

CONFIDENTIAL ATTACHMENT 1

CONFIDENTIAL INFORMATION OR ADVICE

Breach of Contract "A"

In Canadian Public Procurement law, where the City issues a procurement document to the market that is intended to be binding, and where a Supplier submits a bid that is compliant with the rules set out in the procurement document, the City and the Supplier enter into what is known as Contract "A".

Under Contract "A", the City has a number of obligations, including the duty to only accept compliant bids; to award in accordance with the procurement rules (such as lowest price); and to apply the procurement rules in the same way to all bidders.

In turn, bidders also have obligations, the most notable of which is, if a Supplier is selected as the winning bidder, it agrees to enter into the underlying contract for goods and services that is being procured by the City, on the terms and conditions set out in the procurement document. This underlying contract is known as Contract "B".

In this situation, Deloitte LLP ("Deloitte") submitted a binding response to the City's Request for Quotation Document Number 2963148010 (the "RFQ"), which initially included a statement that Deloitte wished to negotiate different terms and conditions than those stated in the procurement document (for Contract "B"). During the procurement process, the City specifically clarified in accordance with procurement rules with Deloitte that this statement would be removed from its response and that Deloitte would agree to abide by the RFQ terms and conditions for Contract "B". As a result, Deloitte was awarded the RFQ as the lowest priced compliant bidder.

Following award, Deloitte refused to abide by the terms and conditions set out in the RFQ, which was effectively a breach of its obligation under Contract "A". The City, as a result, had to move to the second lowest bidder, Fully Managed Incorporated ("Fully Managed"). Fully Managed has, subsequent to award, entered into Contract "B" without deviation from the terms and conditions set out in the RFQ.

Damages for Breach of Contract "A"

In general, damages for breach of Contract "A" by a compliant bidder who refuses to enter into Contract "B" would be the difference in cost to the City between that bid and the bid of the next lowest compliant bidder. In this case, the overall difference in contract value between the bids of Deloitte and Fully Managed was \$4,740,815 (net of applicable taxes) for a five year contract.

Staff in PMMD and TSD consulted with Legal Services about the ability to pursue legal action against Deloitte. [REDACTED]

[Redacted text block]

[Redacted text block]

[Redacted text block]

Contravention of Supplier Code of Conduct

Deloitte also contravened two sections of the Supplier Code of Conduct as set out in Chapter 195. Specifically Deloitte has contravened section 195-13.10 which states:

"Suppliers shall honour their bid, except where they are permitted to withdraw their bid in accordance with the process disclosed in the solicitation. Suppliers shall not refuse to enter into a contract or refuse to fully perform the contract once their bid has been accepted by the City."

And further, subsection 195-13.1B which states:

13.1 – Honesty and Good Faith

B. Suppliers shall submit a bid only if they know they can satisfactorily perform all obligations of the contract in good faith.

The City relied on the honesty of Deloitte's clarification response to determine that Deloitte's Bid submission was compliant and was eligible for award of the RFQ. Deloitte provided a response to the City on December 1, 2021 that admitted that if it complied with the City's Contract "B" it would be in breach of its reseller agreement with ServiceNow, suggesting a lack of intention on the part of Deloitte from the outset to enter into Contract "B".

Suspension

In addition to the question about pursuing a legal claim against Deloitte, under the Purchasing By-law, the Chief Procurement Officer, in consultation with the City Solicitor, has the delegated authority to suspend a supplier for up to 6 months (section 195-13.13B). Further Council has the authority to suspend a supplier for up to 5 years (section 195-13.13A) for breaches of the Supplier Code of Conduct.

The Chief Procurement Officer reviewed this matter with the Chief Technology Officer and the City Solicitor. The Chief Procurement Officer decided not to exercise the 6 month suspension for the following reasons:

- Deloitte is overall performing on their existing contracts and there is an existing relationship that we want to maintain;
- this was the first incident in which Deloitte has failed to honour its bid and it does not appear to have been done with any malicious intent;
- This procurement was for subscription licenses, and not for services. Deloitte typically submits to Request for Proposal procurements where the ability to negotiate tends to be more available; [REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

Overall though, in order to address the fact that Deloitte breached the Supplier Code of Conduct, the Chief Procurement Officer decided that an appropriate response would be to suspend Deloitte from being awarded the contract on the upcoming procurement for Integration Services of ServiceNow licenses. This is a proportional response given that this is the first violation of the Supplier Code of Conduct by Deloitte [REDACTED]
[REDACTED].

Staff's Approach

The Chief Procurement Officer has sent a letter dated February 28, 2022 to Deloitte, on a without prejudice basis suggesting a settlement to the matter on the basis that Deloitte be suspended from being awarded the upcoming procurement for Integration Services of ServiceNow licenses and that Deloitte agree to the suspension and to waive the formal notice that would typically be part of a suspension process.

Deloitte has agreed to the settlement and, as a result, will not bid on the upcoming procurement. Deloitte has indicated that they value the relationship with the City and has learned from this particular matter.