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AMENDMENT TO BY-LAW NO. A-0353-2004-089 (THE "PURCHASING BY-LAW"): PROHIBITING CONTRACT AWARDS TO LITIGATING BIDDERS

The Finance and Administration Committee recommends:

1. receipt of the confidential memorandum, October 23, 2007, from Senior Counsel *(see confidential attachment);* and

2. the following report, October 18, 2007 from the Regional Solicitor be adopted:

1. RECOMMENDATION

It is recommended that:

1. The Purchasing By-law be amended to:
   - (a) prohibit accepting bids and awarding or extending contracts to bidders who are in litigation with the Region where the amount in dispute exceeds $50,000. subject to the following exceptions:
     - (i) where there is only one supplier and the Chief Administrative Officer ("CAO") has approved the award;
     - (ii) in the case of an emergency where health, safety and/or the preservation of municipal infrastructure are at risk; and
     - (iii) when there is a legal obligation to enter into a contact such as a current contract or where there is an inter-municipal agreement.
   - (b) allow staff to exercise discretion to accept and open bids and award contracts to bidders who are in litigation with the Region where the amount in dispute does not exceed $50,000.

2. PURPOSE

The purpose of this report is:

- (a) to outline present Regional policy dealing with bidders on Regional contracts who are involved in litigation with the Region;
- (b) to identify areas where the policy can be strengthened and improved; and
- (c) to suggest specific amendments to the Purchasing By-law which will result in a policy that can be applied consistently in the best interests of the Region.

3. BACKGROUND

3.1 Issues with Current By-law

Section 18.1(c) of the Purchasing By-law requires a report to Council prior to authorizing an award where there is current litigation between the bidder and the Region. There is, however, nothing in the Purchasing By-law to specifically authorize Council to preclude awarding contracts to litigating bidders or to provide guidance on when to award contracts to litigating bidders. As a result, a number of issues have been identified:

- Consistency in dealing with litigating bidders on a case by case basis has been difficult to achieve.
- Litigating bidders are uncertain whether their bids, if the bids are low bids, will be accepted or rejected while engaged in litigation against the Region.
- Staff are uncertain whether contracts will be awarded to litigating bidders.
- The awarding of contracts may be delayed while a report is made to Council in cases where litigating contractors are low bidders.
- There is no direction in the By-Law to assist the CAO in exercising discretion to award contracts to litigating bidders during the summer recess.

3.2 The Region's Bid Documents

The "Information For Bidders" section of the Region's tender documents contains a provision warning bidders that a bid may be rejected where there is current litigation between the Region and the bidder. There is however, no direction in the "Information For Bidders" indicating when or under what circumstances discretion will be exercised in making the decision to either award or not award contracts to litigating bidders.

3.3 York Region's Experience

In recent years, the Region's response in situations where a litigating contractor has submitted a low bid has varied; in some cases, contracts have been awarded to the litigating bidder while in other cases the litigating bidder has been advised that the contract will not be awarded while the dispute is ongoing.

In cases where contracts are awarded to litigating bidders, two issues are apparent:

- Continuing to award contracts to litigating bidders provides no disincentive for contractors to engage in litigation with the Region.
- There is the appearance that the Region by awarding contracts to bidders who are engaged in litigation with the Region is in fact funding litigation against itself.

Recently, Council has indicated a willingness to preclude litigating bidders from being awarded further Regional contracts until the dispute giving rise to the litigation has been resolved. Two cases in the summer of 2007 have illustrated that a refusal by the Region to do business with those who litigate against it can, in fact, be a disincentive to the contractor continuing with the litigation. In both cases, longstanding litigated disputes were settled when the Region communicated its intention to the contractors in question that future contracts would not be awarded until the current disputes were settled.

3.4 The Experience of Other Municipalities

Staff have determined that many other municipalities have clear policies dealing with contractors who wish to do business with the respective municipal governments while engaged in litigation. The local municipalities canvassed who have such clear policies include: Brampton, Brantford, Chatham-Kent, Hamilton, Kitchener, Mississauga, Muskoka, Richmond Hill, Newmarket, Oshawa, Sarnia, Vaughan and Windsor. The regional municipalities canvassed who have such clear policies include: Halton, Niagara, Peel and Waterloo. The position of most other municipal governments with respect to litigating bidders is consistent; in virtually all cases, the respective local or regional Councils reserve the right to refuse to do business with contractors with whom there is current litigation. In virtually all cases, this results in bids by litigating contractors being rejected. Quite simply, the “rule” in these municipalities is that litigating a dispute will preclude doing business with the municipality while the dispute remains unresolved.

4. ANALYSIS AND OPTIONS

4.1 Rationale For Not Doing Business With Litigating Bidders

There are sound business reasons not to embark on further business relationships with those who sue the Region, or whom the Region has to sue. Some of those reasons may be identified as follows:

- Confidentiality issues
  - The Region may be unwilling to share confidential or sensitive project information with a litigant on an ongoing basis.
- Trust issues
  - In cases where the relationship with a contractor has broken down to the point of litigation, the degree of trust required to successfully facilitate a future business relationship may be absent or severely damaged.
- Fear of further disputes
  - It may be the case that a troubled past relationship may indicate that there are fundamental issues between the Region and the contractor that may be indicative of a troubled future relationship.
- Performance Issues
  - Litigation may be based on poor performance by a contractor that has left the Region with no other choice but to commence legal action.
- Analogy to private sector corporations
  - The Region is a municipal corporation. Similar to a private corporation, a municipal corporation should have the ability to decide with whom it would like to do business, provided that the decision is based on legitimate business considerations.

4.2 The Municipal Act

Section 270(1) of the *Municipal Act, 2001* (the "Act") requires municipalities to adopt and maintain policies with respect to the procurement of goods and services. Presently, the Region's Policy does not specify how issues relating to the procurement of goods and services from litigating bidders will be addressed.

There is no legal impediment in the Act or any other statute to preclude the Region from refusing to do business with those who are engaged in current litigation with the Region. In fact, case law in Ontario and from other provinces suggests that such a refusal to do business with litigants is clearly within a municipality's jurisdiction.

4.3 Options

4.3.1 Continue with Status Quo

It is suggested that continuing with the status quo is not a viable option. Amendment to the Purchasing By-law would bring consistency and certainty to the process.

4.3.2 Amend Purchasing By-Law

It is suggested that the preferred approach would be to amend the Purchasing By-law to enhance clarity and consistency and to ensure that section 270(1) of the Act is complied. Specific amendments would be as follows:

(1) In cases where the amount in dispute between the Region and the litigating bidder was in excess of $50,000 the Region would be precluded from awarding contracts to the litigating bidder until the dispute was resolved. Where more than $50,000 is in dispute between the litigating bidder and the Region, the following exceptions to the blanket prohibition against accepting bids or awarding contracts to litigating bidders could be made:

- Where there is only one supplier (would require CAO approval).
- In the case of an emergency where health, safety and/or preservation of municipal infrastructure are at risk.
- When there is a legal obligation to enter into a contract such as a current contract or an inter-municipal agreement.

This suggested amendment would ensure that litigating bidders with disputes over $50,000 would know exactly where they stood in terms of their ability to submit bids while the litigation with the Region was unresolved. Staff could deal with these situations with certainty and Council would not have to deal with such situations on a case by case basis, leading to a consistent application of the Purchasing By-law and Policy.

It is also suggested that the bidding prohibition would apply to prevent renewals of contracts where a litigating bidder with an existing contract might be subject to an option to renew at the Region's discretion.

(2) In cases where the amount in dispute between the Region and the litigating bidder is less than $50,000 the Commissioner whose department is seeking procurement of goods and services would have discretion to award a contract based on consideration of the following:

- Past performance by the litigating bidder.
- The claims history with the litigating bidder.
- An assessment of overall risk in entering into a contract with a litigating bidder.
- A "total cost accounting" approach to be considered in the exercise of discretion to award contracts in cases where the Commissioner deems it to be in the best interests of the Region.

This suggested amendment would provide staff with some discretion to accept bids where the amount in dispute was relatively nominal. The discretion would be reserved to address litigation in Small Claims Court and under the Superior Court of Justice Rules of Simplified Procedure. Litigation in these jurisdictions commonly arises as a result of less serious injuries on Regional contract sites, for example, slip and falls, pot-hole damages to vehicles, etc. In such cases, where the Region is sued as owner of the contract site or roadway under repair and the Region has counterclaimed against the contractor, the contractor will have provided indemnities in the contract with the Region, which fully protect the Region. Further language in the Region's agreements with contractors allows the Region to deduct money from amounts which may be owing to the contractor to pay such claims. The Region is again therefore fully protected and there would likely be no business reason to not award subsequent contracts to the contractor, despite the fact that the Region was technically "in litigation" with them. However, there may be situations where it still may be appropriate to preclude the awarding of future contracts when there is a litigated dispute of less than $50,000; this is why the Commissioner has discretion to award or not award to litigation bidders based on a consideration of the factors listed.

(3) In cases where litigating bidders were either precluded from doing further business with the Region or where a commissioner's discretion to award a contact to a bidder in a case where less than $50,000 was in dispute was exercised a report to Council would be required.

4.3.3 Introduce a Policy Dealing with Litigating Bidders

A Policy dealing with litigating bidders would support the suggested amendments to the Purchasing By-law. The Policy would address:

- The specific business reasons why the Region will exercise its right to refuse to do business with litigants.
- The requirement for a statement in the Region's bid documents (i.e. the "Information to Bidders" section) that if there is current litigation, tenders may not be accepted and contracts may not be awarded, with a specific reference to the Purchasing By-law and Policy.
- Direction to Supplies and Services staff to require that sealed bids identify the bidders so that a check of current litigation can be made and bids from litigating bidders can be rejected.

- Authorization to Supplies and Services staff to reject bids which may happen to be submitted, notwithstanding efforts to screen bids from litigating bidders.
- A definition of "parties in current litigation with the Region", to include not only the actual party or company, but related parties or companies and principals of related companies.

5. FINANCIAL IMPLICATIONS

There are no direct financial implications as a result of this report. Discussions with staff from local municipalities has indicated that their experience with a similar approach to dealing with litigating bidders has not had a negative effect in terms of acting as a disincentive for contractors to bid.

6. LOCAL MUNICIPAL IMPACT

There are no direct local municipal impacts as a result of this report.

7. CONCLUSION

For the reasons specified, it is recommended that the Purchasing By-law be amended as outlined in this report. This amendment, along with a complimentary Policy, would give clarity and consistency to situations in which litigating bidders wish to do further business with the Region.