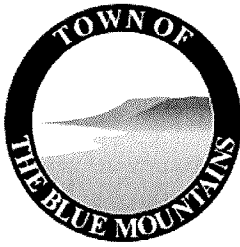


STAFF REPORT: ENGINEERING & PUBLIC WORKS DEPARTMENT



REPORT TO: Council
MEETING DATE: November 14, 2011
REPORT NO.: EPW.11.092
SUBJECT: Refusal to Accept Bids from Skelton
Brumwell & Associates
PREPARED BY: Reg Russwurm, Director of Engineering and
Public Works

A. Recommendations

THAT Council receive Staff Report EPW.11.092, "Refusal to Accept Bids from Skelton Brumwell and Associates", and

WHEREAS the Council of the Corporation of The Blue Mountains is of the opinion that Skelton Brumwell & Associates did not provide acceptable service during the contract administration of the Camperdown Sewer Servicing Contract resulting in some or all of the budget overrun,

THAT Council hereby resolves to refuse to accept bids from Skelton Brumwell & Associates, including bids from any affiliate of Skelton Brumwell & Associates and whether Skelton Brumwell & Associates bids directly, as a prime bidder, or indirectly as a proposed subcontractor or supplier to a prime bidder, for a period of 5 years from the date of passing of this resolution.

B. Background

The Town entered a construction contract with Drexler Construction Ltd (Drexler) for the Camperdown Sewer Servicing Contract No. 4918 in September 2005. The works were substantially complete on November 23, 2006. There were numerous disputes that the Town and the Town's Consultant, Skelton Brumwell and Associates (S-B), attempted to resolve during 2007 and 2008. On November 18, 2008, Drexler Construction Ltd filed a claim with the Ontario Superior Court of Justice against the Town in regards to Camperdown Sewer Servicing Contract No. 4918. The Statement of Claim was for \$2,074,252.46 for breach of contract plus \$2,074,252.46 damages for negligence, or alternatively, \$3,187,845.24 for breach of contract and negligence in the event there was no agreement related to dewatering.

To resolve the contractual disputes, the contract value for Camperdown Sewer Servicing Contract No. 4918 was increased by \$805,083.33 from \$7,796,753.50 to \$8,601,836.83 to resolve the litigation.

The Town is of the opinion that the contractual dispute leading to the cost overrun was caused in all or part because Skelton Brumwell and Associates did not provide acceptable service during the contract administration of the Camperdown Sewer Servicing Contract. The Town has considered litigation with S-B but feels that legal and Staff costs are not justified by any expected settlement.

Regardless that a legal recourse will not be taken, Staff recommend that Council refuse to accept bids from Skelton Brumwell & Associates, including bids from any affiliate of Skelton Brumwell & Associates and whether Skelton Brumwell & Associates bids directly, as a prime bidder, or indirectly as a proposed subcontractor or supplier to a prime bidder, for a period of 5 years from the date of passing of this resolution in accordance with Staff Report EPW.10.001.

Town Staff will ensure that an appropriate protocol is put in place to enforce Council's resolution.

C. The Blue Mountains' Strategic Plan

This report supports Strategic Plan Goal #6 "Providing a strong, well managed municipal government.

D. Environmental Impacts

None

E. Financial Impact

None

F. Consultation With

The report has been reviewed by the CAO and the Manager of Purchasing along with specialised legal advice from Baker & McKenzie LLP.

G. Attached

1. Report EPW.10.001: Refusal to Accept Bids

Respectfully submitted,

Reg Russwurm

Reg Russwurm

Director of Engineering and Public Works

For more information, please contact:

Reg Russwurm

russwurm@thebluemountains.ca

(519) 599-3131 x260

Staff felt it was prudent to amend Section 17 to add clauses with respect to pending litigation in addition to non-fulfillment of contract terms or a breach of contract. Consideration was also given to how long a vendor will be precluded from bidding on work. It was felt the length of time should be left to the discretion of Town Council but that the maximum period of time should not exceed five years. In the event that this clause must be invoked, Staff will bring a report forward to Council to consider refusing bids from a Vendor.

It is important to note that any action to refuse to accept bids will only be done after all other means of dispute resolution have been exhausted such as negotiation, mediation and arbitration. The intention of a revised Clause 17 is that it is to only be used as a last resort after a normal working relationship has deteriorated to the point of being non-functional. The Town prides itself on building good working relationships with all vendors by focusing on cooperation, not confrontation.

In preparation of the revised wording for Clause 17 presented below, the Town's Manager of Purchasing made inquiries for best practices of other municipalities and consulted with senior Staff. The proposed wording has been reviewed and approved by the Director of Financial and Information Services and the Town Solicitor.

Staff recommend the following revised wording for Clause 17 within the Town's Purchasing Policy.

17. Refusal of Bid Responses

- A) The Town will not accept a bid response from:
- i. Any person or corporation which includes any related corporation who, or which, has instituted a legal proceeding against the Town, or against whom the Town has instituted a legal proceeding with respect to any previous contracts, bid submissions or business transactions who is listed as either the proposed general contractor or sub-contractor or vendor within the submitted responses;
 - ii. Any person or corporation which includes any related corporation who, or which, is involved in pending litigation against the Town, or against whom the Town is involved in pending litigation with respect to any previous contracts, bid submissions or business transactions who is listed as either the proposed general contractor or sub-contractor or vendor within the submitted responses;
 - iii. Any Bidder who has not performed works for previous Contracts in compliance with the Contract Documents at the sole discretion of the Town;

- iv. Any Bidder who has previously breached a Contract with the Town at the sole discretion of the Town.
- B) The Town will suspend a bidder from bidding on Town Contracts for a term of up to five (5) years by Resolution of Council if:
- i. The Bidder has not performed works for previous contracts in compliance with the Contract Documents;
 - ii. The Bidder has previously breached a Contract with the Town
- C) Notwithstanding that the Town will not accept a bid response for the reasons outlined in Section A), the vender may make a deputation to Town Council to gain relief from the refusal to accept bids provided that:
- i. The Bidder demonstrates that the proposed work is substantially different from the type of work from which the Town originally instigated the refusal to accept bids, and
 - ii. The Town Council grants relief from the refusal to accept bids prior to the scheduled bid opening date and time of work for which the Vendor wants to bid upon.

Once the revised wording for Clause 17 has been approved by Council, the Town's Purchasing of Goods and Services Policy will be revised. The Purchasing of Goods and Services Procedures document will also be revised to guide Staff on how this clause will be used. Key points for inclusion in the Procedures are:

- To be invoked only after all other means of resolution are frustrated
- A clear breach of contract or failure to fulfill obligations has occurred verified by legal opinion by Town Solicitor
- If the Town's position is proven incorrect during litigation, the clause will be revoked
- Time period to refuse bids is appropriate for the incident and the loss of value to the Town
- Vendors will be informed of their status and a list will be maintained by Manager of Purchasing
- All bids for vendors subject to Clause 17 will be rejected unless relief is gained from Council. It is possible that the Town may be at arm's length in litigation or pending litigation with a vendor and the Town feels that the legal and work situation will not be compromised by entering another contract with the vendor. In those situations, the vendor may make a deputation to Council ahead of the bid closing date to have their bid accepted.

- Wording will be included in the bid documents and agreements to inform future vendors that non-fulfillment of the contract will preclude them from working for the Town for a period of time up to 5 years.
- During the bidding opening process, Staff will check the list containing the names of vendors whose bids will be refused prior to the opening of bids to ensure that bids are not inadvertently opened.

Staff training will be required to ensure that users of the Purchasing Policy and Procedure understand the revised Clause 17 and implications of the same.

C. The Blue Mountains' Strategic Plan

Town's Strategic Plan Goal # 2 "Addressing the Town's Municipal Infrastructure needs" and Strategic Plan Goal #6 "Providing a strong, well managed municipal government" are in part satisfied by the recommended action.

D. Environmental Impacts

None.

E. Budget Impact

The implementation of this process will require Staff time to modify the Town's Purchasing Policy and Procedure and relevant purchasing templates. Staff time will also be required to provide justification and defend the need to invoke a refusal to accept bids. There may also be costs associated with legal fees to defend the Town's actions.

F. Attached

None.

Respectfully submitted,

Reg Russwurm
Director, Engineering and Public Works

For more information, please contact:
Reg Russwurm
rrusswurm@thebluemountains.ca
(519) 599-3131 x260