

The Public Procurement Act and ATIPPA, 2015

Records in the control or custody of public bodies are subject to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. This includes all records related to the procurement process, such as bid documents, contracts, etc. Anyone can request a copy of those records by making an access to information request.

Public bodies are required to grant access to such records unless an exception applies. The primary exception relevant to the procurement process is in section 39 of the *ATIPPA, 2015*:

39.(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

- (i) trade secrets of a third party, or*
- (ii) commercial, financial, labour relations, scientific or technical information of a third party;*

*(b) that is supplied, implicitly or explicitly, in confidence; **and***

(c) the disclosure of which could reasonably be expected to

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
- (iii) result in undue financial loss or gain to any person, or*
- (iv) reveal information supplied to, or the report of, an arbitrator.*
[emphasis added]

All three elements must apply in order to withhold information. This exception applies only to the portions of a record that meet the test. Portions of a record that do not meet the test are subject to disclosure unless another exception applies.

On March 24, 2018, provisions of the new *Public Procurement Regulations* came into force. These provisions affect bidders in that, pursuant to section 8(2), all bidders must review their bid documents prior to submitting them and identify any information in their bids that might qualify for exemption under section 39 in the event of an access to information request.



Office of the Information and Privacy Commissioner
P.O. Box 13004, Station "A", St. John's, NL A1B 3V8
Telephone: (709) 729-6309 or 1-877-729-6309 Fax: (709) 729-6500
E-mail: commissioner@oipc.nl.ca www.oipc.nl.ca

The Public Procurement Regulations state:

8. (1) *An open call for bids shall contain the following:*
 - ...
 - (g) *a statement that the procurement process is subject to the Access to Information and Protection of Privacy Act, 2015;*
 - (2) *a bid received in response to an open call for bids shall identify any information in the bid that may qualify for an exemption from disclosure under subsection 39(1) of the Access to Information and Protection of Privacy Act, 2015.*

IMPORTANT: If bidders do not identify information that may qualify under section 39 of *ATIPPA, 2015* for exemption from disclosure, the Public Body may release to an Applicant any information relating to that bid without notice.

What Does this Mean for Bidders Submitting a Response to an Open Call for Bids?

Section 8(2) places the onus on bidders to identify information in their bids they believe may be exempt from disclosure under section 39. Indicating that information in a bid may be protected from disclosure by section 39 does not mean that it *will* be protected, but failing to do so increases the likelihood of disclosure of the bid's contents if an access to information request is received.

What Happens if Information is Not Identified in a Bid in Accordance with Section 8(2)?

Failure to indicate a claim of section 39 in the bid submission is a failure to indicate that the information is supplied in confidence. This is one of the elements necessary in order to support a claim of section 39. Without it, the information is not exempt from disclosure under section 39 and the Public Body may release the information to anyone who requests it without notice to the bidder.

What Happens if Information is Identified in a Bid in Accordance with Section 8(2)?

If a bidder identifies information in the bid submission that may be exempt from disclosure under section 39, and later an access to information request is made for that information, public bodies will assess the identified information as they normally would under section 39. A bidder's claim relating to the application of section 39 is not, in and of itself, determinative of the application of section 39.

If the Public Body determines that section 39 does not apply, the *ATIPPA, 2015* requires disclosure of records to the Applicant without notice to the bidder. In this circumstance, a bidder is not entitled to notice prior to the release of the information.

If the Public Body determines that section 39 does apply to information identified by a bidder in the bid submission, the *ATIPPA, 2015* requires withholding the records from an Applicant and no notice to a bidder is required.

If, and only if, the Public Body intends to grant access to information that the head of the Public Body believes section 39 might apply to, will bidders receive notification in accordance with section 19 of the *ATIPPA, 2015*. In other words, a bidder will only receive notification if the Public Body cannot determine with certainty that section 39 applies to the identified information but is of the opinion that it might apply.

Bidders may be informally consulted by the Public Body to assist the Public Body in determining whether the requirements of section 39(1)(c) can be met. These consultations are **not** notifications under section 19 and bidders are not entitled to make a complaint with this Office based on those consultations alone.

If notification occurs and the Public Body decides to release the information despite the bidder's objections, the bidder will be notified by the Public Body of the right to file a complaint with this Office. Bidders who complain bear the onus of establishing the applicability of section 39.

For further information and guidance on section 39 of the Act and section 8(1) and 8(2) of the *Regulations*, please consult our *Business Interests of a Third Party* guidance document located on our website (www.oipc.nl.ca).