



Protection of Commercially Sensitive Unit Pricing in Public Procurement

Submission to the 2025 Legislative Review of the
Access to Information and Protection of Privacy Act, 2015

Heavy Civil Association of Newfoundland and Labrador (HCANL)
August 2026

Introduction

The Heavy Civil Association of Newfoundland and Labrador (HCANL) appreciates the opportunity to participate in the legislative review of the *Access to Information and Protection of Privacy Act, 2015* (ATIPPA).

HCANL's submission focuses on one specific issue within the review of access-to-information provisions: the disclosure of detailed unit pricing submitted by contractors through the provincial public procurement process.

This is not a new issue for HCANL. During the previous statutory review, HCANL made a detailed submission regarding section 39 and the protection of third-party commercial information. HCANL supported transparency regarding aggregate contract prices while seeking greater protection for unit prices, bid breakdowns and other commercially sensitive information.

Our experience since the previous review reinforces those concerns and shows why the treatment of detailed commercial pricing under section 39 needs to be reconsidered.

Transparency and Competition

HCANL strongly supports transparency and accountability in public procurement.

The public should be able to determine what work government has procured, which contractor was awarded the work, and the total value of the contract. Those disclosures provide meaningful accountability for the expenditure of public funds.

However, there is an important distinction between disclosure of the total amount government has committed to spend and disclosure of the detailed pricing structure developed by the contractor competing for that work.

For unit-price heavy civil contracts, provincial procurement award information can include the successful contractor's individual rates across numerous categories of work. Those rates may include prices per tonne, cubic metre, linear metre and square metre, as well as lump-sum prices for individual components.

The result is that market participants can access detailed information showing how a successful contractor priced individual components of a project. Across multiple contracts and over time, accumulated unit-price information may provide commercially useful insight into a contractor's pricing behaviour.

Why Unit Pricing Matters

Heavy civil contractors operate in a competitive tendering environment. Developing a bid requires contractors to make commercial decisions concerning equipment utilization, labour productivity, construction methodology, material sourcing, transportation, geography, risk and other project-specific considerations.

Unit prices reflect a contractor's estimating decisions and competitive approach.

HCANL does not suggest that every individual unit price, viewed in isolation, necessarily reveals proprietary information or causes competitive harm. The concern is the systematic disclosure and accumulation of detailed pricing information across contracts and over time.

Where contractors repeatedly compete against one another for similar categories of work, accumulated unit-price information may provide commercially useful insight into competitors' pricing behaviour.

The provincial procurement framework expressly seeks to achieve best value and promote competition among suppliers. Where the statutory harm threshold can be demonstrated, protecting commercially sensitive pricing supports a healthy and competitive public procurement system.

Section 39 and HCANL's Previous Submission

HCANL raised this issue during the previous statutory review.

In its submission regarding section 39, HCANL argued that where a third party can establish that disclosure would cause the types of commercial harm contemplated by section 39, there should not be a separate requirement to establish that the information was originally supplied in confidence.

HCANL's position was that the appropriate focus should be on the nature of the information and the reasonably expected consequences of its disclosure. Information that would significantly harm a third party's competitive position or cause undue financial loss should not lose protection solely because of the circumstances in which it was originally provided to a public body.

HCANL also distinguished between transparency regarding the expenditure of public funds and disclosure of underlying commercial information. HCANL supported disclosure of aggregate contract prices while seeking greater protection for unit prices, bid breakdowns and other commercially sensitive information.

The previous Review Committee subsequently recommended that section 39 be amended to remove the requirement that information be supplied in confidence, thereby focusing the analysis more directly on whether disclosure could reasonably be expected to result in one of the harms identified in the Act.

That recommendation has not been reflected in the current wording of section 39.

HCANL therefore returns to this issue not to advance a new position, but because the concern identified during the previous statutory review remains unresolved.

The Practical Impact

Since the previous review, HCANL's concern has remained particularly relevant in the treatment of unit pricing in public procurement.

For some unit-price contracts, detailed unit prices of the successful contractor are currently made available through the Province's MERX/SOVRA e-procurement platform.

HCANL understands from discussions with departmental officials that the practice of making detailed bid information routinely available developed, at least in part, in response to the administrative burden associated with processing a significant volume of ATIPPA requests for bid information.

HCANL recognizes the practical rationale for proactive disclosure. However, this experience illustrates why changing publication practices alone may not resolve the underlying issue.

If detailed unit pricing continues to be treated as generally subject to disclosure under ATIPPA, removing that information from an online procurement platform may simply result in renewed access requests for the same information.

The current review therefore provides an opportunity to reconsider the underlying legislative framework rather than addressing the issue solely as a matter of publication practice.

Existing Procurement Rules Recognize Potentially Protected Information

The *Public Procurement Regulations* already recognize that bids may contain information potentially qualifying for protection under section 39. Subsection 8(2) requires a bid received in response to an open call for bids to identify information that may qualify for an exemption from disclosure under subsection 39(1) of ATIPPA.

At the same time, the procurement framework provides for disclosure of information concerning bidders, bid prices and the financial value of awarded contracts.

This supports the distinction HCANL is asking the Committee to consider. The outcome and financial value of a public procurement should be transparent, while commercially sensitive information contained within a bid may warrant protection.

The question is whether the current wording and application of section 39 provide sufficient protection for detailed commercial pricing where disclosure could reasonably be expected to cause the harms contemplated by the Act.

A Better Balance

HCANL is not asking government to conceal the expenditure of public money.

HCANL believes the following information should continue to be publicly available following the award of a public contract:

- the project and scope of work;
- the successful contractor;
- the date of award; and
- the total awarded contract value.

This allows the public, media, elected officials and other interested parties to determine who received a government contract and how much public money was committed.

HCANL recognizes that detailed unit pricing can provide additional scrutiny of how individual components of a contract are priced. The question is whether that additional transparency justifies routinely providing competitors with information that may have continuing commercial value.

HCANL submits that disclosure of the successful contractor, scope of work and total awarded contract value provides substantial public accountability, while detailed unit pricing should be subject to a meaningful assessment of potential competitive harm under section 39.

There is a meaningful difference between informing the public of the total value of an infrastructure contract and providing the marketplace with the successful contractor's individual rates for excavation, granular material, asphalt, pipe installation, rock fill and numerous other components of the work.

HCANL also recognizes that legitimate public-interest considerations may support disclosure in appropriate circumstances. However, the fact that information relates to a publicly funded project should not, on its own, determine whether commercially sensitive third-party information is disclosed. The assessment should consider the public accountability purpose served by disclosure alongside the commercial harm contemplated by section 39.

Recommendations

HCANL respectfully recommends that the Committee:

1. Implement the previous Review Committee's recommendation concerning section 39.

HCANL recommends removing the requirement that qualifying third-party business information be “supplied in confidence” as a separate element of the section 39 test, consistent with the recommendation of the previous statutory review. The analysis should focus on whether the information meets the applicable statutory criteria and whether its disclosure could reasonably be expected to result in one of the harms identified in section 39.

2. Clarify the treatment of detailed unit pricing in public procurement.

HCANL recommends that the Committee specifically consider the treatment of unit prices and detailed pricing schedules under section 39. Such information should be capable of protection where disclosure could reasonably be expected to meet one of the harm thresholds established in section 39, including significant harm to a contractor's competitive position.

3. Preserve transparency regarding contract awards.

Any amendment should maintain public access to the identity of the successful contractor and the total awarded contract value.

4. Distinguish public expenditure from underlying commercial pricing.

ATIPPA and government's proactive disclosure practices should recognize that transparency regarding the amount of public money committed does not necessarily require routine disclosure of every component of a contractor's underlying pricing structure.

5. Provide a clear and workable framework.

The legislation should provide sufficient clarity to allow public bodies and third parties to determine consistently when detailed commercial pricing warrants protection, while ensuring that information necessary for meaningful public accountability remains accessible.

Conclusion

Transparency and competition are both essential to effective public procurement.

The public has a legitimate interest in knowing who receives government contracts and how much government has committed to pay. Contractors also have a legitimate interest in protecting commercially

sensitive information where disclosure could reasonably be expected to cause the competitive or financial harm contemplated by ATIPPA. These principles do not need to conflict.

HCANL raised this issue during the previous statutory review, and the previous Review Committee subsequently recommended removing the supplied-in-confidence requirement. That recommendation has not been reflected in the current wording of section 39. Our experience since that review reinforces the need to revisit the issue and specifically consider how section 39 applies to detailed unit pricing in public procurement.

HCANL respectfully asks the Committee to do so and would welcome the opportunity to appear before the Committee or provide additional information.

Respectfully,

A handwritten signature in black ink that reads "Kris Mulcahy". The script is cursive and fluid.

Kris Mulcahy

Executive Director

Heavy Civil Association of Newfoundland and Labrador