



Staff Memo

Report To: South Huron Council

From: **Dan Best, Chief Administrative Officer/Deputy Clerk**

Date: September 6 2022

Report: CAO 23.2022

Subject: Pickering Municipal Drain 2022 Update

Recommendations:

That South Huron Council receives the memo from D. Best, Chief Administrative Officer re: Pickering Municipal Drain 2022 Update; and

That South Huron Council terminate the Drainage Act proceeding and repeal By-Law #40-2022; and

That should the Applicant make another application under Section 78(5) of the *Drainage Act*, that Council suspends Procurement By-law 09-2021 as the Property Owner is responsible for 100% of the costs associated with the work.

Purpose:

Approval

Background and Analysis:

Further to the Council meeting of August 8, 2022, a decision on the Pickering Municipal Drain 2022 was deferred in order for Staff to explore options related to an application under Section 78(5) of the *Drainage Act* and ensure no further costs were incurred by the Applicant.

As Council is aware, the lowest bid for the tenders was incomplete and rejected. The other two tenders were over 133% of the engineer's estimate.

The following clause is contained under O.Reg.500/21 for minor improvements to drainage works made under the *Drainage Act* (Part II, Section 10):

"If the engineer or municipality determines that the contract price of carrying out the activity exceeds 133 per cent of the engineer's estimate of the contract price set out in the engineer's report,

(a) the minor improvement project will proceed if the applicant consents to the new contract price; or

(b) the minor improvement project will not proceed and the municipality will repeal the by-law authorizing the project if the applicant does not consent to the new contract price."

The regulation indicates that "*the minor improvement project will not proceed and the municipality will repeal the by-law authorizing the project if the applicant does not consent to the new contract price*". To provide further clarity, either the applicant says yes to higher contract price or the minor improvement project is terminated and the By-Law is repealed. It is important to note that this process is specific for the 78(5) regulation when activity exceeds the 133 percent of the engineer's estimate.

The applicant and the municipality are not bound by the tender quotes as the tendering occurs with 'pause' if contract price exceeds 133% of engineers estimate and the Applicant is asked whether they approve the higher contract. If the Applicant does not approve the higher contract price then the project is terminated and the applicant pays all the project costs.

Staff met with Mr. McCann on July 28, 2022 to review the tender summary and the applicable clause of O.Reg. 500/21 and to ask him whether he consents to the new contract price. Mr. McCann provided written confirmation that he did not consent to the new contract price and provided a letter outlining the same.

Section 78 (5) and the respective regulation clearly indicates that "*the minor improvement project will not proceed, and the municipality will repeal the by-law authorizing the project if the applicant does not consent to the new contract price*".

Section 78(5) process is different than the regular process of 133%, in the normal process where if the estimate of costs are over 133%, a meeting is scheduled and notices are sent to affected people and Council provides an opportunity for owners to give feedback but Council decides whether the project should proceed. Under Section 78(5), there is no choice once the owner decides not to proceed with the higher contract price. As a result, the following must occur

- The By-Law must be repealed;
- The repeal must occur prior to another application being submitted; and
- The onus is on the applicant to make an application.

Should the property owner make another application for the same scope of work and the Municipality put out another tender for same scope of work within a short period after cancelling the prior tender, we would be at risk of lawsuit from the compliant bidder.

It should be noted that Section 78 (5) of *Drainage Act* is relatively new and existing procurement bylaw provisions do not accommodate the process under section 78(5) of the Drainage Act or the associated regulation. Moreover, the Solicitor has indicated that as the section 78(5) process is rather new, there is no case law where the 133% rule caused a tender process to be terminated.

As the Property owner is paying 100% of the costs associated with the work, the municipality is acting as transfer payment agent. As a result, Council could pass a resolution to waive the procurement policy application should the same section 78(5) project be requested (i.e. same work project) to allow staff to utilize a more flexible approach (most likely what is referenced as a Sole Source procurement)

Financial Impact:

There are no financial implications to the Corporation as a result of the actions outlined in this report.

Legal Impact:

There are no legal implications to the Corporation as a result of the actions outlined in this report.

Staffing Impact:

There are no staffing implications to the Corporation as a result of the actions outlined in this report.

Consultation:

E. Veldboom, Municipal Solicitor
R. Msuya-Collison, GM of Corporate Services
S. Becker, GM of Financial Services

Related Documents:

None

Respectfully submitted,

Dan Best, Chief Administrative Officer/Deputy Clerk