

Request for tender submissions to replace jetty at Philomel Landing

Legislation	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(ba)(i)
Agency	New Zealand Defence Force
Ombudsman	Peter Boshier
Case number(s)	410754
Date	November 2016

Release of tenderers' pricing strategy would give an unfair advantage to their competitors and unreasonably prejudice their commercial position—s 9(2)(b)(ii) OIA applies—release would make tenderers reluctant to provide as much detail about their design specifications in future—s 9(2)(ba)(i) applies—it was in the public interest for NZDF to receive full and detailed submissions as this would otherwise undermine its ability to make an informed decision on the best tenderer to award a contract

An unsuccessful tenderer asked the New Zealand Defence Force (NZDF) for copies of other tenders submitted to replace the jetty at Philomel landing. The NZDF refused the request under sections 9(2)(b)(i) (trade secrets), 9(2)(b)(ii) (unreasonable commercial prejudice), 9(2)(i) (commercial activities), and 9(2)(j) (negotiations). The requester complained to the Ombudsman.

The requester noted that the contract was awarded to a former employee of the NZDF at a higher price. He considered that disclosure of the requested information was therefore important to ensure the integrity of the tender process.

The NZDF responded that the tender submissions contained commercially sensitive information and intellectual property of the tenderers, and release would unreasonably prejudice their commercial position.

The Chief Ombudsman found that sections 9(2)(b)(ii) and 9(2)(ba)(i) applied.

Section 9(2)(b)(ii)

It was clear that the information contained in each tender related to the commercial position of the other tenderers, including their pricing strategy for remaining profitable in a highly competitive and changeable environment. There was a *‘serious or real and substantial risk’* that disclosure of the information at issue would unreasonably prejudice the commercial position of the other tenderers, because it would allow the requester to gain a competitive advantage in future tenders or negotiations with the NZDF.

Section 9(2)(ba)(i)

The Chief Ombudsman noted that the tender submission process was conducted *‘in confidence’*. He also noted that the tender submissions contained the intellectual property of the tenderers. This information was necessary to advise the NZDF of the design features of the Philomel Landing proposals in sufficient detail. The Chief Ombudsman was satisfied that the tenderers that provided this information would have done so subject to an obligation of confidence owed to them by the NZDF.

The Chief Ombudsman also accepted that disclosure of the other submitted tenders would be likely to prejudice the future supply of information from those tenderers, or the supply of information by other prospective contractors tendering for work with NZDF. Tenderers would be hesitant to provide as much detail about their design specifications if they feared that it subsequently would be made publicly available upon request under the OIA. It was in the public interest that the NZDF continued to receive full and detailed submissions by tenderers applying for such contracts, as the absence of detailed information such as design specifications would undermine the ability of the NZDF to make an informed decision on the best tenderer to award a contract.

Public interest in release

The Chief Ombudsman agreed with the requester that there was a public interest in ensuring the integrity of the Government tender process. The NZDF must be seen to be accountable for all of its expenditure of public money. The public also has an interest in knowing whether the NZDF had entered into agreements which might inappropriately favour certain parties. However, there was nothing in the tender documents to suggest that the NZDF acted with impropriety when awarding the tender. The Ombudsman noted that the requester could make a request under section 23 of the OIA for a statement of reasons for NZDF’s decision on his tender submission.

This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman’s view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.