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**Item No. 6**  
**Halifax Regional Council**  
**July 21, 2015**

**TO:** Mayor Savage and Members of Halifax Regional Council

**SUBMITTED BY:** Original Signed by Director

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Bruce Fisher, Acting Director of Finance and ICT/CFO

**DATE:** March 10, 2015

**SUBJECT:** Tender Awards for Snow and Ice Control

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### **INFORMATION REPORT**

#### **ORIGIN**

Item 8.6 of the August 5, 2014 meeting of Council. Council requested a staff report relating to tender awards for snow and ice control contracts with consideration for procurement specifications including a proviso that contractors can only bid if they are in good standing with HRM and they do not have outstanding legal, procurement, or performance issues.

#### **LEGISLATIVE AUTHORITY**

Halifax Charter Section 79(1)(f) states that "The Council may expend money required by the Municipality for snow and ice removal". HRM Charter Section 322(3) further states that "The Council may expend funds for the purpose of clearing snow and ice from the streets, sidewalks and public places in all, or part, of the Municipality".

Administrative Order #35, the Procurement Policy, establishes guidelines that provide for the procurement of goods, services, construction and facilities by the Regional Municipality in a fair, open, consistent and transparent manner resulting in best value as approved by Council.

#### **BACKGROUND**

In 2006, HRM adopted Performance Based Contracts for snow and ice control. Since their adoption, the requirements, performance objectives, specifications and terms of reference for these contracts have been modified through a process of continuous improvement. Techniques, processes and documentation have been developed to manage these contracts to provide snow and ice control in accordance with Council approved standards.

Tendering processes, including those for snow and ice control, are designed to result in a contract with a responsible contractor for a well-defined scope of work and to ensure HRM's interests are protected. These tendering processes must operate within a framework that is consistent with best practice and is defensible as being fair, open, consistent and transparent.

## **DISCUSSION**

It is said that the purpose of tendering contracts is to replace negotiation with competition. The law related to tendering (both statute and common law) requires bid-calling parties to treat all bidders in a tendering competition fairly when evaluating bids. Amongst other things, this duty of fairness means that Halifax is generally required to award tender contracts to the lowest-priced qualified bidder.

There are legitimate reasons why a bid-calling party might not want to enter into contracts with certain vendors (i.e. poor performance on a previous contract). A blanket statement that vendors can only bid if they are in “*good standing with Halifax and do not have outstanding legal, procurement, or performance issues*” would not likely withstand scrutiny from the courts as such a statement is too broad and ambiguous. However, several mechanisms have been built into Halifax’s procurement documents (including snow and ice control tenders) to give the Municipality the flexibility to disqualify problematic vendors and/or reject their bids when appropriate.

### **Bidder Disqualification (aka Bidder-Barring)**

The most decisive method of ensuring that poor performers are not awarded contracts with Halifax is to disqualify such vendors from bidding (aka “bid barring”) on future tenders. This approach is being applied with increasing frequency. The Municipality’s ability to disqualify vendors is set out in Section 11 of the Procurement Policy (Administrative Order #35). In accordance with the Policy, vendors can be disqualified from bidding for up to three years for any of the following reasons:

- (a) Conviction for a criminal offense of a person or a director or official or such person relating to obtaining or attempting to obtain a contract or subcontract or an indication of lack of business integrity or honesty which directly and seriously affects the responsibility of the contractor.
- (b) Serious breach of contract indicating an unwillingness to perform a contract in accordance with the terms and conditions or specifications or a record of unsatisfactory performance of one or more contracts in accordance with the terms and conditions thereof or in accordance with its specifications or both.
- (c) The offer of any gratuity to an official or employee of the Municipality by a vendor or contractor for consideration.

In the coming months, staff will be proposing several amendments to the Procurement Policy, including the addition of wording that will expressly allow Halifax to disqualify vendors who engage in frivolous, vexatious or abusive litigation against the Municipality. While this has not been much of an issue for the Municipality to date, procurement litigation is on the rise in Atlantic Canada, and it does address the hypothetical concern of having to award a contract to a lowest-priced vendor who has a history of commencing frivolous and time-consuming lawsuits against the Municipality.

In late 2014, procurement staff added new wording to HRM’s tenders and RFPs stating that:

*No contract will be awarded to any proponent who is currently disqualified from bidding (or to a proponent whose owner/principal is or was the owner/principal of a vendor who is disqualified from bidding) on the scope of services outlined in this RFP per Administrative Order #35, Procurement Policy, Section 11 – Vendor Performance.*

The purpose of this new wording is to protect against the possibility that a vendor may get bid-barred by the Municipality and then attempt to bid on new contracts through a new or different corporate entity. Similar wording will be included in future snow and ice control tenders.

### **Rejection of Bid**

The second method that a bid-calling party can use to avoid contracting with a poor performing vendor is to reject that vendor's bid in favour of the second-lowest-priced bid. Halifax's procurement documents all include clauses stating that the Municipality reserves the right to reject any or all tenders, or portions thereof and to accept the tender(s) and bids deemed to be in the best interest of the Municipality. This type of clause is referred to as a "*privilege*" clause and allows the Municipality to exercise its privilege to reject or by-pass the lowest-priced bid. Doing so, however, is high risk for the Municipality. Courts across Canada have been inconsistent in whether they will permit bid-calling parties to rely upon such a clause in every instance. If a court determines that the bid-calling party unfairly rejected the lowest-priced bid based on undisclosed criteria, the bid-calling party can be ordered to pay the aggrieved vendor its lost-profits that it otherwise would have made had it been awarded the contract. Therefore, any decision to reject a lowest-priced bid must be based on clearly identified criteria applied fairly to all bidders and should only be made after consulting with Legal Services.

For snow and ice control tenders, it is Halifax's stated objective to contract with responsible bidders who: are in the business of snow and ice control; have satisfactory performance based upon past work experience, (including but not necessarily with the Municipality); and have the financial, managerial and resource capabilities for the size of the project/work under consideration. In evaluating bids on snow and ice control tenders, staff conducts due diligence to ensure bidders meet these requirements. This involves assessment of the equipment, manpower and management resources bidders are proposing to use to undertake the work. The assessment process may include third party reference checks and/or criminal checks. If staff determine through this process that a particular bid would not be in the best interest of the Municipality, the bid can be rejected using the Municipality's privilege clause.

The integration of staff's assessment into the tender award can be a challenge due to its subjective nature. One mechanism that provides some objectivity (and therefore improves the chances of the Municipality successfully defending a decision to reject a bid) is the Vendor Evaluation Scorecard process which was introduced in 2014. At the conclusion of each winter season, each contractor's performance is reviewed and evaluated based upon a Vendor Evaluation Scorecard. The results of the evaluation are documented and shared with the contractor. This provides contractors with feedback on areas for improvement and Halifax with a record of performance for future reference.

### **Contract Management**

It is important to note that the tendering process for snow and ice control results in performance based contracts which incorporate mechanisms to reinforce the importance of performance/standards. These contracts are performance managed and monitored by Supervisors who conduct regular inspections of the service levels provided by the contractors. The contracts provide for Liquidated Damages whereby contractors are assessed predefined damages for failure to meet standards in the areas of: response time, quality of work, equipment, qualified operators, orientation seminars, supervision and contact information, communications and approval of subcontractors. These damages range in cost from \$50 to \$500 per occurrence. The contracts also include the use of holdbacks and the right to offset which can be powerful incentives for contractor performance, and performance surety bonds/certified cheques which provide Halifax with protection in cases of contract forfeiture for non-performance. Furthermore, the contracts contain clauses that can be used to terminate a contract. As previously discussed, contractors can also be disqualified from participating in procurement activities for a specified time for a variety of reasons, including breach of contract and/or nonperformance on a contract.

As with all contracting activities, the terms and conditions of snow and ice control tenders are reviewed on a regular basis to ensure that Halifax achieves best value for its snow and ice control services and that the Municipality's interests are protected.

**FINANCIAL IMPLICATIONS**

There are no financial implications for this report.

**COMMUNITY ENGAGEMENT**

There was no community engagement associated with this information report.

**ATTACHMENTS**

There are no attachments to this report

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A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/cagenda.php> then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 902.490.4210, or Fax 902.490.4208.

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