



A Review of the Procurement and Award of the Winter Maintenance Performance-Based Contracts

June 22, 2023

Tara Anderson, CPA, CA, CIA, BAcc
Auditor General

**AUDITOR
GENERAL**

TORONTO



Table of Contents

Executive Summary	1
Background	15
Audit Results	29
A. Circumstances Impacting the Winter Maintenance NRFP and Outcomes	29
A. 1. Pre-procurement Consultations with Suppliers Raised Some Concerns	29
A. 2. Challenges Caused by Only a Few Suppliers Meeting City’s NRFP Requirements	32
A. 3. Non-Competitive Procurement After Unsuccessful NRFPs	43
B. Verifying the Past Experience and Operational Capability of Potential Suppliers.....	51
B. 1. Challenges in Verifying Past Experience	51
B. 2. Challenges in Evaluating and Verifying Operational Capability	57
B. 3. Challenges in Evaluating and Verifying Impact of Equipment Supply Chain Issues	65
C. Reinforcing Procedural Fairness and Transparency	70
C. 1. Clarifying What Terms Can Be Negotiated and What Constitutes a Value-Added Service .	71
C. 2. Clarifying Inconsistencies and Vague Language in the Call Document	75
D. Clarifying and Strengthening Procurement Policies and Procedures	77
D. 1. Enhance Policies and Procedures Governing Negotiated Requests for Proposals	77
D. 2. Review Bid Dispute Mechanisms	78
D. 3. Involve an Independent Fairness Consultant to Support Perception of Transparency and Procedural Fairness	84
E. Reviewing the City’s Pre-Solicitation Estimates.....	87
E. 1. How the Equipment and Cost Estimates Were Prepared.....	88
E. 2. Determining the Benchmark for Transitioning to Performance-Based Contracts	91
Conclusion	95
Audit Objectives, Scope, and Methodology	97
Appendix 1: Management’s Response to the Auditor General's Report Entitled: “A Review of the Procurement and Award of the Winter Maintenance Performance-Based Contracts”	100

Executive Summary

Nearly \$1.5 billion in winter maintenance contracts (over a 10-year term) were awarded in December 2021

In December 2021, City Council approved the award of five contracts for winter maintenance services totalling nearly \$1.5 billion (net of HST recoveries) over the 10-year contract term (inclusive of the three option years and contingency).

Contract awards resulted from two NRFPs and a non-competitive procurement process

These awards resulted from two negotiated requests for proposals (NRFPs) as well as a non-competitive procurement for the provision of winter maintenance services for all roads, sidewalks, and cycling infrastructure types, including anti-icing, de-icing, plowing, and snow removal.

Questions raised about the procurement processes

Deputations by unsuccessful suppliers and pre- and post- award bid disputes raised concerns and questions about the processes to procure and award the multi-year, multi-million-dollar winter maintenance contracts.

The Auditor General's Fraud & Waste Hotline also received a number of complaints regarding the procurement and award of the winter maintenance contracts, and more recently, complaints about the enforcement of the new contracts and performance of contractors.

City Council amended the Auditor General's 2022 Work Plan

At the time of the award, City Council voted to add the following to the Auditor General's 2022 Work Plan:

- a. a review of the City of Toronto's Negotiated Request for Proposal process
- b. a review of the terms of the winter snow maintenance contracts against previously provided winter maintenance Auditor General recommendations
- c. a review of Transportation Services' contract management process, to ensure internal processes are sufficient to hold winter maintenance contractors accountable to the contract terms

Auditor General's review of procurement processes for the new winter maintenance contracts

This report presents the results of the Auditor General's review of the two NRFPs, as well as a non-competitive procurement for the provision of winter maintenance services (covering part a. of City Council's requested reviews as noted above).

Separate report on status of Auditor General’s prior recommendations and Transportation Services’ processes to hold contractors accountable

A separate report addresses the status of recommendations from two previous Auditor General’s reports on the City’s winter road maintenance program, including Transportation Services’ processes to hold winter maintenance contractors accountable to the new contract terms (covering parts b. and c. of City Council’s requested reviews as noted above). That report will also be presented for consideration at the Audit Committee’s July 7, 2023 meeting.

Category Management and Strategic Sourcing Initiative for Winter Maintenance Services

Goals for strategic sourcing of winter maintenance services

The NRFP for winter maintenance services was jointly developed by the Transportation Services Division, Purchasing and Materials Management Division (PMMD), and external consultants as a strategic sourcing initiative with the goal of increasing value for money, improving quality of service and productivity, and meeting the City’s service level expectations.

Joint sourcing team chose to adopt the more flexible NRFP format

The joint sourcing team chose to implement a non-binding NRFP procurement process, which was a new process for most of the winter maintenance contractors. According to the staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#), the joint sourcing team chose to adopt an NRFP process to increase the ability to collaborate with suppliers through negotiations during the procurement process:

“The previous procurement process used for this scope such as RFQs (Request for Quotation) limited this ability. As such, the City was able to: (i) develop an opportunity to recognize the Suppliers’ difference in experience and quality of delivery through technical proposal evaluations (including evaluation of innovation or value added services); and (ii) facilitate engagement with Suppliers in a collaborative way during the procurement process through direct negotiations with the highest scoring Suppliers for the 11 specific Contract Areas.”

Compared with the previous winter maintenance contracts, using a new procurement approach (moving from RFQ to NRFP) and a new service delivery model (performance-based contracts) added more complexity to the City’s approach to procuring winter maintenance services.

NRFP Introduces More Flexibility and Discretion for the City

What is a negotiated request for proposal (NRFP)?

Unlike the traditional RFQ/RFP format, the NRFP process is not a bid call intended to place legally binding obligations on the City or any supplier to enter into a definite agreement. As set out in the NRFP, the NRFP process is intended to identify prospective suppliers for the purposes of negotiating potential agreements. The NRFP process does not create any legal relationship or obligation regarding the procurement between the supplier and the City until the successful negotiation and execution of a written agreement.

NRFPs give discretion and flexibility to the City; City should still ensure procedural fairness and transparency

The non-binding and flexible format of the NRFPs, including the City's reserved rights clauses,¹ gives discretion to the City on how the process unfolds and in coming to final contract terms. There is also less exposure in instances where the bidding process does not culminate in the award of a contract. With the NRFPs, the City may suspend, modify, and/or cancel, in whole or in part, the NRFPs (with or without the substitution of another NRFP), the contract areas, or the proposed contracts without liability. Regardless, as with all public procurements, the City should still ensure procedural fairness and transparency.

The more flexible format of the NRFPs also means the process rules typically do not allow for lost profit claims under traditional common law tendering rules. This means that should any unsuccessful bidder decide to challenge the City's award decisions, the remedies available under an administrative law judicial review application typically would not include lost profits.

Timing of the Winter Maintenance NRFP

Work started on the procurement in June 2020 with sufficient lead time to award contracts

The joint sourcing team started working on the winter maintenance strategic sourcing initiative in June 2020 with what management thought would be sufficient lead time to issue the NRFP and select suppliers to provide winter maintenance services for the 11 contract areas. **Figure 1** summarizes the key milestones in the procurement of winter maintenance services.

¹ The City reserved the right to, in the City's sole and absolute discretion, at any time: revise the NRFP schedule, to accelerate, eliminate, or postpone any of the dates or times set out in the NRFP, including the submission deadline; add to, delete, or re-order any of the milestones set out in the NRFP; or modify the NRFP process.

NRFP issued in May 2021

Staff advised us that when NRFP1 was issued in May 2021, they anticipated there would be sufficient time to award the contracts (with half a year remaining to complete the procurement and report to City Council), while leaving enough lead time afterward for suppliers to acquire the necessary equipment before the start of the first winter season.

Timelines did not contemplate so few suppliers passing NRFP1

What staff did not anticipate was that so few suppliers would pass Stage 3: Technical Proposal Evaluation and for some contract areas, no suppliers would pass. This is discussed further in the following **Results-in-brief section** and in **Section A**.

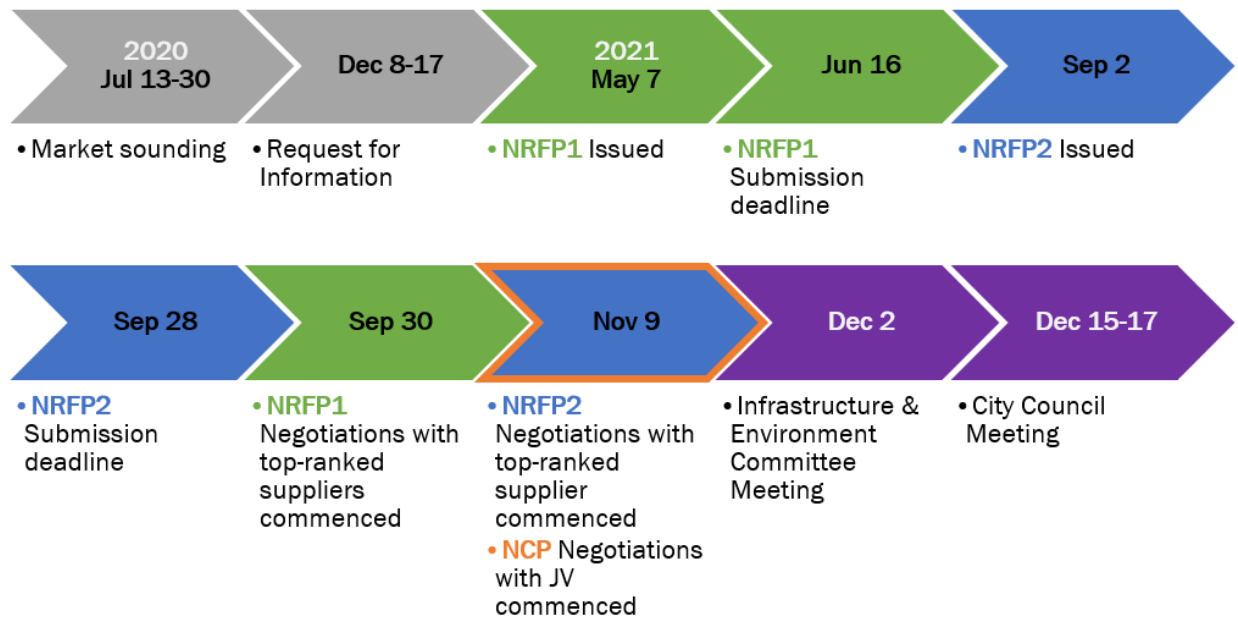
Unanticipated need for a second, overlapping NRFP

The unanticipated need to issue a second, overlapping NRFP introduced time pressures that had a snowball effect. NRFP2 was issued in September 2021 with little time remaining to solicit new proposals, evaluate, negotiate, and make a recommendation to Council. This second NRFP also resulted in few suppliers passing the Technical Proposal Evaluation.

By the time negotiations on NRFP2 proceeded, lead times had run out

By the time negotiations on NRFP1 commenced (after NRFP2 closed) at the end of September 2021 and negotiations on NRFP2 commenced at the beginning of November 2021, Transportation Services' lead times to award contracts for the next (2022/23) winter season had run out. Consequently, a non-competitive procurement (NCP) process was undertaken due to time limitations and results of the previous NRFPs.

Figure 1: Key Milestones in the Winter Maintenance Procurement Process



Staff report highlighted risks if the award was not approved by City Council

In the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#) to City Council, staff highlighted the potential risks if the award was not approved. Management advised that failing to reach an agreement with any of the suppliers would leave the City without the means to provide snow-clearing services for that area, putting the safety of road users at significant risk, and that should the award not be approved, suppliers would likely have insufficient time to procure the required equipment.

Results-in-brief

Audit objective

The objective of this audit was to assess whether the City of Toronto's NRFP procurement process for the provision of winter maintenance services was conducted in a fair, open, and transparent manner and to identify lessons learned for future NRFP processes.

Audit conducted through the lens of opportunities for continuous improvement

Taking into consideration the atypical circumstances surrounding this procurement, we conducted this review through the lens of identifying lessons learned and opportunities for continuous improvement for NRFPs going forward. In particular, we identified lessons learned with respect to:

- A. Circumstances impacting the winter maintenance NRFP and outcomes
- B. Verifying the past experience and operational capability of potential suppliers
- C. Reinforcing procedural fairness and transparency
- D. Clarifying and strengthening procurement policies and procedures
- E. Reviewing the City's pre-solicitation estimates

Key findings and recommendations in these areas are summarized below.

A. Circumstances Impacting the Winter Maintenance NRFP and Outcomes

Challenges related to this procurement likely arose from the unexpected need for a second NRFP

The time frames established for the issuance of the call document, evaluation of proposals, negotiations, and award of the contract, were based on a single NRFP being sufficient. Many of the challenges related to this procurement likely arose from the unexpected need for a second NRFP process (and subsequent non-competitive procurement).

In reviewing the circumstances surrounding the original NRFP, subsequent overlapping NRFP, and non-competitive procurement, we found:

Going forward, establish guidelines and/or criteria for testing significant changes to procurement processes and contracting methods on a smaller scale

- Pre-procurement consultations with suppliers (i.e., market soundings and Request for Information) showed the broad range of perspectives and preferences across the industry. Although some of the consultation comments indicated that the market may not have been fully ready to move to consolidated larger contract areas and scope, Transportation Services ultimately had discretion on what feedback to incorporate or address in the NRFP.

Going forward, for large-scale procurements with significant changes and/or complex procurement strategies, it may be worthwhile to test out changes to procurement processes and contracting methods on a smaller scale, such as through staggered or segmented approaches, in order to review lessons learned and address potential issues, shortcomings, and risks before implementing large-scale changes.

Going forward, provide guidance on when it would be appropriate to use a Request for Supplier Qualification process to reduce the risk of insufficient suppliers that meet the City's requirements

- In both the initial NRFP and subsequent overlapping NRFP, an insufficient number of suppliers met the City's NRFP requirements (particularly, the Technical Proposal Evaluation thresholds).

Going forward, for large-scale procurements, the City should consider whether a separate Request for Supplier Qualification (RFSQ) process would allow the City to gather more information about supplier capabilities and qualifications. Doing so may allow the City to pre-qualify more suppliers to submit responses to a subsequent NRFP, and reduce the risk of contract areas where no suppliers meet the City's requirements, or where concentrating risks with a few suppliers is not appropriate or acceptable to the City.

Going forward, avoid concurrent or overlapping procurement processes

- An unintended consequence of the overlapping NRFPs was that one supplier, who submitted a proposal in response to NRFP1 (and passed Stage 3: Technical Proposal Evaluation but was not the top-ranked supplier), was not notified of their current standing in NRFP1 prior to the NRFP2 submission deadline.²

Going forward, the City should avoid concurrent or overlapping procurement processes where appropriate, and/or implement appropriate risk-mitigation measures to address potential issues that may arise when running concurrent or consecutive procurement processes for the same or related services where the same suppliers may be bidding, especially where operational capability is a factor or evaluation criteria.

Going forward, document the rationale for exercising reserved rights and discretion in the project closeout report

- By the time negotiations on NRFP1 commenced (after NRFP2 closed) at the end of September 2021 and negotiations on NRFP2 commenced at the beginning of November 2021, Transportation Services' lead times to award contracts for the next (2022/23) winter season had run out. As previously noted, management advised that failing to reach an agreement with any of the suppliers would leave the City without the means to provide snow-clearing services for that area, putting the safety of road users at significant risk, and that should the award not be approved by Council, suppliers would likely have insufficient time to procure the required equipment. Thus, staff recommended that two contract areas be awarded through non-competitive procurement processes.

Several suppliers raised bid disputes related to these awards, including one supplier who passed the Technical Proposal Evaluation for a contract area that was ultimately awarded non-competitively. That supplier's bid dispute highlighted that the City did not invite the supplier to enter into negotiations. The City's response to the supplier indicated that, based on the supplier's proposal, staff did not believe a reasonable solution would result from the negotiations. Additionally, the supplier was directed to the City's reserved rights with respect to these non-binding/flexible NRFPs.

² PMMD staff advised that, under normal circumstances (where only a single NRFP is needed), suppliers who pass Stage 3 but are not the top-ranked supplier do not typically find out their standing in the NRFP process until negotiations with the top-ranked and/or other higher-ranked suppliers are complete.

Staff indicated that, while there may have been options to reduce the pricing and explore contract options through negotiations, they believed it was unlikely they would be able to negotiate a reasonable price decrease in the order of millions of dollars. Still, without the City entering into negotiations with the supplier, we cannot know with absolute certainty whether or not the supplier could have improved their pricing to the extent that it would lead to an acceptable financial outcome for the City.

Going forward, when exercising its reserved rights and discretion, the City should document the rationale for exercising such rights in the solicitation file and project closeout report, including the impact and risks to the procurement process and recommendations made based on the exercising of such rights.

Opportunities to make technical proposal requirements and evaluation guidelines clearer

- In **Sections B and C** of the report, we provide examples of where the NRFPs could have been clearer on the technical proposal requirements, where the City could have sought clarification or additional information when conducting Stage 3: Technical Proposal Evaluation, or where the evaluation guidelines could have been more clear.

Limited competition potentially cost the City an additional \$24M a year

PMMD's external consultant estimated the additional cost of limited competition – a consequence of having fewer suppliers respond to the procurement and therefore few suppliers meeting NRFP requirements and moving onto negotiations – to be approximately \$24 million³ per year. The external consultant indicated that the City's need to reissue a second NRFP gave bidders an opportunity to increase their prices, which came in at about 22 per cent higher when compared with pricing received under NRFP1.

B. Verifying the Past Experience and Operational Capability of Potential Suppliers

Past experience is important for the success of performance-based contracts

Sufficient relevant past experience of suppliers is important for the success of performance-based contracts. Therefore, it is important to evaluate and verify a supplier's past experience and performance when awarding such contracts.

³ The extent to which these factors actually increased the contract costs depends on the assumptions of PMMD's external consultant. An aggressive approach versus a conservative approach to making assumptions can produce different estimates of the impact.

Going forward, establish guidelines for reference checks and ensure requirements and scoring guidelines for the evaluation of past experience are sufficiently clear

In their proposals, suppliers were required to provide three examples of projects they completed within the past three years. Suppliers also had to provide references for all three examples so the City could validate the accuracy of responses. Based on our review of the NRFP process rules as well as reference check forms and other records provided by various City staff, we identified areas where the evaluation of suppliers' past experience can be improved. Going forward, we recommend that the City:

- Establish formal procedures or guidelines for how references are to be used to validate the accuracy of supplier responses.
- Review the standard process rules (or NRFP template) and related evaluation criteria for past experience, and enhance guidance and/or training to ensure solicitation requirements and scoring guidelines for evaluation teams are sufficiently clear.

Evaluating the suppliers' ability to deliver required services is key

A key to successful performance-based contracting is conducting an effective evaluation of the suppliers' ability to deliver required services during the procurement process. The City's NRFPs indicated that suppliers should ensure they have the operational capability to deliver on all contract areas for which they submitted responses. The NRFPs also incorporated criteria to evaluate each supplier's capabilities to manage the expected volume of work based on their past experience.

Areas where evaluation of operational capability could be improved

Based on our review of evaluation guidelines and records, we identified areas where the evaluation of suppliers' operational capability could be improved. In particular, we noted that:

- The Technical Proposal Evaluation used a two-pronged, multi-scenario approach for scoring operational capability and approach to scale up operations, which complicated the evaluation process.
- The NRFP asked suppliers to describe the approach to scale up operations and manage the increased volume of work (including but not limited to details that clearly described the scale-up of equipment required, operators, etc.). However, the City did not clearly and explicitly request or require suppliers to provide certain information that could be relevant for assessing whether suppliers could scale up operations in time for the 2022/23 winter season and address or mitigate key risks impacting their capability to meet requirements — most notably, the risks posed by potential shortages in labour and equipment.

- There were no specific evaluation criteria to assess whether suppliers had in place sufficient plans to acquire the necessary equipment within the required time frames given the impacts of the COVID-19 pandemic and international supply chain issues, and/or contingency plans for how suppliers would adjust if they could not acquire all the necessary equipment in time.

Going forward, provide guidance to ensure the City solicits enough information to assess key risks impacting suppliers' capability to meet requirements

Going forward, the City should ensure NRFP process rules and scoring guidelines avoid the use of a two-pronged, multi-scenario approach for a given evaluation criterion/sub-criterion wherever possible. The City should also ensure that NRFPs solicit enough information to enable the City to assess whether key risks impacting suppliers' capability to meet the scope of work and deliverables are appropriately addressed or mitigated.

Going forward, provide guidance on the extent of information that can be requested to verify, clarify, or supplement the information in a supplier's proposal response

The NRFP did not explicitly require suppliers to provide an equipment acquisition plan that reflected the impact of supply chain challenges. Still, the City adopted a flexible, non-binding NRFP format, and the NRFPs indicated that, when evaluating proposals, the City may request further information from a supplier or third parties to verify, clarify, or supplement the information in the supplier's bid. Yet, PMMD and Transportation Services staff indicated that the City was unable to request supplementary information or further clarification outside of the proposal submitted during the NRFP process, to investigate whether the suppliers had an appropriate acquisition plan and/or contingency plan for how they would adjust if they could not acquire all the necessary equipment in time.

Going forward, divisional staff should receive further guidance and/or training to clarify the extent of information that can be requested by the City from a supplier or third parties to verify, clarify, or supplement the information in a supplier's proposal submitted to an NRFP, when evaluating technical proposals and/or undertaking negotiations.

C. Reinforcing Procedural Fairness and Transparency

Non-binding, flexible NRFP format gives the City discretion

Though the non-binding, flexible NRFP format gives the City discretion to suspend, modify and/or cancel, in whole or in part, the NRFPs (with or without the substitution of another NRFP), the contract areas, or the proposed contracts without liability, as with all public procurements, there remains a duty of procedural fairness. In this audit, we identified some areas for continuous improvement for the City to better support procedural fairness going forward. For example:

Going forward, communicate clearly and consistently what can be proposed as value-added services

- To reduce the risk of potential challenges, concerns, or disputes about transparency and procedural fairness in negotiating concessions, going forward, the City should make sure it is clear and consistent when communicating to suppliers what it is willing to negotiate and the range of alternatives it is willing to consider through proposals of “value-added services” (particularly, proposals of alternatives to the requirements set out in the call documents). This will allow suppliers to better understand what they can propose and may result in better value and/or more opportunities to increase revenues or lower costs.

Going forward, make sure NRFP process rules are as clear as possible

- We also noted that questions raised by suppliers and bid disputes highlighted a few areas where language in the NRFP documents could have led to different interpretations of the process rules and requirements, supplier confusion, and bid disputes. Going forward, staff should make NRFP process rules as clear as possible and avoid or clarify process steps that may be interpreted inconsistently or cause supplier confusion.

D. Clarifying and Strengthening Procurement Policies and Procedures

Going forward, clarify or strengthen procurement policies and procedures taking into consideration the impact of the non-binding/flexible NRFP format

As a result of our review, we identified several policies and procedures that should be clarified or strengthened, particularly taking into consideration the impact of the non-binding/flexible NRFP format. These include:

- **Policies and procedures governing procurement processes** including Toronto Municipal Code, Chapter 195; the City’s Procurement Processes Policy; and the City’s Request for Proposal procedure, to name a few. Procedural guidance for PMMD and divisional staff participating in NRFPs can be enhanced by laying out principles for maintaining procedural correctness in NRFPs and a framework (protocols or boundaries) for using discretion and flexibility during the procurement process. Enhancements can include guidance on how to seek clarification or modification of any aspect of the proposal, how to obtain additional information during the NRFP process, and how to conduct commercially confidential meetings and negotiations, and address the corresponding impacts on the evaluation protocols.

- **Policies and procedures governing the City’s bid dispute process** including Toronto Municipal Code, Chapter 195 and the Pre-Award and Post-Award Bid Dispute Procedure. In particular, the City should consider defining circumstances where it may be more appropriate to designate an alternative senior City official to conduct an impartial review of pre-award bid disputes, such as when the Chief Procurement Officer is involved in or provides advice regarding key procurement decisions. Any potential revisions to these policies and procedures should also take into consideration any outcomes or recommendations pending from a previous Council-requested review of the potential for an Inspector General for the City of Toronto.
- **Policies and procedures governing the use of external fairness consultants.** In July 2004, City Council endorsed the approach of using external fairness consultants⁴ in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny. This approach was never clearly articulated into a formal policy with criteria on when a fairness consultant should be used, and the guidance put forward in the 2004 report requires an update.

E. Reviewing the City’s Pre-solicitation Estimates

Going forward, document the reasons for significant variances between City’s pre-solicitation estimates and bids received

The City’s pre-solicitation equipment and cost estimates were much lower than the actual bids received. We noted that different assumptions were used for the estimates and the City’s pricing form for the NRFPs, some of which contributed to widening the gap between the bids received and the estimates. We also noted inconsistencies in the data used for the pre-solicitation estimates and the final NRFP requirements, including changes and corrections made to contract area maps and/or NRFP requirements (identified during the NRFP process). That being said, during the NRFP process, City staff used the estimates in a consistent manner when considering proposal submissions across all contract areas.

⁴ Report on “Feasibility of Using Fairness Consultants for Certain Procurements” considered by City Council in July 2004. <https://www.toronto.ca/legdocs/2004/agendas/council/cc040720/adm5rpt/cl011.pdf>

Going forward, we recommend that the City:

- Review, document, and retain in the solicitation file the reasons for significant variances between pre-solicitation estimates and actual contract values.
- Establish a baseline or perform a cost-benefit analysis when changing the sourcing strategy, procurement approach, or contracting model to better assess the actual outcomes achieved on new contracts.

Conclusion

Flexible, non-binding NRFP format gives management discretion

We found that the flexible, non-binding NRFP format gives management some discretion to modify the NRFP process as it proceeds and because of this, the winter maintenance procurement process generally unfolded according to the rules set out in the NRFP document. While we noted some exceptions potentially impacting the fairness, openness, and transparency of the procurement, most were generally not significant enough to impact the award outcome. We discuss any notable exceptions in the report.

Challenges from the unexpected need for a second, overlapping NRFP process (and subsequent NCP)

Many of the challenges related to this procurement likely arose from the unexpected need for a second, overlapping NRFP process (and subsequent non-competitive procurement), combined with tight timelines. It is a concern that so few suppliers passed the Technical Proposal Evaluation, and that for some contract areas no suppliers met the City's requirements. The result was that two companies and their joint venture were awarded approximately \$1.29 billion (88 per cent) of the total \$1.47 billion dollars in winter maintenance contracts.

Report identifies areas for continuous improvement

While the circumstances surrounding this NRFP process may be atypical, the bid disputes, complaints, issues, and concerns raised during the process point to the need for continuous improvement. The report identifies areas for continuous improvement to strengthen the perception and reality that the City holds itself to the highest standards of fairness, objectivity, impartiality, clarity, openness, and transparency of NRFPs.

Going forward, before adopting large-scale changes to the procurement and contracting approach for services, the City should consider testing out changes on a smaller scale and making adjustments based on the outcomes and lessons learned, where needed. Furthermore, divisional staff should ensure they gather key information to understand cost drivers (e.g., information to establish baselines for the extent to which service levels have been achieved and at what cost) before starting.

The flexible and non-binding NRFP format is an important tool that can allow the City to request and consider relevant information that supports the success of the contracts awarded through the procurement (e.g., detailed plans to scale up and acquire sufficient labour and equipment given known supply chain and labour market risks).

16 recommendations

The 16 recommendations in this report focus on continuous improvement and reinforcing and supporting the City's ongoing efforts to make NRFP process rules, technical proposal requirements, and evaluation criteria clearer, with the goals of keeping as many suppliers as possible through all the evaluation stages and achieving the best possible outcomes and value for the City.

Background

Winter maintenance services

The City’s Transportation Services Division provides annual winter maintenance services on approximately 5,780 km of roads, 7,400 km of sidewalks, and 770 km of bike lanes and major trails, which make up the transportation network in Toronto.

Majority of winter maintenance is delivered by private contractors

The majority of winter maintenance services are delivered by private contractors. In-house staff perform a small portion of winter maintenance work for local roads and laneway salting. In-house staff are responsible for approximately 1,460 km of sidewalk plowing.

Services during a winter storm event

During a winter storm event, Transportation Services is responsible for ensuring that:

- **Roads** are salted when snow begins to fall and stick to road surfaces. The different types of roads (i.e., expressways, arterials, collectors, and local roads) receive different levels of service.
- **Bike lanes** are salted and/or plowed at the same time as the adjacent road, based on the level of service.
- **Sidewalks** are mechanically cleared after 2 cm of snow accumulation. When the 2 cm activation threshold is not reached, or when ice build-up occurs after the City plows have completed its routes, it is up to residents and businesses to ensure sidewalks are clear of snow and ice.
- **Bus stops and transit shelters** will generally be plowed within 12 hours after a snowstorm.
- **Laneways** are salted as necessary to maintain safe and passable conditions.

Refer to **Figure 4** for the Council-approved service levels (on page 26 of this report).

Expiry of the 2015-2022 Winter Maintenance Contracts

Previously, no single contractor was responsible for all services and infrastructure types within a geographical area

Under the contracting model in place from 2015 to 2022 for winter maintenance services, there were 47 contracts with 21 different contractors. Several of these contracts were for a mix of different services or infrastructure types, but no single contractor was exclusively responsible for all services and infrastructure types within a geographical area.

Some contractors only provided a single type of service or serviced a single type of infrastructure

Some contractors performed winter services only for select infrastructure types (e.g., local roads, sidewalks, expressways). As shown in Table 1:

- only one contractor was responsible for salting local roads
- five contractors only performed sidewalk clearing
- five other contractors only performed local plowing
- no contractors performed all the services, and only one contractor performed three out of four core services.

Services were provided by 21 winter maintenance contractors

Table 1: Summary of 2015-2022 Contracts Awarded by Contractor

Contractor	Local Salting	Sidewalk Clearing	Depot ⁵	Local Plowing	Total
Contractor 1	-	1	-	6	7
Contractor 2	-	1	1	3	5
Contractor 3	5	-	-	-	5
Contractor 4	-	3	1	-	4
Contractor 5	-	-	-	2	2
Contractor 6	-	1	1	-	2
Contractor 7	-	-	-	2	2
Contractor 8	-	-	2	-	2
Contractor 9	-	-	1	1	2
Contractor 10	-	2	-	-	2
Contractor 11	-	2	-	-	2
Contractor 12	-	2	-	-	2
Contractor 13	-	1	-	1	2
Contractor 14	-	-	-	1	1
Contractor 15	-	1	-	-	1
Contractor 16	-	-	1	-	1
Contractor 17	-	-	1	-	1
Contractor 18	-	-	-	1	1
Contractor 19	-	1	-	-	1
Contractor 20	-	-	1	-	1
Contractor 21	-	-	-	1	1
Total	5	15	9	18	47

Source: Report dated April 7, 2021 from the Transportation Services Division's external consultant titled "2022-2029 New Winter Contracts, Toronto Winter Maintenance Contracts, Final Report"

2021/22 winter season cost the City over \$100M

For the 2021/22 winter season, Transportation Services delivered the City's winter maintenance program at a cost of about \$100.8 million (contracted services: \$81.9 million in contracted services; in-house staff standby: \$5.5 million; salt: \$13.4 million).⁶

2021/22 was the final winter season under the 2015-2022 contracts

At the end of the 2021/22 season, the 47 contracts with 21 different contractors and a fleet of 1,100 contracted vehicles were due to expire.

Planning for new winter contracts was initiated in June 2020

To prepare for the new winter maintenance contracts, in June 2020, Transportation Services initiated a process to review the existing winter maintenance contracts with an aim to consolidate, adjust, and provide specific and measurable performance contracts.

⁵ Depot contracts were contracts that bundled services (such as salting, snow plowing, and snow removal for expressways and arterial and collector roads) and included a depot location. The actual services included in a depot contract varied from contract to contract and may have included more or fewer services than listed here.

⁶ The total costs for the 2021/22 winter season were significantly higher than in prior winter seasons (2020/21: \$72.6M; 2019/2020: \$78.4M; 2018/2019: \$90.0M). The 2021/22 winter season included more significant winter storm events and the expansion of mechanical sidewalk clearing across the City.

Winter maintenance procurement was a strategic sourcing initiative

As a strategic sourcing initiative, the procurement team was comprised of staff from the Transportation Services Division and Purchasing and Materials Management Division's Category Management and Strategic Sourcing Team. The initiative was also supported by external consultants engaged by the two divisions. The team used several different inputs to understand trends, challenges, and innovation, including market soundings with winter services suppliers, with the goals of increasing value for money, improving quality of service and productivity, and meeting the City's service level expectations.

In the staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#), Transportation Services indicated that the Auditor General's 2020 and 2021 reports on the winter road maintenance program informed the procurement for the new winter maintenance contracts.

Auditor General previously reviewed winter maintenance services under the 2015-2022 contracts

The Auditor General's Office previously reviewed the winter maintenance services under the 2015-2022 contracts and issued the following two reports:

1. [Audit of Winter Road Maintenance Program - Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes](#) (October 2020)
2. [Winter Road Maintenance Program - Phase 2 Analysis: Deploying Resources](#) (June 2021)

The reports contained 26 recommendations in total, including recommendations for improving the efficiency and effectiveness of the program, resolving contract management and contractor performance issues, and measuring and meeting the Council-approved service levels.

Auditor General's prior recommendations did not require a change of procurement method and contract model

The Auditor General's reports did not recommend changing the procurement method or changing the contracting model. Recommended improvements to contract language and contract management and performance monitoring practices did not require changes to the procurement method. Implementation of the operational and contract improvements would be possible even if previous approaches to procurement and contracting continued.

To be clear, contract changes and the requirement to hold contractors accountable to ensure the City receives the service it is paying for could equally apply to all types of procurement methods and contracting models, whether they are performance-based or unit-priced contracts, and whether they are acquired through a traditional RFQ/RFP or a more flexible NRFP format.

Separate report on the Auditor General's review of previous recommendations

The Auditor General conducted a review to assess the implementation status of recommendations raised in its prior review of the winter maintenance services. The results of that review are discussed in a separate report, which will be presented for the Audit Committee's consideration at its July 7, 2023 meeting.

Process to Select Suppliers and Award New Contracts

City issued an NRFP in May 2021 consolidating all winter maintenance services within 11 contract areas

In May 2021, the City issued a negotiated request for proposal Doc2970598171 (NRFP1) which consolidated all winter maintenance services into 11 contract areas (based on 10 geographical regions plus the DVP/Gardiner Expressways). Under NRFP1, suppliers were expected to service all infrastructure (i.e., expressways, arterials, collectors, local roads, sidewalks, bike lanes, and multi-use trails) within a given contract area. Suppliers were also expected to perform all winter activities (i.e., anti-icing, de-icing, salting, plowing, stockpiling, storing, loading, hauling, spreading salt and salt mixtures, making salt brine, and removing snow) within a given contract area.

Rationale for consolidating contracts

The expected benefits of consolidating contracts, as noted by Transportation Services' external consultant, included economies of scale, efficiencies for overall contract management, and more competitive bid pricing. More specifically, the consultant indicated:

“The bundling of activities within an area should provide contractors the ability to realize economies of scope and scale benefits that should result in more competitive bid pricing ... Contracts with the bundling of activities with greater personnel and equipment requirements consolidated at an individual facility for an area should allow contractor efficiencies for overall contract management, people management and equipment management.”

According to the staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#), Transportation Services decided to consolidate all related winter maintenance services work for the following reasons:

“This allows the City to leverage its volume of scope to support a competitive process and reduce City staff time and efforts to manage a reduced number of contracts so it may be used on other urgent City needs.

Another resulting benefit is eliminating existing potential conflicts between multiple suppliers providing different winter maintenance services in a similar area.

Under the aforementioned consolidated approach a single supplier will be accountable for executing all the winter maintenance services within their awarded zone, thus arranging a coordinated implementation.”

Second, overlapping NRFP was issued because first NRFP was unsuccessful in identifying suppliers for some contract areas

The City was unsuccessful in identifying enough suppliers that met its requirements for all contract areas under NRFP1. Consequently, in September 2021, the City issued a second negotiated request for proposal Doc3136860258 (NRFP2). Timelines for the overlapping NRFPs (including the milestones in **Figure 1**) are summarized in **Figure 2**.

The City was also unable to identify enough suppliers that met its requirements through NRFP2. The City decided to award two contract areas through non-competitive procurement. The impact of so few suppliers meeting the City’s NRFP requirements, and the subsequent non-competitive procurement, are further discussed in **Section A**.

Figure 2: Winter Maintenance Procurement Process Timeline



* Including a letter to the NRFP1 supplier who passed Stage 3 but was not a top-ranked supplier

Over \$1 Billion in Contracts Awarded to Four Suppliers and One Joint Venture

City Council approved the contract award December 15, 2021

In December 2021, the Infrastructure and Environment Committee considered a staff report from the General Manager, Transportation Services and Chief Procurement Officer, Purchasing and Materials Management on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#). The report was forwarded to City Council without recommendations. City Council adopted this item on December 15, 2021 with amendments⁷.

The report recommended the award of contracts to four suppliers and one joint venture (made up of two of those four suppliers) to provide winter maintenance services for all roads, sidewalks, and cycling infrastructure types (including anti-icing, de-icing, plowing and snow removal) from October 2022 to April 2029, with three additional separate option years extending to April 2032.

Total value of contracts estimated to be nearly \$1.5 billion over 10 years

The staff report indicates the base contract value (net of HST recoveries) is over \$1 billion. The three additional option years are valued at nearly \$500 million for a grand total contract value of nearly \$1.5 billion over the 10-year contract term, inclusive of the three option years, contingency, annual incentive provision, value-added service (costs and benefits), and estimated annual escalation adjustment of three per cent to account for CPI inflation. **Table 2** breaks down the contract awards by supplier. As noted below, two of the suppliers (IML and A&F) and their joint venture (JV) received a total of \$1.29 billion (88 per cent) of the 10-year base contract value (excluding HST), representing nine of the 11 contracts.

⁷ [Agenda Item History - 2021.IE26.4 \(toronto.ca\)](#)

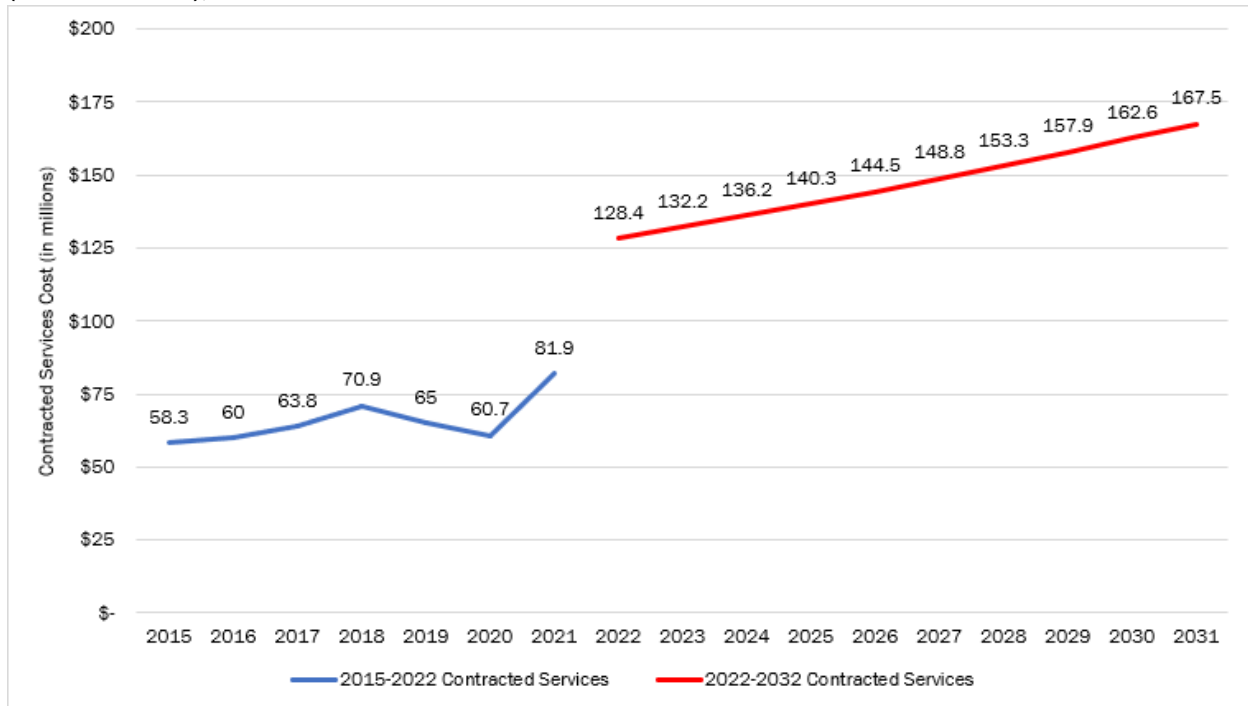
Table 2: Summary of Contract Awards

Supplier	Contract Areas	Wards	Season 1 (2022/23) Contract Value	Total 10-Year Contract Value
Emcon Services Inc.	DVP / Gardiner	N/A – Don Valley and Gardiner Expressways	\$5,166,125	\$58,972,697
Infrastructure Maintenance Ltd. (IML)	TOA 1-1	Scarborough North (23) Scarborough Guildwood (24) Scarborough – Rouge Park (25)	\$12,553,029	\$143,906,411
A&F Di Carlo Construction Inc. (A&F)	TOA 1-4	Spadina – Fort York (10) University – Rosedale (11) Toronto Centre (13)	\$6,879,592	\$78,866,817
	TOA 1-5	Parkdale – High Park (4) Davenport (9) Toronto – St Paul’s (12)	\$8,730,328	\$100,083,423
			\$15,609,920	\$178,950,240
2868415 Ontario Inc., a joint venture (JV) between Infrastructure Maintenance Ltd. and A&F Di Carlo Construction Inc.	TOA 1-2	Scarborough Southwest (20) Scarborough Centre (21) Scarborough – Agincourt (22)	\$15,764,676	\$180,724,342
	TOA 1-3	Toronto – Danforth (14) Beaches – East York (19)	\$11,151,671	\$127,841,410
	TOA 2-1	Etobicoke North (1) Humber River – Black Creek (7)	\$15,986,176	\$183,263,590
	TOA 2-3	Don Valley West (15) Don Valley East (16)	\$10,611,828	\$121,652,717
	TOA 2-4	York South-Weston (5) Eglinton-Lawrence (8)	\$12,206,332	\$139,931,918
	TOA 2-5	Etobicoke Centre (2) Etobicoke – Lakeshore (3)	\$18,690,219	\$214,262,417
			\$84,410,902	\$967,676,394
Maple Crete Inc.	TOA 2-2	York Centre (6) Don Valley North (17) Willowdale (18)	\$10,631,513	\$121,878,387
Total (excluding HST)			\$128,371,489	\$1,471,384,129
Total (net of HST recoveries)			\$130,630,827	\$1,497,280,488

Cost more than doubled between 2020/21 (right before NRFP1 was issued) and 2022/23

The \$128.4 million cost (excluding HST) of contracted winter maintenance services for the 2022/23 season is over \$46 million higher than the approximately \$81.9 million spent on contracted services during the 2021/22 winter season. It is more than double the \$60.7 million spent on contracted services during the 2020/21 winter season. **Figure 3** illustrates the jump in costs under the old contracts compared with anticipated costs under the new 10-year contracts due to market conditions and changes to the procurement and contracting method, which are discussed further in **Section E**.

Figure 3: Actual Spend on Old Contracts (2015 to 2022) versus Estimated Value of New Contracts (2022 to 2032), in \$ millions



Source: Transportation Services

What has stayed the same for the new contracts?

Transportation Services responsible for holding suppliers accountable to contract requirements

Under the new contracts, Transportation Services' responsibility to monitor the suppliers' work has not changed. The Division continues to be responsible for holding suppliers accountable to the contract requirements.

In comparing the key terms and conditions in the old and new winter maintenance contracts, we found that the nature of the work and required winter maintenance activities are generally the same. More specifically:

Roads/infrastructure being serviced have not changed

1. Roads/infrastructure being serviced have not changed

The infrastructure being serviced (such as expressways, bike lanes, arterials, collectors, local roads, sidewalks,⁸ and multi-use trails) generally remain the same.⁹

⁸ In June 2021, City Council approved the expansion of sidewalk winter snow clearing services to include the vast majority of sidewalks in the city, effective for the 2021/22 winter season. [Agenda Item History - 2021.IE22.13 \(toronto.ca\)](#)

⁹ Management advised there were some changes between what was serviced by contractors in the 2021/22 season (old contracts) versus the 2022/23 season (new contracts), primarily for bike lanes where every year approximately 40-50 km of new bicycle lane infrastructure is constructed.

Winter maintenance services/activities have not changed

2. Winter maintenance services/activities have not changed

The winter maintenance services and sequencing of work (such as anti-icing, de-icing, salting, plowing, stockpiling, storing, loading, hauling, spreading salt and salt mixtures, making salt brine, and removing snow) generally remain the same.

The fundamental approach to dispatching vehicles, and deciding what material to use and in what amounts, have not changed. All these decisions and activities are still initiated at Transportation Services' direction.

Requirement for onboard GPS devices has not changed

3. Requirement for onboard GPS devices has not changed

GPS is still required on all fleet and equipment so that the City can use GPS data to monitor and verify work and to process contractor payments. The new contracts clarify what the City expects of its contractors regarding the availability and maintenance of the GPS devices and data.

What has changed for the new contracts?

Significant reduction and consolidation of contracts

Over and above the move to significantly reduce and consolidate the 47 activity- or infrastructure- based contracts into 11 or fewer contracts for all services needed for defined geographical areas, the most significant change to the contracts is the shift from using a conventional unit-priced contract to a performance-based contract.

Move to a performance-based contract

In performance-based contracts, rather than the contract indicating what means should be used to achieve the end result, the contractor decides how to deliver the end result. In a performance-based contract, the payment is based on the supplier achieving a specific performance outcome (e.g., plowing expressways to achieve bare pavement within a specific time frame). Since the payments are based on the final performance outcome, the supplier typically has the flexibility to design their approach (e.g., planning its own routes, fleet size, vehicle types, and staffing).

This is different from conventional unit-priced contracts where payments are based on inputs or transactions — i.e., the quantity supplied, or units of work completed (e.g., number of lane kilometers salted, number of hours spent on plowing). In a conventional unit-priced contract, since the supplier is paid based on the units (i.e., quantity) of service or products supplied, the contractor has less incentive to be more efficient or effective.

The move to performance-based contracts included the following key changes to the contracts and contract management practices:

Suppliers decide equipment, fleet size, and routes

1. Contractor decides fleet size, equipment to use, and routes

For the 2015-2022 contracts, the City decided what equipment suppliers had to use and how many vehicles to deploy. Under the NRFPs (and ensuing contracts), the suppliers decide the fleet size, choose the equipment to use,¹⁰ and design what routes to take. To improve service reliability and reduce breakdowns, the maximum allowable age of certain vehicle types was reduced under the new contracts. Terms and conditions regarding mechanical fitness and maintenance of equipment are also clarified in the new contracts.

By allowing the suppliers to decide on the fleet size and mix, the responsibility shifts to the suppliers to ensure they have selected the correct number and type of vehicles needed to do the work to meet the established service levels.

Transportation Services still controls when the contractors go out to salt and plow

While the new contracts give suppliers the flexibility to decide what equipment to use and what routes to take, a call-out by the City is still needed to notify suppliers to activate equipment and commence operations for spreading, salting, spot-cleaning, brine preparation, plowing, etc.

2. Service level requirements, outcomes, and key performance indicators have been clarified

Service level requirements and expected pavement outcomes have been clarified in the new contracts

The Council-approved service levels have not substantially changed since the 2021/22 winter season.¹¹ They are publicly posted on the City's website.¹² The responsibility for fulfilling these requirements within the time allowed have shifted from the City to the supplier. The service level expectations included in the new contracts are outlined in **Figure 4**.

¹⁰ The type of vehicles and equipment suppliers proposed were selected from a list of vehicle types approved by the City for each service/activity as specified in the NRFP.

¹¹ In June 2021, Council approved the expansion of sidewalk winter snow clearing to the vast majority of sidewalks in the city, effective for the 2021/22 winter season. For the expanded city-wide service, Council adopted the same service levels already in place for sidewalk plowing. (i.e., initiating plowing whenever 2 cm of snow accumulated with completion of each route within approximately 12 hours). [Agenda Item History - 2021.IE22.13 \(toronto.ca\)](#)

¹² <https://www.toronto.ca/services-payments/streets-parking-transportation/road-maintenance/winter-maintenance/levels-of-snow-clearing-service/>

The new contracts now specifically and explicitly define the service levels and required outcomes and specify price adjustments based on performance metrics and compliance with service level requirements. Upon Transportation Services notifying them to activate equipment for salting or plowing, suppliers must:

- meet the applicable service level requirement as mandated by the City
- perform winter maintenance services within the specified maximum operating time
- achieve the desired pavement outcome.

Contracted service levels

Figure 4: Service Levels Included in the new (2022-2032) Winter Maintenance Contracts

Infrastructure Type or Activity	Initiation Level ¹ (cm of snow accumulation)	Maximum Operating Time	Desired Pavement Outcome
Salting Operations			
DLA Expressways/ Arterials/Collectors	N/A	6 hours	Visible salt residue per lane
Expressways	Up to 2.5 cm	2 hours	Bare Pavement
Arterials	Up to 5 cm	4 hours	
Collectors	Up to 8 cm	4 hours	Centre Bare
Local Roads		8 hours	Safe and Passable
On-road Cycle Lanes	Adjacent roadway accumulation	Same as Maximum Operating Time for the adjacent roadway ²	Safe and Passable
Plowing Operations			
Expressways ³	2.5 cm	2 hours	Bare Pavement
Arterials ³	5 cm	6 hours	
Collectors ³	8 cm	8 hours	Centre Bare
Local Roads	8 cm	14 hours	Safe and Passable
Windrow Clearing	Windrow height exceeds 25 cm	Maximum Operating Time for the adjacent roadway plus 2 hours	Safe and Passable
On-road Cycle Lanes	Adjacent roadway accumulation	Same as Maximum Operating Time for the adjacent roadway ²	Bare Pavement
Combined Salting & Plowing Operations			
Sidewalks	2 cm	12 hours	Safe and Passable
Bus Stops & Pedestrian Crossovers	2 cm	12 hours	Safe and Passable
Separated Cycle Tracks & Multi-use Paths	2 cm	8 hours	Bare Pavement

1. The City may initiate salting or plowing earlier than the indicated standard.
2. On-road cycle lanes must be cleared by the Vendor as part of adjacent roadway Operations at no additional cost to the City.
3. When plowing Operations are carried out by the Vendor on expressways, arterials, collectors, and locals; the Vendor is required to provide salting as part of plowing Operations at no additional cost to the City.

Transportation Services still responsible for monitoring and enforcing contract compliance

In the same way that Transportation Services was responsible for monitoring performance, enforcing contract compliance, and holding contractors responsible for meeting the expected performance under the old contracts, the need for robust processes and controls governing contract management and monitoring of contract performance continues under the new contracts.

Rigorous processes and records to measure performance outcomes needed

We do not expect that monitoring efforts required by Transportation Services will be reduced. On the contrary, the City will likely need more rigorous processes and records to measure performance outcomes in order to properly apply the related price adjustments based on the service levels.

Separate report addresses Transportation Services processes to hold contractors accountable to service level requirements

Our review of Transportation Services' processes to hold contractors accountable to service level requirements during the 2022/23 winter season is discussed in a separate report. That report is being presented for the Audit Committee's consideration at its July 7, 2023 meeting.

3. Liquidated damages clauses have been clarified and new performance-based price adjustments have been incorporated

Liquidated damages provisions have been simplified to make them easier to understand and enforce

Both the old and new contracts included liquidated damages clauses. In the previous audit of the winter maintenance services, the Auditor General found that the old contract provisions for liquidated damages were difficult to understand and could be cumbersome to enforce. Consequently, staff did not consistently enforce liquidated damages. In the new contracts, the liquidated damages clauses have been simplified with the intent of making them easier to understand and enforce.

Performance-based price adjustments have been incorporated

To encourage optimal contractor performance, financial incentives and disincentives have been incorporated into the new contracts. The new contract includes terms such that contractors who consistently meet the prescribed performance metrics (i.e., routes completed within maximum operating time and compliance with desired pavement outcomes) will be rewarded. Those who do not will incur financial consequences.

Auditor General's review of the enforcement of liquidated damages and price adjustments clauses is reported separately

Our review of Transportation Services' enforcement of the new liquidated damages clauses and new financial incentives/disincentives clauses through the 2022/23 winter season is discussed in a separate report. That report is being presented for the Audit Committee's consideration at its July 7, 2023 meeting.

Audit Results

This section of the report contains the findings from our audit work followed by specific recommendations.

A. Circumstances Impacting the Winter Maintenance NRFP and Outcomes

Goals for strategic sourcing of winter maintenance services

The NRFP for winter maintenance services was developed as a strategic sourcing initiative¹³ with the goal of increasing value for money, improving quality of service and productivity, and meeting the City's service level expectations.

A. 1. Pre-procurement Consultations with Suppliers Raised Some Concerns

Market soundings with 8 industry suppliers

In July 2020, Transportation Services and PMMD staff met with eight winter maintenance service providers (seven of which subsequently submitted proposals in response to the NRFP) as part of the market research to help inform the strategic sourcing approach/procurement strategy for winter maintenance services.

Market soundings used to understand cost drivers and industry experience with performance-based contracts

PMMD staff advised us that, given the large number of suppliers in the field and the time required to develop the procurement approach, the eight suppliers were selected based on experience with performance-based contracts and/or providing winter services to the City of Toronto or other public organizations. These one-on-one meetings with suppliers were held to understand their key cost drivers, experience with other types of procurements and performance-based contracts, and types of technology and practices currently being used in the market.

¹³ According to a 2020 Staff Report to City Council seeking [Authority to Enter into a Non-competitive Contract with Ernst & Young to Support Category Management and Strategic Sourcing \(toronto.ca\)](#), strategic sourcing is one part of the category management approach to procurement. It relies on analyzing information about the supplier market and anticipated volumes and dollar value of purchases. Negotiation with suppliers and periodic assessments of supply transactions are hallmarks of effective strategic sourcing. Applied to the City, strategic sourcing is intended to leverage the City's purchasing power to find the best possible values in the marketplace.

Some suppliers expressed concerns during market soundings

Based on the notes taken during the market soundings, some suppliers expressed concerns with taking on larger service areas or new services (in particular, sidewalk clearing), and with acquiring equipment on time. For example:

- When asked how consolidating scope areas would impact their ability to bid and deliver the services, one supplier clearly expressed that their operations could handle a larger consolidated contract area. Other suppliers highlighted the risk of fewer bids by consolidating, while others provided both pros and cons.
- When asked if they had experience with outcome/performance-based contracts, some suppliers indicated they had “No experience on this” and that “Fewer and fewer are willing to do [performance-based contracts] at all. Doesn’t know where it would start...” One supplier indicated they had experience with performance-based contracts in another jurisdiction, and that it was a benefit to them and that jurisdiction.
- When asked if there were scope areas they did not have the ability or desire to deliver, several suppliers raised concerns with the liability risks associated with sidewalks.¹⁴
- Some suppliers began raising the potential for supply chain issues or longer lead times needed to get equipment, indicating “With COVID-19, manufacturing has been impacted and equipment might take longer” and “takes 12-18 months to get trucks.”

Additional RFI also indicated mixed interest in bundling winter activities

In December 2020, the City issued a Request for Information (RFI) via the City’s SAP Ariba Online Procurement System to assess suppliers’ capability and capacity to bid on scope areas, which would then determine if and how the scope areas could be consolidated. There were 10 respondents (including three that had already participated in the market soundings). Responses from the RFI were similar to those from the market soundings. For example, 40 per cent of respondents indicated a willingness to provide all winter maintenance services, while several others expressed concern with including sidewalks and/or bus stops and cycle lanes.

¹⁴ An external consultant engaged by Transportation Services also noted that the Request for Information, market sounding of contractors, and the insurance industry all identified that more equitable sharing of contract risk and liabilities is an important step to ensure the City attracts a broad range of contractor participation. The consultant recommended that the City review the indemnities clause in the existing winter maintenance contracts to assess the possibility of creating a more balanced sharing of contract risk and liabilities.

City was not obligated to incorporate or address supplier feedback

The market soundings and RFI show the broad range of perspectives and preferences across the industry. Although some of the comments are indicative that the market may not have been fully ready to move to consolidated larger contract areas and scope, the City had no obligation to incorporate any or all of the feedback received.

City's approach informed by external consultant's recommendations

In 2020, Transportation Services engaged an external consultant to examine variables within the 2015-2022 contracts and service delivery elements. The study looked to reduce the total number of contracts while maintaining or improving current levels of service.¹⁵ This study was to include an evaluation of different combinations of contract areas and activities including expressway, arterial, collector, local, sidewalk, and cycle contracts. The consultant made recommendations that were mostly adopted by Transportation Services in the NRFP with some adjustments.

Going forward, test out significant changes to review lessons learned

Going forward, when feedback from market soundings and RFIs are mixed, or when there are significant changes to procurement processes and contracting methods, or when the complexity of the category management and strategic sourcing initiative is high, it would likely be prudent and insightful to test out the impact of the changes to procurement processes and contracting methods on a smaller scale. This could be done, for example, by issuing a solicitation for a smaller geographical region (or a subset of total contract areas) rather than the whole city, or by staggering contracts or staging changes over time. This approach can help the City review lessons learned and address potential issues, shortcomings, and risks before implementing large-scale changes.

¹⁵ As noted by the Auditor General, in the 2020 report "Audit of Winter Road Maintenance Program – Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes," Transportation Services was not measuring the achievement of the Council-approved and provincially mandated service levels, which are necessary to ensure public safety and the reliability of the transportation network. Since service levels were not tracked, there is no way of knowing the extent to which contractors were meeting service levels within the costs and constraints (e.g., equipment levels) of the 2015-2022 contracts.

Specifically, testing the approaches out before making wholesale changes can be used to inform decisions on how best to address:

- feedback from suppliers in the marketplace
- key cost drivers of the good or service
- constraints that may limit competition or the number of suppliers that would be capable of delivering services on a large scale
- bid submissions that are significantly different than City expectations
- mitigation measures for potential or unforeseen global or local market conditions and supply chain disruptions
- timing the strategic sourcing events to take advantage of market conditions.

This would also enable the City to better educate the industry on the changes and may help improve the quality of responses, increase competition, and potentially achieve a better result for the City.

Recommendation:

- 1. City Council request the Chief Procurement Officer to establish guidelines and/or criteria for client divisions to consider when implementing complex procurement strategies and/or significant changes to the approach for category management and strategic sourcing initiatives, and to test changes on a smaller scale such as through staggered or segmented approaches, where possible, in order to review lessons learned and address potential issues, shortcomings, and risks before implementing wholesale changes.**

A. 2. Challenges Caused by Only a Few Suppliers Meeting City's NRFP Requirements

City originally planned for a single NRFP

On May 7, 2021, the City issued a negotiated request for proposal Doc2970598171 (NRFP1). The City originally planned to award all 11 contract areas through this NRFP. Suppliers had until June 16, 2021 to submit proposals.¹⁶

The time frames established for the issuance of the call document, evaluation of proposals, negotiations, and award were set based on a single NRFP being sufficient. Many of the challenges related to this procurement likely arose from the unexpected need for a second NRFP process (and subsequent non-competitive procurement).

¹⁶ The original submission deadline of June 2, 2021 was revised twice.

Insufficient Number of Suppliers Met City's NRFP1 Requirements

6 of 11 contract areas had no suppliers meet City requirements

For each contract area, the City received proposals from three suppliers¹⁷ at most. As shown in **Table 3**, there were six contract areas where no suppliers passed Stage 3: Technical Proposal Evaluation.¹⁸ For the remaining five contract areas (TOA 1-1, TOA 1-4, TOA 1-5, TOA 2-2, and Don Valley/Gardiner Expressway), five suppliers passed Stage 3.

Table 3: Number of Suppliers Who Bid versus Number of Suppliers Who Passed Stage 3 (NRFP1)

Contract Area	1-1	1-2	1-3	1-4	1-5	2-1	2-2	2-3	2-4	2-5	DVP & GE
# of suppliers who bid	3	2	1	2	2	3	3	2	1	2	3
# of suppliers who passed Stage 3	1	0	0	1	1	0	1	0	0	0	2

After Stage 3 concluded in August 2021 (three months after NRFP1 was issued), the City sent letters to suppliers indicating whether they passed the Technical Proposal Evaluation stage.

5 suppliers were notified they would be moving on to Stage 4: Pricing Evaluation

The five suppliers who passed were sent letters indicating they would be moving on to Stage 4 and that “*Following the completion of Stage 4: Pricing Evaluation; Suppliers will proceed to Stage 5: Ranking of Suppliers per Contract Area and Stage 6: Contract Negotiations.*” The letter further indicated that: “*With the imminent issue of a new nRFP for the remaining six (6) Contract Areas; the City will pause the commencement of negotiations until the closing of the new nRFP. The City is still targeting the initial Winter Maintenance Services' timelines for contract award.*”¹⁹

¹⁷ Two contract areas only received proposals from one supplier. Five contract areas received proposals from two suppliers. Four contract areas received proposals from three suppliers.

¹⁸ The six contract areas where no suppliers passed Stage 3 were TOA 1-2, TOA 1-3, TOA 2-1, TOA 2-3, TOA 2-4, and TOA 2-5

¹⁹ As noted in the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#), although Stages 4 and 5 (Pricing Evaluation and Ranking for NRFP1, respectively) were completed by August 18, 2021, the City did not begin Stage 6 (Negotiations) until after the final closing date for NRFP2.

5 other suppliers did not pass Stage 3: Technical Proposal Evaluation

The five suppliers who did not pass the Technical Proposal Evaluation stage were sent letters indicating their submitted proposals did not meet the requirement of achieving an overall threshold of 70 points in the technical evaluation to proceed to Stage 4: Pricing Evaluation. These five suppliers were offered the opportunity for a debriefing. These debriefings occurred between August 11 to 19, 2021.

NRFP1 debriefings and NRFP2 information meetings provided similar general feedback

The five suppliers who passed the Technical Proposal Evaluation stage did not receive a debriefing in advance of the subsequent NRFP. However, as noted in the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#), in an effort to maintain fairness for all suppliers, the City included the same general themed feedback in the material presented during the NRFP2 supplier information meeting conducted on September 13, 2021, as was communicated during the debriefings with suppliers that did not pass Stage 3 on NRFP1. This material was then shared via addendum on September 16, 2021, so that all suppliers, regardless of whether they attended the optional information meeting, would have access to the same information.

Unintended Impacts of Overlapping Procurements

Second, overlapping NRFP issued with very little time remaining in the planned contract award time frame

On September 2, 2021, a second negotiated request for proposal Doc 3136860258 (NRFP2) for winter maintenance services was issued for the six contract areas where no suppliers passed the Technical Proposal Evaluation stage in NRFP1. NRFP2 closed for submissions on September 28, 2021, prior to the conclusion of NRFP1.

Supplier asked how to handle the overlapping procurement processes

As a result of the overlapping procurement processes, a question arose over whether suppliers who remained eligible for contract areas under NRFP1 could still bid on NRFP2. City staff responded in an addendum: *“Yes. Please review Part 1 - nRFP Process, Section 1.1.3. Suppliers may submit Responses for one (1) or more of these six (6) Contract Areas. Suppliers are requested to only submit Responses for the number of Contract Areas that they have sufficient capacity to service.”*

Top-ranked suppliers for NRFP1 were sent letters inviting them to negotiations prior to NRFP2 closing

We noted that in the five days leading up to the NRFP2 submission deadline, the top-ranked suppliers for NRFP1 (four out of the five suppliers who passed Stage 3) were notified by the City that they were being invited to enter contract negotiations – the earliest of which would commence on September 30, 2021. As a result, these four suppliers would have been in a better position to assess their operational capability to bid on additional contract areas under NRFP2.

One supplier was not notified of their current standing in NRFP1 prior to the NRFP2 submission deadline

However, one supplier who passed Stage 3 but was not the top-ranked supplier was not made aware by the City of their current standing in NRFP1 (i.e., because they were not a top-ranked supplier, they did not receive an invitation to the contract negotiations for NRFP1 before the NRFP2 submission deadline). This supplier was not informed until well after the submission deadline for NRFP2 (November 19, 2021) that they were not the top-ranked supplier and would not be awarded a contract area through NRFP1. PMMD staff advised that, under normal circumstances (where only a single NRFP is needed), suppliers who passed Stage 3 but were not the top-ranked supplier would not typically find out their standing in the NRFP process until negotiations with the top-ranked and/or other higher-ranked suppliers were complete.

Supplier's bid dispute

The supplier, in their post-award dispute submission, stated that:

“As a result of the City’s decision in August 2021 to pause negotiations until the closing of the updated nRFP, [Supplier] was unfairly put in a worse position worse than the suppliers who did not pass the technical scoring threshold. Without any clear direction from the City around the City’s interpretations of [Supplier]’s capacity to handle more work, [Supplier] felt it could not bid on more work pursuant to Part 1, Section 1, Article 1.1.2 of the nRFP. As a result, it was precluded from submitting a proposal for the updated nRFP, while it waited a further three months to be informed that it was not the successful bidder for the ... Contract Area. [Supplier] notes that none of the other suppliers [that passed the technical evaluation stage] from the first nRFP bid on the updated nRFP, except in a joint venture capacity.”

City's response to bid dispute

The City’s pre-award and post-award bid dispute response to the supplier did not appear to clearly address or respond to this matter. However, the post-award bid dispute review team advised us that nothing in either NRFP precluded the supplier from submitting a proposal in response to NRFP2 and that the non-binding nature of the NRFPs meant that at any time up until execution of an agreement the supplier could walk away from their proposal without consequence or penalty. This meant the supplier could have submitted a proposal to NRFP2, and if they had been successful on both NRFPs could have chosen to either: (i) withdraw from NRFP1 and remain with NRFP2; (ii) withdraw from NRFP2 and remain with RFP2; (iii) withdraw from both NRFPs; or (iv) if they determined they had appropriate capacity, remain with both.

In the future, where operational capability is a potential concern, the City should avoid concurrent or overlapping procurement processes for similar services involving the same potential suppliers wherever possible and/or consider cancelling an unsuccessful solicitation in its entirety and reissuing the procurement rather than continuing with an overlapping procurement. While the need for a second, overlapping NRFP is not the norm, where concurrent or overlapping procurement processes cannot be avoided, the City should take steps to proactively educate suppliers to ensure they understand the flexibility afforded to them due to the non-binding nature of the NRFPs. This is especially the case when NRFPs are relatively new to the suppliers, as that may impact suppliers' decision regarding what to bid on.

Insufficient Number of Suppliers Met City's NRFP2 Requirements

4 of 7 suppliers passed the Stage 3: Technical Proposal Evaluation for NRFP2

Seven suppliers submitted proposals in response to NRFP2. Four of them met the minimum thresholds of Stage 3: Technical Proposal Evaluation to advance to Stage 4: Pricing Evaluation for five of the remaining six contract areas (TOA 1-2, TOA 1-3, TOA 2-3, TOA 2-4, and TOA 2-5).

Table 4: Number of Suppliers Who Bid versus Number of Suppliers Who Passed Stage 3 (NRFP2)

Contract Area	1-1	1-2	1-3	1-4	1-5	2-1	2-2	2-3	2-4	2-5	DVP & GE
# of suppliers who bid	NRFP 1	3	2	NRFP 1	NRFP 1	2	NRFP 1	3	4	2	NRFP 1
# of suppliers who passed Stage 3		1	1			0		1	3	1	

One remaining contract area where no suppliers met City requirements

As shown in **Table 4**, for contract area TOA 2-1, two suppliers submitted proposals. However, neither supplier met the minimum scoring requirements, and the City formally notified suppliers on October 29, 2021 that this contract area would not be awarded through NRFP2.

For another contract area, City did not negotiate with a supplier who passed the technical evaluation because staff concluded there was no viable option for negotiations

For contract area TOA 2-5, management advised that the City did not negotiate with the only supplier to pass the Technical Proposal Evaluation stage because City staff were of the view that they would not be able to successfully negotiate a significantly lower price than the one proposed by the supplier. The staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#) indicated:

“In reviewing the pricing proposal submitted for Contract Area TOA2-5, the City determined that the proposal did not meet the requirements outlined in the nRFP. Staff concluded there was no viable option for Stage 6 – Negotiations that would result in an acceptable financial outcome for the City. As a result, the City cancelled the award for the Contract Area and would be seeking alternative sourcing options for the provision of these services.”

The decision by the City to not negotiate with the one supplier who passed the Technical Proposal Evaluation stage for TOA 2-5 is further discussed in **Section A.3**.

Two contract areas were awarded through non-competitive procurement

Solicitation documents for the non-competitive procurement of contract areas TOA 2-1 and TOA 2-5 were issued on November 4, 2021 and on November 5, 2021, respectively. Refer to **Section A.3** for further discussion on the non-competitive procurement.

Negotiations for NRFP2 and non-competitive procurement occurred concurrently

Negotiations with the top-ranked supplier for contract areas under NRFP2 (TOA 1-2, TOA 1-3, TOA 2-3, and TOA 2-4) occurred between November 9 and 10, 2021. The same supplier was awarded contract areas TOA 2-1 and TOA 2-5 through non-competitive procurement and negotiations occurred concurrently with contract areas awarded under NRFP2.

Reviewing NRFP Requirements and Evaluation Methodology When Only a Few Suppliers Meet City’s NRFP Requirements

City should have assessed the need for substantive changes to the NRFP

After the first NRFP, where half the suppliers who submitted proposals did not pass Stage 3: Technical Proposal Evaluation despite having past experience delivering winter maintenance for the City (and/or other jurisdictions), the City should have considered whether it needed to make substantive changes to the NRFP process, up to and including cancelling, redrafting, and reissuing a wholly new NRFP applicable for all contract areas with revised requirements, evaluation criteria, and thresholds.

Some changes were made before issuing NRFP2

City staff advised that before proceeding with the second NRFP, the following changes were made:

- Revisions made through NRFP1 addenda were incorporated into NRFP2.
- Stage 2: Financial Requirements were modified by adding an additional question related to capital requirements.
- Minor updates were made to technical proposal questions to illicit more detail and increase clarity on expectations. The largest updates were made to the Delivery Approach questions, where additional detail was requested on:
 - methods to overcome challenges where infrastructure types are serviced at different times or when multiple operations are working at the same time
 - geographic contract area-specific approach to coordinate and sequence activities to meet the City's service levels in an efficient manner where infrastructure types are serviced at different times or when multiple operations are working at the same time
 - how the number of equipment was derived and what factors were taken into account such as route length, equipment material capacity, and operating speeds.
- The terms for price adjustments for adhering to service levels were adjusted to include a sliding scale that resets each winter season. This was done based on feedback received during the post-NRFP1 debriefings, where suppliers indicated that disincentives tied to the level of service was a key contributor of high equipment numbers and therefore potentially costs.
- The pricing form was updated to request a description of the 'Other' cost component under the 'Daily Rate' to understand the impact of these costs.

There were no substantive changes to equipment requirements or to liquidated damages clauses.

Changes were not significant enough to cancel NRFP1 and make NRFP2 applicable for all contract areas

The changes were not significant enough for the City to cancel NRFP1 and make NRFP2 applicable to all contract areas (rather than to just the remaining six areas).

Transportation Services indicated that extending the existing 47 contracts was not feasible

Some suppliers suggested that Transportation Services could have considered extending the existing 47 contracts for a year. However, Transportation Services indicated that this was not feasible, because to do so would not be a small undertaking and the City's hiring freeze had impacted staff resources available to address the matter. Given the time constraints around getting contracts in place in time for the 2022/23 winter season, Transportation Services believed awarding new contracts was the only way forward.

By the time negotiations on the NRFP2 proceeded, lead times had run out

By the time negotiations on NRFP1 commenced (after NRFP2 closed) at the end of September 2021, and negotiations on NRFP2 commenced at the beginning of November 2021, Transportation Services' lead times to award contracts for the next (2022/23) winter season had run out. Management advised that should the award not be approved by City Council, suppliers would likely have insufficient time to procure the required equipment before the start of the next winter season.

Management advised City Council that not approving these contracts would leave the City in a vulnerable state

In the supplementary report to City Council, management indicated that *"Not approving these contracts would leave the City in a vulnerable state with minimal negotiating leverage with the existing suppliers."* Staff further indicated that:

- The City would have to renegotiate 47 separate contracts, with existing suppliers who know they will not be awarded contracts beyond the one-year extension. Some existing suppliers may not be interested in continuing to provide winter maintenance services on a short-term basis or for any number of other reasons.
- Failing to reach an agreement with any of the suppliers would leave the City without the means to provide snow-clearing services for that area, putting the safety of road users at significant risk on various road classifications and in non-compliance with Ontario Maintenance Standard Regulations for winter maintenance.
- Existing suppliers may not be satisfied with the current financial contract terms and could require significant cost increases before agreeing to continue with the City.
- The City will have to reissue contracts in future years, which based on the current economic forecasts could result in much higher bids.

PMMD’s consultant estimated the additional cost of fewer suppliers bidding and meeting NRFP requirements to be about \$24M annually

PMMD’s external strategic sourcing consultant estimated the additional cost of limited competition – a consequence of having fewer suppliers respond to the procurement and so few suppliers meeting NRFP requirements and moving onto negotiations – to be approximately \$24 million per year.²⁰ The external consultant indicated that the City’s need to reissue a second NRFP gave bidders an opportunity to increase their prices, which came in at about 22 per cent higher when compared with pricing received under NRFP1.

Using Vendor Debriefings to Educate Suppliers

Debriefings provide an opportunity to explain why proposals were not selected so suppliers can improve for the next procurement

The City has a policy on supplier debriefings. According to the policy, the purpose of a debriefing is to provide a means to explain to an unsuccessful supplier why their proposal/bid was not selected in order for that supplier to improve upon their proposal/bid for the next procurement opportunity. The debriefing provides an opportunity to recognize the time, effort and cost expended by both the supplier and the City. It explains the evaluation process and provides feedback on a supplier’s proposal/bid, identifying strengths and areas for improvement for future proposals/bids. The supplier debriefing is not for the purpose of providing an opportunity to challenge the procurement process.

Debriefings between NRFP1 and NRFP2

As noted previously, between NRFP1 and NRFP2, the City provided debriefing opportunities to five suppliers who did not pass Stage 3: Technical Proposal Evaluation. In an effort to maintain fairness for all suppliers, the City included the same general themed feedback in the material presented during the NRFP2 supplier information meeting as was communicated in the debriefings.

Supplier-specific feedback was relatively generic

Based on NRFP1 debriefing notes, as summarized in **Table 5**, we found that scripted feedback to suppliers on areas for improvement was relatively high-level and generic, primarily indicating that the supplier should provide more detailed responses or specific details, or that responses lacked significant detail.

²⁰ The extent to which these factors actually increased the contract costs depends on the assumptions of PMMD’s external consultant. An aggressive approach versus a conservative approach to making assumptions can produce different estimates of the impact.

Table 5: Comparison of Feedback to Unsuccessful Suppliers

Feedback provided to supplier:	Unsuccessful Supplier				
	1	2	3	4	5
The contract specific area tab questions required more detailed responses including how you derived your equipment proposal related to service level requirements. These were Delivery Approach questions 3.4.1.1 and 3.4.1.2.	X	X	X	X	X
Provide specific details of what you are proposing to the City.	X	X	X	X	
Many of the questions lacked significant detail. One of these were Technology and Risk Management.	X	X	X		
Could have provided more detail to the City for the Technology and Risk Management, and Fleet Management questions.				X	
Only answered 1 of 2 parts of the Risk Management question.					X

City staff provided some examples when asked

Additionally, during the debriefings, some suppliers asked specific questions about where their proposal needed more detail. For example, suppliers asked staff to elaborate on the details required for Delivery Approach questions 3.4.1.1 and 3.4.1.2, or whether their response was lacking on the quantitative or qualitative side.

In response to these questions, staff provided some additional detail. For example, staff indicated to one supplier that for the GPS-related question, the supplier should tell the City how they were going to use GPS to meet the contract requirements, and how they would make sure the GPS was in working order in terms of process and procedures. Staff also indicated that sufficient rationale or explanation was not provided for how suppliers derived their proposed equipment numbers and how it would meet the service level requirements. Some of these questions and responses were then included in the NRFP2 supplier information session, which all potential suppliers had the option to attend.

To maintain fairness during the debriefings for NRFP1, staff did not provide any information on the specific scoring of proposals.

City asked suppliers to identify areas for potential improvements for NRFP2

To identify areas for potential improvements for NRFP2, during the debriefings, the City also asked suppliers questions to better understand if any parts of the NRFP were difficult to understand, and if any aspects of the procurement process or NRFP documents prevented the suppliers from providing complete and comprehensive responses. Also, since the equipment proposed was observed to be significantly higher than the City's estimates, staff asked what factors and assumptions went into the proposed equipment. Suppliers identified, for example, that the City needing to provide more detail in what is being requested for technical questions, liquidated damages were very harsh and unreasonable, and the large fleet proposed was to mitigate the risk of excessive penalties.

In some cases, adjustments were made to the NRFP. For example, as noted previously, additional detail was added specifically to the NRFP2 questions (3.4.1.1 and 3.4.1.2) related to Delivery Approach.

Some suppliers did not significantly improve or provide more details in their responses to NRFP2

Despite the feedback provided by City staff during the debriefings and in the material presented during the NRFP2 supplier information meeting, NRFP2 did not have a significantly better result over NRFP1 (in terms of increasing the number of new suppliers submitting responses and meeting the NRFP requirements²¹).

In reviewing the proposals submitted by a supplier who did not pass the Technical Proposal Evaluation stage for both NRFP1 and NRFP2, we observed that they did not significantly improve the information or detail provided in their proposal submission, even though providing greater detail was recommended by City staff during the debriefings.

Better feedback was provided in debriefings after NRFP2

We noted that the debriefings that took place after NRFP2 contained more specific and actionable feedback. However, by then, the NRFP process had ended.

²¹ Of the seven suppliers who submitted a response to NRFP2, five had previously submitted a proposal under NRFP1 and the other two 'new' suppliers were joint ventures that comprised at least one supplier who submitted a proposal under NRFP1. There were two suppliers who passed Stage 3: Technical Proposal Evaluation for NRFP2 who had not previously passed under NRFP1. One supplier was within one point of passing NRFP1. The other supplier's score improved significantly from NRFP1 to NRFP2. Neither of these two suppliers were awarded contracts.

Recommendation:

2. **City Council request the Chief Procurement Officer to provide guidance for client divisions on avoiding concurrent or overlapping procurement processes where appropriate, and/or implement appropriate risk mitigation measures to address potential issues that may arise when running concurrent or consecutive procurement processes for the same or related services where there may be the same suppliers bidding for contracts where operational capability is a factor or evaluation criteria.**

A. 3. Non-Competitive Procurement After Unsuccessful NRFPs

Staff reported the City was unable to award two contract areas through the two NRFPs

In the staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#), staff indicated that non-competitive procurement of contract areas TOA 2-1 and 2-5 occurred because the City was unable to award those areas through the two NRFPs:

“As the City was unable to award Contract Area TOA2-1 and TOA2-5 through the two (2) Negotiated Request for Proposals described above, Transportation Services elected to procure the provision of winter maintenance services for these areas through a Non-Competitive Procurement, in accordance with Section 195-7.1 of Toronto Municipal Code Chapter 195, Purchasing.”

Transportation Services elected to undertake non-competitive procurement

Chapter 195 of the Toronto Municipal Code allows for a non-competitive procurement to be undertaken where both the proposed non-competitive procurement and the particular supplier can be justified in good faith, based on one or more of the exceptions specified in §195-7.1 including:

F. An attempt to procure the required goods or services by soliciting competitive submissions has been made in good faith, but has failed to identify a compliant submission or qualified supplier, or where the submissions received have been collusive

P. Such other non-competitive procurement exemptions authorized by Council

No suppliers met the minimum technical scoring requirements for TOA 2-1

The staff report noted that NRFP1 and NRFP2 identified no suppliers who met the minimum technical scoring requirements for contract area TOA 2-1.

For TOA 2-5, staff concluded there was no viable option for negotiations that would result in an acceptable financial outcome for the City

For contract area TOA 2-5, the staff report indicated that for NRFP1, the contract area did not have a supplier who met the minimum scoring thresholds. For NRFP2, while a supplier did pass Stage 3: Technical Proposal Evaluation, staff thought they would not be able to negotiate the bid price down to a level that would be acceptable to the City. The staff report indicated that:

“In reviewing the pricing proposal submitted for Contract Area TOA2-5, the City determined that the proposal did not meet the requirements outlined in the nRFP. Staff concluded there was no viable option for Stage 6 – Negotiations that would result in an acceptable financial outcome for the City. As a result, the City cancelled the award for the Contract Area and would be seeking alternative sourcing options for the provision of these services.”

City solicited a price proposal from the joint venture (JV) for the two contract areas

In the staff report, staff indicated that consequently:

“The City solicited a proposal from 2868415 Ontario Inc. (Joint Venture), the highest ranked Supplier identified in the evaluation process of the nRFP 2: Doc3136860258. In this previous solicitation, 2868415 Ontario Inc. (Joint Venture) had demonstrated the operational and financial capacity to be awarded additional Contract Areas beyond what it had been awarded. Upon reviewing the proposal submitted in response to this Non-Competitive Procurement, the City conducted negotiations for these two (2) Contract Areas, which were concurrently held with negotiations for nRFP-2: Doc3136860258.”

JV was not the highest-scoring or highest-ranked supplier for TOA 2-5 under NRFP2

For clarity, the joint venture (JV), 2868415 Ontario Inc., received the highest overall score for Stage 3: Technical Proposal Evaluation across all suppliers who submitted a proposal for any of the contract areas under NRFP2, but were only the highest-ranked supplier for the contract areas they bid for under NRFP2 (i.e., TOA 1-2, TOA 1-3, TOA 2-3, and TOA 2-4). The JV was not the highest-scoring or highest-ranked supplier for TOA 2-5 as they did not submit a bid for this contract area under NRFP2.

City Did Not Invite Top-Ranked Supplier for TOA 2-5 to Enter into Negotiations

Supplier concerns over the non-competitive award of contract area TOA 2-5

Steed and Evans Ltd.²² submitted a written communication dated December 2, 2021 to the Infrastructure and Environment Committee regarding their concerns over the non-competitive award of contract area TOA 2-5.

One supplier passed Stage 3: Technical Proposal Evaluation for TOA 2-5

For contract area TOA 2-5, our review of the City's internal evaluation records indicates that Steed and Evans was the only supplier who passed Stage 3: Technical Proposal Evaluation. As the only supplier scored on pricing for TOA 2-5, they received full marks on the pricing evaluation.

Supplier's interpretation of NRFP language about the City's intent to invite top-ranked suppliers to enter into negotiations

The supplier appears to have interpreted the NRFP language outlining the stages of the NRFP process to mean that the top-ranked supplier would automatically be invited into negotiations and allowed an opportunity to come to terms with the City. One part of the NRFP stated that the top-ranked suppliers in each contract area "may" be invited to enter into direct contract negotiations to finalize a contract. Elsewhere, when describing the various stages of the NRFP process, the NRFP stated that the City "intends to invite the top-ranked Suppliers" to enter into contract negotiations.

City relied on reserved rights and non-binding, flexible NRFP format

Notwithstanding the permissive language that left the discretion to the City for entering into negotiations, the City's reserved rights in the NRFP included the right to suspend, modify, and/or cancel, in whole or in part, the NRFP, the contract areas, or the proposed contracts, without liability. They also included the right to modify the NRFP process, including a decision not to open Stage 6: Negotiations.

City did not invite the top-ranked supplier for TOA 2-5 to enter into negotiations

Ultimately, the City did not invite Steed and Evans, the top-ranked supplier for TOA 2-5, to enter into negotiations. The City notified the supplier that the City was formally cancelling contract area TOA 2-5 and instead would be seeking alternative sourcing options for that contract area.

²² Steed and Evans Ltd. is identified in this section of the report, because the supplier's name and commercial information included in communications between the City and the supplier are quoted in this section of the report. The communications between the City and the supplier were submitted by the supplier in a written communication to the Infrastructure and Environment Committee that is publicly available at: <https://www.toronto.ca/legdocs/mmis/2021/ie/comm/communicationfile-142014.pdf>

City's reasons for cancelling TOA 2-5 from NRFP2

In a letter to Steed and Evans dated November 5, 2021, the City cited that the significant gap between the supplier's proposed cost and the City's estimates led to the conclusion that there was no viable option for negotiations that would lead to an acceptable financial outcome for the City. Specifically, the letter stated:²³

*"As you are aware, there are six (6) contract areas (to be awarded and established separately) associated with this nRFP, of which Steed and Evans Ltd has submitted a proposal for Contract Area **TOA 2-5**. Upon review of your pricing submission for this contract area, the City has determined that your total bid cost of **\$26,448,690 is approximately \$20 Million above** the City's estimated budget. This significant variance has led to the conclusion that there is no viable option for Stage 6 - Negotiations that would lead to an acceptable financial outcome for the City.*

*Based on the above mentioned details; the City is formally cancelling **Contract Area TOA2-5** of nRFP Doc3136860258 and instead will be seeking alternative sourcing options for the provision of these services."*

Supplier filed pre- and post-award bid disputes

The supplier subsequently filed pre- and post-award bid disputes with the City as well as a deputation/communication to the Infrastructure and Environment Committee to consider alongside the staff report recommending the awards of winter maintenance contracts.

²³ This letter, in its entirety, and other communications between the supplier and City staff were submitted as part of the supplier's written communication to the Infrastructure and Environment Committee and is available publicly at: <https://www.toronto.ca/legdocs/mmis/2021/ie/comm/communicationfile-142014.pdf>

Supplier submitted a written communication to the Infrastructure and Environment Committee

Steed and Evans' written communication²⁴ expressing its view of the NRFP to the Infrastructure and Environment Committee on December 2, 2021 indicated:

"Report says Steed and Evans (SE) did not meet the requirements set out in nRFP for Stage 4 Pricing Proposal - this contradicts with letter SE received Nov 5.

The letter SE received on November 5 indicates the City does not intend on negotiating because SE's price of approximately \$26 million/yr is \$20 million over the City's estimate.

Nowhere in Stage 4 Pricing Proposal does it state that a Supplier's price must meet an undisclosed budget number. The price is to be scored against the lowest price in the Contract Area amongst all bids that passed the technical portion. In this Contract Area, as well as other contract areas that are recommended for award, our price was the only one that made it to stage 4 and therefore had no other prices to compare to. This would leave us as top ranked supplier for the Area and would proceed to negotiations as per nRFP. There are no provisions within the nRFP to dismiss a contractor at this stage - they must proceed to negotiations. All preceding stages up to this point had a pass/fail or minimum score required to continue."

Steed and Evans further indicated that:

"The City's decision to use a non-competitive procurement process to solicit and recommend for award of Contract Area TOA 2-5 does not meet the requirements for use of non-competitive procurement published in Article 7 of Toronto Municipal Code Chapter 195, Purchasing."

In its written communication, Steed and Evans stated:

"Steed and Evans is a compliant bidder and the submitted price is not grounds for not moving to the negotiation stage of the nRFP ... The City's proposal to offer a contract with a non-competitive solicitation when a compliant bid has been received is not fair. Negotiations should continue with the compliant bidder."

²⁴ The supplier's written communication to Infrastructure and Environment Committee is available publicly at: <https://www.toronto.ca/legdocs/mmis/2021/ie/comm/communicationfile-142014.pdf>

City's response to bid dispute notes that a reasonable solution would not result from the negotiations

Consistent with the staff report to the Infrastructure and Environment Committee, the City's response to the supplier's bid dispute indicated that staff did not believe that, based on what was contained in the supplier's proposal, a reasonable solution would result from the negotiations. The City's bid dispute response stated:

"The intent of the nRFP is to rank the highest scoring proponents in order to attempt to negotiate a final agreement. The underlying principle to the negotiation is that a reasonable solution can be agreed upon. When reviewing your proposal, staff were concerned that your proposed price was approximately \$20 million over the estimate for TOA2-5, and that the number of equipment being proposed was also higher than what was estimated. The further assumption was that Steed and Evans, in accordance with the Supplier Code of Conduct, section 195-13.1, Honesty and Good Faith (as found in Chapter 195, Purchasing), submitted a proposal in a honest and good faith manner such that negotiating down to a price that would be acceptable to the City may undermine Steed and Evan's ability to perform the work. Therefore, staff did not believe that based on what was contained in your proposal that a reasonable solution would result from the negotiations."

City's response pointed to the City's reserved rights and non-binding procurement

The City's response also points out the NRFP is a non-binding procurement process and the City's reserved rights as stated in the NRFP call document – which, as noted previously, identifies the City's sole and absolute right to revise the NRFP and its processes without liability – would include a decision not to open Stage 6: Negotiations.

Difference in proposed pricing was in the order of millions of dollars

The supplier also challenged the accuracy of the City's estimate. We discuss the City's equipment and pricing estimates in **Section E**. The supplier's pricing was approximately 4.00 times the City's estimate. The JV's non-competitive price proposal was approximately 2.70 times²⁵ the City's estimate. This yields a difference in proposed pricing in the order of millions of dollars.

²⁵ The JV's price proposals for the contract areas it bid for under NRFP2 (i.e., TOA 1-2, TOA 1-3, TOA 2-3, and TOA 2-4) were in the range of 2.25 to 2.67 times the City's estimates for those contract areas. We note that the NRFP pricing form included "Additional Unit Rates", and some examples of these rates included costs related to load and stockpile salt in salt storage structure, transfer salt to another Depot and/or salt storage structure, and re-weigh salt within Depot area. These costs were not included as part of the City's estimates and were therefore excluded when comparing the suppliers' bids against the City's estimates.

Staff indicated that, while there may have been options to reduce the cost and explore contract options through negotiations, in their view, it was unlikely they would be able to negotiate a reasonable price decrease in the order of millions of dollars. We note that the negotiations across other contract areas yielded net contract price decreases of less than \$550,000.

No way to know whether supplier would have significantly improved its pricing

Without the City entering into negotiations with the supplier, there is no way to know with absolute certainty whether or not the supplier would have improved its pricing to the extent that it would lead to an acceptable financial outcome for the City.

To avoid potential challenges related to procedural fairness, the City could have initiated contract award negotiations with the top-ranked supplier

While the NRFPs allowed the City flexibility in its procurement approach, to avoid potential challenges related to procedural fairness, the City could have initiated negotiations with the top-ranked supplier to provide an opportunity to negotiate with the City and potentially reduce the price based on clarifications and changes to the contract terms and requirements before determining whether a final proposed pricing was reasonably acceptable.

Negotiations could be discontinued if an agreement could not be reached

If, after undertaking such negotiations, an agreement could not be arrived at, NRFP2 indicates the City may discontinue negotiations:

“If the pre-conditions of award listed in Part 4 are not satisfied or if the parties cannot conclude negotiations and finalize the agreement for the Deliverables within the Contract Negotiation Period, the City may discontinue negotiations with the top-ranked Supplier and may invite the next-best-ranked Supplier to enter into negotiations. This process will continue until an agreement is finalized, until there are no more Suppliers remaining that are eligible for negotiations or until the City elects to cancel the negotiated RFP process, whichever occurs first.”

That being said, the City would only open negotiations in good faith if they believed a result the City was willing to accept could be negotiated.

PMMD staff considered conducting negotiations to try and obtain a more reasonable pricing

In our review of internal communications, dated November 4, 2021, we found that PMMD staff considered conducting negotiations to try and obtain more reasonable pricing because negotiations aligned with the NRFP evaluation process and reduced the risk of disputes in the future. However, staff ultimately decided to cancel TOA 2-5 from NRFP2.

Staff ultimately decided to cancel TOA 2-5

Based on those internal communications, the main factors that appear to have influenced the decision to cancel TOA 2-5 and proceed with non-competitive procurement include:

- The significantly higher pricing compared to the City's price estimates and staff's belief they would not be able to negotiate a reasonable price. Management advised us that there was little movement in other negotiations with respect to price reductions, and none in the order of millions of dollars.
- The challenges of concluding negotiations in time to finalize the staff report to meet Council reporting deadlines, and that missing reporting deadlines would put mobilization timelines at major risk for the 2022/23 year. Management advised us that if time was not a factor, then staff may have tried to negotiate, but that it still seemed very unlikely the supplier would have been able to move much on the price.

No other suppliers asked to provide pricing for TOA 2-1 and TOA 2-5

As noted previously, the City solicited pricing from the JV because they received the highest overall score for Stage 3: Technical Proposal Evaluation across all suppliers who submitted a proposal for any of the contract areas under NRFP2. The City did not request any of the other suppliers who passed the technical evaluation threshold for NRFP1 or NRFP2 to provide pricing for the two contract areas.²⁶ There was no requirement to do so under the NRFPs. However, in doing so, the City was concentrating risk largely on two suppliers (individually and as part of the JV).

Going forward, the City should document the rationale for exercising such rights in the solicitation file and the project closeout report, including the impact and risks to the procurement process and recommendations.

Request for Supplier Qualification

Going forward, the City should consider whether a RFSQ process would enable more suppliers to stay within the process

Going forward, for large-scale procurements, the City should consider whether a separate request for supplier qualification (RFSQ) process would allow the City to gather more information about supplier capabilities and qualifications. Doing so may allow the City to pre-qualify more suppliers of services to submit responses to a subsequent NRFP and reduce the risk of contract areas where no suppliers meet the City's requirements, or where concentrating risks with a few suppliers is not appropriate or acceptable to the City.

²⁶ Across both NRFP1 and NRFP2, five other suppliers and a joint venture (that included one of those five suppliers) passed the Technical Proposal Evaluation threshold, including three suppliers (either on their own or as part of a joint venture) who were not awarded any contract areas under NRFP1 or NRFP2.

Recommendations:

3. **City Council request the Chief Procurement Officer to provide guidance for client divisions to document in the solicitation file the rationale for exercising reserved rights or discretion when conducting a negotiated request for proposal, and to record the rationale for exercising such rights or discretion in the project closeout report.**
4. **City Council request the Chief Procurement Officer to provide more guidance and/or training for client divisions identifying when it would be appropriate to:**
 - a. **Implement a request for supplier qualification (RFSQ) process in advance of a negotiated request for proposal (NRFP) process, to address the risk of an insufficient number of suppliers meeting technical requirements and to increase the likelihood that more qualified suppliers submit pricing proposals.**
 - b. **Cancel, review, and reissue an amended RFSQ and/or NRFP where an insufficient number of qualified suppliers meet the City's requirements or where concentrating risks with few suppliers is not appropriate or acceptable to the City.**

B. Verifying the Past Experience and Operational Capability of Potential Suppliers

Winter maintenance directly impacts public safety

The NRFPs state that “the provision of Winter Maintenance Services have a direct impact on the safety of pedestrians, cyclists and motorists.”

Past experience and operational capability were worth over 30% of the Technical Proposal Evaluation

A supplier’s past experience (on projects completed within the past three years) and operational capability (to manage the volume of work based on past experience) are indicators of their ability to provide winter maintenance services and meet performance requirements. These two criteria were together worth more than 30 per cent of the overall Technical Proposal Evaluation.

B. 1. Challenges in Verifying Past Experience

Past experience is important for the success of performance-based contracts

Sufficient relevant past experience is important for the success of performance-based contracts. Therefore, it is important to evaluate and verify a supplier’s past experience and performance when awarding such contracts.

Suppliers were required to provide 3 examples of projects completed within the past 3 years

In their proposals, suppliers were required to provide three examples of projects completed within the past three years detailing the following for each example:

- contract value
- relevance to contract areas
- process and tools used to meet service levels
- metrics on equipment breakdowns and response times
- experience with usage of outcome-based metrics and performance tracking.

Scoring guidelines for past experience could be clearer

We noted that the scoring guidelines for past experience did not indicate that the supplier must have a required number of years of experience with the project example provided (e.g., one year versus seven years working on the project). Scoring guidelines also did not specify what would be considered ‘relevant’ experience to winter maintenance. Further, they did not provide a higher score for experience that was more relevant (e.g., project examples of similar size and scope) compared to experience that was less relevant (e.g., project examples that covered a much smaller portion of the services, activities, and infrastructure types required under the contract).

Bid disputes and complaints questioned the extent of experience of selected suppliers

Bid disputes, as well as Fraud & Waste Hotline complaints, questioned the extent of experience the suppliers who were awarded the vast majority of work had providing large-scale/volume of winter maintenance services in large urban areas or communities.

A question was raised about whether Infrastructure Maintenance Ltd. (IML) had completed any contracts of the size or magnitude of the contract it was awarded²⁷ and/or had completed a contract for the City of Toronto.

²⁷ IML was awarded a \$143.9 million contract for contract area TOA 1-1 over the 10-year period (\$12.5 million for Year 1). IML is also one of the two component entities of the joint venture 2868415 Ontario Incorporated, which was separately awarded \$967.7 million in contracts for contract areas TOA 1-2, TOA 1-3, TOA 2-1, TOA 2-3, TOA 2-4, and TOA 2-5 over the 10-year period (\$84.4 million for Year 1).

IML's technical proposal indicated it had been a winter maintenance contractor providing services since 2015

The three project examples included in IML's technical proposal submissions for relevant past experience were:

1. Contract 0196: Plowing, salting and DLA operations on Expressway, Arterial, and Collector roads within the East Scarborough area. Project start date: October 15, 2015; Project end date: April 15, 2022. "We have been servicing East Scarborough's expressway, arterial and collector roads from the Depot 8 location since 2015."
2. Contract 0078: Plowing of local roads within the South-West Scarborough area. Project start date: December 1, 2015; Project end date: March 31, 2022.
3. Contract 0073: Plowing of local roads within the North York area. Project start date: December 1, 2015; Project end date: March 31, 2022.

IML's proposal indicates \$43M in total winter maintenance revenues on 5 City contracts for 6 winter seasons from 2015-2021

IML's proposal submission also stated: "Infrastructure Maintenance Ltd. is a winter maintenance contractor that has operated in the Toronto Area since 2015. We have successfully completed contracts dealing with every infrastructure type under sub-contract to Defina Haulage."²⁸ The proposal also indicates "IML TOTAL WINTER MAINTENANCE REVENUE" of \$43,273,056.99 related to the six winter seasons from 2015-2021 for the following:

- Depot 8 Camp Location Expressway, Arterial and Collector Plowing and Salting Operations
- South-East Scarborough Sidewalks and Bus Stop Clearing and Salting Operations
- South-West Scarborough Local Plowing Operations
- North York Local Plowing Operations [1]
- North York Local Plowing Operations [2]

Suppliers were required to provide references for all project examples

Suppliers were also required to provide references for all three project examples so the City could validate the accuracy of responses.²⁹ As part of the Technical Proposal Evaluation for IML, three reference forms were completed by three City staff.

²⁸ Defina Haulage Ltd (Defina) is the contractor to whom the City awarded the noted contracts.

²⁹ While the NRFP indicated that the City's decision to contact references and validate the accuracy of reference responses was at its discretion, for the supplier evaluations we reviewed, we found that PMMD contacted (or attempted to contact) the referees listed in the proposals for the purposes of conducting a reference check.

Evaluation team asked PMMD if referees understood they were providing a reference for IML

During Stage 3: Technical Proposal Evaluation, the evaluation team asked PMMD if “the references understood that they were providing a response for Infrastructure Maintenance and not Defina who holds the contract directly for the City.” In addition, the evaluators noted “it is not clear whether they were a registered sub for all years of the contract as we are aware they were only a sub for 2019/2020 season.”

PMMD confirmed with one referee that the reference was for IML

PMMD staff asked the referee for Contract 0078 to confirm the reference provided was for IML (instead of Defina) and to confirm how many years IML was a subcontractor on this project. According to PMMD staff’s notes, the referee confirmed the reference was for IML, and that IML was “the lead” on the “7th year of the 7-year contract.”

PMMD staff did not confirm with the other two referees whether they understood they were providing a reference for IML (the subcontractor for the listed projects) rather than Defina (the main contractor for the listed projects).

A second referee confirmed to us that their reference was for work performed by Defina, supported by IML as subcontractor

While one of those referees has since retired from the City, the other referee, for Contract 0196, advised us that reference information was for the work performed by Defina supported by IML as a subcontractor. The referee was unable to provide the value or proportion of the work done by IML as subcontractor but noted that IML was an official subcontractor beginning in the 2019/20 season.

Information provided by Fair Wage Office and Transportation Services regarding IML as a registered subcontractor

We also requested further information and records from the Fair Wage Office and Transportation Services contract administrators.

- Based on the information from Fair Wage Office records provided for our review, IML was registered as a subcontractor on the following contracts:
 - Contract 0196 for three winter seasons (2019/20, 2020/21, and 2021/22)
 - Contract 0073 for none of the winter seasons and Contract 0074 for one winter season (2021/22)
 - Contract 0078 and Contract 0105 for none of the winter seasons.

- Transportation Services’ contract administrators for these contracts indicated to us:
 - Contract 0196: “We found emails from 2019 that state IML as an approved subcontractor for Defina Haulage.”
 - Contract 0073/0074: “I’m not aware of IML being a sub-contractor at any point during my time [two winter seasons (2020/21 and 2021/2022)] overseeing these contracts for Defina haulage for 0073 and 0074.”
 - Contract 0078/0105: “I am not aware of IML being used as a sub-contractor for either 0078 or 0105 contracts.”

There are potential discrepancies between the records and information provided by the Fair Wage Office and Transportation Services staff and IML’s proposal.

Seeking clarity on information provided in IML’s proposal

Given the questions raised by the evaluation team and potential discrepancies noted in responses to our inquiries, at the time the NRFPs were being evaluated, it would have been worthwhile for PMMD to seek further clarification from all the referees, and potentially from IML, regarding the information provided in IML’s proposal.

Affiliated Persons of Defina and IML

During our audit, we were advised that given the broad nature of the definition of an Affiliated Person,³⁰ IML is likely to be an Affiliated Person to Defina Haulage Ltd, the main contractor on the listed contracts. As far as we know, this information was not obtained, provided to, or considered by the evaluation team during the NRFP process. Our understanding is that had this information been provided to the evaluation team, depending on the nature of the affiliation, the past experience of Defina may have been deemed relevant when evaluating IML’s past experience.

A question was also raised about whether A&F Di Carlo (A&F), by themselves or as 2868415 Ontario Incorporated, a newly formed joint venture (JV), would have three similar projects in the last three years.

³⁰ Toronto Municipal Code, Chapter 195 defines an “Affiliated Person” as everyone related to the supplier including but not limited to employees, agents, representatives, organizations, bodies corporate, societies, companies, firms, partnerships, associations of persons, parent companies, and subsidiaries, whether partly or wholly owned, as well as individuals and directors, if: A. Directly or indirectly either one controls or has the power to control the other, or B. A third party has the power to control both.

Only 2 of the 3 project examples provided by A&F were completed in the past three years

The same three project examples were used in the proposals submitted by A&F and the JV — all were projects completed by A&F. One example was a project that was not completed within the past three years, yet A&F and the JV both scored full marks for “Past Experience.”

A&F (on its own) would not be able to provide three City of Toronto projects completed within the past three years. Specifically, we note that A&F was awarded only two of the 47 contracts with the City in the last round of winter maintenance procurements (2015-2022) — a sidewalk project and a depot 7 project (expressways, arterial, and collector road salting and plowing).

A&F and the JV did not include any information in their proposals on winter maintenance experience from other jurisdictions in the past three years. The JV’s proposal also did not include IML’s project examples (the other entity participating in the JV). Therefore, they did not fully meet the NRFP requirement to provide three examples of projects completed in the last three years.

A&F and the JV would still have passed the Technical Proposal Evaluation

This notwithstanding, had A&F and the JV been deducted points for using an example that was not completed within the past three years, they would still have passed the overall Technical Proposal Evaluation threshold. Furthermore, they would still be the highest-scoring supplier for the contract areas they bid on.

Going forward, we recommend clarifying NRFP process rules and scoring guidelines

Based on our review of NRFP process rules and reference check records provided by management, going forward, we recommend the following areas be clarified in the NRFP process rules and/or in the scoring guidelines:

- the required number of years of past experience the bidder must demonstrate through relevant project examples of similar size and scope, and scores to be assigned relative to the relevance of project examples provided
- information that should be provided when past experience is as a subcontractor, and whether that experience as a subcontractor should be given equal weighting to experience as a main contractor
- what to do if an individual listed as a referee declines to provide a reference verifying the supplier’s past experience information, or where the substitution of referees listed is needed because they are unavailable (e.g., due to retirement or sick leave)
- what to do if references highlight past performance issues with past projects, and what impact that should have on the score

- what to do if referees can only validate a portion, and not all, of the project information provided by the supplier (e.g., some information provided by referees is inconsistent with the supplier's submission; referees can only provide references for a portion of the contract duration noted for the project)
- what to do when project examples provided are not responsive/do not meet the NRFP requirements

Recommendations:

5. **City Council request the Chief Procurement Officer to review the process and form used for checking references, and establish formal procedures or guidelines for how references are to be used to validate accuracy of solicitation responses and how information from reference checks can be clarified with referees and suppliers.**
6. **City Council request the Chief Procurement Officer to review the standard process rules (or template) for negotiated requests for proposals and related evaluation criteria for past experience and reference checks, and enhance guidance and/or training for client divisions to ensure solicitation requirements and scoring guidelines for evaluation teams are sufficiently clear.**
7. **City Council request the Chief Procurement Officer, in consultation with the City Solicitor, to review how affiliate relationships may impact the evaluation of a supplier's past experience, and provide guidance to Purchasing and Materials Management Division staff and client divisions on how to evaluate.**

B. 2. Challenges in Evaluating and Verifying Operational Capability

An effective evaluation of the contractors' ability to deliver required services during the procurement process is key

A key to successful performance-based contracting is conducting an effective evaluation of the contractors' ability to deliver required services during the procurement process. For example, in an audit of the Province of Ontario's performance-based contracts for Winter Highway Maintenance, the Auditor General of Ontario found that contractors were unable to meet contract requirements and that the procurement process did not adequately factor in contractors' ability to deliver required services.³¹

³¹ Auditor General of Ontario's [Special Report, April 2015: Winter Highway Maintenance \(auditor.on.ca\)](http://auditor.on.ca)

City required suppliers to have the operational capability to manage and deliver the volume of work they bid on

The City's NRFPs indicated that suppliers should ensure they have the operational capability to deliver on all contract areas for which they submitted responses. The NRFP also incorporated criteria to evaluate each supplier's capability to manage the expected volume of work based on their past experience.

Operational capability was assessed based on:

- **years of past experience**

- **past revenues relative to value of contract areas being bid on or scale-up approach**

More specifically, to evaluate a supplier's ability to deliver required services, the NRFP requirements for "Operational Capability" requested suppliers to provide the following information to enable the City to evaluate their capability to manage the volume of work based on past experience:

1. Overall number of years of experience delivering winter maintenance work. Supplier should have at least three (3) years of past experience.

2. Average revenue from winter over the past three (3) years. Supplier should have previously delivered at least 60% of the total value of all Contract Areas that are being bid on in this negotiated RFP³² or describe the approach to scale up operations and manage the increased volume of work. The scale-up approach should include but not be limited to details that clearly describe scale-up of internal operations and administration, project managers, capital/equipment required, operators, etc.

Minimum scoring threshold for Operational Capability criteria

If a supplier's score for "Operational Capability" failed to meet the minimum threshold score defined in the NRFP, it was to be rejected and not evaluated further.

Use of a Quantitative Metric to Evaluate Operational Capability

Impact of contract areas bid under NRFP1 were not considered in assessing operational capability under NRFP2

In evaluating whether suppliers had previously delivered at least 60 per cent of the total value of all contract areas that were being bid on, evaluators treated the two NRFPs as mutually exclusive or as independent procurements. More specifically, evaluators' calculations of the contractor's operational capability metric³³ did not take into account additional capacity constraints created by contract areas bid on in both NRFP1 and NRFP2 (and the subsequent non-competitive procurement) as well as any commitments to other (non-City of Toronto) customers.³⁴

³² In NRFP2, the wording was adjusted slightly to say "60% of the total value of all contract areas where a Response is submitted in this negotiated RFP"

³³ Average revenue from winter maintenance over the past three (3) years ÷ total value of all contract areas that were being bid on.

³⁴ Information on commitments to other customers and the impact to operational capability and capacity constraints was not requested as part of the NRFP.

The operational capability metric may have been appropriate when the City originally planned to award all 11 contract areas through a single NRFP. However, this metric was not modified in a manner to contemplate all 11 contract areas when the second NRFP was issued.

The second NRFP only contemplated the six contract areas included in NRFP2, rather than contemplating whether suppliers could manage the volume of work they had bid on across the 11 contract areas covered by NRFP1 and NRFP2. Furthermore, the City did not re-evaluate the impact on NRFP2 of additional capacity constraints introduced by the subsequent non-competitive procurement.

Impact when considering all contract areas being bid on and actual price submission

Table 6 shows the impact on the operational capability metric when the following are taken into account:

1. Contract areas bid under: (a) NRFP2 only; (b) NRFP1 and NRFP2; (c) NRFP1, NRFP2, and the non-competitive procurement
2. Total contract value based on: (i) City estimates; and (ii) actual price submissions

As shown in green in the table, based on the metric used in the NRFP2 Technical Proposal Evaluation scoring, the JV passed the threshold of “at least 60% of the total value of all Contract Areas that are being bid on in this negotiated RFP” because it was based on contract areas bid on in NRFP2 only by the JV and the City’s estimates for contract value.

Had the evaluation criteria taken into account the contract areas bid on by the JV and its component companies (A&F and IML) across NRFP1 and NRFP2 (and later the non-competitive procurement) and/or the contract values based on the actual pricing submission, the JV would have fallen short of the 60 per cent threshold (as shown by the orange and red metrics in the table).

Table 6: Joint Venture Operational Capability to Manage the Volume of Work (Based on Metric Used by Evaluation Team)

	(a) When considering contract areas bid on in NRFP2 by the JV and ignoring contract areas bid on by component companies (A&F and IML) in NRFP1	(b) When considering contracts areas bid on across NRFP1 and NRFP2 by the JV and its component companies (A&F and IML)	(c) When considering contract areas bid on across NRFP1, NRFP2, and the non-competitive procurement
(i) Metric when using City estimates for contract value	64%*	36%	27%
(ii) Metric when using actual pricing submission for contract value	26%	17%	11%

*Metric used for NRFP2 Technical Proposal Evaluation scoring

Note: The JV's three-year average annual revenue is equal to the combined three-year average annual revenue as indicated by A&F and IML in their individual proposals.

Evaluating Proposed Approach to Scale Up Operations

Quantitative metric appears to have played a more significant role in evaluating operational capability than scale-up approach

We note that past revenues as a percentage of estimated contract values appear to have played a more significant role, or was of greater importance, in evaluating operational capability than the scale-up approach. Evaluators paid greater attention to the approach to scale-up operations when past revenues were a much smaller proportion of the estimated future contract value.

Suppliers were expected to describe their approach to scale up operations and manage the increased volume of work

The NRFPs indicated that if suppliers did not meet the 60 per cent threshold, they could “describe the approach to scale-up operations and manage the increased volume of work. The scale-up approach should include but not be limited to details that clearly describe scale-up of internal operations and administration, project managers, capital/equipment required, operators, etc.”

Consensus scoring notes indicate JV's response for scale-up was provided but not detailed

In reviewing the evaluation summary for the JV, we noted that the comments in individual evaluators' scoring spreadsheets about the supplier's scale up approach varied.³⁵ Ultimately, the evaluation team's consensus scoring summary indicated the JV's “*Response for scale up was provided but not detailed.*”

³⁵ Some evaluators indicated the supplier “Provided a very detailed response outlining scale-up...” or “A detailed scale up approach was provided...” Other evaluators did not specifically comment on the level of detail or relevance of the scale-up approach or indicated “They have also provided a scale up approach.”

Consensus score appears to be based on the operational capability metric and not the quality of scale-up approach

The consensus scoring summary also indicated the JV received a score of 4 out of 5 marks³⁶ for the “Overall Experience – Value and Scale-up approach” evaluation criteria. It appears this is primarily because the JV met the 60 per cent threshold (when taking into account only the contract areas bid on under NRFP2, but not contract areas bid on by the component entities in NRFP1, and the contract areas awarded through the subsequent non-competitive procurement).

Level of detail provided in scale-up approach would have mattered where the threshold for the operational capability metric was not achieved

As noted previously, consideration of all contract areas being bid on under NRFP1 and NRFP2 (and the subsequent non-competitive procurement), as well as the actual price submissions, would have impacted the JV’s ability to meet the 60 per cent threshold for the operational capability metric and, in most cases, the 30 per cent threshold included in the scoring guidelines in **Table 7**. In such a scenario, given that the consensus scoring comment indicated “Response for scale up was provided but not detailed”, it is unclear what the JV would have scored based on the way the scoring guidelines (as shown in **Table 7**) are worded.

The JV would have required at least a score of 3 out of 5 available marks to pass the operational capability threshold and Stage 3: Technical Proposal Evaluation and to move on to the next evaluation stage.

³⁶ The scoring guidelines indicate a score of 4 out of 5 available marks be awarded if the revenue is greater than or equal to 60% of total submissions across contract areas where bids are submitted and/or the scale-up approach provided was ‘detailed’, and a score of 5 out of 5 available marks be awarded if the revenue is 100% of total submissions across contract areas where bids are submitted and/or the scale-up approach provided was ‘excellent detailed.’

**Table 7: Scoring Guidelines for Operational Capability Criteria (b)
Average Revenue or Scale-up**

Guideline	Score out of 5
Missing response	0
Revenue is <30% of total submissions across Contract Area and limited ability or vague approach to scale up ³⁷	1
Revenue is 30-59% of total submissions across Contract Areas and limited ability or vague approach to scale up	2
Revenue is 30-59% of total submissions across Contract Areas and moderate ability or acceptable approach to scale up	3
Revenue is ≥ 60% of total submissions across Contract Areas where bids are submitted and/or a detailed scale up approach is provided	4
Revenue is 100% of total submissions across Contract Areas and/or an excellent detailed scale up approach is provided	5
Ideal scale up plan may include: Approach to scale up internal operations and administration, project managers, capital/equipment required, operators, etc	

Using a two-pronged, multi-scenario approach for scoring can complicate evaluations and should be avoided

Using a two-pronged, multi-scenario approach to scoring can complicate the evaluation procedures. Going forward, rather than having two different aspects (e.g., the metric and the scale-up approach) evaluated through a single, multi-scenario scoring criteria (and missing some of the scenarios in the scoring guidelines), a simpler approach would be to score those two aspects separately.

Ensure NRFP Proposal Requirements are Sufficiently Detailed to Obtain Sufficient Relevant Information from Suppliers

JV's proposal included descriptions matching the areas specified in the NRFP

In reviewing the JV's proposal submission, we noted that the proposal included descriptions of its scale-up approach under four headings corresponding to the four areas specified in the NRFP call document, including internal operations, management and administration, staffing (operators), and equipment/capital required.

³⁷ The scoring guidelines did not address scenarios where the metric was less than 30 per cent and a moderate ability or an acceptable approach to scale up was provided.

However, we noted the following:

JV's proposed scale-up approach to staffing mirrored A&F's submission for NRFP1 even though the number of contract areas bid on doubled

- The JV's proposal response for scale-up approach for staffing mirrored A&F's submission for NRFP1 even though the number of contract areas bid on doubled. Specifically, A&F bid on two contract areas under NRFP1, while the JV bid on four contract areas under NRFP2. Further, the total size of the contract areas bid under NRFP2 was 2.76 times larger than that of the contract areas bid on under NRFP1. Both proposals indicated under its approach that "We currently have [redacted] staff and will recruit an additional [redacted] locally to fully support both contract areas."

No detail was provided on how the supplier planned to recruit a high volume of staff or address potential labour shortages

Elsewhere in the proposal (separate from the section on the scale-up approach), different information was provided indicating that [redacted] staff were needed to service the four contract areas under NRFP2.

The scale-up approach for staffing indicated the "*Staffing strategy will include: local recruitment, and incumbent staff of other contractors.*" No further details were provided on how the supplier planned to recruit such a high volume of staff or address potential labour shortages.

JV's proposed scale-up approach to equipment mirrored A&F's submission for NRFP1

- The JV's proposal response for the scale-up approach for equipment mirrored A&F's submission for NRFP1 and indicated the same amount of capital needed to acquire additional equipment and line of credit available.

Elsewhere in the proposal (separate from the section on the scale-up approach), the JV submitted a financial coverage page showing the financial capacity to cover the capital requirements for NRFP2 – the amounts were different than what was noted in the scale-up approach section of the proposal.

No detail was provided on expected equipment delivery timelines or how the supplier planned to address supply chain risks

The scale-up approach for equipment indicated that "*We will acquire a combination of financed and leasable equipment to reduce the upfront capital requirements of the contract and support positive cashflow.*" No further details were provided, including expected delivery timelines for vendors from whom the JV would be acquiring/leasing equipment or how the JV would address any impacts of global supply chain issues.

City did not explicitly request relevant information on the impact of potential shortages in labour and equipment

That being said, in the NRFP, the City did not clearly and explicitly request or require suppliers to provide certain information that may be needed to assess whether suppliers could scale up operations in time for the 2022/23 winter season and address or mitigate key risks impacting their capability to meet requirements – most notably, the risks posed by potential shortages in labour and equipment.

For example, in preparation for the start of the winter contracts, (i.e., the 2022/23 winter season), the City did not specifically ask or require suppliers to provide, as part of the technical proposal requirements, detailed plans/sourcing strategy for how each piece of equipment would be procured (purchased or leased), including who they planned to source the equipment from; a schedule or expected time frames for the delivery of specific types of equipment that needed to be acquired (e.g., tri-axle truck with plow blade, tandem axle truck with plow blade, tractor with plow); and contingency plans for if the supplier encountered supply chain issues.

No specific evaluation criteria to assess contingency plans if suppliers could not acquire equipment in time

The Technical Proposal Evaluation had no specific evaluation criteria to assess whether suppliers had sufficient plans in place to acquire the necessary equipment within the required time frames and in light of known supply chain issues, and/or what contingency plans the suppliers had if they could not acquire all the necessary equipment in time. Supply chain concerns are further discussed in **Section B.3**.

Recommendation:

- 8. City Council request the Chief Procurement Officer to provide guidance for client divisions and ensure that standard process rules (or templates) for negotiated requests for proposals and related scoring guidelines avoid the use of a two-pronged, multi-scenario approach for a given evaluation criteria/sub-criteria wherever possible; and, where the use of a two-pronged, multi-scenario approach is unavoidable, ensure evaluation criteria/sub-criteria is clear and all possible scenarios have been considered and incorporated in the scoring guidelines.**

B. 3. Challenges in Evaluating and Verifying Impact of Equipment Supply Chain Issues

Supply chain issues impacting acquisition timelines were well known

Supply chain issues and shortages impacting availability and acquisition timelines were well-known early on and well before the procurement and award of contracts. For example, we noted the following industry articles reported on these issues:

- [Pandemic Could Strain Equipment Suppliers - Snow Magazine \(snowmagazineonline.com\)](https://www.snowmagazineonline.com/article/pandemic-could-strain-equipment-suppliers) (June 2020)
- [Order Plows Early to Avoid Shortages - Unfitting - Work Truck Online](https://www.snowmagazineonline.com/article/order-plows-early-to-avoid-shortages-unfitting-work-truck-online) (June 2020)
- [Brace For Shortages - Snow Magazine \(snowmagazineonline.com\)](https://www.snowmagazineonline.com/article/brace-for-shortages) (August 2021)

Contract award timelines based on equipment purchase lead times of 9 to 12 months

Notwithstanding the well-known supply chain issues, management advised that the anticipated award timelines provided equipment purchasing lead times of 9 to 12 months (i.e., award was anticipated in October 2021, but occurred in December 2021 due to complicating factors in the procurement).

Suppliers are required to ensure sufficient equipment to meet service levels are at the depot by contracted dates

The NRFPs required suppliers to:

- ensure they provide a sufficient quantity of equipment to meet the required service levels and key performance indicators
- provide and maintain all equipment in order to provide winter maintenance services in accordance with the contract
- ensure all equipment is at the depot ready and fit to commence operations by the dates specified in the contract.

Suppliers expressed concerns about their ability to source equipment in time due to supply chain delays

During the pre-procurement and NRFP process, suppliers raised some questions, comments, and concerns related to sourcing the required equipment by the dates outlined by the NRFPs, and whether the City would relax equipment requirements and/or grant a grace period for acquiring equipment. For example, a bidder advised the City that equipment suppliers could not guarantee delivery times or costs due to supply chain delays caused by the global COVID-19 pandemic. A bidder also informed the City that suppliers were cancelling some existing orders due to these global supply chain issues.

City did not extend the equipment delivery date requirements

As indicated in NRFP addenda containing responses to questions raised during the NRFP process, the City did not extend the delivery date requirement for equipment or provide a grace period for acquiring equipment. It maintained that all required equipment would have to be ready by the dates specified in the contract.

NRFP did not explicitly require suppliers to provide an equipment acquisition plan that reflected the impact of supply chain challenges

Information about the suppliers' sourcing strategy and contingency plan is important

As noted in **Section B.2**, it is important to obtain information about the suppliers' sourcing strategy for the mix of equipment it proposed to assess the risk to contract performance. Given the supply chain concerns, suppliers who did not have the equipment on hand and needed to acquire a higher volume of equipment would be at greater risk of not obtaining the equipment in time for the start of the 2022/23 winter season and meeting the required service levels.

For example, we noted that in response to NRFP2, the JV said that "all equipment will be purchased." But the JV did not provide an acquisition plan that addressed supply chain concerns or describe how they would acquire the necessary equipment.

Equipment acquisition plans were requested after contracts were awarded

It was not until late February 2022 that Transportation Services staff began requesting equipment acquisition plans in response to selected suppliers coming forward with potential difficulties procuring equipment.

Flexible NRFP format should have enabled the City to obtain and consider key information as part of evaluation process

PMMD and Transportation Services staff indicated to us that the City was unable to request supplementary information or further clarification outside of the proposals submitted during the NRFP process to investigate whether the suppliers had an appropriate acquisition plan. This was despite the City adopting a flexible, non-binding NRFP format, and the NRFP indicating that:

- The City reserves the right to, in the City's sole and absolute discretion, at any time modify the NRFP process (and this reserved right was referenced in the City's response to bid disputes).
- When evaluating proposals, the City may request further information from a supplier or third parties to verify, clarify, or supplement the information in the supplier's bid. This may include but is not limited to clarification with respect to whether a bid meets the mandatory, technical, and/or pricing requirements. The City may revisit and re-evaluate the supplier's bid response or ranking on the basis of any such information.
- Negotiations may include requests by the City for supplementary information from the supplier to verify, clarify, or supplement the information provided in their proposal or to confirm the conclusions reached in the evaluation, and may include requests by the City for improved pricing or performance terms from the supplier.

NRFP process rules should be written to provide the City with the greatest amount of flexibility to obtain high-quality information from suppliers

NRFP process rules should be written to provide the City with the greatest amount of flexibility to obtain high-quality information from suppliers. We note that other NRFPs (but not the winter maintenance NRFPs) provided flexibility in their process rules so that the City, at its sole and absolute discretion, could:

- conduct commercially confidential meetings to provide further clarification of the City's requirements, or request supplementary information or further clarification after reviewing technical proposals, in order to allow the City to obtain higher-quality information from suppliers
- provide a period in which suppliers can revisit their technical and/or pricing proposal and resubmit their best and final offer based on the clarified understanding of the City's requirements.

Transportation Services assured City Council that equipment would be in place in time for 2022 winter season

Initial staff report did not highlight any concerns with the delivery of equipment

The staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#) indicated that negotiations focused on various topics including but not limited to "A review and adjustment of proposed equipment levels." The staff report did not indicate any concerns with the delivery of equipment by the start of the 2022/23 winter season, and this does not appear to have been raised by staff during the Infrastructure and Environment Committee meeting itself.

Transportation Services briefed councillors on market conditions ahead of City Council meeting

Transportation Services management advised us that briefings to councillors in advance of the December 2021 City Council meeting included information on market conditions and cost drivers. Management also advised us that during the briefings, they answered questions around the procurement of equipment. Management indicated they were upfront that equipment not arriving on time was a minor possibility but one the Division could work with vendors on. Transportation Services management indicated that it advised City Council this could be an issue and the City would work with vendors where leniency was required.

Staff subsequently indicated to City Council that if an award did not occur, there would be insufficient time to procure equipment

In the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#), management indicated to City Council that if an award did not occur, suppliers would have insufficient time to procure equipment:

“Further to this, should the award report not be approved by City Council, there will likely be insufficient time for vendors to procure the required equipment. The market soundings conducted in preparation for the procurement with the industry advised that they require between nine and twelve months to procure and outfit the equipment required for winter maintenance services. The current market conditions may require additional lead time.”³⁸

Transportation Services assured City Council that equipment would be in place in time for 2022 winter season

When seeking authority to award the contracts, management assured City Council that equipment would be in place for the 2022 winter season and, that in the event suppliers were unable to meet equipment needs, there were conditions in place that would provide compensation to the City. That said, management further clarified that, if for whatever reason the suppliers were unable to provide equipment that could meet the age requirements of the contract by the start of the winter season, then Transportation Services may be in a position to allow the suppliers to provide some older equipment as a temporary measure. Management indicated that staff would be able to identify well before October 2022 if contingencies needed to be put in place.

City Council’s questions and management’s responses related to equipment can be found at this recording of its December 16, 2021 meeting: <https://youtu.be/ucwlgRfYLTw?t=26040>.

Minimal Changes in Equipment and Pricing from Bid Submissions to Final Contracts

Time frames required for equipment to be at the depots were unchanged

In the contracts executed with selected suppliers, no changes were made from the NRFP requirements that equipment needed to be ready and at the depot by the dates set out in the NRFP.

Limited changes were made to proposed equipment

We noted very limited changes to the total number of vehicles proposed and the numbers specified in the final contracts. For example, at most, there were changes involving nine pieces of equipment for a given contract area. The largest net increase for a given contract area was seven pieces of equipment, and the largest net decrease was three pieces of equipment.

³⁸ We note that the staff report is referring to timelines communicated by suppliers during the July 2020 market soundings, rather than the longer lead times of 14-16 months communicated through supplier questions and City responses included in the NRFP addenda.

Limited changes to pricing were made

Net changes in the estimated Year 1 (2022/23) contract values ranged from around -10 to 6 per cent (average -0.1 per cent) of the bid submission price.

Actual Delivery of Equipment Did Not Occur as per Contract

Suppliers indicated some modifications to equipment would be needed after contracts were awarded

After the contracts were awarded, the City met with two winning bidders, Infrastructure Maintenance Ltd. and Maple Crete Inc., in early February 2022 to discuss modifying equipment requirements. Similarly, Transportation Services staff told us that the JV (2868415 Ontario Inc.) also indicated they might need to have a conversation about equipment procurement issues. Staff advised us they were open and willing to have this discussion. After a conversation with the JV on March 23, 2022, Transportation Services staff told us that “for both A&F Di Carlo and the Joint Venture there are modifications that need to be permanently made” to the equipment requirements.

In Q1 2022, the City requested suppliers provide an equipment acquisition plan

Transportation Services staff requested those suppliers to provide a “revised proposal with the following details” in order to “make a fully informed decision on your proposed changes”:

1. An equipment acquisition plan identifying timelines for delivery and configuration and anticipated availability for GPS installation
2. Copies of correspondence/orders initially placed with Equipment manufacturers
3. A revised proposal filled out on the attached form referencing the replacement items and a summary of what’s changing such as: equipment, pricing, infrastructure types. Additional columns have been added to your pricing and equipment tabs for you to populate and highlight what is being eliminated
4. Correspondence of the anticipated order date and delivery of equipment or whether it’s been extended
5. Confirmation your revised proposal will allow you to meet the contract requirements including Service Levels
6. Any other mitigating measures you are taking to ensure that you will be meeting your contractual requirements or to ensure that the equipment is outfitted in time for the start of the Winter Season.

In May 2022, Transportation Services advised us that “we had a framework in place and no matter which set of contractors we would have likely been in this situation. It does not change the terms of the agreement we had and [we] are confident we will have equipment and contracts ready for the winter season. We typically work with all vendors on global issues that come up and this would be no different and was communicated with this intent.”

Auditor General’s review of processes to hold contractors accountable is discussed in a separate report

The results of our review of Transportation Services’ process to hold contractors accountable to the new contracts — in particular, the arrival of equipment, related liquidated damages, and price adjustments for the 2022/23 winter season — are discussed in a separate report. That report is being presented for Audit Committee’s consideration at its July 7, 2023 meeting.

Recommendation:

9. **City Council request the Chief Procurement Officer to provide further guidance and/or training for client divisions to:**
 - a. **Ensure that requirements in negotiated requests for proposals solicit enough information to enable the City to assess whether key risks impacting suppliers’ capability to meet the scope of work and deliverables have been appropriately addressed or mitigated.**
 - b. **Clarify the extent of information that can be requested by the City from a supplier or third parties to verify, clarify, or supplement the information in a supplier’s proposal response submitted to a negotiated request for proposal, when evaluating technical proposals and/or undertaking negotiations.**

C. Reinforcing Procedural Fairness and Transparency

Reinforce key practices that support procedural fairness of NRFPs

Though the non-binding, flexible NRFP format gives the City discretion to suspend, modify, and/or cancel, in whole or in part, the NRFPs (with or without the substitution of another NRFP), the contract areas, or the proposed contracts without liability, as with all public procurements, there remains a duty of procedural fairness.

We have identified some areas for continuous improvement for the City to better support procedural fairness going forward. This includes avoiding terms that may be inconsistent or subject to different interpretations, and ensuring instructions and requirements are clearly written.

C. 1. Clarifying What Terms Can Be Negotiated and What Constitutes a Value-Added Service

Negotiations are an opportunity to clarify requirements and seek improvements to the proposal

Negotiations are an opportunity to clarify requirements and proposal details to ensure suppliers understand the project and the project team understands what the supplier is proposing. To that end, negotiations provide an opportunity to seek improvements to the proposal based on clarifications, including improvements to performance terms and proposal pricing.

Negotiations involve a give-and-take

By their very nature, negotiations tend to involve some give-and-take, and it may be possible to justify a concession on one point by demonstrating a benefit obtained on another point.

Examples of the give-and-take during winter maintenance NRFP negotiations

The following are some examples of the give-and-take that occurred during the winter maintenance NRFP negotiations:

- **Changes to Depot Site Requirements** – The NRFP indicated that at the end of each Winter Season, all equipment must be removed from depots, unless otherwise approved to remain by the City. During the procurement, suppliers asked for clarification of the City’s Depot Site Requirements. In responding to supplier questions, the City clearly and plainly stated “Equipment must be removed at the end of the winter.” During negotiations, the City decided to allow suppliers to enter into a lease agreement to leave equipment at the depot sites between winter seasons in return for a fee to be paid to the City by the supplier.³⁹
- **Changes to Proposed Equipment and Pricing** – There were limited changes to the number and type of equipment proposed and related pricing (as noted in **Section B.3**).
- **Changes to the Price Adjustments and Service Level Table** – The clauses for price adjustments and related service level table in NRFP1 were amended in NRFP2. All executed contracts included these changes.
- **Items Provided at No Additional Cost to the City** – Certain negotiated additions to the contract were provided at no additional cost to the City, including items described in the supplier’s proposal.

³⁹ We note that, as of April 30, 2023, lease agreements had not yet been executed with any of the contracted suppliers. A proposed amendment to the contracts, to allow suppliers the right to use and occupy a portion of the depot lands from April 16, 2023 to October 14, 2023 and pay the City a licensing fee, had been drafted but not yet been executed as of May 15, 2023.

- **Value-Added Services to be Provided to the City** – Certain value-added services, proposed by suppliers and accepted by the City, and any related financial impacts, were added to the contract.

When concessions alter or remove critical contract terms, challenges can arise

In general, the more prescriptive the NRFP is in terms of establishing minimum requirements and dictating mandatory specifications or methodologies, the more limits there should be on what is open to negotiation. When major⁴⁰ concessions are made to alter or remove critical contract terms or minimum performance requirements, other suppliers may argue that had they known the concession was going to be made, they could have made their proposal more attractive.

Response to bid dispute

In responding to bid disputes raising that the City was willing to accept terms contrary to the NRFP terms, the City indicated that:

“The nature of the NRFP process is that where a proponent raises an issue in negotiations that the City has discretion to consider, the City may entertain such negotiations. This does not guarantee that the City will enter into an agreement with any bidder for any contract areas, unless such negotiations are beneficial to the City.”

City can provide more clarity on what terms or requirements it is willing to negotiate

To reduce the risk of potential challenges, concerns, or disputes about transparency and procedural fairness in negotiating concessions, going forward the City should consider enhancing or clarifying what terms or requirements it is willing to negotiate or move on if alternatives are proposed and how to make such proposals (for example as a “value-added service”).

Considering Proposals for Value-Added Services

Benefit of NRFP is working collaboratively with suppliers to adopt innovative solutions

A benefit of the NRFP approach is the ability to work collaboratively with suppliers to adopt innovative solutions to meet the City’s objectives. To make the most of this approach, the City should take the time to explain its needs and provide enough lead time for suppliers to help find ways to save the City money or propose solutions that create other benefits and efficiencies for the City.

⁴⁰ What may be perceived as a ‘major’ concession by some, may not be considered ‘major’ by others. There is no criteria by which to measure what is a ‘major’ or ‘material’ change to requirements.

NRFP asks for value-added services in addition to those required by the City

The winter maintenance NRFPs indicated that suppliers could offer services in addition to those required by the City. In particular,

“Suppliers may offer services in addition to those required by the City that are relevant to the delivery of Winter Maintenance services and could add additional value in areas such as the management oversight, tracking, monitoring or delivering on the requirements of the negotiated RFP. Suppliers must indicate whether the proposed value-added service will have a cost to the City, and if so, a cost-benefit analysis should be provided.”

To that end, in its Technical Proposal Form template, the City indicated that suppliers should provide a description of the value-added service and their applicability to the City (e.g., any additional technology, process to reduce stand-by cost, track weather patterns) and indicate whether the service would be provided at no additional charge or offered at an additional cost. If charging an additional cost, a cost-benefit analysis should also be included.

City advised suppliers to include proposed alternatives to equipment requirements as part of the value-added services

When we reviewed the NRFP addenda, we noted that suppliers asked how they could submit different, unapproved equipment other than those specified in the NRFP requirements, or how they could show their ability to reduce an equipment’s total hours per year versus the City’s anticipated hours. The City’s response was to include these, along with a cost-benefit analysis, as part of the value-added services.

Similarly, when asked “Is the Successful Supplier allowed to park a portion of equipment at a private facility if it improves response time for call outs?”, the answer provided was “The Successful Supplier is expected to park Equipment at the specified Depot(s) for the Contract Area. Suppliers can make a proposal for parking equipment at a private facility within the Value-Added Services Section of the proposal including a cost benefit analysis.”

City advised suppliers it would not change depot site requirements

On the other hand, when asked whether the [Depot] facilities were available for parking equipment for the duration of the contract, the City referred suppliers back to the NRFP Part 3 requirements^{41,42}. The City did not make explicitly clear to all suppliers that it was willing to consider alternatives if suppliers proposed them as value-added services. The City’s response, in this case, could potentially be interpreted that compliance with these requirements were non-negotiable.

⁴¹ Part 3 of the NRFP specifies the requirements for deliverables and scope of work

⁴² Depot Site Requirements included in Part 3 of the NRFP specifies that all equipment must be removed from Depots at the end of each winter season, unless otherwise approved to remain by the City.

Debatable whether suppliers understood that the City would consider proposed alternatives to Part 3 requirements

Given that the addenda responses were specific to the scenarios noted, it is debatable whether potential suppliers understood, and could have interpreted more broadly, that the City would be willing to consider any and all proposals to change or offer alternatives to the Part 3 requirements as part of the Value-Added Services proposed, as long as such proposals were beneficial to the City.

Scoring guidelines for value added services could be clearer

The scoring guidelines for evaluators, as summarized in **Table 8**, were somewhat vague. Yet, 10 per cent of the overall score for Stage 3: Technical Proposal Evaluation was allocated to Value-Added Services. In particular, the guidelines were unclear on what would be considered value-adds deemed as “relevant” and “innovative”, and what would be considered as providing “limited”, “moderate”, and “significant” additional value to the City’s delivery of winter maintenance services.

Table 8: Evaluation Criteria/Guidelines for Value-Added Services

0 – Relevant information not provided
1 – Value-added service(s) have limited relevance or provide limited additional value to the City’s delivery of winter maintenance services.
2 – Value-added service(s) are adequately relevant providing limited additional value to the City’s delivery of winter maintenance services.
3 – Value-added service(s) are relevant providing moderate additional value to the City’s delivery of winter maintenance services.
4 – Value-added service(s) are relevant providing significant additional value to the City’s delivery of winter maintenance services.
5 – Value-added service(s) are innovative and relevant providing significant additional value to the City’s delivery of winter maintenance services.
Points may be awarded based on quantitative or qualitative value-add. Higher points may be awarded when lower number of value-added services are provided, but they have a high impact on City projects, E.g., access to latest technology that may considerably improve efficiency and help reduce costs. Higher points may be added for complete understanding of what is being proposed (relevance) and the value to the City.

Going forward, clearly and consistently communicate what the City is willing to negotiate or consider as part of value-added service proposals

Going forward, the City should make sure it clearly and consistently communicates to suppliers, in the NRFP documents, submission templates, and scoring guidelines, what can be proposed as value-added services (and, in particular, what alternatives to the Part 3 requirements the City is willing to consider). This will allow suppliers to better understand what they can propose and may result in more and better value-adds to the City and/or identify opportunities to increase revenues or lower costs.

Recommendation:

- 10. City Council request the Chief Procurement Officer to provide more guidance to client divisions on “value-added services” to be included in suppliers’ technical proposal content requirements and evaluation criteria contained in negotiated request for proposal solicitation documents, to ensure the City is clear and consistent when communicating to suppliers what it is willing to negotiate and the range of alternatives it is willing to consider through proposals of “value-added services” (including through addenda containing questions and answers and in examples of value-added services provided within technical proposal forms).**

C. 2. Clarifying Inconsistencies and Vague Language in the Call Document

Questions and bid disputes were raised by suppliers regarding inconsistent or vague language

The questions raised by suppliers and bid disputes highlighted several other areas (over and above what has already been discussed in earlier sections of the report) where language in the NRFP documents could have led to different interpretations of the process rules and requirements, supplier confusion, and bid disputes.

For example, language in NRFP1 regarding the Technical Proposal Evaluation scoring thresholds led to ambiguity on whether the City would lower the thresholds where fewer than three suppliers met the threshold requirements for each contract area. In NRFP2, the City made clear that, at its sole discretion, the threshold may be reduced. For both NRFP1 and NRFP2, the City chose not to reduce the thresholds where fewer than three suppliers achieved the required minimum operational capability threshold or overall Technical Proposal Evaluation threshold.

City reserved the right to modify the NRFP process

As noted in the NRFP, the City reserves the right to, in its sole and absolute discretion, at any time:

- revise the NRFP schedule to accelerate, eliminate, or postpone any of the dates or times set out in this NRFP, including the Submission Deadline
- add to, delete, or reorder any of the milestones set out in this NRFP
- modify the NRFP process.

Although City reserved the right to discretion, wherever possible, staff should make process rules as clear as possible

The nature of the NRFP leaves discretion to City staff. Still, to reinforce procedural fairness and support greater transparency, wherever possible, staff should make process rules as clear as possible, eliminate inconsistencies, and document the reasons for the exercise of reserved rights.

Staff explained the rationale for exercising their discretion in a supplementary report to Council

For example, if the City was ultimately prepared to accept lower technical scores, then for greater clarity and transparency, it should have simply said so at the outset. Alternatively, if the City was not prepared to accept proposals that failed to meet the threshold, then for greater clarity and transparency, it should have removed any indication that lower scores would be considered from the process rules.

In the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#), staff provided further information that:

“The evaluation team reviewed the viability of reducing the evaluation thresholds but confirmed that this would not have yielded enough additional successful suppliers. The team took steps to provide specific feedback to all of the unsuccessful suppliers and solicit direct feedback from them about the process.”

Based on our review of the final consensus scoring summaries, a lowering of the technical proposal threshold would not have resulted in many more additional suppliers moving on to the next evaluation stage.⁴³

Other areas of the contracts that Transportation Services operational staff identified could have been clearer include:

- requirements for a minimum number of administrative staff and non-working supervisors
- requirements related to equipment from one contract area being moved/used in another contract area.

Recommendation:

- 11. City Council request the Chief Procurement Officer to provide guidance and/or training to staff to make negotiated request for proposal process rules as clear as possible, and avoid or clarify process steps that may be interpreted inconsistently or cause supplier confusion.**

⁴³ Lowering the overall technical proposal threshold would have resulted in one additional supplier moving on to the next stage for one contract area in NRFP1 where no suppliers had original passed the threshold. Lowering the overall technical proposal threshold for NRFP2 would not have resulted in more suppliers moving on to the next evaluation stage.

D. Clarifying and Strengthening Procurement Policies and Procedures

D. 1. Enhance Policies and Procedures Governing Negotiated Requests for Proposals

Toronto Municipal Code addresses standard procurement methods

[Toronto Municipal Code, Chapter 195, Purchasing \(toronto.ca\)](#) addresses the standard procurement methods for information gathering (RFI/REOI), pre-qualification for selective solicitations (RFSQ), competitive solicitations (RFQ/RFT/RFP), and non-competitive or limited solicitations, as well as the cancellation of such solicitations.

Limited integration of flexible formats into City's procurement policies and procedures

The impacts of PMMD's category management and strategic sourcing approaches, including the use of market soundings and the more flexible NRFP format, have been integrated into the Toronto Municipal Code and the City's Procurement Processes Policy at a very high level. For example:

- The definition of an RFP indicates that an RFP solicitation may allow for consecutive or concurrent negotiations to be conducted with suppliers on any of the contact terms.
- Negotiation procedures indicate:
 - Where negotiations are permitted by a solicitation, they must be conducted fairly and in a manner that does not disclose confidential commercial information about any other supplier.
 - Alternative strategies or solutions shall not be considered for evaluation, unless they are explicitly requested in the solicitation, and the process for evaluating such strategies or solutions is disclosed to all potential suppliers.

Policies and procedures lean toward traditional formats

Policy and procedural guidance lean toward the binding (Contract A/Contract B) formats of traditional RFQ/RFT/RFP and provide less detailed guidance on expectations for the flexible, non-binding NRFP format where there is more room for staff discretion and exercising of reserved rights. For example, the Request for Proposal procedure only indicates that "The Client must consult with PMMD and Legal Services (Legal) if they are considering flexibility in a RFP (e.g. Non-Binding RFP, Best and Final Offer, negotiations, draft form of agreement, non-numerical cost evaluations, or special terms and conditions)."

Enhance procedural guidance laying out principles or framework for seeking clarifications, modifications, and conducting negotiations

Procedural guidance for PMMD and divisional staff participating in NRFPs can be enhanced by laying out principles for maintaining procedural correctness in NRFPs and a framework (protocols or boundaries) for using discretion and flexibility during the procurement process. Enhancements can include guidance on how to seek clarification or modification of any aspect of the proposal, how to obtain additional information during the NRFP process, and how to conduct commercially confidential meetings and negotiations, and address the corresponding impacts on the evaluation protocols.

Recommendation:

- 12. City Council request the Chief Procurement Officer, in consultation with the City Solicitor, to review procurement policies and procedures and integrate additional procedural guidance specific to the implementation of more flexible, non-binding procurement methods (e.g., negotiated requests for proposals).**

D. 2. Review Bid Dispute Mechanisms

Bid dispute mechanisms are addressed in Article 10 of the Toronto Municipal Code, Chapter 195, Purchasing.

Purpose of City's bid dispute procedure is to ensure supplier bid disputes are dealt with objectively, fairly, and openly and with transparency

The City also has a [Pre-Award and Post-Award Bid Dispute Procedure](#) which describes the City's processes:

“to ensure supplier bid disputes, either pre-award or post-award of the solicitation, are dealt with objectively, fairly, openly and with transparency and that suppliers understand the available resolutions available to resolve a Pre-Award or Post-Award Bid Dispute.”

4 suppliers filed pre-award disputes; 5 suppliers filed post-award disputes

The City received pre-award disputes from four suppliers and post-award disputes from five suppliers related to the winter maintenance NRFPs.⁴⁴

⁴⁴ While the nature and number of pre-award bid disputes were not included in the staff report to the Infrastructure and Environment Committee, several of the unsuccessful suppliers made depositions when the report on the Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services was considered by the Committee on December 2, 2021.

Scope of Bid Dispute Reviews

Bid dispute process is not an end-to-end review of a given procurement

The bid dispute process is not expected to be a comprehensive review of a given procurement from start to finish.

Supplier must be specific about the parts of the process they believe have been materially breached

Rather, under Article 10 of the Toronto Municipal Code, Chapter 195, Purchasing and/or the City's Pre-Award and Post-Award Bid Dispute Procedure, the disputing party is expected to identify a specific inappropriate practice or decision that is outside of the purchasing bylaw or PMMD's procurement practices and provide evidence or information that supports the specific rationale and reasoning for their dispute. This then sets the scope of the bid dispute review.

Reviewer's role is to evaluate compliance with the process

The bid dispute reviewer's role is to evaluate compliance with the process and not the results of the procurement. For example, both the Chief Procurement Officer (at the time of the winter maintenance NRFPs) and the Controller advised us that it is generally not the reviewer's role to question the scores assigned by the technical evaluation team (e.g., should the supplier have been awarded 3 points versus 4 points), but they would review that the evaluation/scoring process enumerated in the call document is the process that was followed (if that was the subject of the dispute).⁴⁵

Not all matters raised in the bid disputes would fall under Municipal Code §195-10

We also noted that the bid disputes raised some matters that did not describe an act or omission alleged to have materially breached the procurement process (and would not ordinarily fall under the scope of Toronto Municipal Code, Chapter 195, Article 10). Still, some of the matters are areas for the City to review for lessons learned to improve the transparency or clarity of NRFP processes and procedural rules going forward – for example, including greater detail in the NRFP to describe technical proposal requirements and evaluation criteria, establishing a robust joint venture policy, and engaging an external fairness consultant.

Matters raised in the bid disputes have been discussed in this report

Many of the matters raised in the bid disputes have been discussed in this report.

Results of Bid Dispute Reviews

As per City policy, the pre-award disputes were reviewed by the Chief Procurement Officer, and the post-award disputes were reviewed by the Controller or their designate(s), in consultation with Legal Services staff.

⁴⁵ This approach is generally consistent with federal Procurement Ombudsman Regulations which preclude the Ombudsman from substituting their opinion for the judgement of the department involved, unless there is insufficient written evidence to support that assessment or the assessment is unreasonable. [Procurement Ombudsman Regulations \(justice.gc.ca\)](https://www.justice.gc.ca/procurement-ombudsman-regulations)

Chief Procurement Officer reviewed pre-award disputes

The Chief Procurement Officer's review of pre-award disputes included reviewing the communications (disputes) received from the suppliers, requesting and reviewing information/records provided by PMMD staff and/or Transportation Services staff, asking staff clarifying questions specific to the bid dispute, and consulting with Legal Services staff who were assigned to the winter maintenance NRFP.

Response letters were issued dismissing the pre-award disputes

At the conclusion of the Chief Procurement Officer's review of each pre-award dispute, a response letter was issued advising the supplier that, based on the review of the dispute and how the NRFP was conducted, the bid dispute was being dismissed. The letters set out (at a high level) why the dispute was being dismissed based on the points that the supplier raised.

Controller reviewed post-award disputes

The review of post-award disputes was conducted under the Controller's supervision by legal counsel and a PMMD manager⁴⁶ and included reviewing the communications (disputes) received from the suppliers, reviewing pre-award disputes and responses, reviewing certain NRFP documents and debriefing meeting minutes, and asking PMMD staff clarifying questions specific to the bid dispute.

Response letters to post-award disputes concluded the City had appropriately applied its discretion in following the procurement process

At the conclusion of the Controller's review of each post-award dispute, a response letter was issued advising the supplier the Controller had reviewed and considered the supplier's pre-award bid dispute and the Chief Procurement Officer's responses to it, which he concurred with. The Controller's response then responded to new issues raised. All the response letters indicated that the Controller had determined the City had appropriately applied its discretion in following the procurement process in conjunction with Toronto Municipal Code, Chapter 195, Purchasing and that the decision was final.

Establishing Circumstances or Criteria Where an Alternate Senior City Official Should Be Designated to Review Bid Disputes

Chief Procurement Officer is not ordinarily involved in day-to-day procurement process decisions

Ordinarily, the Chief Procurement Officer is not involved in day-to-day decision making for transactional procurements. As with any Category Management and Strategic Sourcing initiative, the Chief Procurement Officer was involved in discussions about the high-level strategy and the approach of the Winter Maintenance NRFP.

⁴⁶ To maintain the impartiality of the bid dispute reviews, the Controller indicated the PMMD manager had not been involved in the winter maintenance NRFP procurement processes.

Key decision point where the Chief Procurement Officer was consulted during the procurement process was a matter subsequently raised in a pre-award bid dispute

One key decision point where PMMD and Transportation Services staff consulted with the Chief Procurement Officer (and Legal Services) was with respect to the decision not to proceed with negotiating with the top-ranked supplier for contract area TOA 2-5 and to cancel the contract area from NRFP2.

Staff seeking advice from the Chief Procurement Officer on this decision may create the appearance of potential bias for the Chief Procurement Officer in reviewing and responding to a dispute matter raised regarding a decision on which he was directly consulted.

That said, the Toronto Municipal Code and the City's existing pre-award bid dispute procedure specifically designates the Chief Procurement Officer to review pre-award bid disputes. There is no alternative prescribed in the Municipal Code. The Chief Procurement Officer (at that time of the bid dispute review) also advised us that at the time the Purchasing Bylaw was updated, PMMD had a relatively flat organizational structure which did not enable bringing in an alternative senior staff to review bid disputes.

It should be noted that, in this case, the bid dispute was also subsequently reviewed by the Controller as part of the post-award bid dispute process.

City should define circumstances where an alternative senior City official should be designated to review bid disputes

Going forward, to reduce the potential for an actual or perceived bias, the City should consider defining circumstances where it may be more appropriate to designate an alternative senior City official to conduct an impartial review of pre-award bid disputes, such as when the Chief Procurement Officer is involved in or provides advice regarding key procurement decisions.

Status of Council-requested review of models in other jurisdictions and the potential for an Inspector General for Toronto

Where post-award bid disputes have been rejected there is no further avenue of appeal within the City

Where suppliers are not satisfied with the outcome of the bid dispute process, the City's Pre-Award and Post-Award Bid Dispute Procedure states "The Supplier cannot appeal the decision of the Treasurer [now the Controller] to another City Official, but is entitled to pursue any necessary legal action, such as judicial review or other appropriate legal remedy, as they deem fit."

Existing mechanisms to support trust, confidence, and fairness in open procurement processes are staff-managed or staff-initiated

An October 2021 staff report⁴⁷ to the Executive Committee indicated that because many of the existing mechanisms (e.g., bid dispute process, using external fairness consultants) to support trust, confidence, and fairness in the procurement process are staff-managed or staff-initiated, and because of opportunities for Accountability Officer oversight of open procurement processes are limited, an additional independent mechanism could enhance the perception of fairness of open procurement practices.

Examples of independent procurement and contracting oversight in other jurisdictions

The staff report gave some examples of models in other jurisdictions to illustrate some potential fairness or oversight features that could be considered for the City's procurement process.

- The City of Montreal's Inspector General oversees the contracting processes and how contracts are carried out by the City or a related entity. This position has powers to investigate and inspect books and records; amend tender documents; cancel any contracting process, or rescind or suspend an ongoing contract under certain conditions; and make recommendations to the City Council. This office proactively monitors calls for tenders and contract awards and proposes corrections or improvements when deficiencies are noted. It also investigates any complaints related to the contracting process and provides training to Council members and City staff on recognizing and preventing breaches of integrity in the making or carrying out of contracts.
- The federal Office of the Procurement Ombudsman investigates supplier complaints about the award of a contract valued below \$30,300 for goods and \$121,200 for services, and the administration of a federal contract regardless of dollar value. It also provides alternative dispute resolution services if both parties to the contract agree to participate, reviews procurement practices related to recurring or systemic procurement issues, and gives recommendations on how to improve them. The Procurement Ombudsman cannot impose sanctions, penalties, or remedies, nor can it cancel or change contract terms and conditions. However, it can recommend a department compensate a supplier for complaints regarding the award of a contract, based on the likelihood that the complainant would have been awarded the contract if it were not for the actions of the department.

⁴⁷ The October 2021 staff report was prepared in response to a May 2021 City Council motion directing the City Manager to report to City Council on a review of the role of the Accountability Officers in relation to the procurement process and identification of any gaps. [Agenda Item History - 2021.EX27.2 \(toronto.ca\)](https://www.toronto.ca/agenda-item-history-2021-ex27.2)

- The Canadian International Trade Tribunal provides an opportunity to review the propriety of the procurement process related to contracts covered by certain trade agreements. It has the authority to inquire into complaints and decide whether the federal government broke certain procurement obligations, and to recommend remedies. In addition, the Tribunal has the authority to write to the senior management of federal government institutions about their procurement processes in general.

City Council requested staff to review the potential for an Inspector General for the City of Toronto

Upon consideration of the report, in November 2021, City Council adopted a motion directing the City Manager to conduct a further review of the potential for an Inspector General for the City of Toronto using the considerations described in the report (October 13, 2021) from the City Manager and to report to the Executive Committee at its June 8, 2022 meeting. A report back was not made before the end of the previous Council term.

This request was reintroduced in this term of Council at the first meeting of the General Government Committee through a motion requesting the Chief Financial Officer and Treasurer report back to the Committee on the possibility of Toronto adopting the Open Contracting Global Principles and an Inspector General, as part of the report on Chapter 195.⁴⁸

Recommendations:

- 13. City Council request the City Manager, in consultation with the City Solicitor, to review Toronto Municipal Code Chapter 195, Article 10, as well as the Pre-Award and Post-Award Bid Dispute Procedure, to make recommendations to City Council regarding changes to address or clarify the circumstances or criteria where an alternate senior City Official should be designated to review pre- or post- award bid disputes.**
- 14. City Council request the City Manager to ensure the review of Toronto Municipal Code Chapter 195, Article 10, as well as the Pre-Award and Post-Award Bid Dispute Procedure, to take into consideration any outcomes or recommendations related to the City Council-directed review of the potential for an Inspector General for the City of Toronto.**

⁴⁸ [Agenda Item History - 2023.GG1.1 \(toronto.ca\)](#)

D. 3. Involve an Independent Fairness Consultant to Support Perception of Transparency and Procedural Fairness

Suppliers questioned why a fairness monitor was not involved

Multiple bidders raised concerns that a fairness monitor had not been appointed for the NRFP.

Reasons why staff did not retain a fairness monitor

In general, the appointment of a fairness monitor is left to the discretion of City staff. To explain why the City did not retain a fairness monitor for this project, in the [Supplementary Report - Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#), management advised City Council of the extent of PMMD oversight of the procurement, noting that:

“Throughout the winter maintenance strategic sourcing initiative, the City’s Purchasing and Materials Management (PMMD) staff led and oversaw all three (3) procurements to uphold the use of fair, open and transparent processes in line with the City’s policies and procedures. Due to its complex nature, three (3) different PMMD staff were assigned to this initiative, with further oversight from management, in an effort to ensure that all three procurements met the highest standards of business ethics ...

As this was a strategic sourcing initiative, there were regular touchpoints and monthly updates on the progress of this procurement with the Director, Purchasing Client Services as well as with the Chief Procurement Officer. In addition to this, staff from Legal Services Division were engaged throughout all three (3) procurement processes to review documentation, advise on risks, and for consultation on adherence to applicable by-laws, procedures, and policies.

Given the number of PMMD staff engaged in this procurement for the purposes of maintaining a fair, open, and transparent process, consultation from Legal Services Division, and the implementation of best practices from previous strategic sourcing initiatives, the City did not retain a Fairness Monitor for this project.”

Appointing a fairness consultant can be helpful in creating a perception of impartiality in awarding major contracts

Still, we note that engaging an independent party can instill a higher level of confidence by creating a perception of impartiality in awarding major contracts.

The Bellamy Report⁴⁹ highlighted that:

“Experts in both the public and private sectors suggest that having a fairness commissioner results in a higher level of confidence by prospective bidders that the process will be managed fairly.”

And further that:

“... the Ontario integrity commissioner recommended the appointment of a fairness commissioner in major projects to oversee the RFP evaluation process, and in some cases the development of the RFP, to ensure that the process is objective and fair throughout. Introducing a fairness commissioner could be a helpful step in creating a perception of impartiality in awarding major contracts.”

In 2004, City Council endorsed using fairness consultants based on call complexity and the likelihood of intense scrutiny

In July 2004, City Council endorsed the approach of using external fairness consultants⁵⁰ in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny. This approach was never clearly articulated into a formal policy with criteria on when a fairness consultant should be used. The guidance put forward in the 2004 report requires an update.

Fairness consultants were engaged for 9 of the 40 NRFPs over the last five years

Currently, there is no consistent set of circumstances or criteria for when an independent fairness consultant should be engaged. Based on data provided by PMMD staff,⁵¹ out of the approximately 40 NRFP procurement processes conducted between 2018 and 2022, nine had a third-party fairness consultant appointed (as listed in **Table 9**).

Table 9: Use of Fairness Consultants on NRFPs between 2018 and 2022

Award Year	NRFP	Description	\$ Value (net of HST recoveries)
2019	6907-19-0145	Fleet Services - Supply of Various Fuels and Services	\$114,192,596
2019	4204-19-5019	Construction of Watermains for Engineering Services for Detailed Design	\$56,686,028
2020	Doc1960427682	CREM - Provision of Custodial Services at Various City of Toronto Locations	\$42,322,940
2020	Doc2102349866	Provision of IT professional services for Technology Services	\$31,099,384

⁴⁹ Report on the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry is available at: https://www.toronto.ca/ext/digital_comm/inquiry/inquiry_site/report/index.html

⁵⁰ Report on “Feasibility of Using Fairness Consultants for Certain Procurements” considered by City Council in July 2004. <https://www.toronto.ca/legdocs/2004/agendas/council/cc040720/adm5rpt/ci011.pdf>

⁵¹ We have not verified the accuracy and completeness of the data provided by PMMD staff.

Award Year	NRFP	Description	\$ Value (net of HST recoveries)
2020	3907-19-7227 (Doc2118337433)	Full Length Trenchless Rehabilitation of Small Diameter Gravity Sewers and Related Works of Various Locations in the City of Toronto (Excluding Toronto Proper)	\$17,678,918
2021	Doc2481086143	Provision of System Integrator Services for the Financial Systems Transformation Program	\$44,811,001
2021	Doc2604476104	Provision of Vote Counting Equipment for the City Clerk's Office	\$14,973,545
2021	Dec2305234907	Arboricultural Services (Tree Maintenance)	\$41,124,257
2022	Doc2809578227	Construction Project and Document Management System for the City of Toronto's Engineering and Construction Services	\$5,863,887

Examples of criteria for when a fairness consultant should be engaged

The City should revisit its approach to engaging fairness consultants on an ad-hoc/as-required basis at staff’s discretion. It should also establish clearer guidance on when there may be a need to provide greater assurance with respect to procedural fairness of the NRFP procurement process – for example, by setting thresholds or criteria for complex, high-risk, high-profile, or high-scrutiny projects where a fairness commissioner or process monitor should be engaged. Such criteria may include:

- a dollar threshold where all procurements for contracts over a certain value have an independent fairness consultant engaged
- procurements that include negotiations or where the process allows for significant discretion (e.g., NRFPs)
- procurements for goods and services that will be delivered using a new model or approach
- procurements that involved a high degree of risk or controversy, or are subject to a high degree of public scrutiny.

Recommendation:

- 15. City Council request the Chief Procurement Officer to implement a policy or procedure which establishes the criteria for engaging an independent fairness consultant to monitor a procurement process. Documentation should be retained on file to support why a fairness consultant is or is not engaged before the issuance of such procurements.**

E. Reviewing the City's Pre-Solicitation Estimates

Post-award dispute question on accuracy of estimates

In a post-award dispute, one supplier wrote that, in their debriefing, the supplier asked City staff to confirm the accuracy of their estimate to which a response was not provided and had yet to be followed up on. Further, the supplier alleged that:

“We do believe that certain City staff must know their estimate of [\$X] million per year for [Contract Area] was a gross error or was intentionally falsified...We are requesting that the City answer to the validity of their estimate...”

Controller's response

In responding to the bid dispute, the Controller indicated to the supplier that he had:

“conducted sufficient due diligence to review your comments and the additional information provided. In considering your statement ... I am satisfied that there is no evidence to support those statements ...”

Estimates were prepared before NRFP1 issued

The estimates staff used during the NRFP process were prepared by Transportation Services' external consultant before the first NRFP was issued.

A consultant estimated 1,060 pieces of equipment would be required at a total annual cost of \$53.8M for the 11 contract areas

In April 2021, the external consultant provided Transportation Services with contract area estimates, which included equipment numbers and cost estimates (standby cost, operating cost, and total cost). It was estimated that about 883 pieces of equipment would be required, and that the estimated total annual cost for the 11 contract areas was \$44.8 million. The estimates also contemplated an additional 20 per cent contingency to account for unknowns and variances from assumptions.

Equipment Estimate	Equipment Estimate + 20% contingency	Cost Estimate	Cost Estimate + 20% contingency
~883	~1,060	\$44.8M	\$53.8M

Estimates were based on historical data

The consultant's estimates were based, in part, on the City's historical RFQ data⁵² (for the 2015-2022 contracts that were structured differently) and savings that Transportation Services' consultant indicated might be possible by moving to the new model.

⁵² The Consultant's report indicates the bid costs were assumed to be in 2015 dollars and were inflated to 2020 dollars using a 3% annual inflation rate consistent with the City of Toronto bid documents.

Estimates came with disclaimers

In providing equipment and cost estimates for each of the 11 contract areas, the external consultant included a clear disclaimer on the face of their spreadsheets stating that “This analysis relies on third party data and multiple assumptions. The analysis was developed on a best efforts basis; however, [consultant] provides no warranty as to the accuracy of these estimates.”

In transmitting the estimates to Transportation Services staff, the consultant also specifically indicated to staff that “I provided a disclaimer on both spreadsheets and recommend this information be used only to guide the evaluation of your contract bids and not hard criteria to make pass / fail decisions on the bids.”

No evidence came to our attention that would suggest that the estimates were artificially lowered or used in a manner to purposely impact the procurement process or outcome

We noted some inconsistencies in the data used for the pre-solicitation estimates and the final NRFP requirements, including changes and corrections made to contract area maps and/or NRFP requirements (identified during the NRFP process). However, no evidence came to our attention that would suggest that the City’s estimates were artificially lowered or used in a manner to purposely impact the procurement process or outcome. During the NRFP process, City staff used the estimates in a consistent manner when considering proposal submissions across all contract areas.

E. 1. How the Equipment and Cost Estimates Were Prepared

Transportation Services engaged an external consultant to develop new equipment and service requirements

In preparing to procure and award the new winter maintenance contracts, Transportation Services engaged an external consultant to conduct an assessment of the old contracts (the 2015-2022 winter maintenance program) to provide recommendations on how to strengthen and optimize the existing contract delivery model in light of industry best practices — including facility and equipment requirements, fleet options, route optimization, and service levels — while meeting the needs and demands of the City of Toronto in a safe, environmentally sustainable, operationally efficient, and equitable manner.

2018/19 winter maintenance contracted service cost was \$70.9M

Under the 47 old (2015-2022) winter maintenance contracts, the City decided the number and type of equipment to use to complete the work. According to a report by Transportation Services’ consultant, the contracts specify the requirement for 1,354 pieces of equipment. The consultant also reported that the City’s 2018/19 winter maintenance contracted service cost was \$70.9 million.

The external consultant recommended an alternative approach for the new (2022-2029) winter maintenance contracts, where the City would create a 'menu' of the equipment required for each winter maintenance activity that a contractor could select from to achieve specified service outcomes. Transportation Services adopted this approach for the new contracts.⁵³

Equipment estimate methodology

To develop the equipment estimates, the external consultant prepared a bottom-up analysis for each of the 11 contract areas to calculate the fleet size (using the total road length), expected vehicle speed, and the maximum time allowed by the Council-approved service levels.

1,060 pieces of equipment were estimated to be needed

This analysis was completed for each infrastructure type and activity within each contract area. It was estimated that about 883 pieces of equipment would be needed across all 11 contract areas. A 20 per cent contingency was then applied to this number to account for unknowns and variances from assumptions such as different driving speeds when plowing and salting. The resultant estimate of 1,060 pieces of equipment was used by the City to evaluate the reasonableness of equipment levels proposed by suppliers.

Equipment estimates were only for the base equipment needed

The consultant advised us the estimates were based on the base amount of equipment required and did not include contingency equipment. The liquidated damages and price adjustment clauses of the new contracts are one of the reasons suppliers indicated they proposed more equipment.

Cost estimate methodology

To develop their cost estimates, the external consultant used:

- a) **Total Standby Cost Estimate:** Standby charges⁵⁴ are payments that ensure contractor equipment and personnel availability. The consultant standby cost estimate was based on historical equipment carrying costs⁵⁵ to have equipment fleet available on standby for 26 weeks and operators on standby for 40 hours per week (or 1,040 hours per season).

⁵³ When they bid, the contractors were asked to select from that menu when defining the type and number of pieces of equipment needed to service a contract area. The NRFP included specifications for the maximum age of equipment at the start of the contract.

⁵⁴ In the current NRFP, the standby charges are referred to as a "Daily Rate." The NRFP required suppliers to detail cost components that make up the Daily Rate for each applicable equipment type, including equipment purchase/lease cost, maintenance costs, operator costs, and depot operations costs.

⁵⁵ The consultant's report indicated that estimates for equipment carrying rates were generally based on the City's historical RFQ data (for the 2015-2022 contracts that were structured differently), equipment capital costs of a municipality in another province, and average prices for one manufacturer of equipment. The Consultant's report indicates that the historical RFQ data was assumed to be in 2015 dollars and were inflated to 2020 dollars using a 3% annual inflation rate consistent with the City of Toronto bid documents.

- b) **Total Operating Cost Estimate:** This is the cost⁵⁶ associated with active work during winter events. The estimate was based on an hourly operating rate for each piece of equipment with an operator⁵⁷ when actively engaged in winter maintenance activities.
- c) **Total Cost Estimate = Total Standby Cost Estimate + Total Operating Cost Estimate**

Cost estimate for the 11 contract areas was \$53.8M

It was estimated that the total contracted service cost per year would be \$44.8 million for all 11 contract areas. After applying a 20 per cent contingency, this brought the estimate to \$53.8 million per year. This cost estimate was \$17.1 million less than the City’s 2018/19 winter maintenance contract cost of \$70.9 million.

Number of rounds and hours to achieve service level expectations will impact total cost

We noted that the multiplication factors (e.g., number of operating hours or number of standby hours) used to develop the cost estimates were not always the same as the multiplication factors applied by the City in the pricing forms used for the NRFPs.

Pre-solicitation estimates and final supplier pricing are not directly comparable

Overall, we found the City’s cost estimates and the suppliers’ pricing are impacted by several variables that make them not directly comparable – including the number of pieces of equipment, standby (daily) rate, operating rate, and rate multipliers (operating hours and standby hours). As noted previously, the contract area pricing⁵⁸ received from the suppliers who passed technical thresholds were anywhere from 1.54 to 4.11 times the City’s cost estimates (including 20 per cent contingency) and the equipment⁵⁹ proposed ranged from 0.79 to 1.34 times the City’s equipment estimates (including 20 per cent contingency).

⁵⁶ In the current NRFP, the “Operating Rate” shall include cost for operator, fuel, and light maintenance when engaged in operations.

⁵⁷ The consultant’s report indicated the estimated labour rates were based on historical Statistics Canada heavy equipment operator hourly wage rates and the Ontario minimum wage (October 1, 2020) as well as employment insurance payments. Further, the consultant’s report indicated the equipment operating rates were based on the hourly equipment operating cost of a municipality in another province.

⁵⁸ The NRFP pricing form included “Additional Unit Rates”. Some examples of “Additional Unit Rates” included costs related to: load and stockpile salt in salt storage structure; transfer salt to another Depot and/or salt storage structure; and re-weigh salt within Depot area. These costs were not included as part of the City’s estimates, and therefore, were excluded when comparing suppliers’ bid pricing against the City’s estimates.

⁵⁹ There are differences between the equipment list the consultant used to generate its estimates and the ‘menu’ of equipment in the NRFP pricing form. For example, the equipment and cost estimates includes nurse trucks. However, nurse trucks are excluded from the NRFP pricing form because they are to be provided at no additional cost to the City under the 2022-2029 contracts.

Consultant highlighted that bid prices will be determined by market conditions and impact of changes to contracts

The consultant's March 2021 report noted that ultimately, the changes in the contractor bid prices from the next contract cycle (relative to that in the last contract cycle) would be determined based on:

1. Market conditions at the time of the procurement – contractor costs (e.g., equipment, fuel, labour) and the amount of other opportunities that potential contractors are engaged in or have the potential to be engaged in, and therefore the availability of equipment and labour to bid on winter maintenance services; and,
2. The impact of the changes to the contract provisions.

The consultant indicated that:

“After the next round of contractor bids are received and final contracts negotiated, the changes in the total bid amounts will be knowable. However, the amount of the change in the total bid amount related to each of (i) a change in market conditions or (ii) the new contract provisions will not be able to be determined. The only knowable outcome will be the change in the total bid amounts.”

E. 2. Determining the Benchmark for Transitioning to Performance-Based Contracts

City went into procurement expecting savings

The City went into the procurement expecting to see savings from the prior year's contracted winter maintenance costs.

As noted previously, Transportation Services engaged an industry consultant to complete a separate study. The consultant reported that the City could save approximately 10 to 22 per cent on annual contracted winter maintenance services. These savings were expected by implementing the following initiatives:

- performance-based contracts
- simplifying/clarifying contractor pricing
- reducing equipment
- consolidating contracts (to achieve economies of scale and scope).

Auditor General's 2020 audit found the City never measured itself against the Council-approved service levels to determine how often they were met

However, as the Auditor General pointed out in her October 2020 audit report, the City never measured itself against the Council-approved service levels to determine how often they were met. It also did not clearly define performance outcomes or measure against them. Transportation Services only measured the level of activity during a winter storm. This means the City did not know how it was performing against service levels and outcomes in the past.

In particular, the 2020 audit report noted that:

“The Key Performance Indicators (KPIs) used by Transportation Services only measure the level of activity (i.e. outputs) during a winter storm. They do not measure whether the required service levels have been achieved, or whether the program’s intended outcomes were met. Without clearly defining meaningful performance measures and targets, it is difficult to track and evaluate the effectiveness of the program, measure service levels, ensure public safety, and improve the reliability of the transportation network.

To measure the overall effectiveness of the program, outcome-based performance measures are most useful. While Transportation Services has recently started working on outcome-based KPIs, it is important to implement robust internal controls and processes to collect the information necessary for measuring outcomes.”

So, while the City knew how much it was spending on the old contracts (about \$70 million plus \$20 million in-house to manage winter maintenance for the 2018/19 winter season), it did not know to what extent it was meeting the Council-approved service standards (i.e., how well it was doing) for this level of spending.

No service level baseline to compare against when assessing the benefits and value derived from the new contracting approach

Transportation Services did not undertake an assessment of actual service levels achieved under the old contract before entering into the NRFPs and new performance-based contracting model. Therefore, no baseline was established for the actual cost to achieve Council-approved service levels (or whatever service level was actually achieved) to compare against when assessing the benefits and value derived from the new contracting approach.

Management indicated that “There wasn’t a direct cost comparison, this was too difficult a task given the move from 47 to 11 contracts and none of the areas were overlapping.”

External strategic sourcing specialist came up with an estimated cost for the new contract

We note that, separate from the equipment and cost estimates prepared by Transportation Services’ consultant, PMMD engaged an external strategic sourcing consultant to help the City realize financial and non-financial benefits from strategic sourcing opportunities. The external strategic sourcing consultant worked with staff from PMMD and Transportation Services (herein referred to as the “joint sourcing team”) to estimate the new winter maintenance contract cost.

Strategic sourcing specialist originally set a baseline of \$79.4M less potential savings from moving to a new model

In April 2021, the joint sourcing team identified that continuing to contract under the old model would cost about \$79.4 million. This estimate was based on historical costs, adjusted for inflationary and economic factors related to labour, fuel, vehicles, and equipment, and after factoring in COVID-19 impacts on those costs.

By the end of April 2021, going into the first round of procurement, the City was expecting bid prices to come in the range of \$61.9 million to \$71.5 million for the 2022/23 winter season, the midpoint being \$66.7 million (based on an estimated cost of \$79.4 million for continuing under the old model net of the \$7.9 million to \$17.5 million in savings Transportation Services' consultant indicated might be possible by moving to the new contracting model).

After proposals were evaluated, the strategic sourcing specialist recast the baseline to \$159M

After receiving the results of the NRFPs and non-competitive procurement, the external strategic sourcing specialist recast their estimate for the first year of the contract.

Based on the results of the NRFPs and non-competitive procurement, the consultant adjusted the estimated annual baseline for the 2022/23 winter season to \$159 million (a 100 per cent increase or double the pre-solicitation estimate) citing inflation and market conditions; economic factors such as higher labour cost, equipment costs, fuel costs, and insurance costs; impacts of the contracting model; and limited competition/quality submissions.

The staff reported cost avoidance estimate of \$400M over 10-year contract is based on the adjusted post-solicitation baseline compared to actual contract values

The strategic sourcing consultant's estimates were not used in the NRFP process at all, but the post-solicitation adjusted baseline was used to separately determine the "cost avoidance of \$401,297,702 (or \$40,129,770 average annual cost avoidance) as compared to the estimated baseline (pre-solicitation estimate adjusted for inflation and market conditions)" reported in the staff report on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#).

If the original pre-solicitation baseline was used, no cost avoidance would have been reported

The \$400 million in cost avoidance is based on the difference between the post-solicitation-adjusted estimated baseline contract value of \$159 million in the first year (and \$1.8 billion over 10 years) and the actual contract value of \$128 million in the first year (and \$1.4 billion over 10 years). If the original pre-solicitation baseline was used, no cost avoidance would have been reported. Rather, a significant increase in costs resulting from the change in procurement and contracting approach would have been reported.

Review of strategic sourcing and how success fees are used and how outcomes are measured is a separate future audit

A full review of savings/cost avoidances quantified by the City's external strategic sourcing consultant (and success fees contract) were outside the scope of this audit. At City Council's request,⁶⁰ an audit of the City's non-competitive contract(s) for consultants supporting the City's Category Management and Strategic Sourcing strategy, (which may include a review of how success fees are used and how outcomes for such contracts are measured), is included in the Auditor General's 2023 Work Plan.

Recommendation:

- 16. City Council request the Chief Procurement Officer to provide guidance for client divisions to:**
 - a. Review, document, and retain in the solicitation file the reasons for significant variances between pre-solicitation estimates and actual contract values.**
 - b. Establish a baseline or perform a cost-benefit analysis when changing the sourcing strategy, procurement approach, or contracting model to better assess the actual outcomes achieved on new contracts.**

⁶⁰ [Agenda Item History - 2020.GL19.2 \(toronto.ca\)](#)

Conclusion

Flexible, non-binding NRFP format gives management discretion

The flexible, non-binding NRFP format gives management some discretion to modify the NRFP process as it proceeds; because of this, the process generally unfolded according to the rules set out in the NRFP document. We noted some exceptions potentially impacting the fairness, openness, and transparency of the procurement of winter maintenance services. However, most of these exceptions were not of such significance to have impacted the award outcome. Where exceptions were notable, we have discussed these in the report.

Challenges from the unexpected need for a second, overlapping NRFP process (and subsequent NCP)

Many of the challenges related to this procurement likely arose from the unexpected need for a second, overlapping NRFP process (and subsequent non-competitive procurement), combined with tight timelines. It is a concern that so few suppliers passed the Technical Proposal Evaluation, and that for some contract areas no suppliers met the City’s requirements. The result was that two companies and their joint venture were awarded approximately \$1.29 billion (88 per cent) of the total \$1.47 billion dollars of winter maintenance contracts.

Report identifies areas for continuous improvement

While the circumstances surrounding this NRFP process may be atypical, the bid disputes, complaints, issues, and concerns raised during the process point to the need for continuous improvement. The report identifies areas for continuous improvement to strengthen the perception and reality that the City holds itself to the highest standards of fairness, objectivity, impartiality, clarity, openness and transparency of NRFPs.

Going forward, before adopting large-scale changes to its procurement and contracting approach for services, the City should consider testing out changes on a smaller scale and making adjustments based on the outcomes and lessons learned, where necessary. Furthermore, divisional staff should ensure they gather key information to understand cost drivers before starting (e.g., information to establish baselines about the extent to which service levels have been achieved and at what cost).

The flexible, non-binding NRFP format is an important tool that can allow the City to request and consider relevant information that supports the success of the contracts awarded through the procurement (e.g., detailed plans to scale up and acquire sufficient labour and equipment given known supply chain and labour market risks).

16 recommendations

The 16 recommendations in this report focus on continuous improvement and reinforcing and supporting the City's ongoing efforts to make NRFP process rules, technical proposal requirements, and evaluation criteria clearer, with the goal of keeping as many suppliers as possible through all the evaluation stages and achieving the best possible outcomes and value for the City.

Audit Objectives, Scope, and Methodology

Award of new winter maintenance contracts

On December 2, 2021, the Infrastructure and Environment Committee considered a staff report on the “Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services.”

The staff report was forwarded by the Infrastructure and Environment Committee to City Council without recommendations.

City Council, at its December 15, 2021 meeting, authorized the General Manager, Transportation Services to negotiate, enter into, and execute agreements based on the terms and conditions set out in the negotiated requests for proposals (NRFPs) and on such other terms and conditions satisfactory to the General Manager, Transportation Services.

City Council amended the Auditor General’s 2022 Work Plan

At this same meeting, City Council voted to add the following to the Auditor General’s 2022 Work Plan:

- a. a review of the City of Toronto's Negotiated Request for Proposal process;
- b. a review of the terms of the winter snow maintenance contracts against previously provided winter maintenance Auditor General recommendations; and
- c. a review of Transportation Services' contract management process, to ensure internal processes are sufficient to hold winter maintenance contractors accountable to the contract terms.

The Council motion can be found here:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2021.IE26.4>

Auditor General’s review of procurement processes for the new winter maintenance contracts

This report presents the results of the Auditor General’s review of the two NRFPs, as well as the non-competitive procurement process, for the provision of winter maintenance services (covering part a. of City Council’s requested reviews as noted above).

Separate report on status of Auditor General’s prior recommendations and Transportation Services’ processes to hold contractors accountable

A separate report addresses the status of recommendations from two previous Auditor General’s reports on the City’s winter road maintenance program, including Transportation Services’ processes to hold winter maintenance contractors accountable to the new contract terms (covering part b. and c. of City Council’s requested reviews as noted above). That report will also be presented for consideration at the Audit Committee’s July 7, 2023 meeting.

Audit objective and scope

The objective of this audit was to assess whether the City of Toronto’s NRFP procurement process for the provision of winter maintenance services was conducted in a fair, open, and transparent manner, specifically:

- Negotiated Request for Proposal Doc2970598171 (NRFP1)
- Negotiated Request for Proposal Doc3136860258 (NRFP2)
- Non-Competitive Procurement

This audit focused on the procurement process and did not include a detailed review of the scope of work, technical specifications/deliverables, or contractual requirements for winter maintenance services. A review of the terms of the winter maintenance contracts compared against previously provided winter maintenance recommendations by the Auditor General is included in a separate report. That report will also be presented for consideration at the Audit Committee’s July 7, 2023 meeting.

Methodology

Our audit methodology included the following:

- reviewing the Auditor General’s two previous reports on the City’s winter road maintenance program:
 - [Audit of Winter Road Maintenance Program - Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes](#) (October 2020)
 - [Winter Road Maintenance Program - Phase 2 Analysis: Deploying Resources](#) (June 2021)
- reviewing the staff reports on the [Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services \(toronto.ca\)](#) and [Supplementary Report – Award Report for Various Suppliers for the Provisions of Winter Maintenance Services \(toronto.ca\)](#)
- listening to recordings of the Infrastructure and Environment Committee’s and City Council’s consideration of Item 2021.IE26.4, “Award of Negotiated Request for Proposals to Various Suppliers for the Provision of Winter Maintenance Services” [Agenda Item History - 2021.IE26.4 \(toronto.ca\)](#)

- reading written communications/deputations from suppliers received by the Infrastructure and Environment Committee on Item 2021.IE26.4
- reviewing relevant complaints received by the Fraud & Waste Hotline
- reviewing key documents related to the NRFP processes, including relevant information and records from the market soundings, Request for Information, NRFP1 and NRFP2 call documents and addenda, proposal submissions, consensus evaluation records, reference check forms, internal briefing notes and correspondence, and debriefing meeting minutes
- reviewing pre- and post- award bid dispute communications received from suppliers, responses to the suppliers by the Chief Procurement Officer and the Controller, and information and records considered during the pre- and post- award bid dispute reviews
- reviewing Transportation Services' external consultant's March 2021 report "New Winter Contracts Potential Contract Cost Savings", and April 2021 report "2022-2029 New Winter Contracts, Toronto Winter Maintenance Contracts, Final Report", including equipment and cost estimates prepared by the consultant, and interviewing the external consultant to better understand the estimates and reports prepared for Transportation Services
- interviewing or obtaining clarifications from certain PMMD and Transportation Services staff involved in the NRFP process
- interviewing or obtaining clarifications from certain staff involved in the pre- and post- award bid dispute review processes
- interviewing PMMD's external supply chain and category management consultant involved in the NRFP process.

Compliance with generally accepted government auditing standards

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix 1: Management’s Response to the Auditor General's Report Entitled: “A Review of the Procurement and Award of the Winter Maintenance Performance-Based Contracts”

Recommendation 1: City Council request the Chief Procurement Officer to establish guidelines and/or criteria for client divisions to consider when implementing complex procurement strategies and/or significant changes to the approach for category management and strategic sourcing initiatives, and to test changes on a smaller scale such as through staggered or segmented approaches, where possible, in order to review lessons learned and address potential issues, shortcomings, and risks before implementing wholesale changes.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD to create a guideline and/or criteria for when smaller scale pilot procurements are to be used as part of a strategic approach for large recurring services contracts where scope and procurement method are being largely changed due to client needs, market conditions, lessons learned and require more complex procurement strategies. It is important to note that executing pilot contracts for procurements where supplier investment into capital equipment is required, may be challenging and not financially feasible for the City. Therefore, pilot contracts may be considered for terms of 3 years or more but less than 5 years. These pilots may demonstrate larger costs to the City as a result of reduced scope and contract term as it would be a pilot. The guideline and/or criteria is to be drafted by end of Q1 2024.

Recommendation 2: City Council request the Chief Procurement Officer to provide guidance for client divisions on avoiding concurrent or overlapping procurement processes where appropriate, and/or implement appropriate risk mitigation measures to address potential issues that may arise when running concurrent or consecutive procurement processes for the same or related services where there may be the same suppliers bidding for contracts where operational capability is a factor or evaluation criteria.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD’s intention is to ensure that only one corporate call is issued for similar scopes instead of running concurrent procurement processes where feasible. To mitigate the potential risk of supplier capacity & capability, City Divisions and PMMD will ensure that the evaluation methodology includes the supplier capacity and capability/resource requirements to assess and score their eligibility.

Recommendation 3: City Council request the Chief Procurement Officer to provide guidance for client divisions to document in the solicitation file the rationale for exercising reserved rights or discretion when conducting a negotiated request for proposal, and to record the rationale for exercising such rights or discretion in the project closeout report.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: <p>This is part of PMMD’s standard procurement practice and will ensure it is being applied by all staff. Reserved Rights can be found in the nRFP template. PMMD to ensure that when exercising reserve rights or discretion involving the amendment of process rules set out in a nRFP and that staff document and identify to the CPO for approval a rationale for doing so.</p> <p>This rationale will be documented in the Strategic Sourcing Close Out Report that is prepared at the end of each procurement and signed off by the CPO, Purchasing Director and the Division Head and any respective Directors for the procurement.</p> <p>Revisions to this section would need to be reviewed by the City Solicitors to understand and consider the legal implication of any such changes.</p>

Recommendation 4: City Council request the Chief Procurement Officer to provide more guidance and/or training for client divisions identifying when it would be appropriate to:

- a. **Implement a request for supplier qualification (RFSQ) process in advance of a negotiated request for proposal (NRFP) process, to address the risk of an insufficient number of suppliers meeting technical requirements and to increase the likelihood that more qualified suppliers submit pricing proposals.**
- b. **Cancel, review, and reissue an amended RFSQ and/or NRFP where an insufficient number of qualified suppliers meet the City’s requirements or where concentrating risks with few suppliers is not appropriate or acceptable to the City.**

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: <ul style="list-style-type: none"> a. PMMD will provide guidance for when an RFSQ process can be utilized in coordination with an nRFP process. b. Cancellation guidelines are part of PMMD’s standard procurement practice and PMMD will ensure it is being applied by all staff when applicable. Discussions will continue to be had with Divisions as circumstances arise where cancellation is required, or not enough suppliers bid.

Recommendation 5: City Council request the Chief Procurement Officer to review the process and form used for checking references, and establish formal procedures or guidelines for how references are to be used to validate accuracy of solicitation responses and how information from reference checks can be clarified with referees and suppliers.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: The overall reference check process will be assessed as it varies for each solicitation. A review of the current process will be undertaken, and a best practices and guideline document will be created by PMMD for all divisions where a reference section is required in their procurements. This will be reported back to the Auditor General’s office, in Q1, 2024.

Recommendation 6: City Council request the Chief Procurement Officer to review the standard process rules (or template) for negotiated requests for proposals and related evaluation criteria for past experience and reference checks, and enhance guidance and/or training for client divisions to ensure solicitation requirements and scoring guidelines for evaluation teams are sufficiently clear.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: Past experience rules and process varies by the project, however standardized sample language is already included in the nRFP template, Part 4 – Form B Technical Proposal Qualifications. Divisions are instructed to revise standard language as per their project specific requirements. These instructions are outlined in the template stating “[<i>Note to Finalization: The following sample information requested should be modified as necessary to suit the circumstances of the project</i>]” PMMD will further review the nRFP template to identify if and/or where further standardized language can be added, as well as enhanced scoring guidelines for evaluating past experience requirements. A reminder communication will be sent to all Divisions in Q3 2023 on the above-noted section and the completion required and ensuring any training material is updated.

Recommendation 7: City Council request the Chief Procurement Officer, in consultation with the City Solicitor, to review how affiliate relationships may impact the evaluation of a supplier’s past experience and provide guidance to Purchasing and Materials Management Division staff and client divisions on how to evaluate.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD will consult with the City Solicitor with respect to understanding how an affiliate relationship may make the past experience of one Supplier relevant to another when applicable situations arise. Currently, evaluated criteria are contained within a solicitation document to evaluate a proponent’s past experience, account management, and team experience. A review of the current language in templated will be undertaken by PMMD along with the City Solicitor by Q4 2023.

Recommendation 8: City Council request the Chief Procurement Officer to provide guidance for client divisions and ensure that standard process rules (or templates) for negotiated requests for proposals and related scoring guidelines avoid the use of a two-pronged, multi-scenario approach for a given evaluation criteria/sub-criteria wherever possible; and, where the use of a two-pronged, multi-scenario approach is unavoidable, ensure evaluation criteria/sub-criteria is clear and all possible scenarios have been considered and incorporated in the scoring guidelines.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: Due to the complexity and the evolving changes of the procurement landscape, varied evaluation requirements may be required on occasion, though PMDD will strive to minimize the use of the two-pronged approach unless required and primarily use a single scenario approach for defining the scoring grid/criteria.

Recommendation 9: City Council request the Chief Procurement Officer to provide further guidance and/or training for client divisions to:

- a. **Ensure that requirements in negotiated requests for proposals solicit enough information to enable the City to assess whether key risks impacting suppliers' capability to meet the scope of work and deliverables have been appropriately addressed or mitigated.**
- b. **Clarify the extent of information that can be requested by the City from a supplier or third parties to verify, clarify or supplement the information in a supplier's proposal response submitted to a negotiated request for proposal, when evaluating technical proposals and/or undertaking negotiations.**

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD team will provide guidance to ensure that the Division provides all applicable technical requirements as part of the supplier capability and capacity portion of proposal evaluations. The technical requirements, proposal content, and technical methodology are developed by the division and reviewed by PMMD for fair, open and transparency purposes. As Divisions are ultimately the technical experts who understand the scope and operational requirements, they are responsible for the development of the technical evaluation methodology and ensuring the City solicits enough information to enable assessment of whether key risks impacting supplier capabilities meet requirements. PMMD will advise on general capability questions, supplier diversity and social procurement. PMMD will continue to follow the procurement practice of seeking clarification from suppliers on bid submissions through the current process.

Recommendation 10: City Council request the Chief Procurement Officer to provide more guidance to client divisions on “value-added services” to be included in suppliers’ technical proposal content requirements and evaluation criteria contained in negotiated request for proposal solicitation documents, to ensure the City is clear and consistent when communicating to suppliers what it is willing to negotiate and the range of alternatives it is willing to consider through proposals of “value-added services”, (including through addenda containing questions and answers and in examples of value-added services provided within technical proposal forms).

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD will ensure nRFPs state items which can be negotiated and what is excluded. This will include but will not be limited to items such as pricing, alternative delivery options, proposed resources and solutions, validation of assumptions, review of value-added services, KPI’s, service level agreements, implementation plans, and others based on the type of goods or services being negotiated. PMMD will further ensure that client divisions understand what value-added services considered could be and that communication within procurements is clear and consistent.

Recommendation 11: City Council request the Chief Procurement Officer to provide guidance and/or training to staff to make negotiated request for proposal process rules as clear as possible, and avoid or clarify process steps that may be interpreted inconsistently or cause supplier confusion.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: A review of the current process will be undertaken, and a best practices and guideline document will be created by PMMD for all divisions where a reference section is required in their procurements. This will be reported back to the Auditor General’s office, in Q1, 2024. PMMD agrees that this may need to be further clarified internally with the team, and a review of the current process will be undertaken. PMMD will ensure that the Client team is providing a rationale/risk analysis where applicable to use their discretionary right, such as reducing the threshold to bring more suppliers into the qualifying list. Approval by the Divisional Sponsor and the Purchasing Director will be required before any changes are incorporated.

Recommendation 12: City Council request the Chief Procurement Officer, in consultation with the City Solicitor, to review procurement policies and procedures and integrate additional procedural guidance specific to the implementation of more flexible, non-binding procurement methods (e.g., negotiated requests for proposals).

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD is currently in the process of reviewing its policies and procedures. Progress regarding procedural updates will be reported in Q2, 2024

Recommendation 13: City Council request the City Manager, in consultation with the City Solicitor, to review Toronto Municipal Code Chapter 195, Article 10, as well as the Pre-Award and Post-Award Bid Dispute Procedure, to make recommendations to City Council regarding changes to address or clarify the circumstances or criteria where an alternate senior City Official should be designated to review pre- or post- award bid disputes.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD, along with the City Solicitor, is currently in the process of reviewing the Toronto Municipal Code Chapter 195. This will include a review of Article 10, including possible criteria for when an alternate senior City Official should be designated to review pre-award or post-award bid disputes. Policy updates are to be reported to Council in Q3 2023.

Recommendation 14: City Council request the City Manager to ensure the review of Toronto Municipal Code Chapter 195, Article 10, as well as the Pre-Award and Post-Award Bid Dispute Procedure, to take into consideration any outcomes or recommendations related to the City Council-directed review of the potential for an Inspector General for the City of Toronto.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: PMMD, along with the City Solicitor, is currently in the process of reviewing the Toronto Municipal Code Chapter 195. This review will include the possibility of an Inspector General role for the City of Toronto. Should the role be supported, then PMMD will review the possibility of involving them in pre-award and post-award bid disputes. Updates regarding Chapter 195 are to be reported to Council in Q3 2023.

Recommendation 15: City Council request the Chief Procurement Officer to implement a policy or procedure which establishes the criteria for engaging an independent fairness consultant to monitor a procurement process. Documentation should be retained on file to support why a fairness consultant is or is not engaged before the issuance of such procurements.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: The guidelines for when to engage a fairness monitor will be developed, documented, and communicated to the PMMD Staff and Divisional Leadership. Guidelines are anticipated to be developed by Q1 - 2024.

Recommendation 16: City Council request the Chief Procurement Officer to provide guidance for client divisions to:

- a. Review, document, and retain in the solicitation file the reasons for significant variances between pre-solicitation estimates and actual contract values.
- b. Establish a baseline or perform a cost-benefit analysis when changing the sourcing strategy, procurement approach, or contracting model to better assess the actual outcomes achieved on new contracts.

Management Response: <input checked="" type="checkbox"/> Agree <input type="checkbox"/> Disagree
Comments/Action Plan/Time Frame: <ul style="list-style-type: none">a. As part of the nRFP process, PMMD relies on the budget estimates provided by divisions. PMMD provides additional input as to how marketplace has affected the pricing, including possible increases and market fluctuations, as part of the overall sourcing strategy. Should the Divisional client does not agree with our estimates and wish to use alternate budgetary financials, PMMD ensures the cost variance reason is documented as part of the project close-out report. Additionally, should PMMD team negotiate cost reduction as part of the nRFP process, then it is documented in the recommendation and reported back to the approving authority (e.g., General Government Committee, City Council). Should only one bid be received, PMMD staff will complete the Unbalanced bid analysis, which is already embedded in PMMD’s procurement processes. PMMD completes an unbalanced bid analysis using the pre-solicitation estimates and supplier quoted prices by items. This analysis highlights individual line items, which are:<ul style="list-style-type: none">I. Significant in value relative to the total contract value (2.5%-5% or more) ANDII. Have a large variance in comparison to the pre-solicitation estimates.Divisions are required to address the acceptability of any unbalanced line items and rationalize how they will manage the contract with these items should we proceed.b. PMMD completes a cost-benefit analysis when changing the sourcing strategy, procurement approach, or contracting model in order to assess better the actual outcomes achieved as part of more complex sourcing strategies.

**AUDITOR
GENERAL**

TORONTO

