

DECISION

Case Number: 392051

The mandate of the Fairness and Transparency Advisor (FTA) is to ensure that various processes associated with the Core Area Sewage Water Treatment project are fair, transparent, impartial and objective. In this capacity, the FTA is an observer of, and commentator on, process. The FTA has no remedies.

BACKGROUND

The Issue as Raised in the Complaint:

Is Urban Systems an “Independent” Consultant in accordance with the Capital Regional District (CRD)/ Core Area Liquid Waste Management Committee (CALWMC, ‘the Committee’) criteria, and did CRD/CALWMC properly and transparently follow its own criteria in awarding a contract to Urban Systems to conduct the Feasibility and Costing Analysis?

Questions as Posed by the Complainant:

1. Did the CRD staff follow the proper procedures in evaluating the submission and recommending awarding a contract to Urban Systems in apparent contradiction of the conditions stated in the RFP and the stated intentions of the CALWMC?
2. Did the CALWMC act in good faith in awarding a contract to Urban Systems in apparent contradiction of the public statements made to engage an independent consultant for this phase of the project work?
3. If the answer to either question above is no, is the contract awarded to Urban System valid or not?
4. If the contract is not valid, what other submissions were received in response to the RFP and how were they ranked relative to the Urban Systems submission?

SCOPE OF THE REVIEW AS DEFINED BY FTA

The mandate of the FTA excludes issues associated with procurement. The rationale for this exclusion is as follows:

- Public procurement (inclusive of the solicitation and evaluation phases) and the subsequent contract award process, is governed by a specific body of common law which establishes principles related to ensuring a competitive bidding framework for the purchasing activities of public bodies.

The role of the FTA is encumbered in this complaint by the context in which the issue is raised which is grounded in a procurement process - something the FTA is not empowered to comment on. However, the complaint, as framed, has four questions, one of which, in

September 25, 2015

my view, is narrow and not specific to procurement. While it is true that the issue itself did arise in the context of a procurement process, one of the questions posed is about fairness and procedural issues more generally, and is not dependent on responses to the other questions.

As such, I have allowed question two – *“Did the CALWMC act in good faith in awarding a contract to Urban Systems in apparent contradiction of the public statements made to engage an independent consultant for this phase of the project work?”* - to proceed to an investigation and excluded the others, which are grounded more clearly in procurement and contract law - a decisive factor in limiting the scope of the review.

FINDINGS

These findings are limited to the following question:

1. Did the CALWMC **act in good faith** in awarding a contract to Urban Systems **in apparent contradiction of the public statements made to engage an independent consultant** for this phase of the project work? [emphasis added]

ISSUE SUMMARY

The concern raised in this complaint turns on issues of procedural fairness specific to a decision-making process undertaken by the CRD through the CALWMC.

The issues raised by the complainant are as follows:

- Did the Committee act in good faith in awarding a contract to Urban Systems;
- Did the Committee respect public statements relative to the criteria surrounding “independence” - a process which should have resulted in the selection of an “independent” consultant for this phase of the work.

ANALYSIS

The analysis is focused on six questions:

1. **What evidence is there that the Committee intended that the consultant(s) selected for this phase of the project be “independent”, and how did the Committee characterize independence?**

In this instance, the complaint contained a concise statement of the material facts on which the party is relying in raising a question of good faith. The complainant submits that on several occasions, the Committee made public statements with respect to the need for “independence” of consultants selected for this phase of the project.

September 25, 2015

The record suggests that the Committee's desire for independence was first expressed and characterized in the September 2014 Terms of Reference¹ for Phase 1 and Phase 2 of the Options Study (as it was then termed) for Core Area Sewage Treatment project. These Terms of Reference² stated:

*"CRD staff would work... to craft Terms of Reference generally based on criteria noted in Alternative 1. The **independent consultant** would have **no previous association** with the Seaterra Program, Peer Review Team or previous CRD wastewater program studies" [emphasis added].*

Review of the public record reveals that the CRD was, as of this juncture, seeking a new way of moving forward. There are many references to a forward-looking desire by the Committee to restore public faith in the process moving forward.

An August 5, 2014 Notice of Motion³ requested that:

"funding be provided from the sewage treatment budget to support an independent assessment of alternative locations to McLoughlin and Hartland..."

Subsequently, an August 13, 2014 Notice of Motion⁴ on the project options was introduced. This Notice of Motion was in immediate response to the Township of Esquimalt's "decision not to zone to CRD requirements", which, as stated in the Notice of Motion, effectively created an "enforced hiatus" for the project. This Notice of Motion stated a need, in proceeding with options development, to "re-think what, quite possibly, was a less than optimal project" and determine "[a] new, clearly objective, and efficient process of investigation". Further to this, the Notice of Motion stated that:

"[t]o be accepted by the public at large, any such an investigation must be seen as" [i]ndependent and objective with no connections to special interests or "traditional" interests in the sewage industry".

Terms of Reference for the options work⁵ were shared with the Westside Select Committee for the second part of the Option Development phase. These Terms of Reference for engineering and financial analysis further elaborated on the characteristics of independence by stating that:

¹ Report to Core Area Liquid Waste Management Committee Meeting of Wednesday September 10, 2014: Terms of Reference – Options Study for Core Area Sewage Treatment. September 2014.

² The RFP issued in May 2015 was for Phase 2 of the Options Study, and appropriately titled, "Core Area Liquid Waste Management Plan Wastewater Treatment System Feasibility & Costing Analysis".

³ Notice of Motion – Options for Wastewater Treatment. August 5, 2014. Agenda for the Core Area Liquid Waste Management Committee Meeting of Wednesday September 10, 2014.

⁴ Notice of Motion – Core Area Liquid Waste [sic] Committee: Implementing a Process for Investigating Best Practices. August 13, 2014. Agenda for the Core Area Liquid Waste Management Committee Meeting of Wednesday September 10, 2014.

⁵ Report to Westside Wastewater Treatment and Resource Recovery Select Committee Meeting of Tuesday May 26, 2015. Terms of Reference – Independent Engineering and Financial Analysis Beyond June 2015. May 2015.

September 25, 2015

“[t]his work will be conducted by a firm(s) that has no past affiliation with the Seatterra Program, the Peer Review Team or wastewater planning study commissioned by the CRD for the Core Area since 2006”.

Lastly, the September 4, 2015 Draft Project Charter^{6,7} for the current Phase 2 of the project brings life to these above-mentioned intentions of the Committee for a “new” options development and site selection process moving forward. The Charter creates a clear separation between the current work on the project and the work conducted from 2006 to 2014. These boundaries are drawn between the “old” project and the “new” project on page 3 of the Charter, which states that:

“[t]he work of the Eastside and Westside Select Committees, the CALWMC, and the public between June 2014 and July 2015 lays the groundwork for the current project, Core Area Sewage and Resource Recovery System 2.0”.

2. What actions did the Committee take in support of the commitment to ensure that the consultant engaged would be independent?

As previously stated, the Committee created Terms of Reference for a consultant to be hired for the current phase of the project and in those Terms of Reference, stipulated that such a consultant must be “independent”.

The Committee then included the eligibility criteria related to “no prior affiliation” in the solicitation for the work. In its Request for Proposals 15-1834, dated May 2015, the CRD imposed the following limitation on potential bidders:

“Proponent Eligibility

The Consultant will have no past affiliation with the Seatterra Program, the Peer Review Team or any other core area wastewater treatment planning study commissioned by the CRD since the 2006 Ministry of Environment directive to implement secondary treatment was issued.”

3. Did the CRD have appropriate regard for the eligibility constraints placed in the RFP?

This question must be answered in the context of the overall steps of a procurement process which include a variety of control mechanisms and systems.

⁶ Draft Project Charter. Core Area Sewage and Resource Recovery System 2.0 – Phase 2: Analysis, Options Costing and Public Engagement. September 4, 2015.

⁷ As noted in the Draft Project Charter, the CALWMC is seeking input from the Select Committees, CRD staff and the Technical Oversight Panel, in order to amend the draft in accordance with input received. The final project charter will be proposed for adoption at the CALMWC on October 2.

September 25, 2015

Solicitation Phase

The RFP included a standard conflict of interest clause whereby potential bidders were required to disclose in their proposal any actual or potential conflicts of interest and past or existing business relationships which they may have with the CRD. The RFP also, through the Submittal Form B, asked proponents to *"describe corporate projects that have been completed by the project firms within the last ten years... and which are relevant to the subject Project"*. Through these steps the CRD was clearly intending bidders to provide information concerning both existing and past relationships with the CRD.

Evaluation Phase

The CRD received several proposals in response to the May 2015 RFP. The tender process used was a two-envelope system which separated the technical proposal (based on and intended to meet the statement of work as well as any eligibility requirements) from the cost proposal in the form of two separate and sealed envelopes.

The evaluation process involved three distinct steps.

Step 1: Screening:

The first step was a screening of proposals by CRD staff to assess bid compliance, which included consideration of the eligibility criteria.

In the screening step, staff assessed compliance with the eligibility requirements by determining whether bidders had any relevant and material connection with the eligibility criteria. Although some bidders had what might be characterized as a "prior affiliation" with the CRD wastewater project - depending on how "past" is defined (see assessment of "past affiliation" in discussion in question four below) - only one bidder's past involvement was determined to be material, disqualifying them from further consideration in the evaluation process.

Given the arguments made below with respect to the Committee's objectives relative to introducing the eligibility requirement, a decision to screen- in proposals, despite on the surface their having noted prior work with CRD- related wastewater issues, was a reasonable point of compromise. Rejecting bids based on a blanket exclusion, given the project timelines, would have frustrated the process by adding several weeks to the procurement process ultimately impairing the CRD's ability to meet the imposed timelines. In addition, the prior work identified by the bidders who were ultimately screened in, was deemed peripheral and could not be characterized as related to previous planning studies.

This step was followed by the technical review.

Step 2: Technical Review:

The technical review step was conducted by an evaluation team made up of four staff members (two from the CRD and two from municipalities), whose mandate it was to review and evaluate the bids. The Chair of the CALWMC and one of the Co-Chairs of the Westside Committee were appointed to the evaluation team as observers. The evaluation

September 25, 2015

team used a standard scoring and weighting framework consistent with the published evaluation criteria. These steps were intended to ensure integrity and consistency in the treatment of bids received.

Step 3: Financial Evaluation:

Proposals which made it through step 2 proceeded to have their cost envelopes opened.

In attempting to reconcile the Committee's stated objectives and the overall timelines, a balance must be struck at an interpretation that promotes the intentions of the Committee and at same time respects procedural rights of bidders in the context of the overall timeframes imposed on this project. As such, I am satisfied that the CRD gave reasonable consideration to the inclusion and evaluation of the eligibility criteria through the procurement process.

4. Did Urban Systems meet the eligibility requirements?

The issue turns on whether or not Urban Systems was an eligible bidder.

In order to be an eligible bidder, proponents must not have had:

- A past affiliation with the Seaterra Program;
- A past affiliation with the Peer Review Team; or
- A past affiliation with any other core area wastewater treatment planning study commissioned by the CRD since the 2006 Ministry of Environment directive to implement secondary treatment was issued.

At issue is Urban Systems' past and recent involvement with CRD wastewater- related projects, as it is argued by the complainant, their involvement is a tangible expression of their non-compliance with the tender criteria.

Of central importance in assessing their **recent** involvement, is qualifying the word "past" in the eligibility requirement as this, in my view, where the issue crystallizes.

The word "past" is not a defined term in the RFP. A nuanced approach is therefore needed to understand what timeframe the Committee was referring to when they imposed "*past affiliation*" to exclude potential bidders. There is evidence that the discussion of "*no past affiliation*" began as early as 2014, suggesting that a definition of "past" as meaning – prior to the issuance of the RFP- would be an unduly narrow interpretation in light of the evidence. "Past" therefore has a different meaning than simply the issuance date of the RFP.

September 25, 2015

Why then, did the Committee seek to exclude “past” involvement and what did this mean? On any reasonable interpretation, past, at a minimum, cannot be construed as “current”. This distinction strikes at the heart of the matter.

As previously stated elsewhere in these findings, the record contains several references to concerns raised by the Committee related to public faith in the process **going forward**.

There is evidence that the Committee turned its mind to ensuring that going forward, the public would be able to trust the results by ensuring that the consultant retained, had no prior views or perspectives on any of the “past” options.

A September 2014 letter to the CRD from the Westside municipalities and the Chief of the Songhees Nation concerning the Terms of Reference for the proposed Options Study requested that any evaluation of alternative sites not be constrained by “*internal bias*” so as to “*reinforce existing decisions.*” This letter requested that the Options Study not be fettered by the work of the previous options development which led to the proposed site at McLoughlin Point.

It seems reasonable to infer that the Committee was seeking to create a distance between this “new” process – the one embarked on after the defeat of the McLoughlin Point proposal - and the previous process related to wastewater treatment which has unfolded over the years (the “old” process). I believe that there is sufficient evidence in the record to support the view that they intended to sever the relationship between those involved in substantive planning prior to the Spring of 2014 when the motion was defeated at the Esquimalt Council, and the activities that have unfolded since then – and it is this separation in time that defines “past affiliation”.

The record also shows a distinct shift in the governance of the wastewater issue within the CRD since 2014. Prior to the defeat of the rezoning application for the CRD’s revised McLoughlin Point project, the Seaterra Program oversaw all aspects of wastewater planning for the CRD. But Seaterra has now been wound down and a new governance model replaces it.

This lends further support to the view that the Committee intended to create a clear separation between the “old” wastewater planning project; and the “new” one – the one they are currently engaged in.

It might be further argued that the first activity of the “new” wastewater treatment planning project was the development of options; the options which are now subject to the feasibility and costing analysis under the current project. As such, following that rationale, one could not reasonably argue that Urban Systems was involved in a “past” project as the project under consideration is “current”.

Information provided by CRD staff indicates that Urban Systems had done work with the CRD in 2008 which involved preparing development cost charges - a charge levied by local governments on any new development to offset that portion of the costs related to services that are incurred as a direct result of any new development. The work was technical in nature and narrow in scope and did not have anything to do with options which were under consideration related to facility location or type. In doing the work Urban Systems was not affiliated with the Seaterra Program or the Peer Review Team, nor was the work part of any other core area wastewater treatment planning study. Therefore, Urban Systems' 2008 work did not render the firm ineligible to bid on RFP 15-1834.

In addition, Urban Systems was part of a design-build team that responded to a Request for Qualifications that was put out by the Seaterra Program in December 2013 to upgrade the Clover Point Pump Station (an existing pump station that discharges wastewater). The intent of the project was to increase the capacity of the pump station and to allow the pump station to pump wastewater to the new plant planned for McLoughlin Point. Due to the change in direction on the wastewater treatment project, the Clover Point Pump Station project never proceeded and a contract was never awarded. Urban Systems' participation in the competition did not render it ineligible to bid on RFP 15-1834 as it was not engaged to do the work.

5. Did the CALWMC act in good faith in awarding a contract to Urban Systems in apparent contradiction of the public statements made to engage an independent consultant for this phase of the project work

The analysis has already traced the chronology of events related to the solicitation and contract award and has commented on the fairness of that procedure by stating that I believe that the CRD had appropriate regard for the eligibility criteria. Therefore I must find that they acted in good faith in awarding the contract to Urban Systems. The fact that ultimately, the award was to a firm (Urban Systems) with a prior affiliation – given the facts of this case – cannot be misconstrued as having acted in bad faith.

6. Did the CRD properly and transparently follow its own criteria in awarding a contract to Urban Systems to conduct the Feasibility and Costing Analysis?

On the totality of the evidence, I find that the CRD acted properly and transparently and followed its criteria in awarding the contract to Urban Systems.