TORONTO

REPORT FOR ACTION

Purchasing By-law Amendments - Supplier Code of Conduct and other clarifications

Date: February 5, 2018
To: Government Management Committee
From: Treasurer
Wards: All

SUMMARY

This report recommends amendments to the Supplier Code of Conduct of the Purchasing By-law based on consultation with the City's Broader Construction Association Consultation Group (the BCACG) to address concerns the BCACG has raised with a provision related to the City Treasurer's ability to disqualify a supplier in litigation or in debt with the City.

In addition, other amendments are being recommended to provide additional clarity to provisions related to the responsibilities of Division Heads and Projects Lead as it relates to contract management, and the delegation for awards and for non-competitive contracts by Division Heads relates to delegated authority under the Financial Control By-law.

RECOMMENDATIONS

The Treasurer recommends that:

City Council adopt the proposed revisions to Chapter 195, Purchasing, based on the summary set out in Attachment 1 of this report.

FINANCIAL IMPACT

There is no financial impact associated with the adoption of this report.

The Acting Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

City Council on July 12, 13, 14 and 15, 2016 adopted GM13.13 "Amendments to the Purchasing By-law and Procurement Processes Policy" which included as part of the amendments to the Purchasing By-law, the introduction of a Supplier Code of Conduct.

See: http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.GM13.13

COMMENTS

The revised Purchasing By-law came into force on January 1, 2017. Over the course of 2017, the Chief Purchasing Officer and Legal Services noted a few items might be clarified in the revised by-law, and in the course of discussions with the City's Broader Construction Association Consultation Group, a specific amendment is sought with respect to the Supplier Code of Conduct. The recommended changes are summarized in Appendix 1.

Supplier Code of Conduct Amendments

As part of the revised Purchasing By-law, a Supplier Code of Conduct was introduced. The Supplier Code of Conduct consists of a number of different provisions, many of which were already in use in City procurement documents. However, given the importance of ensuring a high standard of conduct by Suppliers participating in the Procurement Process, these provisions *were* made part of the Purchasing By-law. The Purchasing By-law now requires that suppliers declare that they are in compliance with the provisions in the Supplier Code of Conduct. In addition, the Purchasing By-law (Article 195-3.1(A)) and the Procurement Processes Policy (Article 21.1) grant the Chief Purchasing Officer with the authority to prescribe and approve further appropriate procedures and templates to ensure compliance with the Supplier Code of Conduct.

One specific provision of the Supplier Code of Conduct is article 195-13.13, Suppliers in debt or in litigation with the City. This article allows that the Treasurer in his/her absolute discretion may disqualify a supplier who is in debt or in litigation with the City. This was intended to provide the City the discretion to disqualify a supplier that engages in litigation without consideration for maintaining a viable working relationship or a reasonable standard of business integrity. This was not intended to automatically disqualify all Suppliers who might be in debt or litigation with the City, or to litigation unrelated to the performance of a supplier contract. It was also not intended to apply to reasonable claims or to bid disputes by suppliers.

Members of the City's Broader Construction Association Consultation Group (BCACG) raised concerns about that specific provision. These concerns were first raised as GM13.13 was being debated at GMC and at Council. The associations continued to raise the concerns after Council adopted GM13.13.

The concerns raised by the BCACG include:

- The provision infringes the right of individuals and corporations to engage in litigation and/or alternative dispute resolution, as the provision will be interpreted as a threat to legitimate litigation;
- The provision could penalize firms even where they are successful in the litigation;
- The provision will create an environment in which the City will receive fewer bids and/or higher prices;
- The provision is overly broad in scope, subjective and unclear in its application, which could lead to arbitrary decision making; and
- There was a lack of consultation with the BCACG prior to reporting to GMC and Council.

As a result, over the course of 2017, the Chief Purchasing Officer and Legal Services met with the BCACG to listen to their concerns with respect to this provision. Based on the input from the BCACG and further consideration internally between the Chief Purchasing Officer, the Treasurer and the previous Deputy City Manager & Chief Financial Officer, the Chief Purchasing Official presented an alternative approach to the specific supplier in debt or litigation provision in the Purchasing By-law to the BCACG. The alternative approach includes deleting the existing provision regarding suppliers in litigation with the City and enhancing a different provision in the Supplier Code of Conduct related to Suppliers' performance. In addition a new provision related to the review of suspensions will be added to provide for a mechanism to allow suspended suppliers a means to have their suspension reviewed and possibly lifted. The BCACG were more supportive of this alternative approach.

Other Amendments

Other minor amendments were noted over the course of 2017. These amendments centre around:

- Ensuring that responsibilities of Division Heads and Project Leads are clear, as it relates to adopting further procedures regarding contract management, including those related to performance security enforcement, subcontracting, contract assignments, amendments and early termination;

- Clarify that the delegation for awards and for non-competitive contracts relates to the delegated authority to the Division Heads under the Financial Control By-law;
- Revise the definition of the Chief Purchasing Official to Chief Purchasing Officer to reflect a change in title.

CONTACT

Mike Pacholok, Chief Purchasing Officer, Purchasing and Materials Management
Ph: 416-392-7312 - Em: mike.pacholok@toronto.ca

SIGNATURE

Mike St. Amant
Treasurer

ATTACHMENTS

Attachment 1 - Summary of Proposed Revisions to Chapter 195

Attachment 1 - Summary of Proposed Revisions to Chapter 195

No.	Provision	Description
1	195-2.1 - Definitions	Delete definition Chief Purchasing Official and replace with Chief Purchasing Officer
2	195-4.1G - Division Head responsibilities	Clarify the role of the Division Head in overseeing the management of all contracts, including approvals for items such as subcontracting, assignment, amendment, optional renewal, early termination, enforcement of warranty and performance security and the adoption of related divisional contract management procedures.
3	195-4.2D - Divisional Project Lead responsibilities	Clarify the role of the Project Lead in managing contracts including approvals for items such as subcontracting, assignment, amendment, optional renewal, early termination, enforcement of warranty and performance security
4	195-7.3 - Non-competitive or limited solicitation contract authority	Provide clarity that the authority for a non-competitive or limited solicitation is within the division head's commitment authority under Chapter 71, Financial Control, [as delegated by the City Manager].
5	195-8.1D - Authority to award - Chief Purchasing Officer	Provide clarity that the authority for the award is related to the division head's commitment authority under Chapter 71, Financial Control, [as delegated by the City Manager]
6	195-11.1 - Contract Execution and Purchase Orders	Provide clarity that the execution of the contract is related to the division head's commitment authority under Chapter 71, Financial Control [as delegated by the City Manager]

No.	Provision	Description
7	195-13.11 - Supplier Performance	Expand the Supplier Performance provision so that it is clear that no supplier shall, in the performance of a contract with the City do the following: (1) Materially fail to perform in accordance with the terms of one or more contracts; (2) Over-bill, double-bill, retain a known over-payment, or fail to notify the City of an over-payment or duplicate payment within a reasonable time; (3) Bill for goods or services not supplied; (4) Bill for goods or services of one grade, while supplying goods or services of an inferior grade; (5) Misrepresent the quality or origin of goods and services, their functionality or suitability for a purpose, or their performance characteristics; (6) Misappropriate any property or right of the City, in any form; (7) Submit false or exaggerated claims to the City; (8) Submit misleading information to the City; (9) Seek modifications to the price of a contract through false or misleading representations, including materially undervaluing a bid or any included unit prices to win a contract award with the intention of later seeking unnecessary contract modifications; (10) Fail to pay debts to the City upon reasonable demand; (11) Act in any manner that is a conflict of interest with the City without the knowledge and consent the City; or (12) Any other professional misconduct or omissions that adversely reflect on the commercial integrity of the supplier.
8	195-13.13 - Suppliers in debt or in litigation with the City	Delete the provision.
9	195-13.14 - Suspension of suppliers from future solicitations	Clarify the provision by indicating that a suspension by the City or the Chief Purchasing Officer must be based upon evidence that there has been a contravention of the Supplier Code of Conduct or for any other professional misconduct or omissions by the supplier that adversely reflect on the commercial integrity of the supplier.

No.	Provision	Description
10	Review of Suspensions	Add a new provision that allows a suspended supplier to be able to apply to the Chief Purchasing Officer for a review of the suspension upon the completion or at least half of the total suspension period. Further that any decision to reinstate a suspended supplier may be made by City Council based on the recommendation of the Chief Purchasing Officer and the appropriate Division Head, subject to reasonable conditions or limitations that the supplier will not pose a material risk to the City's procurement process, contract management or reputation for the remaining duration of the original suspension.