
MEMORANDUM

PWC-C 9-2020

Subject: Niagara Region Liquid Biosolids Management Program Renewal of Contract Agreement with Thomas Nutrient Solutions - Additional Information re: Procurement Process

Date: February 11, 2020

To: Public Works Committee

From: Ron Tripp, P.Eng., Acting CAO / Commissioner of Public Works

This memorandum has been prepared in response to questions raised at the January 14, 2020 Public Works Committee meeting through the consideration of Report PW 3-2020. The following motion was carried at that meeting:

*That staff **BE DIRECTED** to initiate a Request for Proposal (RFP) process respecting the loading, haulage/transportation, lagoon management and land application of liquid biosolids and residual solids generated from Niagara Region water and wastewater treatment facilities; and*

*That staff **BE DIRECTED** to extend the agreement with Thomas Nutrient Solutions for biosolids management services (within the existing contract scope) for up to nine months; and*

*That staff **BE DIRECTED** to provide a report to Public Works Committee at the meeting being held on Tuesday, February 11, 2020 respecting the contract with Thomas Nutrient Solutions and the RFP process.*

Recommendation to Negotiate

Staff confirm that the recommendation to negotiate with the current vendor was not improper. The term of the existing three (3) year contractual agreement with Thomas Nutrient Solutions for liquid biosolids and residual solids management services ended on December 31, 2019. This agreement provided a negotiated renewal opportunity for an additional term of one to three years, subject to Council approval. A very important clarification should be made based on the discussion at the January 14 Public Works Committee (PWC) meeting. The referenced agreement did not include an explicit "right to renewal", nor did staff intend to suggest that this was the case to PWC. The following is the clause from the agreement:

"10.2 The Parties may renew this Agreement for an additional term of one (1) to three (3) years upon mutually agreeable terms. At least sixty (60) days prior to

the expiration of the Term of this Agreement, either Party may advise the other Party of its desire to renew this Agreement upon termination and, if the other Party agrees, the Parties shall forthwith commence negotiations. No such negotiations shall be binding upon the Parties until the execution of a separate written agreement between the Parties, duly approved by the authorizing board of both Parties”.

While there was some discussion regarding the source of authority for the opportunity to negotiate, the discussion included interchanged references “right” and “opportunity”. These two terms have very different meanings with respect to a contractual agreement and only opportunity to negotiate is appropriate in the context of this agreement. It was not explicitly clear in the authorizing Report PW 17-2017 if there was an expectation in 2017 to extend beyond 2019. Staff can only confirm that the extension of the original 2013 agreement included the same term that allowed for an opportunity to negotiate a further extension. Ultimately, a decision to extend the agreement for even one year required the approval of Council. It is acknowledged by staff that due to the unsuccessful Request for Pre-Qualification (RFPQ) process, and the timing of the report to Council, Council had no practical choice in January 2020 but to extend the current agreement for a period of time sufficient to undertake a subsequent procurement process.

Timing of Report

The Committee raised questions and concerns regarding the timing of the report and recommendation to PWC. Specifically, the recommendation regarding the agreement for services was being considered after the end of the term of the existing agreement, December 31, 2019. Staff acknowledge that this timing was not desirable and was not what was intended when a procurement process was initiated earlier in 2019. The RFPQ process was not described in PW 3-2020. However, questions arose and there was some discussion regarding the RFPQ during the Committee. It appeared as though there was not a clear and consistent understanding of that RFPQ process and its results based on that discussion. Staff can confirm the following steps were taken:

- May-July 2019 – Public Works and procurement staff worked on the development of a RFPQ document and evaluation process
- August 7, 2019 – 2019-RFPQ-232 issued
- September 5, 2019 – 2019-RFPQ-232 submission deadline, three submissions received

- September 2019 – Public Works staff developed a Request for Tender (RFT) document
- September 2019 – Public Works staff undertook an evaluation process of the RFPQ overseen by Procurement staff for the three proposal submissions
- October 25, 2019 – the RFPQ process was formally cancelled prior to the completion and communicated to all vendors with no evaluation results

There appeared to be confusion with respect to the result of the RFPQ Evaluation process based on the PWC discussion. While the RFPQ was formally cancelled and communicated on October 25, a previous notification was sent to all of the vendors on October 4 indicating that they did not meet the requirements of the prequalification and were not successful. This first notification was sent in error and was later corrected/clarified in the October 25 notification. Notwithstanding the “formal/technical” outcome of the RFPQ, staff can confirm that the evaluation work undertaken through September was anticipated to result in the prequalification of only one vendor for RFT process. As this result would not likely have provided for a competitive RFT bid process, staff cancelled the RFPQ process and initiated steps to negotiate the extension of the existing service agreement. The timing of this outcome was unfortunate as the end of term of that agreement was now within two months. A decision was made to extend the existing agreement for three months in order to undertake discussions with the current vendor and allow for the presentation of a recommendation to PWC/Council. Ultimately, it was the intention of staff to extend the term of the current agreement a sufficient amount of time in order to allow for the analysis of the unsuccessful RFPQ process, the development of a new comprehensive procurement process and the successful completion of a competitive bidding process.

Procurement Next Steps

Further to the direction of PWC at the January 14 meeting, Public Works, procurement and legal staff have conducted a series of meetings in order to debrief the previously unsuccessful RFPQ process, evaluate options for a new process and determine next steps. While this work is on-going, staff have determined that due to both the outcome of the previous process and the need to ensure that there is no risk of potential perceived bias by a vendor, a fairness advisor will be retained to oversee the development and execution of the process. As a matter of practicality, this is the first step in the process and has been recently initiated. Staff have also considered and continue to evaluate the inclusion of industry expertise, in the form of a consultant

and/or municipal peers, to assist in the development and execution of the procurement process.

Extension of Current Contract Term

It was noted in PW 3-2020 that the term of the current agreement was extended by three months to March 31, 2020 within the authority of the CAO. PWC approved an extension of the current agreement for nine months. The recommendation does not indicate whether this nine-month extension commenced January 1, 2020 or April 1, 2020. It should be noted that should the term expire at the end of September, the transition to a new vendor, should that be the outcome, may involve business continuity and operational risks. September and October have historically been the busiest months for land application of biosolids. Additionally, based on the result of 2019 procurement process and in the interest of a successful competitive bid process, staff recommend nine months plus the three previously authorized resulting in a term ending December 31, 2020. Staff seek clarity with respect to PWC's intention and direction on this matter.

Respectfully submitted and signed by,

Ron Tripp, P.Eng.
Acting Chief Administrative Officer /
Commissioner of Public Works