



## Document 5

# THE OTTAWA CONSTRUCTION ASSOCIATION

L'ASSOCIATION DE LA CONSTRUCTION D'OTTAWA

S E R V I N G   T H E   N A T I O N A L   C A P I T A L   R E G I O N

SINCE 1889

May 10, 2010

Mr. Jeff Byrne  
Manager, Supply  
Supply Management Branch  
City of Ottawa

Dear Jeff:

### **Re: Bidding Prohibition Against Suppliers Involved in Litigation with the City**

The Ottawa Construction Association is **opposed** to a blanket or discretionary bidding prohibition against suppliers engaged in litigation against the City.

City Procurement staff have rightfully identified a number of defects to implementing a blanket exclusion. The most significant is the fact that the City purchases many goods and services from limited and or specialized markets with limited suppliers – which aptly describes segments of the construction industry. Any exclusion of a firm would unintentionally hurt the City by limiting the number of bidders.

While not identified in the City report, the Association wishes to emphasize that there are numerous contractors in the building sector and a large proportion of the roads, sewers and water infrastructure sector that are regular frequent suppliers to the City. Arguably there are many infrastructure firms that their business is totally dependent on the City's annual capital infrastructure program.

For any firm that is a regular or dependent contractor or supplier to the City, the potential of a bidding exclusion on the grounds of litigation translates into a potential threat that may be used by the City during the administration of any construction contract.

Rare is the construction project that has no deficiencies in design or upfront investigation of existing building or site conditions. As a result, virtually every significant construction project requires changes necessitating negotiation and contract

modification and potentially time extension. In the negotiation process over any item, the potential is there for the City's Project Management representative to hold the bidding exclusion as a 'hammer' over the head of the contractor.

The vast majority of the several hundred City of Ottawa contracts annually conclude positively but unfortunately certain projects and the inherent negotiations do not always succeed and there are times when contractors must turn to the Courts to obtain in their view fair compensation.

Do contractors turn to the Courts frivolously? The Association does not believe this to be the case at all and that for the City to penalize a contractor for pursuing a legal remedy is patently unfair. Let the Courts decide fault and remedy. If the City is wrong, then it should do the right thing, accept responsibility and learn from the outcome for the betterment of its ongoing design and construction procurement.

Just a year ago, the City reached a multi-million dollar settlement with the Siemens-PCL consortium for the wrongful cancellation of their light-rail contract. In the years leading up to the settlement, there was a failed effort by one City Councillor to gain support for implementing a bidding exclusion against firms in litigation with the City. The Association would like to believe that the fellow City Councillors viewed the bidding exclusion as a misguided unfair strategy to pressure the parties to drop the litigation or negotiate a reduced settlement.

The Association does not support the alternative discretionary bidding exclusions that are proposed due to the very fact that they are discretionary and some subjective.

The underlying issue within construction procurement in OCA's view is the small faction of suppliers who are below the necessary standard of competence and through the City's 'low bid' procurement system regularly win City contracts.

OCA recommends the City deal with 'unsatisfactory' performing construction firms by using the existing authority of Section 37 in the City's Procurement By-Law to prohibit them from bidding.

## **SUPPLIER PERFORMANCE**

37. (1) The Director shall document evidence and advise Supply Management in writing where the performance of a supplier has been unsatisfactory in terms of failure to meet contract specifications, terms and conditions or for Health and Safety violations.
- (2) The City Treasurer may, in consultation with the City Solicitor, prohibit an unsatisfactory supplier from bidding on future contracts.

In addition to the issue of excluding suppliers who are engaged in litigation with the City, you have asked the Association to comment on the Motion put forward by Councillor Monette that would have the City construction procurement process exclude firms with 'sub-standard' 5 year records in health and safety and apprenticeship employment. Our response is as follows:

**Health & Safety** – OCA **supports** the City in raising the procurement bar in terms of construction health and safety.

The City should do business with construction firms that have a safety management and training program in place that can be demonstrated through an *effective contractor evaluation process*.

The motion put forward at the Corporate Services Committee is absent in detail as to defining what a "sub-standard record in health and safety" is. We do not agree with the experience threshold of 5 years minimum applied. In OCA's view, the 5 years minimum experience criteria is unreasonable and cuts out many new and growing firms from bidding and has no relation to whether the firm has an effective safety management program in place.

OCA would recommend that City policy makers debate first whether they wish to incorporate construction health and safety into their procurement practices. If the decision is YES, OCA would be pleased to provide industry expertise into any consultation as to how best to evaluate a contractor's safety management program.

We have within our 1,000 membership base numerous firms that have experience working in other jurisdictions and industrial sectors where Buyers require contractors to pre-qualify on their safety program.

In several provinces, the industry has witnessed the introduction of safety accreditation or certification by the provincial Workers Compensation Boards. Safety accreditation involves a full audit of a company's safety management program and as a result has proven to be a good tool for Buyers of construction to incorporate into their construction procurement systems. We believe the provinces of Alberta, Manitoba and Nova Scotia require all construction firms to be certified or accredited by their provincial WCB if they wish to bid on their construction projects.

OCA expects in the near future that Ontario Workers Safety Insurance Board (WSIB) will be following in the footsteps of other provinces with accreditation.

OCA would support the City in adopting a WSIB accreditation standard as the basis of evaluating a constructor's safety program. Based on our knowledge of other provincial accreditation systems, getting accredited is not complex and it is accessible to all firms to obtain – regardless of size, jurisdiction or how long they have been in business.

**Apprenticeship** - With respect to restricting contractors with a 5 year sub-standard record on apprenticeship training (however that is defined), OCA is **opposed** to the City considering action in this area.

The thinking behind the motion is flawed on a number of grounds.

Two significant failures of the motion is the reality that there are several occupations in construction industry that do not have an apprenticeship in existence and secondly for a large number of the unionized construction trades, contractors have no control over apprenticeship hiring – it is under the control of the construction trade union itself.

The City **should not prohibit** firms from bidding on an element that is outside of their control.

Yours truly,



Michael Caletti  
Chairman