Court upholds dismissal of waste firm?s $3.5m lawsuit against Town

By Tom Claridge

In a unanimous decision, the Ontario Court of Appeal has upheld a trial judge's dismissal of a $3.5-million lawsuit alleging a breach of contract by the Town of Orangeville seven years ago.

The appellants, Graillen Holdings Inc. (Graillen) of New Lowell and Region of Huronia Environmental Services Ltd. (Rohe), had provided collection, haulage, storage and disposal of Orangeville's biosolids from 2002 until 2010, when the Town decided to put the services out to tender.

Also in 2010, the Town entered into an agreement of purchase and sale with Graillen to purchase its lagoons for storage of the biosolids waste. That agreement included a termination clause that the Town could exercise based on its investigation of the purchase's financial impact and economic viability and advisability.

The call for tenders resulted in competing bids from Rohe and Courtland-based Entec Waste Management Inc. Entec's bid proposed a new form of dewatering process which would obviate the Town's need to store the biosolids waste, and, as a result, the Town's reason to purchase Graillen's lagoons. Entec's bid was also slightly lower than Rohe's.

The lawsuit followed the Town's decision to award the contract to Entec and cancel the lagoon purchase. At issue were both whether the Entec bid had complied with terms of the call for tenders and whether the Town acted reasonably and in good faith in cancelling purchase of the lagoons.

In June 2016, Ontario Superior Court Justice David Stinson agreed that the Entec bid was non-compliant because it had failed to include certain documents and that, by accepting Entec's bid, the Town had breached the 2010 tendering process. However, he also found that the appellants were not entitled to damages, because they had failed to show they would have been awarded the contract, concluding that the Town would have instead re-tendered the contract.

?Assuming without deciding that the Entec bid was in fact non-compliant, we reject the submission that the trial judge erred in concluding that the tender contract would not have been awarded to Rohe, as the compliant bidder. The trial judge found that the appellants did not meet their onus to show on a balance of probabilities that the contract would have been awarded to Rohe,? the judges wrote.

?In particular, the 2010 tendering process had disclosed to the Town that its preferred option of adopting a dewatering process was viable and therefore could be the subject of a new and different tendering process. In addition, after opening the tenders, it became clear that Rohe's tender, while compliant, suffered from similar problems to those which had occurred during the Town's 2005 tendering process and that had led to the re-tendering of the 2005 contract. Those problems included the fact that the appellants' representatives sought to renegotiate the length of the contract with Town council, as well as a lack of clarity regarding the price and volume in the Rohe's bid as submitted. ...

?In these circumstances, we agree with the trial judge's conclusion that it would have been open to the Town to reject the bids, cancel the tendering process, and re-tender with different specifications for the legitimate purpose of ensuring that the new bids met its needs.?

Justices Janet Simmons, Raul Rouleau and Lois Roberts also agreed with the trial judge that the Town had acted reasonably and in good faith in terminating the agreement of purchase and sale, and ordered that the appellants return the Town's deposit.

As the successful party, the Town was awarded $45,000 in partial costs.

Although Orangeville Council's discussions concerning the lawsuit took place behind closed doors, Sheila Duncan, the Town's Communications Manager, told the Citizen Wednesday that ?the matter has carried over for several months and each decision by Council and the courts was noted in open session.?