



Corporate Report

NO: R024

COUNCIL DATE: February 13, 2006

REGULAR COUNCIL

TO: Mayor & Council DATE: February 6, 2006

FROM: City Solicitor
General Manager, Finance,
Technology & HR FILE: 3900-20-15742

SUBJECT: Purchasing Policy Amendments

RECOMMENDATION

It is recommended:

1. That Council adopt the proposed amendments to the Purchase and Expenditure Authorization By-law, 2005, No. 15742 (the "By-law") attached as Appendix "A" to this report.
2. That Council approve the proposed amendments to the Purchasing Policy No. 2-7 (the "Purchasing Policy") attached as Appendix "B" to this report.

INTENT

The amendments to the By-law and Purchasing Policy will permit Council and staff to include in the evaluation of current quotations, bids, tenders and proposals, the increased costs to the City of recent or outstanding claims or litigation.

BACKGROUND

At the present time, the City's Purchasing Policy permits the acquisition of goods by means of a tender process, a request for quotations or a request for proposals ("RFP"). Neither the By-law nor the Purchasing Policy expressly permit Council or staff to address the issues which are raised when a party seeking to submit a quotation, bid, tender or proposal was a party to a current or recent claim or lawsuit against the City.

DISCUSSION

When a company or person initiates a claim or litigation against the City the relationship has become adversarial. However, that party may seek to continue bidding for work for the City. The issue which arises is whether the claim or litigation has consequences which should play a role in evaluating the subsequent tenders or bids submitted by the litigating party. This is not a question of a poisoned working relationship, but a question of ensuring that appropriate factors are included in assessing the real value of subsequent bids or proposals. Some of the factors are as follows:

1. The claim or litigation may be an indication of the style of operation of the particular company; litigation may be one of the tools the company uses to maximize their profits on any particular job. Quite apart from the costs of the litigation, the complications arising from the litigation and its merits, the litigation will add to the costs and burden of future contracts with the company or directors and principals of the company. For example, staff working on future contracts may expend additional time and energy documenting all aspects of the relationship and interaction to protect the City should additional litigation be initiated by the company. This additional administrative time would not be part of a good working relationship and comes at a cost to the City. The litigation can increase the cost of administering a subsequent contract such that the actual costs to the City are higher than other similarly priced contracts.
2. Where litigation is initiated by the City against a contractor, the litigation may be an indication of a difficult contractor who failed to provide services in accordance with the contract agreement. If the City continues to enter into agreements with the contractor, additional staff time is required to ensure compliance with contract specifications that would not be required in normal contractual relations. The additional time may include not only the additional administrative time spent on the contract, but also additional inspection and monitoring of the works of the contractor to ensure that the City is receiving what it is entitled to receive under the contract.
3. Where litigation is initiated by the contractor it may have a chilling affect on future disputes between the City and the contractor. The City may be reticent to enforce particular aspects of the contract for fear of potential litigation. As a result a tender submitted by such a company will contain hidden costs in terms of the work product which need to be taken into account when evaluating the tender or proposal.

In addition to these factors, the litigation process may create an unfair advantage for the litigating company with respect to future bids or proposals.

Prior to trial the company will be entitled to conduct examinations for discovery of City employees and obtain production of City documents which relate to the litigation. Those documents are not available to contractors who are submitting bids or proposals for City projects. For example, if, as part of the litigation process, a contractor obtains information as to not only all of the particulars of the bids or proposals submitted by other contractors, but also the comparative evaluations undertaken by the City and its consultants of those proposals, it will have a distinct advantage in the future which is not afforded to other contractors or parties submitting bids or proposals. This lack of fairness between the parties due to the litigating party's ability to obtain additional information undermines one of the objectives of the City's purchasing policy which is to ensure that all parties seeking to do

business with the City begin on the same footing with the same information available to them.

It was in response to these concerns that the City added to its standard RFP document a section entitled "Litigation" which states:

4.4 Litigation

In addition to any other provision of this RFP, the City may, in its absolute discretion, reject a Proposal if the Proponent, or any officer or director of the Proponent submitting the Proposal, is or has been engaged directly or indirectly in a legal action against the City, its elected or appointed officers, representatives or employees in relation to any matter.

In determining whether or not to reject a Proposal under this section, the City will consider whether the litigation is likely to affect the Proponent's ability to work with the City, its consultants and representatives and whether the City's experience with the Proponent indicates that there is a risk the City will incur increased staff and legal costs in the administration of the Contract if it is awarded to the Proponent.

While Section 4.4 addresses some of the concerns, the concepts inherent in Section 4.4 have not been adopted throughout the City and it is for that reason that it is recommended that there be amendments to the By-law and the Purchasing Policy.

The proposed amendments do not constitute a blanket prohibition against contracting with parties who are or have been involved in litigation against the City, they simply clarify that the City may take the affects of the litigation process into account when considering a bid or proposal. However, in some cases, where the litigant has an unfair advantage in the bidding or proposal process due to information they may have obtained through the litigation it may be appropriate to return the bids or proposals to the bidders unopened.

Legal Background

Clauses similar to the ones proposed in Appendices "A" and "B" were considered by the B.C. Supreme Court in the case of *Hancon Holdings Ltd. v. Nanaimo* in 2001. The court in that case considered the legal authority for such clauses and held that there was nothing in the *Local Government Act*, R.S.B.C. 1996, c. 323 (the "*Local Government Act*") which precluded litigation clauses and that the City was empowered by the general powers granted to municipalities to enact such litigation clauses. In particular, the court noted that the legislation did not place a restriction on the City's entitlement to determine with whom it would contract. The amendments to the *Local Government Act* and the enactment of the *Community Charter*, S.B.C. 2003, c. 26 (the "*Community Charter*") since the time of the *Hancon* case do not alter the applicability of the reasoning set out in *Hancon* nor has *Hancon* been overruled by the courts in British Columbia.

CONCLUSION

There is a need for consistency in the treatment of all parties seeking to submit quotations, bids, tenders or proposals to the City for City projects. The adoption of the proposed amendments ensures that the City may, as part of its consideration of the costs associated with those quotations, bids, tenders or proposals, take into account the affects that an ongoing claim or litigation or a recent claim or litigation may have on the overall value of the particular quotation, bid, tender or proposal submitted.

The purpose of the clause is to ensure that the City is able to properly evaluate all of the potential costs that relate to any quotation, bid, tender or proposal and to ensure that all parties seeking to provide the City with quotations, bid, tenders or proposals are treated in a manner consistent with the intent of the bidding processes. The proposed amendments do not constitute a blanket prohibition against contracting with parties who are or have been involved in litigation against the City, they simply clarify that the City may take the affects of the litigation process into account when considering a bid or proposal.

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Attach.

APPENDIX "A"

6(a.1) Legal Action Exemption

The City may, in its absolute discretion, reject a quotation, bid, tender or proposal submitted by a corporation or entity pursuant to sections 6(b)-6(f) or 9 of this By-law if the corporation or entity, or any officer or director of the corporation or entity, is or has, either directly or indirectly through another corporation or entity, been engaged in legal action against the City, its elected or appointed officers or employees in relation to:

- (i) any other contract for works or services; or
- (ii) any matter arising from the City's exercise of its powers, duties, or functions under the *Local Government Act, Community Charter* or another enactment,

within five years of the date of the request or invitation.

6(a.2) In determining whether to reject a quotation, bid, tender or proposal under section 6(a.1), the City will consider whether:

- (i) the legal action has the potential to affect the corporation or entity's ability to work with the City, its consultants or representatives;
- (ii) the City's experience with the corporation or entity indicates that the City is likely to incur increased staff and legal costs in the administration of the contract if it is awarded to the corporation or entity; and,
- (iii) the legal action has or may give the corporation or entity access to information related to a similar quotation, bid, tender or proposal which is not available to others.

APPENDIX "B"

PRINCIPLES

- (8.1) Consider as part of the evaluation of the purchase the consequences of ongoing or recent claims or litigation in accordance with sections 6(a.1) and 6(a.2) of the City of Surrey Purchase and Expenditure Authorization By-law, 2005, No. 15742.