

What Is Open Contracting and Why Is It A Good Idea?

Sean Murray – Director of Research and Quality Assurance

Simply put, Open Contracting is the proactive disclosure of procurement records. Procurement records are records that are produced as a result of a procurement process initiated by a public body – more commonly known as an open call for bids or tenders. This occurs when public bodies need to purchase goods or services from the private sector. At the end of the procurement process, a company wins the contract and provides those goods or services for a price.

Ultimately the taxpayer pays for these expenditures, so how do we know we are getting value for money? Open Contracting means that the public body buying the goods or services publishes information about the details of the contract and the procurement process, and it does so proactively without having to be asked for it. That makes the information available for scrutiny by the public, the media and others.

Currently, the only way to obtain many of these details is to file an access to information request using the *ATIPPA, 2015*. To get a sense of the kinds of ATIPP requests that are made for contracts and related records, just search for the word “contract” in this [database](#) of completed ATIPP requests. Bear in mind that this list only includes core government – it doesn’t include health authorities, educational bodies, municipalities, etc, so it’s only part of the picture. Suffice to say that A LOT of taxpayers’ money is spent buying goods and services through the procurement process.

For anyone seeking access to this information, the good news is that, for the most part, if you ask for it you will get it through an ATIPP request. Thirty-plus years of case law has pretty clearly established what information you can and can’t obtain relating to the government procurement process. There are certain exceptions for some types of business information though - you can read about that in our [guidance document](#).

There are inherent delays when requesting this information through the ATIPP process, however. First, you have to file a request and public bodies have up to 20 business days to respond to your request. In certain circumstances, they may also be able to extend that deadline if an extension is granted by the Commissioner.

Even though in most cases you will be able to get that information through the ATIPP process, sometimes it turns into a long, complicated battle. In our [2016-2017 Annual Report](#) we noted that 17 of the 37 reports the Commissioner issued were related to “third parties” – typically companies supplying goods or services to public bodies in a procurement process. We also noted that this Office was involved in 11 appeals at the Supreme Court, Trial Division where companies were seeking to overturn a decision by a public body to disclose information. We continue to be involved in several such appeals currently.

The upshot is that even where the Commissioner has conducted a review and assured the public body that the law requires them to disclose the information, third party businesses who have received notification from the public body of the intention to release the information have a right under the *ATIPPA, 2015* to take the matter to court. This is a time-

consuming, expensive process for all concerned, and even if it results in disclosure, the information may be too stale to be of value to the requester.

From a government efficiency point of view, a move towards Open Contracting might help avoid a lot of the time and expense that goes into the process of responding to requests, searching for and reviewing records, and notifying third parties. Businesses also consume scarce resources when they attempt to resist disclosure, often engaging legal advice and sometimes proceeding to court.

An ideal result for Open Contracting would be that any information that clearly would not qualify to be withheld under the *ATIPPA, 2015* should be proactively disclosed once the contract is awarded. The *ATIPPA, 2015* process will still be there to deal with any procurement information for which there is some doubt as to whether or not it should be released.

It's important to recognize a couple of key facts here. Open Contracting doesn't mean releasing more information than what is currently allowed to be released under the *ATIPPA, 2015*. It just means releasing the maximum that is already allowed, but doing so proactively.

Furthermore, the *ATIPPA, 2015* itself is modeled on other similar statutes across Canada, and the approach to procurement information is very similar across the country, and has been for decades. There's actually not much new here. The only thing Open Contracting would do is eliminate the bureaucratic process that slows down access.

The other key thing to note is that Open Contracting is well known around the world, and in fact is much more advanced in other countries than it is in Canada. There is a fairly new international organization, of which Canada's federal government is a part, called the [Open Contracting Partnership](#). That group of countries is working to promote and advance Open Contracting. Not only has it reduced corruption where that problem exists, but government procurement costs have actually dropped in many cases. All of the benefits are discussed in detail on the Open Contracting web site, as well as in [reports](#) where the issue has been studied.

As it turns out, we are in a good position currently in Newfoundland and Labrador to move towards Open Contracting. The new *Public Procurement Act and Regulations* are designed to encourage and support greater transparency in the procurement process. There is provision in that *Act* for the creation of an Electronic Notification System which will require the publication of information about procurement activities. Although some of the basic information which is to be published on the Notification System has been set out in regulations, the Chief Procurement Officer has the authority to require more comprehensive information to be posted there as well.

When it comes to Open Contracting, there are immediate benefits in terms of timely access to information which would bypass the labour-intensive ATIPP process. Studies have also found other benefits, including lower procurement costs stimulated by greater competition. Because of these benefits, many countries and sub-national jurisdictions throughout the world have moved to an Open Contracting model. Although other provincial governments in Canada have talked about or made commitments towards Open Contracting, such as

Ontario and Manitoba, none have yet moved forward with implementation. In Newfoundland and Labrador, we have reasons to proceed and we have the necessary legislative framework to do it. We have an opportunity to play a leadership role on the national, and indeed the world stage by being the first Canadian province to make it happen. Now that our provincial public sector procurement system is being overhauled, there has never been a better time for Open Contracting.