public institutions under public access laws, information that falls under solicitor-client privilege will typically remain shielded from those disclosure duties so that public institutions can access confidential advice from their lawyers in relation to procurement disputes.

Paul Emanuelli

Court Recognizes Solicitor-Client Privilege

Dispute Legal Advice Remains Confidential

In its March 2020 decision in *Corner Brook (City) v. Newfoundland and Labrador (Information and Privacy Commissioner),* the Supreme Court of Newfoundland and Labrador determined that the advice given to the municipality by its solicitor in connection with a procurement dispute remained privileged and protected from public access requests. The dispute dealt with a series of allegations raised by a backhoe contractor. The contractor challenged the lack of business it was awarded under a contractor roster but lost its legal challenges. The contractor then filed a public access request to obtain access to the advice provided to the municipality by its solicitor in the course of the litigation. The court ruled that solicitor-client privilege did not expire at the end of the litigation and remained protected from public access disclosures.

Paul Emanuelli

IPC Rejects Bidder's Argument that Disclosure Would Prejudice its Competitive Position

Court Upholds Ruling

In its June 2022 decision in *K-Bro Linen Systems Inc. v. Ontario (Information and Privacy Commissioner)*, the Ontario Superior Court of Justice - Divisional Court denied a contractor's judicial review application challenging an Ontario Information and Privacy Commission ("IPC") decision to disclose contract details pursuant to a public access request.

The applicant argued that the contract details included sensitive commercial information that, if disclosed, would be prejudicial to its competitive position.

However, the IPC ruled that the information in question was not supplied to the government in confidence and was instead the product of negotiations. The court found that the IPC's ruling was rational, internally coherent, and consistent with existing jurisprudence.

As this case illustrates, where a contract is formed through negotiations, even where those negotiations are limited in scope, this may preclude the information contained within the final contract from being shielded from public access requests. (see Recent Rulings Protect Confidential Bidder Information)

Paul Emanuelli

Rulings Turn on the Facts of Each Case

Uncertain Outcomes

Burden of Proof: When relying on disclosure exemptions under public access rules, the default assumption is that government records should be disclosed. The onus lies with the party arguing against disclosure to substantiate its reasons for non-disclosure on a case-by-case basis based on the specific facts of each situation.

In its February 2021 decision in *Houston v. Nova Scotia (Minister of Department of Transportation and Infrastructure Renewal)*, the Nova Scotia Supreme Court ordered the government to release information pertaining to a funding agreement after the government initially refused a public access request for that information.

The court ruled that the information in question did not fall within the statutory exemptions that would allow the government to withhold it release since, notwithstanding the government's arguments, the evidence did not demonstrate that the disclosure of the management fee in the contract would be prejudicial to the contractor.

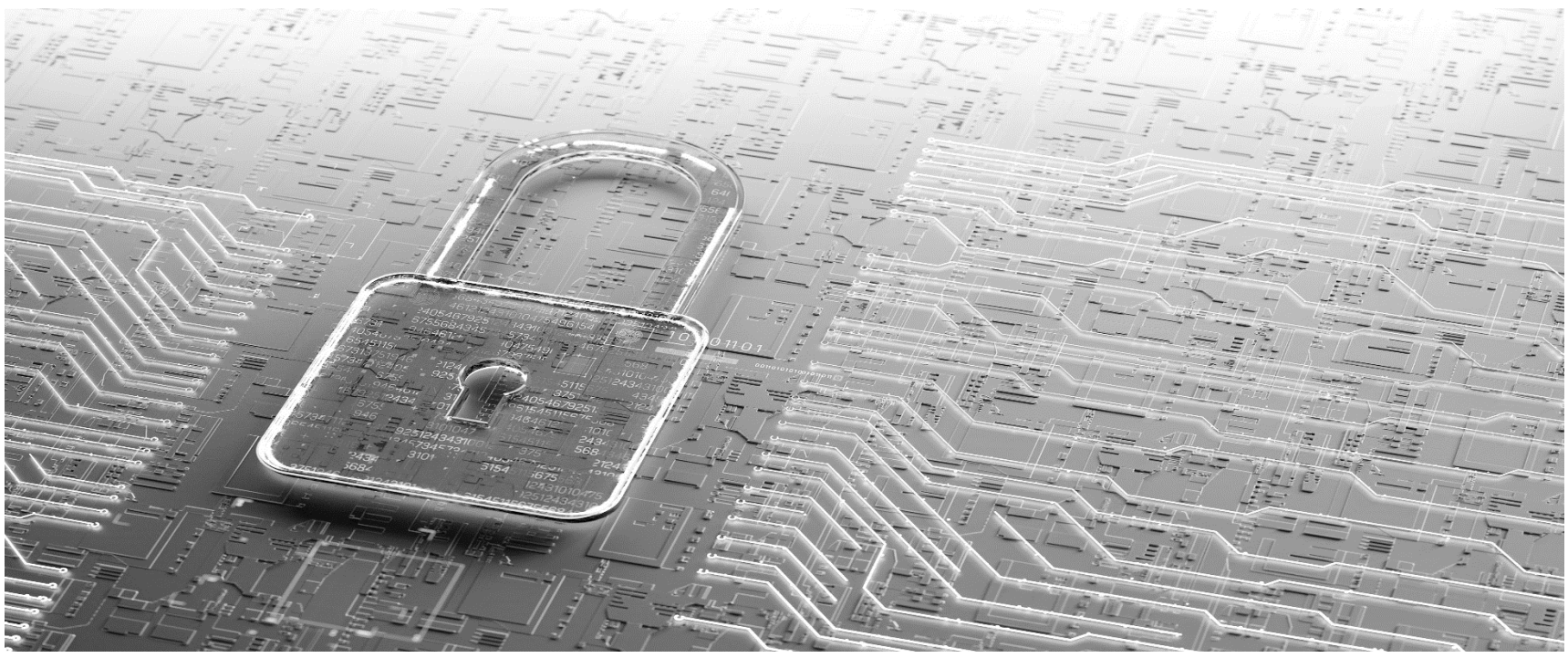
However, in its May 2018 decision in *Seon (MRS Consulting) v. Regina Roman Catholic School Division No. 81*, the Court of Queen's Bench of Saskatchewan upheld a school board's refusal to disclose bid evaluation records under a public access request due to concerns over the confidentiality of bid information for the provision of computer hardware. The court concluded that the information in question was protected from disclosure under the relevant provisions of that statute. The court also concluded that the disclosure of the commercial information could prejudice the future competitive position of other bidders, noting that the losing bidder that filed the access request admitted that it wanted this information to assist in its future business planning. (see Recent Rulings Protect Confidential Bidder Information)

Paul Emanuelli

Court Rules Against Disclosure

Incumbent Information Protected

In its January 2019 decision in *Shannex Inc. v. Nova Scotia (Health and Wellness)*, the Nova Scotia Supreme Court ruled against the disclosure of commercial bidder information. The dispute dealt with a public access request for information relating to annual operations funding and budget summaries for an incumbent Nova Scotia nursing homes service provider. The incumbent took the position that the disclosure of this information would harm its competitive position in future bidding competitions. The court agreed after determining that the information in question was commercial and financial in nature and that it had originally been provided to the government in confidence by the incumbent with the expectation that its confidentiality would be protected. (see Recent Rulings Protect Confidential Bidder Information)



Locking Down Pricing: While the overall case law trend appears to increasingly recognize the need to shield a supplier's confidential information from disclosure to avoid undermining that supplier's competitive position in future bidding competitions, each situation must be assessed on its own merits since the legal rulings will ultimately turn on the specific facts.

Disclosure Could Prejudice Contractor's Future Competitive Position

Court Protects Ambulance Services Pricing

Spotlight on Confidentiality

In its July 2018 decision in *Medavie Health Services–New Brunswick Inc. v. New Brunswick (Department of Health)*, the New Brunswick Court of Queen's Bench denied a public access request after determining that the disclosure of financial information contained in an ambulance services agreement could be prejudicial to the contractor. The contractor agreed to the disclosure of the total contract value, but argued that it relied on the financial information contained in the contract when it bid on or negotiated contracts and that the disclosure of this information to its competitors would give them a future unfair advantage.

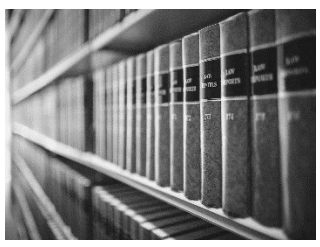
The court agreed, finding that the disclosure of the information in question would cause harm to the contractor's competitive position.

As this case illustrates, financial information contained in government contracts should be redacted from public access requests where the disclosure of that information would cause harm to the future competitive position of the contractor. (see Recent Rulings Protect Confidential Bidder Information)

Protecting Pricing: The ability to address pricing errors in bid submissions remains subject to confusion and controversy and exposes the evaluation process to bid protests risks. Rather than restricting its bid correction procedures to discrepancies between unit and total prices, or other minor price calculation errors, government institutions should instead adopt broader rectification protocols that permit bidders to cure all apparent pricing errors during a confidential cure period. Where implemented, this practice will help avoid downstream compliance disputes while preserving the confidentiality of competitively sensitive pricing information and maximizing competition.

Balancing Transparency and Confidentiality

Recent Rulings Protect Confidential Bidder Information



In its May 2021 determination in *Joe Parsons Construction Ltd. v. Public Works and Government Services*, the Canadian International Trade Tribunal found that the government breached its confidentiality duties during a retendering process.

The Tribunal found that the government prematurely disclosed the contract price of the winning bidder and then rescinded that award due to the after-the-fact discovery of alleged price evaluation irregularities.

The dispute dealt with two related tender calls for minor earthworks and hydraulic seeding services in Sydney, Nova Scotia. The complainant was initially awarded one of the contracts, but that award was revoked after the government discovered irregularities in its original evaluation process.

The complainant took issue with the rescission of its award and the retender since its original total prices were already made public and there was no change in the scope of the new tender call to offset any resulting competitive prejudice. The complainant asked that the new tender call be cancelled and reissued with changed quantities to allow for a fresh bidding process. After noting that under the relevant trade treaty rules the government had 72 days to release contract award information, the Tribunal ruled that the government had prematurely released that information and prejudiced the complainant's competitive position in the retendered contract. Further, the Tribunal confirmed that the contract award disclosure duties under the trade treaties are not absolute. Rather, they remain subject to the broader trade treaty duty to protect confidential supplier information if the disclosure of that information might prejudice fair competition between suppliers or cause prejudice to a bidder's participation in a procurement process.

Noting that the bids in the retender were lower than in the original bidding process, the Tribunal determined that the complainant was prejudiced by the disclosure of the pricing information. The Tribunal concluded that the integrity of the bidding process was seriously compromised through the improper disclosure in the original contract award announcement.

> The price disclosure made it possible for bidders to correct errors in their original bids and undercut the prices of winning bids in the prior round.
>
> - Canadian International Trade Tribunal Ruling

In fact, the Tribunal noted that one bidder, who was not part of the original solicitation, submitted an offer that underbid all other bidders.

The Tribunal also found that the government overreacted in its decision to retender since the original concern over the ability to correct calculation errors was unwarranted. As the Tribunal determined, the original solicitation clearly allowed the government to correct errors in the bid documents when calculating the extended pricing so there was no need for the government to cancel the first tendering process. The Tribunal therefore ordered the government to re-evaluate the original bids to determine the complainant's ranking in accordance with the established price correction calculations and to compensate the complainant for any lost profits that may have resulted from an improper initial award.