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WASTE MANAGEMENT LEGAL ISSUES

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WASTE MANAGEMENT POTPOURRI: THE SWEET SMELL OF GARBAGE

I. INTRODUCTION

The *Environmental Management Act* (the "EMA") and the various regulations enacted under the EMA regulate waste within British Columbia. Local governments play an important role in regulating waste in British Columbia through the development of waste management plans and bylaws and by providing waste management services.

The first part of this paper will survey the waste management regime under the EMA and its various regulations. It will look at waste management plans as well as organic waste, recycling and landfill gas regulations. The second part of this paper will look at possible avenues to address the inevitable nuisance complaints that are associated with waste as well as waste management procurement and contracting considerations for local governments.

II. WASTE MANAGEMENT UNDER THE ENVIRONMENTAL MANAGEMENT ACT

The EMA regulates, among other things, municipal waste management. Under section 23 of the EMA "municipal solid waste" is defined as refuse that originates from residential, commercial, institutional, demolition, land clearing or construction sources and refuse specified by the Director to be included in a waste management plan.

Part 3 of the EMA establishes requirements for local government waste management, including waste management plans. A "waste management plan" is a plan that sets out the local government's high-level vision for waste management. Waste management plans must have goals and targets and are intended to guide solid waste management activities and policy development in the local government. They contain provisions or requirements for the management of recyclable material or other waste or a class of waste within all or a part of one or more municipalities.

Regional districts and municipalities are both captured by the waste management plan provisions in the EMA. Section 24 of the EMA provides that a municipality may submit a waste management plan for the approval of the Minister. Upon the request of the Minister, a regional district and a municipality must prepare a waste management plan for approval of the Minister:

> 24(1) A municipality, alone or with one or more other municipalities, may submit for approval by the minister a waste management plan, that complies with the regulations respecting the management of municipal liquid waste.
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> (2) On the written request of the minister, a regional district must submit for approval by the minister a waste management plan that
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> (a) Is for the benefit of the whole area of the regional district,

(b) Complies with the regulations, and

(c) Is in respect of biomedical waste.

(3) Despite any other requirement of this Act, the minister, by notice in writing, may

(a) Direct a municipality to prepare a waste management plan that complies with the regulations or revise a waste management plan and submit it to the minister for approval on or before a date specified by the minister, or,

(b) Specify a date by which a municipality must provide proof, in a form satisfactory to the minister, of the progress that the municipality is making to comply with this section.

A municipality must consult with the public when developing a waste management plan, and the Minister may not approve a waste management plan unless the Minister is satisfied that there was adequate public review and consultation with respect to the development of the waste management plan.

Operational certificates are another aspect of the legislative waste management regime in British Columbia. Under section 28 of the EMA, the Director may, in accordance with the regulations, issue an operational certificate with or without conditions to a municipality or to any person who is the owner of a site or facility covered by an approved waste management plan. An operation certificate forms part of the waste management plan and cannot conflict with the plan. Every person must manage waste at a site in accordance with the conditions of an operational certificate.

A. Waste Management Bylaws

A regional district may adopt bylaws to regulate the management of municipal solid waste or recyclable material for the purpose of implementing an approved waste management plan. A bylaw that implements a waste management plan may regulate, prohibit or address one or more of the following matters set out in section 25(3) of the EMA, which includes:

- The types, quality or quantities of municipal solid waste or recyclable material that may be brought onto or removed from a site;
- The discarding or abandonment of municipal solid waste or recyclable material;
- The burning of any class or quantity of municipal solid waste or recyclable material;

- The delivery, deposit, storage or abandonment of municipal solid waste or recyclable material at authorized or unauthorized sites;
- The transport of municipal solid waste or recyclable material within or through the area covered by the waste management plan;
- The operation, closure or post-closure of sites; and,
- Fees.

Every bylaw of a regional district to manage solid waste must be approved by the Minister.

The key feature of a waste management plan and all bylaws that implement it is that every person must manage municipal solid waste and recyclable material at a site in accordance with a waste management plan and the bylaws enacted to implement it.

B. Fees

In relation to the collection and disposal of municipal solid waste generated within a regional district or within a municipality that has contracted with a regional district for the disposal of municipal solid waste, a regional district may, by bylaw, set fees payable by persons who use the services of a waste hauler and by generators of municipal solid waste. The fees may be based on the quantity, volume, type or composition of municipal solid waste generated, the fees charged by the applicable waste hauler for its services or any other criteria prescribed by regulation. Further, the fee may vary by class of persons, operations, activities, industries, trades, businesses, works, sites or municipal solid wastes.

C. Municipal Bylaws and Approvals

A bylaw, permit, license, approval or other document issued under the authority of a municipal bylaw that conflicts with the EMA, the regulations, an approved waste management plan or a permit, approval or order under the EMA is of no force or effect to the extent of the conflict. For example, a municipality may not enact a bylaw that limits the amount of compost that may be processed at a site to less than the amount that the person is authorized by a permit issued under the EMA to process.

Furthermore, a municipal zoning bylaw that prohibits land from being used for a purpose allowed under a provincial permit, approval or order or an approved waste management plan respecting the land may be suspended by the Lieutenant Governor in Council to the extent necessary to enable the rights given by the permit, approval or order to be exercised.

III. ORGANIC WASTE

The Organic Matter Recycling Regulation (the "OMRR") governs compost, including the storage and distribution compost and composting facility requirements. "Compost" is a stabilized

earthy matter having the properties and structure of humus that is beneficial to plant growth when used as a soil amendment, that is produced by composting and is only derived from organic matter. "Composting" is defined as the process of controlled biological oxidation and decomposition of organic matter in accordance with the time and temperature requirements specified in the OMRR. For the purposes of the EMA, compostable and recyclable materials continue to be waste until they are processed in accordance with the OMRR.

The OMRR contemplates two classes of compost, Class A and Class B, and it establishes different requirements for each. Both Class A and Class B compost must be derived from only organic matter, which includes food and yard waste, but may also include brewery and winery waste, manure, milk processing waste, poultry carcasses, red-meat waste and untreated wood waste. Class A is compost that is generally comprised only of yard waste and unprocessed wood waste and treated in accordance with specified schedules of the OMRR. Class B compost is compost that is derived from any organic matter and treated in accordance with stricter requirements under the schedules.

There are no volume restrictions for the distribution of Class A compost. However, Class B compost can only be applied to land in accordance with a land application plan, the methodology specified in the OMRR and the soil substance concentrations specified in the OMRR or the site-specific numeric soil standards approved by the Director.

A. Composting Facilities

Part 5 of the OMRR establishes requirements for composting facilities, including construction and operation requirements. Plans and specifications for the construction and operation of a new composting facility, or any modification of an existing composting facility that results in a specified increase in the annual production capacity, are required to be prepared by a qualified professional. Section 24(2) of the OMRR states that composting facility plans and specifications are required to include:

- All works to be constructed on the site;
- Design capacity of the composting facility;
- A leachate management plan which stipulates how leachate generated from any and all stages of the composting process will be minimized, managed, treated or disposed;
- An odour management plan which stipulates how air contaminants from the composting facility will be discharged in a manner that does not cause pollution; and,
- An operating and closure plan for the composting facility.

Every operator of a composting facility must ensure that the facility is operating in compliance with the plans and specifications prepared by the qualified professional.

Special care is taken in the OMRR to address leachate management. A facility must be designed so that the processing and curing areas of the facility are located on an impermeable surface like asphalt or concrete, be roofed or covered and have a leachate collection system designed to reuse or remove leachate from the processing and curing areas.

IV. RECYCLING

The Recycling Regulation enacted under the EMA sets out recycling plans and programs for extended producers in British Columbia with respect to different categories of recyclable materials, including beverage containers, packaging and paper as well as lead-acid batteries.

The courts have addressed the distinction between recyclable material and waste. In *R. v. Jopp Ventures Corp.*, the Court had to determine whether materials intended for recycling constituted "waste" within the *Waste Management Act*, R.S.B.C. 1996, c. 482, the predecessor of the EMA. The respondent operated a waste-disposal and recycling business that collected unwanted materials from different sources, including grocery stores, gardening stores, a municipality and private citizens for a fee. The respondent collected various matters, including organic materials, hog fuel, packaging, lumber and drywall from construction sites, manure and yard cuttings and would ground up the materials, compost them and then package and sell the compost. The respondent was charged with contravention of the *Waste Management Act* for introducing waste into the environment and the Production and Use of Compost Regulation, B.C. Reg. 334/93. The Court stated:

> [19] Thus, discarded material remains "waste", even though it has value to its recipient for some purpose, until such time as it is converted into a useful material. In the present context, the materials handled by Mr. Jopp were discarded by the persons who paid him to take them away. They would no longer be waste when they had been converted into compost but, until then, they were waste and were subject to the legislative provisions governing waste.
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> [20] … The principle … that discarded materials do not cease to be waste when they come into the hands of someone who intends to recycle them, is applicable to all discarded materials.

Section 1 of the Recycling Regulation defines the term “producer”, which includes a person who manufactures in British Columbia a beverage that is sold in a container, sells, offers for sale or distributes a new tire product in British Columbia or manufactures, distributes or imports for use in a commercial enterprise antifreeze, solvents, pesticides, gasoline, lead-acid batteries, pharmaceuticals, lubricating oil and filters, oil containers, paint and electronics.

Section 2 of the Recycling Regulation sets out the duties of producers. Producers that use in a commercial enterprise, sell, offer for sale or distribute in British Columbia a product within the beverage container product category and/or packaging and paper product category are required to comply with the extended producer responsibility plan requirements set out in Part 2 of the Recycling Regulation. For produces of beverage containers, plans under this part must achieve a 75% recovery rate, or another rate established by the Director, any other performance measures required by the Director and any performance measures set out in the plan.

For producers of other categories of recyclable waste covered by the Recycling Regulation, Part 3 sets out the requirements for extended producer responsibility programs if there is no extended producer responsibility plan in place. These producers must provide retailers of the producer's product certain consumer information, including the amount of any fee associated with the producer's extended producer responsibility program that is charged by the producer and identified separately on the consumer's receipt of sale. Additionally, a producer must operate a collection facility for all products currently or previously used in a commercial enterprise, sold, offered for sale or distributed in British Columbia that are within a product category in respect of which the producer uses in a commercial enterprise, sells, offers for sale or distributes a product.

A producer of this second class of recyclable materials must manage all products collected at a collection facility provided by that producer in adherence to the following descending order of preference, such that pollution prevention is not undertaken at one level unless or until all feasible opportunities for pollution prevention at a higher level have been taken:

- Reuse the product;
- Recycle the product;
- Recover material or energy from the product;
- Otherwise dispose of the waste from the product in compliance with the EMA.

Effective January 1, 2023, the Recycling Regulation will also apply to packaging-like and single-use products.

V. LANDFILL GAS MANAGEMENT

The Landfill Gas Management Regulation (the "LGMR") governs the release of landfill gas into the environment. The LGMR defines landfill gas as a mixture of gases generated by the decomposition of municipal solid waste. Landfill gas management includes managing the migration of landfill gas as well as the collection, storage and flaring of landfill gas.

A regulated landfill site is a landfill site that has 100,000 tonnes or more of municipal solid waste in place or receives 10,000 or more tonnes of municipal solid waste annually. Regulated landfill sites that are estimated to generate 1,000 tonnes or more of methane annually must ensure that a landfill gas management facilities design plan is prepared for the landfill site. Landfill gas management facilities design plans are required to be prepared by a qualified professional, approved by the Director and include the following information:

- A description of existing or planned methods, management practices and processes for landfill gas management at the landfill site;
- A plan for the installation, operation and maintenance of landfill gas management facilities at the landfill site, including a contingency plan for disruption in landfill gas management for scheduled or emergency maintenance or replacement of landfill gas management facilities;
- Recommendations for optimizing landfill gas management at the landfill site;
- Any other information required under the guidelines; and,
- Certification by the qualified professional that the plan was prepared in accordance with the guidelines.

Once a plan is approved, the landfill operator must install landfill gas management facilities and implement practices, processes and methods for landfill gas management in accordance with guidelines addressing the migration of landfill gas, use of landfill covers, operation of landfill gas management facilities, landfill gas collection and flaring equipment and landfill gas management facilities maintenance.

Section 9 of the LGMR requires landfill gas to be flared in accordance with the approved guidelines unless the landfill gas is used for a purpose and in a manner that reduces emissions of methane to the atmosphere in an amount equivalent to the reduction that would be achieved by flaring the landfill gas.

VI. ADDRESSING NUISANCE COMPLAINTS

Although almost everyone would agree that waste management is an essential part of any well-run community, almost no one would agree that a waste management facility should be located near their home. However, they must be located somewhere. This unfortunate reality leads to inevitable conflicts between residents and an essential, but nuisance generating, service, with local governments often caught in the middle. Fortunately, local governments have several tools available to address these conflicts.

A. Local Government Nuisance Bylaws

Local governments have several tools available to address nuisance complaints from residents in relation to private compost and waste operators. Under section 8(3)(h) and section 64 of the *Community Charter*, municipalities may adopt bylaws to regulate, prohibit and impose requirements in respect of odours that are liable to disturb the comfort, rest and enjoyment of the public. Under section 323 and 325 of the *Local Government Act*, regional districts may adopt bylaws that abate and prohibit nuisances and provide for the recovery of the cost of abatement, but only if the regional district provides a service in relation to the control of odours.

B. Waste Management Bylaws

Regional districts may also address nuisances through bylaws that regulate the management of solid waste in the regional district. Under section 25(3) of the EMA, a regional district may adopt a bylaw that regulates and prohibits, among other things, the types, quality or quantity of waste that may be brought onto or removed from a site, the discarding or burning of waste, and the delivery or storage of waste. The bylaw may also require a site operator to hold a licence and comply with a code of practice that may be attached to the bylaw, set terms and conditions for issuing, suspending or cancelling those licences, to hold insurance and provide for fines for contraventions of the bylaw. Note, however, that a regional district must consult with stakeholders before adopting such a bylaw.

Regional district bylaws imposing these regulations and prohibitions have been challenged and upheld by courts in a few instances. In *Westcoast Landfill Diversion Corp. v. Cowichan Valley (RD)*, the Regional District adopted Bylaw No. 2570, 2004, under the EMA, in response to numerous and ongoing odour complaints from residents. One resident memorably complained that the odour smelled "like someone had vomited up sour milk." The bylaw required composters to obtain a licence and enclose all composting operations within a structure. The Court found as fact that the facility created obnoxious compost odour that caused significant discomfort, inconvenience and unpleasantness to neighbours and that the facility could have been constructed in a manner that reasonably contained odours, such as enclosing the compost within a building. The Court concluded that the Regional District had the authority to enact Bylaw 2570 and that the compost operator failed to take remedial steps required under the bylaw.

In *Foundation Organics v. Capital Regional District*, the composter sought judicial review of two decisions of the Capital Regional District. The first decision conditionally suspended the composter's licence issued under the Capital Regional District's waste management bylaw made pursuant to the EMA due to odours from the facility creating a nuisance. The second decision was the Capital Regional District's denial of an appeal by the composter of its first decision. The composter argued that the decisions were unreasonable.

One of the bases on which the Capital Regional District suspended the composter's licence was that the composter was receiving more than 100 tonnes of food waste each week, in contravention of the terms of its operational certificate issued by the Director under the EMA. Although the operational certificate is a provincially issued document, compliance with the operational certificate was made one of the conditions of the licence issued by the Capital Regional District under its bylaw. The Court held that in this way, the Capital Regional District was entitled to impose a limit on the quantity of waste entering the facility, even though its bylaw did not impose a quantitative limit. Ultimately, the Court held that the Capital Regional District acted reasonably in suspending the composter's licence for exceeding the quantitative limit.

Under section 25(3)(a) of the EMA a regional district bylaw may impose a limit on the quantity of waste entering a facility. While it may be inconvenient to place quantitative limits within a waste management bylaw because they depend largely on the plan for a particular facility, there are benefits in doing so, especially where there are legitimate nuisance concerns regarding a larger facility. Limiting the quantity of waste is a very effective tool to control odours, and an express limit set out in the bylaw is less likely to be held unenforceable by a court than a limit set out in an operating plan that is referenced in a licence. In addition, setting out a quantitative limit in the bylaw will put the regional district in a position to refuse to issue licences under the bylaw where the proposed operation exceeds the quantitative limit, whereas a regional district will generally be required to approve a licence under a licencing regime that references limits set out in operating plans. That said, regional districts cannot be too aggressive in limiting quantities – under section 34 of the EMA these bylaws may not be adopted without the approval of the Minister. In addition, if the Minister considers it in the public interest the Minister may require a regional district to amend a bylaw enacted under section 25 of the EMA.

C. Municipal Zoning Bylaws

Note that although municipalities may regulate composting and waste management facilities via zoning bylaws, section 37(6) of the EMA provides that a zoning bylaw cannot prohibit a waste management facility that is permitted under a permit approval or order issued in respect of the land or an approved waste management plan. In such circumstances the Lieutenant Governor in Council may by order suspend the operation of the bylaw to the extent necessary to enable the rights granted under the permit, approval or order.

D. Composting in the Agricultural Land Reserve

Addressing nuisances created by composting and waste management facilities in the Agricultural Land Reserve brings different challenges. First, there are two different types of composting that may be conducted on agricultural land. Under section 7 of the Agricultural Land Reserve Use, Subdivision and Procedure Regulation, the use of agricultural land for the production, storage and application of compost is a farm use that may not be prohibited by a local government if (1) the compost is Class A compost under the OMRR and all of the compost

is produced, stored and applied on the agricultural land on which it was produced or (2) the compost is from agricultural by-products that were produced for a farm use.

There are exceptions to the above-noted rule. First, certain municipalities are empowered to adopt bylaws that regulate farming areas under section 552 of the *Local Government Act*. Under the Right to Farm Regulation those municipalities are the Township of Langley, City of Abbotsford, the Corporation of Delta and the City of Kelowna. Those municipalities may adopt bylaws, that among other things, regulate and prohibit in respect of stored materials, waste facilities and certain farm operations. Note, however, that a bylaw enacted under section 552 may be adopted only with the approval of the Minister of Agriculture.

Second, under section 27(2) of the Agricultural Land Reserve Use, Subdivision and Procedure Regulation, the production, storage and application of Class A compost is permitted but may be prohibited by a local government if at least 50% but less than 100% of the compost produced, stored and applied is used on the agricultural land on which it was produced.

VII. WASTE MANAGEMENT PROCUREMENT AND CONTRACTING

Local governments often contract out waste collection and other waste management services. The following is a non-exhaustive list of procurement and contracting considerations for a local government looking to provide such services through a contractor.

A. Procurement

The first step is deciding the procurement vehicle – tender or request for proposals. Each has advantages and disadvantages and appropriate uses.

Requests for proposals are non-binding calls for proposals for delivery of a service. They are best used when a local government wishes to implement a service but is open to proposals on how the service will be delivered. For example, a request for proposal process would be appropriate where the local government wishes to implement an organics diversion program but is flexible in the type of facility and processes used at the facility to compost organics. One of the key advantages of using a request for proposals process over requesting tenders is that it is non-binding, meaning that the local government will not be held liable to any proponent in the evaluation and selection process. The key downside of requesting proposals is that until the contract for the work is signed a proponent may withdraw at any time, including the proponent who is selected by the local government.

Tenders are binding calls for services. They are best used when a local government has a clearly defined scope of the services and only needs a contractor to offer their best price to provide those services. In the waste management context, a tender process would be appropriate where the local government is seeking a contractor to provide waste collection services for an established curb-side collection service with a defined service area and a specified number of pickups per week or month. As noted, the key advantage of using a tender

process over a request for proposals is that a contractor who is selected by the local government is bound to enter into the contract for the work at the price bid by the contractor.

This advantage does not come without risk for local governments. The obligation of a contractor to enter into a contract for the work described in the call for tenders is a term of an implied contract that arises between the parties when the bidder submits a bid in compliance with the terms of the local government's tender call. This pre-award contract has come to be known as "Contract A", to distinguish it from the contract for the work - "Contract B". Like any contract, Contract A imposes terms on both parties. This is where the trouble arises for local governments. The courts have imposed two terms into Contract A that are particularly onerous for owners: the obligation to only accept a bid that is materially compliant with the terms of the tender call and the obligation to treat all bidders fairly and equally.

Over the years these terms have resulted in very significant liability for owners, including local governments. While the obligation to accept only a materially compliant bid seems reasonable, the devil is in the details. Specifically, contractors frequently submit bids riddled with errors, some material and some not. This places the owner in the position of having to determine whether an error is material, which will render the bid non-compliant and incapable of acceptance, or immaterial, which may be accepted. This determination is critical. If the local government determines an error is material and disqualifies the bid, it may be sued by that contractor. In the alternative, if the local government determines the error is immaterial and selects that bid, it may be sued by the next lowest bidder claiming that it improperly selected a materially non-compliant bid.

The second implied obligation is to treat all bidders fairly and equally. Again, this obligation seems reasonable on its face. However, an assessment of what is "fair" can vary significantly from one person to another. An inadvertent step taken or error made in the evaluation process can be, and has been, alleged to breach the duty of fairness.

1. Avoiding Tendering Liability

Fortunately, avoiding liability in procurement is not rocket science. The first way to avoid liability is to avoid tendering altogether by choosing to procure services through a request for proposals process. In order to ensure a procurement process is held to be a request for proposals and not a tender, a local government must ensure that the request for proposals does not impose any obligations on proponents. In particular, this means that a local government cannot require that bids be irrevocable, including by securing that irrevocability by requiring proponents to submit a bid bond. The courts have also held that the following factors are significant in determining that a procurement is non-binding and will not attract liability for an owner: an express disclaimer of contractual intention, the contract for the work is not prescribed or attached to the request for proposals, the work is not certain to proceed, and the general lack of formality of the process. If a local government ensures its request for proposals adheres to these characteristics it is very unlikely that the procurement will be held to be a tender that may subject the local government to liability.

If a local government determines that it is best served by requiring irrevocable bids, there are still a few ways to limit or avoid liability. The first is by expressly excluding the implied terms that often result in owner liability in procurement – the obligation to only accept a materially compliant bid and the obligation to treat bidders fairly and equally. While these obligations form a cornerstone of tendering law, it is important to remember that they are implied terms. Courts will not imply terms into contracts when those terms are contradicted by the express terms of the contract. To seasoned procurement professionals this may seem contrary to the established body of tendering case law. However, one has only to look *at Kinetic Construction Ltd. v. Comox-Strathcona (Regional District)*, 2004 BCCA 485, to find a case in which the highest court in British Columbia, the Court of Appeal, held that it would not imply the obligation of an owner to reject a materially non-compliant bid where the contract contained an express term disclaiming any such obligation.

The other way in which a local government can avoid liability in a tendering is to include in its tender documents an exclusion or limitation of liability clause similar to the following:

> The liability of [the owner] for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder by reason of the acceptance or the non-acceptance by [the owner] of any bidder's bid or arising in any way from this tender process shall be limited to $1,000.

While the courts have held exclusion of liability clauses enforceable against aggrieved bidders, they have also shown a willingness to interpret them narrowly. In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, the contractor alleged that the owner had breached its Contract A obligations by awarding the project to an ineligible bidder. The owner defended the claim by referring to an exclusion of liability clause in its tender documents that read:

> … no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP.

The Supreme Court of Canada refused to enforce the clause on the basis that the phrase "participating in this RFP" limited the application of the clause to claims arising from the request for proposal as conducted in accordance with its terms. The Court held that since bidder eligibility was a key aspect of the procurement, and the owner permitted an ineligible bidder to participate, the parties were no longer participating in the procurement to which the exclusion clause applied.

Although exclusion of liability clauses have been held enforceable since *Tercon*, in our opinion a limitation of liability clause, even one that limits damages to an amount that no bidder would ever sue to recover, is more likely to be respected by a court.

B. Contracting

We turn now to examine some contractual clauses that are of particular importance or unique to waste management service contracts. The key term in any service contract is the description of the services provided and the compensation due to the contractor for providing those services. Both of these terms should be described as clearly and precisely as possible in order to avoid any misinterpretations or opportunities for the contractor to claim compensation not within the contemplation of the local government at the outset of the contract. The contract should also contain a clause that provides that the contractor is not entitled to any compensation in addition to what is expressly set out in the contract or in a written amendment to the contract.

One term of greater significance in the waste management context than in most other spheres is a complaint logging and response process. In addition to the legislative tools discussed earlier in this paper, a contractual provision that requires an operator with whom the local government has a contractual relationship to address odour and other nuisance complaints can be a powerful tool. An effective provision could take the form of the local government collecting and forwarding complaints to the contractor. The contractor would then be obliged to respond to the local government setting out the causes of the complaint and the actions that will be taken to address the complaint. If the complaint is not resolved satisfactorily within a certain period of time, the local government may require the contractor to take additional measures, impose a contractual penalty or suspend the services.

As with most contracts, a contract with a waste services contractor should require the contractor to comply with all laws, bylaws, regulation and orders made in respect of the service. In addition to those requirements, a contractor should also be required to comply with any operating certificate issued under the EMA that it holds and any licence issued under the applicable bylaws that implements the waste management plan.

Where the contractor is operating a waste management or composting facility, the local government should require the operator to prepare for its approval various plans, including a health and safety plan, a leachate management plan, an odour management plan, a stormwater management plan and a wildlife and vector management plan.

If the contract provides for the collection and composting of organics at a new facility, the contractor may only be willing to enter into the contract if the local government guarantees a minimum amount of compost per year. While this may be the only way to secure the contractor's commitment to construct and operate the facility, this entails some financial risk for the local government as well. Another consideration is ownership of the finished Class A compost produced at the facility. The contractor will typically wish to own the compost, but the local government may require that a specified amount of Class A compost be delivered to it as one of the benefits of the contract.

1. Standard Form Contracts

Sometimes when a local government, particularly a small local government, seeks waste management services the contractor will offer or insist to provide the services pursuant to its standard form contract.

Read these contracts carefully before signing. They often contain onerous and anti-competitive terms which are reflective of the relatively profitable and cutthroat waste management industry. Most will include a right to adjust rates for increases in fuel, staffing and other charges. They may contain a clause that provides that the term will automatically renew unless notice is given within a specified period. In addition, some of them contain terms that effectively provide the contractor a right of first refusal in respect of any future provision of waste collection services. The effect of the clause is to provide that if, near the end of the contract, the local government conducts a procurement process to find a replacement contractor, it must provide to the incumbent service provider the terms of the preferred proponent. Then the incumbent may choose to continue to provide waste management services to the local government on the terms of that offer.

Even worse, these contracts may contain liquidated damages clauses that are triggered when the local government purports to terminate the contract, including by failing to comply with the aforementioned right of first refusal. These clauses can impose stiff penalties – in one case being the greater of 15 months of service charges under the contract and the sum of amounts that would have come due under the remainder of the term.

These contracts not only overcharge and impose penalties, they hamstring a local government when it seeks to procure waste management services from a different provider. If at all possible, seek to enter into a contract drafted by the local government, or at least strike out or amend the most onerous terms.

VIII. CONCLUSION

Waste management is a significant matter for local governments. The EMA and the various regulations enacted under it aim to improve our communities by regulating waste. Local governments play a significant role in in this regard by establishing waste management plans and bylaws as well as providing waste management services. We hope the foregoing summary of the regulatory regime, the tools to address nuisance complaints and contracting and procurement considerations for waste management services will be of use to local governments in their efforts to manage waste.

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