



City of Hamilton

AUDIT, FINANCE AND ADMINISTRATION COMMITTEE ADDENDUM

Meeting #: 23-015
Date: October 5, 2023
Time: 9:30 a.m.
Location: Council Chambers
Hamilton City Hall
71 Main Street West

Tamara Bates, Legislative Coordinator (905) 546-2424 ext. 4102

6. DELEGATION REQUESTS

- *6.1 Jason Herd, Fairway Electrical Services, respecting the City's letter to Fairway, dated September 18th, 2023 (Item 10.4) (for today's meeting)

10. DISCUSSION ITEMS

- *10.4 Commercial Relationship between City of Hamilton and Fairway Electrical Services Inc. (LS23032/FCS23101) (City Wide)

Moved from Item 14.3

Discussion of Private & Confidential Appendix "A" to Report LS23032/FCS23101 would be pursuant to Section 9.3, Sub-sections (e) and (f) of the City's Procedural By-law 21-021, as amended, and Section 239(2), Sub-sections (e) and (f) of the *Ontario Municipal Act, 2001*, as amended, as the subject matter pertains to litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board; and advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

14. PRIVATE AND CONFIDENTIAL

*14.3 Appendix A to Commercial Relationship between City of Hamilton and Fairway Electrical Services Inc. (LS23032/FCS23101) (City Wide)

Pursuant to Section 9.3, Sub-sections (e) and (f) of the City's Procedural By-law 21-021, as amended, and Section 239(2), Sub-sections (e) and (f) of the Ontario Municipal Act, 2001, as amended, as the subject matter pertains to litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board; and advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Please note that Report LS3032/FCS23101 - Commercial Relationship between City of Hamilton and Fairway Electrical Services Inc. (LS23032/FCS23101) (City Wide) has been moved to Item 10.4

Submitted on Wed, 10/04/2023 - 07:55

Submitted by: Anonymous

Submitted values are:

Committee Requested

Committee
Audit, Finance & Administration Committee

Will you be delegating in-person or virtually?
Virtually

Will you be delegating via a pre-recorded video?
No

Requestor Information

Requestor Information
Jason Herd
Fairway Electrical Services Inc.
1104 Fiddlers Green Road
Hamilton, ON. L9G 3L1
Jason@fairwayelectrical.com

Preferred Pronoun
he/him

Reason(s) for delegation request
To address the city's letter to Fairway, issued on September 18th, 2023.



Will you be requesting funds from the City?
No

Will you be submitting a formal presentation?
No



CITY OF HAMILTON
CORPORATE SERVICES DEPARTMENT
Legal and Risk Management Services Division

CORPORATE SERVICES DEPARTMENT
Financial Services Division

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|---------------------------|--|
| TO: | Chair and Members Audit, Finance and Administration Committee |
| COMMITTEE DATE: | October 5, 2023 |
| SUBJECT/REPORT NO: | Commercial Relationship between City of Hamilton and Fairway Electrical Services Inc. (LS23032/FCS23101) (City Wide) |
| WARD(S) AFFECTED: | City Wide |
| PREPARED BY: | Patricia D'Souza (905) 546-2424 Ext. 4637 Tina Iacoe (905) 546-2424 Ext. 2796 |
| SUBMITTED BY: | Lisa Shields, City Solicitor, Legal and Risk Management Services Division, Corporate Services Department |
| SIGNATURE: |  |
| SUBMITTED BY: | Shelley Hesmer, Acting Director Financial Services and Taxation & Corporate Controller Corporate Services Department |
| SIGNATURE: |  |

RATIONALE FOR CONFIDENTIALITY

Discussion of Private & Confidential Appendix "A" to Report LS23032/FCS23101 in closed session would be pursuant to Section 9.3 of the City of Hamilton's Procedural By-law 21-021, as amended, and Section 239(2)(i) of the Ontario *Municipal Act, 2001*, as amended, as the subject matter pertains to:

- litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board; and,

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- the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

RATIONALE FOR MAINTAINING CONFIDENTIALITY

Staff are recommending that the Private & Confidential Appendix “A” to Report LS23032/FCS23101 remain confidential as it includes details of ongoing litigation affecting the City of Hamilton (City) and revealing the content of this Appendix “A” and the discussion of, or direction on, legal strategy such as negotiations, could be compromised by public disclosure and would harm the City’s interests.

RECOMMENDATIONS

- That, due to the impairment of the commercial relationship between the City of Hamilton and Fairway Electrical Services Inc. that has resulted from litigation proceedings, a ban be imposed upon Fairway Electrical Services Inc. and any of its related corporate or individual entities from competing on or being awarded any City contract until and including October 11, 2025, or the litigation resolves, whichever is sooner;
- That staff be directed to reject any current and future bids, proposals or quotations received from Fairway Electrical Services Inc. or any of its related corporate or individual entities, until and including October 11, 2025, or the litigation resolves, whichever is sooner;
- That the City of Hamilton does not enter into any contract with Fairway Electrical Services Inc., or any of its related corporate or individual entities until and including October 11, 2025, or the litigation resolves, whichever is sooner; and,
- That Appendix “A” to Report LS23032/FCS23101 remain confidential as it contains details regarding ongoing litigation affecting the City and the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

EXECUTIVE SUMMARY

Fairway Electrical Services Inc. (“Fairway”) is currently in litigation with the City of Hamilton. It is the view of staff that the litigation has impaired the commercial relationship between Fairway and the City, and as such, Fairway should be prohibited from being awarded any City Contract for a period of two years, to allow for the litigation to be concluded.

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The contract giving rise to this litigation is Contract No. C11-65-17 (the “Contract”) for the maintenance and repairs of high and low voltage electrical equipment and systems for various City of Hamilton facilities. Fairway was awarded the Contract in October 2017 for an initial one-year term, with four optional renewal terms.

Fairway sued the City in May 2022 for claims relating to the performance of the Contract. The litigation is currently ongoing.

The Contract ended on October 31, 2022, and City staff have issued a Request for Tenders for this same work, which closes on October 12, 2023. It is not known how many other contractors will bid on this project. Banning Fairway from bidding may or may not impact the bidding process in the circumstances.

Alternatives for Consideration – See Page 7

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: At the time of this Report, City staff has issued a Request for Tenders C11-33-23, a Tender for Maintenance and Repairs of High and Low Voltage Electrical Equipment and Systems for Various City of Hamilton Facilities and Request for Tenders C13-24-23 for Electrical Infrastructure Installation for Electric Fleet Vehicle Charging Stations. Banning Fairway will decrease the eligible number of bidders for these Request for Tenders, as well as any other future bids, proposals or quotations, and may result in the City paying more than it would otherwise have paid.

Staffing: Not Applicable

Legal: The City’s right to ban a vendor from future bids where the commercial relationship between the City and the vendor has been impaired, is set out in the Procurement Policy By-law No. 20-205 as amended. Further legal implications are set out in Confidential Appendix “A” to Report LS23032/FCS23101.

HISTORICAL BACKGROUND

In 2017, Fairway was the successful bidder on Contract No. C11-65-17 (the “Contract”) for the maintenance and repairs of high and low voltage electrical equipment and systems for various City-owned facilities, including:

- Central Public Library
- First Ontario Centre
- Hamilton City Hall

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- Hamilton Convention Centre
- Hamilton Place
- Parking Underground
- Tim Hortons Field
- Lister Block
- Hamilton Farmer's Market

The initial term of the Contract was for one year with the option to extend the Contract for four additional one-year terms (five years in total, starting on or around October 5, 2017). It was subsequently renewed for the optional additional four terms, on the same terms and conditions as the initial Contract, ending on October 31, 2022.

Issues arose between the parties with respect to billing during the third term of the Contract (November 1, 2019, to October 31, 2020) which resulted in Fairway issuing a civil claim against the City in May 2022. The litigation is currently ongoing.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

By-Law 20-205 as amended, Procurement Policy, Policy #1 – Vendor Eligibility allows the City to exercise its discretion to reject any future bid, proposal or quotation from Fairway or any of its related corporate or individual entities, in accordance with the terms of the City's Procurement Policy which states until such time as Council considers that the commercial relationship between the parties is no longer impaired. The relevant portions of the Policy appear in the Analysis section below.

RELEVANT CONSULTATION

- Corporate Facilities & Energy Management Division, Public Works Department

ANALYSIS AND RATIONALE FOR RECOMMENDATION

As indicated above, Fairway has commenced litigation against the City in relation to Contract No. C11-65-17, for maintenance and repairs of high and low voltage electrical equipment and systems for various City facilities. Due to the nature of the allegations contained in the legal claim, the details of which are set out in Confidential Appendix "A" to Report LS23032/FCS23101, this litigation has impaired the commercial relationship between Fairway and the City.

The City of Hamilton's By-Law No. 20-205, as amended, Procurement Policy, Policy #1 – Vendor Eligibility, Subsection 4.1 (2)(a) states, in part, the following:

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- “(2) Without limiting or restricting any other right or privilege of the City and regardless of whether or not a Bid otherwise satisfies the requirements of a Request for Prequalifications, RFP or RFT, the City may reject any Bid from a vendor where,
- (a) in the opinion of the City, the commercial relationship between the City and the vendor has been impaired by the act(s) or omission(s) of such vendor including but not limited to any one or more of the following having occurred within the five year period immediately preceding either the date on which the RFP or RFT is awarded or the date on which the vendor has been shortlisted pursuant to a Request for Prequalifications:
 - (i) the vendor being involved in Litigation with the City;
 - (xi) any other act or omission by the vendor that the City deems to impair the commercial relationship between the City and the vendor.
 - (b) in the opinion of City there are reasonable grounds to believe that it would not be in the best interests of the City to enter into a contract with the vendor.”

Subsection 4.1 (4) and (5) of Policy #1 states the following:

- “(4) In the circumstances described in subsections (2) and (9), the City may, in addition or in the alternative to rejecting a Bid from a vendor, ban a vendor from competing for or being awarded any City contract for a period of up to ten years.
- (5) Without limiting or restricting any other right or privilege of the City, the City may refuse to enter into a contract with a vendor where any of the circumstances described in (2)(a), (2)(b) or (9) of this Policy # 1 have occurred within the five-year period preceding the date on which the refusal to enter into the contract is approved by Council. In addition, or in the alternative to refusing to enter into the contract, the City may ban a vendor from competing for or being awarded any City contract for a period of up to ten years as approved by Council.”

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Proposed Ban:

Staff is recommending that, pursuant to Subsection 4.1 (4) of the Procurement Policy, Council impose a ban on Fairway from competing for or being awarded any City Contract for a period of two years from the date of this Report or until the litigation resolves, whichever is sooner, to allow for the litigation to be disposed of, either via informal settlement, order and/or final judgment. In accordance with this ban and the City's authority under subsection 4.1(2)(a) of the Procurement Policy, staff are also recommending Council direct staff to reject any current and future bids, proposals or quotations received from Fairway Electrical Services Inc. or any of its related corporate or individual entities, for this same period.

Impact of Ban on other Projects:

Fairway currently holds three contracts with the Public Works Department:

- C13-30-22 Tender for Streetlighting Maintenance
- C15-70-22 Tender for Homestead Drive - Streetlighting Upgrades
- C15-73-22 Tender for Streetlighting Upgrades for Three Locations

The proposed ban for two years or until the litigation resolves, whichever is sooner, should not impact the administration or completion of these other contracts. If Fairway's performance under these other contracts is satisfactory, such that staff wish to exercise any renewals of those contracts, if applicable, they can do so. However, should staff feel that Fairway has exhibited unsatisfactory performance, staff are equally free to not exercise any renewal and carryout a further procurement process for those goods and/or services.

Committee and Council are also advised that, at the time of this Report, Fairway is currently a registered participant for Request for Tenders C11-33-23, a Tender for Maintenance and Repairs of High and Low Voltage Electrical Equipment and Systems for Various City of Hamilton Facilities and Request for Tenders C13-24-23 for Electrical Infrastructure Installation for Electric Fleet Vehicle Charging Stations. Both Requests for Tenders are due to close on October 12, 2023. It is not known how many vendors will bid on these projects. The scope of work that is included in these Request for Tenders is similar, if not identical work to the work that is the subject of the current litigation between the City and Fairway. As such, it is the opinion of staff that the commercial relationship between the parties has been impaired by this litigation. Should Council approve this Report, Fairway and any of its related corporate or individual entities shall be precluded from participating as eligible bidder to RFT C11-33-23 and C13-24-23 and any other tender, proposal or quotation until such time as approved by Council.

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ALTERNATIVES FOR CONSIDERATION

- 1) Council could allow Fairway to continue to bid on all City projects despite the fact the contractor has initiated litigation against the City. Doing so would ensure that the total number of bidders on any City project would not be affected by this dispute. It is possible that Fairway would be the lowest bidder or preferred vendor on one or more future projects and allowing the contractor to bid might result in cost-savings to the City. However, permitting Fairway to bid would entail the risks as enumerated in the Confidential Appendix “A” Section of this report.
- 2) Council may wish to consider a shorter or longer ban than the proposed two-year ban.

ALIGNMENT TO THE 2016-2025 STRATEGIC PLAN**Economic Prosperity and Growth**

Hamilton has a prosperous and diverse local economy where people have opportunities to grow and develop

Our People and Performance

Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Confidential Appendix “A” to Report LS23032/FCS23101

- Commercial Relationship between City of Hamilton and Fairway Electrical Services Inc

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