



STAFF REPORT ACTION REQUIRED with Confidential Attachment

Board Request: Staff Review of Options to Exclude Bombardier from Future Bidding

Date:	July 29, 2015 Deferred to September 28, 2015
To:	TTC Board
From:	Chief Executive Officer
Reason for Confidential Information:	This report contains advice that is subject to solicitor-client privilege including communications necessary for that purpose.

Summary

At the June 22, 2015 Board Meeting a report was submitted providing a status update on the TTC's contract with Bombardier Transportation Canada Inc. (Bombardier) relating to the design and supply of 204 new low floor streetcars. At the Board Meeting, the Board adopted a motion requesting that staff provide a report back outlining the range of options available for potentially excluding Bombardier, based on poor performance, from other TTC contracts related to new vehicles. This report is a response to the Board inquiry.

Generally, as part of the TTC's bidding process, the TTC reserves the right to either prohibit a company from bidding or not awarding a contract to a company with a poor performance history, based on documented contractor performance ratings. In addition, with respect to the current streetcar contract, TTC also has the ability to enforce the liquidated damages provision and/or terminate the contract, if certain conditions exist.

Recommendations

It is recommended that the Board:

1. Receive the information as set out in the report and the Confidential Attachment;
2. Authorize that the information provided in the confidential attachment is to remain confidential in its entirety as it contains information that is subject to solicitor-client privilege.

Financial Summary

There is no financial impact directly related to this report.

This report does not contain any recommendations with respect to a specific course of action.

The contract for the supply of 204 low floor streetcars was awarded to Bombardier in 2009 for a total price of \$993,008,166, inclusive of taxes, duties, freight, and brokerages fees. The contract requires that a certain portion of the vehicles (minimum of 25%) include Canadian content in accordance with the requirements (policy) as adopted by the Province of Ontario and the TTC.

The second lowest bidder's price was more than 50% higher than Bombardier's submitted price. The price of the second lowest bidder was \$1,525,832,084. This represents a cost difference of \$532,823,918.

The Chief Financial & Administration Officer has reviewed this report and agrees with the financial summary.

Accessibility/Equity Matters

There are no accessibility or equity matters arising from this report.

Decision History

April 2006 - A Board decision was made to procure accessible streetcars to replace the streetcar fleet (ALRV and CLRV) that was approaching the end of its design life.

On December 18, 2007, the TTC Board adopted a motion requiring that the TTC RFP for the design and supply of new streetcars include a minimum requirement of 25% Canadian content.

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2008/Jan_23_08/Minutes/Minutes_December_18%2C.pdf

January 2008 - A Request for Proposal was posted on the TTC's Web site. Nineteen companies were issued copies of the proposal document out of which two submissions were received. Based on the review of each submission, it was determined that neither bidder had provided a proposal that complied with the TTC requirements as set out in the Request for Proposal documents. This decision was supported by an independent fairness monitor retained to oversee the procurement process. As a result the TTC cancelled the Request for Proposal.

At the August 27, 2008 Board Meeting staff were directed to proceed with a Structured Multi-Phase Bid Process (SMPBP) with three car builders that had demonstrated experience in producing 100% low floor light rail vehicles. These companies were

Alstom Transportation Inc. (Alstom), Bombardier Transportation Canada Inc. (Bombardier) and Siemens Canada Limited (Siemens). Refer to Board Meeting Highlight item 1 in the following link:

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2008/Aug_27_2008/Highlights/index.jsp

At its April 27, 2009 meeting, the TTC Board approved a staff recommendation to award the contract to Bombardier for the supply of streetcars to replace the aging fleet and accommodate marginal future growth. Toronto City Council's approval of the Contract was, amongst other conditions, subject to a commitment of funding from the Province of Ontario. Refer to the Board Highlights item 1 in the following link:

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2009/Apr_27_2009/Highlights/index.jsp

On June 19, 2009, the Province of Ontario announced funding of up to \$416,300,000.00 towards 1/3 of the Eligible Costs for the TTC's procurement of the new low floor streetcar fleet. Subsequently, in a special meeting on June 26, 2009, Toronto City Council approved the funds required to complete the purchase of 204 low floor streetcars. The TTC and Bombardier executed the Contract on June 30, 2009 for a total Contract price of \$993M inclusive of taxes but before foreign exchange. Subsequent Contract Amendment costs have not been included. The procurement documents were structured to reflect a minimum award of 204 vehicles. The procurement documents included an option to purchase up to 400 additional vehicles for use by the TTC for future growth requirements and in any approved Transit City projects (subsequently 300 option vehicles were assigned to Metrolinx based on a Board authority at the May 6, 2010 Board Meeting.) Refer to the Deferred from Last Meeting to Permit Debate/Public Presentation Item 8 in the following link:

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2010/June_2_2010/Minutes/index.jsp

On January 21, 2013 an Agreement was established between the Province of Ontario, City of Toronto and the Toronto Transit Commission regarding Ontario's and Toronto's contribution toward the TTC's low floor streetcar fleet replacement project. City funding will be sourced through a combination of debt and the application of gas tax funding.

On June 22, 2015, a status update report was provided to the Board outlining the current status of the delivery of the new streetcars. At the June 22nd meeting, the Board requested that staff report back to the July 29th, 2015 Board meeting with respect to a range of option available to the TTC based on Bombardier poor performance to deliver the streetcars within the time specified in the Contract Schedule.

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2015/June_22/Reports/Board_Report_with_Confidential_Attachment_New_Streetcar.pdf

Issue Background

At the June 22, 2015 Board meeting, the Board received a report outlining the current status of the delivery of the new streetcars. In accordance with the Contract delivery schedule (as adjusted), by the end of 2014 the TTC was expecting to receive 37 streetcars and by the end of 2015, TTC was to receive 73 total streetcars. The actual number of streetcars delivered as of December 31, 2014 was 3 and Bombardier was targeting to have 27 streetcars delivered by the end of 2015.

At the June 22, 2015 Board meeting, the Board adopted the following motion:

That staff be requested to report back at the next Board meeting on a range of options, including the exclusion of Bombardier from bidding on future contracts for new vehicle purchases for a specified period of time, based on poor performance related to the delivery of the new streetcars.

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2015/June_22/Reports/Board_Report_with_Confidential_Attachment_New_Streetcar.pdf

Comments

(A) Prohibition based on poor performance:

As part of the TTC standard procurement practices and included in TTC Bid Documents (e.g. Instructions to Bidders), the TTC expressly reserves the right not to award a specific contract to a company with a poor performance rating history involving the TTC.

In the 2008/2009 RFP issued for the design and supply of 204 streetcars, the Instructions to Proponents contained the following provision relating to the TTC's ability to not award the contract to a company with a poor performance history:

The Commission is under no obligation to the Proponents to accept any Proposal from Proponents that have an unsatisfactory "Contractor Performance Evaluation" rating or which had contracts with the Commission which were terminated for default or from Proponents that have previously been given a "Notification of Award" of contract by the Commission and defaulted in proceeding with the work of the contract; or any Proponent that has submitted false or misleading disclosure of Lobbying; or non-disclosure of Lobbying by the Proponent. The Commission also is under no obligation to accept any Proposal with whom an officer or director of that Proponent has been an officer or director of a company/contractor that has previously received an unsatisfactory performance rating, or has had a Commission contract that was terminated for default or has been given a "Notification of Award" of contract by the Commission and defaulted in proceeding with the work of the contract. (emphasis added)

This provision, although subject to some modification, is standard in all TTC project procurement RFP documents. The provision expressly reserves the right of the TTC not to award a contract to a company with a demonstrated unsatisfactory TTC Contractor Performance Review.

It should be noted that the TTC's internal process generally allows the company that receives an unsatisfactory performance evaluation the ability to either appeal the evaluation or to create an action plan (and implement it), acceptable to the TTC, on how the company plans to remedy the unsatisfactory evaluation. The appeal process is internal to TTC and is conducted by senior executives of the TTC.

Assuming that the process has been followed and a company continues to have a demonstrated unsatisfactory Contractor Performance Evaluation, the TTC may rely upon the express provision of the Instructions to Proponents (or Bidders) to not award a future contract to that company. TTC has relied upon this provision in the past on not awarding a contract to a company. Generally, the prohibition is time limited (e.g. 3 to 5 years) and allows the company after the time period to re-apply to the TTC to be able to bid TTC work, which approval may contain conditions.

With respect to the current streetcar contract, if: (a) the TTC conducts a Contractor Performance Evaluation on the current Bombardier contract and the evaluation determines an "unsatisfactory" performance rating based on the stated criteria, and (b) the process relating to the appeal and/or action plan is followed, but the poor performance is not remedied, the TTC would be in a position to prohibit or not award a future vehicle supply contract to Bombardier for a specified time period. In order to rely upon the provision in which the TTC reserves its right not to award to a company with an unsatisfactory performance history it is imperative that all of the steps in the process, as outlined above, be followed, without a pre-determination of the outcome.

A further discussion on the potential impact and risk relating to prohibiting Bombardier from bidding future vehicle purchase contracts is set out in the Confidential Attachment.

(B) Application of Liquidated Damages

The current contract with Bombardier for the supply of new streetcars contains a provision relating to the application of liquidated damages for the late delivery of new vehicles. Currently for every day the Bombardier is late in delivering a new vehicle, provided the delay is not caused by the TTC or a force majeure event, the amount payable under the current liquidated damage provision on a per day per vehicle (which was a genuine pre-estimate of damages the TTC would suffer if the delivery of the vehicles were late), applies. The contract contains an overall cap of 5% of the total contract price on the amount of liquidated damages payable for late delivery.

The liquidated damage amount arising from the late delivery of vehicles has been calculated, but not yet deducted in accordance with the contract requirement. The contract provides that if Bombardier is late in the delivery of its vehicles, but catches up by the 60th vehicle (*i.e.* the 60th vehicle is delivered on time), that no liquidated damages that accumulated for vehicles 4 – 60 would be deducted. If the 60th vehicle is not

delivered on time, all of the accumulated liquidated damages would apply. Based on the adjusted schedule, the 60th vehicle is scheduled to be delivered in late August 2015. Should Bombardier fail to deliver the 60th vehicle within the adjusted schedule timeline the TTC would be in a position to deduct liquidated damages. However, it should be noted that Bombardier's position is that the schedule is subject to a further adjustment associated with various delay claims related to the TTC's instructions for changes to meet specifications.

A further discussion on the application of liquidated damages is set out in the Confidential Attachment.

(C) Termination

A third potential option is the termination of the Contract in accordance with the express terms and conditions of the Contract. This is in addition to the application of liquidated damages. A further discussion on the option of termination is set out in the Confidential Attachment.

Contact

Name: Michael Atlas
Job Title: Senior Solicitor
Dept: Legal Department
Phone: 416-393-3854 Email: michael.atlas@ttc.ca

Attachments

Attachment 1– Confidential Attachment