

TORONTO TRANSIT COMMISSION REPORT NO.

MEETING DATE: December 19, 2013

SUBJECT: PROCUREMENT AUTHORIZATION
TORONTO-YORK SPADINA SUBWAY EXTENSION
SUPPLY AND INSTALL RADIO ELECTRONICS AND
COVERAGE TESTING
CONTRACT A80-16

ACTION ITEM

RECOMMENDATION

It is recommended that the Board authorize the award of a contract to Futurecom Systems Group Inc. (Futurecom) in the amount of \$7,872,944.61 for Contract A80-16, Toronto-York Spadina Subway Extension (TYSSE) – Supply and Install Radio Electronics and Coverage Testing.

FUNDING

Sufficient funds for this expenditure are included in the Toronto-York Spadina Subway Extension project as set out on pages 1229 to 1232 of the TTC 2013-2022 Capital Program (Category Expansion) which was approved by the Board on November 21, 2012 and by City Council on January 16, 2013.

BACKGROUND

The TTC is planning the design and construction of a new 8.6 km long underground subway line from the existing Downsview Station to the Vaughan Metropolitan Centre Station located in the Region of York.

The work of this contract is for the Supply and Installation of Radio Electronics and Coverage Testing. The contract includes the supply of labour, equipment, products and services to install, test and commission tunnel and subway station radio systems at the six TYSSE subway stations. The completed Subway Radio Antenna System (SRAS) will provide 2-way radio communications for TTC employees and emergency services personnel from the City of Toronto and York Region.

**PROCUREMENT AUTHORIZATION
TORONTO-YORK SPADINA SUBWAY EXTENSION
SUPPLY AND INSTALL RADIO ELECTRONICS AND
COVERAGE TESTING
CONTRACT A80-16**

DISCUSSION

A Request for Bid was issued on April 26, 2013 to Futurecom on a single source basis.

The bidder agreed to execute a performance bond in the amount of \$500,000.00. Additional protection for the TTC is offered through the terms of payment clause, which provides that services and equipment shall be paid after completion, delivery and acceptance by the TTC's representative.

Reason for Single Source

The existing TTC Subway Radio Antenna System has been designed to provide very specific performance levels and to work with the existing TTC, Toronto Police, Fire and EMS systems. In 1994 Futurecom started designing the system and provided all hardware and amplifiers to support the system as a sub-contractor for Alcatel on Contract ZT-00-X1, Subway Radio. Through multiple enhancements, they developed the system into a sophisticated computer based network management system, which carries out automatic system recovery in case of an emergency, and also enables the TTC maintenance personnel to test, verify operation and remotely adjust operating parameters. The system compatibility is necessary to preserve current safety and emergency response capabilities. Any expansion of the system must be fully compatible with the existing TTC system.

Futurecom submitted a bid and stated exceptions and qualifications, which affected clauses such as: Ownership; Warranty; Proprietary Rights; Default by the Contractor; Force Majeure; Valuation of Changes in the Work; Claims and Continuance of the Work; Termination for Convenience; Records and Audit; Indemnification. Following discussions and negotiations, an agreement was reached between the TTC and Futurecom. Above mentioned clauses were amended as agreed and included in the revised Contract Document (attached Appendix B).

JUSTIFICATION

The bid submitted by Futurecom Systems Group Inc. is a single source.

70-95
03-04-000120223

Attachments: Appendices A and B

APPENDIX A

Toronto-York Spadina Subway Extension –
Supply and Install Radio Electronics and Coverage Testing

Contract A80-16
Single Source

Summary of Submissions

	<u>Bid Price</u>
1. Futurecom Systems Group Inc. *	\$7,872,944.61

*Recommended Company

APPENDIX B

Toronto-York Spadina Subway Extension – Supply and Install Radio Electronics and Coverage Testing

Contract A80-16

GC5 OWNERSHIP		
Original Clause	Agreed Clause	Impact
<p>5.1 The Contractor shall provide the Commission adequate documents for securing title to the Works. The Contractor must provide the documents to the Commission before Contract Completion. The Contractor shall warrant that title to the Works shall be delivered free and clear of all liens, mortgages and encumbrances, financing statements, security agreements and claims and demands of any character, including but not limited to any liens or other claims of the Contractor's supplier, subcontractors or employees.</p> <p>5.2 All information obtained by the Contractor including drawings and other technical drawings and data, including environmental and technical reports, standard operating procedures, processes and manuals and all other information related to the Works shall be the property of the Commission and upon Contract Completion shall be provided or returned to the Commission, as applicable, in electronic format acceptable to the Commission, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format.</p>	<p>5.1 The Contractor shall provide the Commission adequate documents for securing title to the Works. The Contractor must provide the documents to the Commission before Contract Completion. The Contractor shall warrant that title to the Works shall be delivered free and clear of all liens, mortgages and encumbrances, financing statements, security agreements and claims and demands of any character, including but not limited to any liens or other claims of the Contractor's supplier, subcontractors or employees, <i>provided that Contractor has been paid in accordance with the Contract.</i></p> <p>5.2 All information obtained by the Contractor including drawings and other technical drawings and data, including environmental and technical reports, standard operating procedures, processes and manuals and all other information related to the Works (<i>"Commission Confidential Information"</i>) shall be the property of the Commission and upon Contract Completion shall be provided or returned to the Commission, as applicable, in electronic format acceptable to the Commission, acting reasonably, where it exists in electronic format, and in its original format, when not in electronic format, <i>provided that the Contractor shall be entitled to keep one archival copy of Commission Confidential Information to be kept with the Contractor's legal department to be used only in a dispute with the Commission regarding the Contract, and the Contractor shall not be required to provide or return information that is contained on back-up media and other storage devices that are not regularly accessed in the ordinary course of business. Commission Confidential Information shall not include information which (a) is already in the public domain as demonstrated by written or tangible evidence, (b) becomes generally available to the public other than as a result of a disclosure by the Contractor, the Commission or either party's representatives, or (c) was available to the Contractor on a non-confidential basis prior to its disclosure by the Commission or the Commission's Representative as demonstrated by written or other tangible evidence.</i></p>	<p>No impact.</p>

GC10 WARRANTY

Original Clause	Agreed Clause	Impact
<p>10.1 The Contractor shall promptly correct at its own expense any defect or deficiency in the workmanship or material which appears within a period of two years from the date of issuance of the Final Acceptance Certificate or Acceptance Certificate, as applicable or such longer period as may be specified for certain Products or Work. Neither testing, inspection, payment or acceptance of the Work by the Commission's Representative shall relieve the Contractor of this responsibility.</p> <p>10.2 Upon receiving notice of a defect or deficiency, the Contractor shall immediately correct, within forty-eight hours or some other reasonable time agreed to with the Commission's Representative and at the Contractor's own expense, all Work found defective, deficient or unable to meet the design, performance and operation criteria set out in the Contract. The Contractor shall also correct, at its own expense any damage to other work resulting from any corrections required under this general condition. If the Contractor after such notification shall delay or default in making good the Work, then the Commission's Representative may arrange to correct the defect and the Contractor shall be liable for all costs, changes and expenses in connection therewith. New Warranty periods shall commence upon the completion of the remedied Work.</p> <p>10.3 . If, as determined by the Commission's Representative, the Contractor is not expedient in correcting defective Work or Work not performed in accordance with the Contract Documents, then the Commission may deduct from the monies otherwise due to the Contractor, the difference in value as determined by the Commission's Representative between the Work as performed and that which is called for by the Contract Documents.</p>	<p>10.1 The Contractor shall promptly correct at its own expense any defect or deficiency in the workmanship or material which appears within a period of two years from the date of issuance of the Final Acceptance Certificate or Acceptance Certificate, as applicable or such longer period as may be specified for certain Products or Work. Neither testing, inspection, payment or acceptance of the Work by the Commission's Representative shall relieve the Contractor of this responsibility. Contractor's warranty hereunder does not cover the following:</p> <ul style="list-style-type: none"> a) Defects or damage resulting from use of the Work in other than its normal and customary manner; b) Defects or damage from improper installation, testing, operation or maintenance provided by parties other than the Contractor; c) Defects or damage due to alterations, modifications or adjustments carried out by the Commission without Contractor's express approval; d) Defects or damage from misuse, accident, water or neglect; e) Freight or brokerage fees to the repair depot; f) Scratches or other cosmetic damage to Product surfaces that does not affect the operation of the Product; g) Normal wear and tear. <p>The Contractor's warranty is conditioned upon proper storage, installation, use and maintenance</p> <p>10.2 Upon receiving notice of a defect or deficiency, the Contractor shall promptly repair or replace within reasonable time agreed to with the Commission's Representative and at the Contractor's own expense, all Work found defective, deficient or unable to meet the design, performance and operation criteria set out in the Contract. If the Contractor after such notification shall unreasonably delay or default in making good the Work, then the Commission's Representative, after notice to Contractor, may arrange to correct the defect and the Contractor shall be liable for all reasonable costs, changes and expenses in connection therewith. Corrected Work shall be warranted for the later of the original warranty period or ninety (90) days following completion of the correction.</p> <p>10.3 If, as determined by the Commission's Representative, the Contractor is not expedient in correcting defective Work or Work not performed in accordance with the Contract Documents, then the Commission may deduct from the monies otherwise due to the Contractor, the difference in value as determined by the Commission's Representative between the Work as performed and that which is called for by the Contract Documents. Except as expressly provided herein, Contractor makes no warranty of any kind, expressed or implied, with respect to any goods, parts or services provided by Contractor, including, but not limited to, the implied warranties or merchantability and fitness for a particular purpose.</p>	<p>No impact.</p>

GC11 PROPRIETARY RIGHTS

Original Clause	Agreed Clause	Impact
<p>11.1 If any design, device, process or material covered by a letters patent or trade mark, copyright, industrial design, trade secrets or other forms of intellectual property, is provided by the Contractor under the Contract, the Contractor shall indemnify, defend and save the Commission harmless from any action or claim arising out of the infringement or alleged infringement of any valid or allegedly valid patent, trademark, copyright, industrial design, trade secret or other forms of intellectual property and shall indemnify the Commission for any cost, expense and damages which it may suffer or be obliged to pay by reason of such action or claim.</p> <p>11.2 The Contractor shall pay royalties and patent fees required for the performance of the Contract.</p> <p>11.3 Any drawings, documents, technical data, methods, processes, tooling, and inventions; whether conceived, or developed and produced during the course of the Contract specifically for the purposes of completing the Contract, shall be the property of the Commission, who shall have sole exclusive rights for subsequent use of same, except as may otherwise be granted by the Commission.</p> <p>11.4 The Commission has the right, within the scope of the Contract and for the sole purpose of operating, maintaining and subsequently modifying the Work, to use, duplicate, or disclose internally within the Commission, the technical data and the information conveyed therein, in whole or in part, and to have or permit others to do so, as set out below:</p> <p>11.4.1 Manuals or instructional materials prepared for installation, operating, maintenance or training purposes;</p> <p>11.4.2 Technical data pertaining to items, components or processes which were prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements;</p>	<p>11.1 If any design, device, process or material covered by a letters patent or trade mark, copyright, industrial design, trade secrets or other forms of intellectual property, is provided by the Contractor under the Contract, and if any claim is made against the Commission that alleges that such design, device, process or material is an infringement of any letters patent, trade mark, copyright industrial design, trade secret or other form of intellectual property, then the Commission shall notify the Contractor promptly and the Contractor shall, with the Commission's assistance, if required, but at the Contractor's expense provide defense of any litigation. If any of the Work is held to infringe any U.S. Letters Patent, trade mark, copyright, industrial design, trade secret or other form of intellectual property, and their use is enjoined or, if as a result of a settlement, the Contractor deems its continued use unadvisable, then the Contractor will, at its option and expense, procure for the Commission the right to continue using the Works, modify the Works so that they become non-infringing, but which meets the performance specifications of the Contract, or replace the Works with non-infringing Works which meet the performance specifications of the Contract. Section 11.1 shall not apply and Contractor shall have no obligation or liability with respect to any Claim based upon Works that have been altered, modified, or revised without the consent or agreement of the Contractor and such modification or revision is the basis of the alleged infringement or unauthorized use of Products. The foregoing states the Contractor's entire liability for infringement of intellectual property rights.</p> <p>11.2 The Contractor shall pay royalties and patent fees required for the performance of the Contract.</p> <p>11.3 Any drawings, documents, technical data, methods, processes, tooling, and inventions; whether conceived, or developed and produced during the course of the Contract specifically for the purposes of completing the Contract, except for source code software and board level schematic diagrams, shall be the property of the Commission, who shall have sole exclusive rights for subsequent use of same, except as may otherwise be granted by the Commission.</p> <p>11.4 The Commission has the right, within the scope of the Contract and for the sole purpose of operating, maintaining and subsequently modifying the Work, to use, duplicate, or disclose internally within the</p>	<p>No impact</p>

<p>11.4.3 Other technical data which has been or is normally furnished without restriction by the Contractor or Subcontractors;</p> <p>11.4.4 Computer and microprocessor software documentation including program design language or pseudo-code listings, fully annotated source code and machine level listings;</p> <p>11.4.5 In the event that the Contractor and/or its Subcontractors require an agreement prior to providing confidential technical data to the Commission, then the Commission will enter into a non-disclosure agreement acceptable to said parties to ensure delivery of confidential technical data pursuant to the Contract Documents;</p> <p>11.4.6 Other specifically described technical data, which the parties agree will be furnished without restriction.</p> <p>11.5 No such copyrighted matter, shall be included in technical data furnished hereunder unless the written permission of the copyright owner has been obtained by the Contractor for use by the Commission in the manner herein described.</p> <p>11.6 The Contractor shall report to the Commission promptly and in written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.</p> <p>11.7 The Contractor hereby permanently waives in favour of the Commission, any moral rights as defined in the Copyright Act, R.S. 1985. c.C-42, which it may have in or to any copyrighted material and shall provide to the Commission at Contract Completion or at such other time as the Commission may require, a written permanent waiver, in a form acceptable to the Commission, of moral rights of every author who contributed to such copyrighted materials.</p>	<p>Commission, the technical data and the information conveyed therein, in whole or in part, and to have or permit others to do so, as set out below:</p> <p>11.4.1 Manuals or instructional materials prepared for installation, operating, maintenance or training purposes;</p> <p>11.4.2 Technical data pertaining to items, components or processes which were prepared for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements;</p> <p>11.4.3 Other technical data which has been or is normally furnished without restriction by the Contractor or Subcontractors;</p> <p>11.4.4 Computer and microprocessor software documentation including program design language or pseudo-code listings, fully annotated source code and machine level listings;</p> <p>11.4.5 In the event that the Contractor and/or its Subcontractors require an agreement prior to providing confidential technical data to the Commission, then the Commission will enter into a non-disclosure agreement acceptable to said parties to ensure delivery of confidential technical data pursuant to the Contract Documents;</p> <p>11.4.6 Other specifically described technical data, which the parties agree will be furnished without restriction.</p> <p>11.5 No such copyrighted matter, shall be included in technical data furnished hereunder unless the written permission of the copyright owner has been obtained by the Contractor for use by the Commission in the manner herein described.</p> <p>11.6 The Contractor shall report to the Commission promptly and in written detail each notice or claim of copyright infringement received by the Contractor with respect to any technical data delivered hereunder.</p> <p>11.7 The Contractor hereby permanently waives in favour of the Commission, any moral rights as defined in the Copyright Act, R.S. 1985. c.C-42, which it may have in or to any copyrighted material and shall provide to the Commission at Contract Completion or at such other time as the Commission may require, a written permanent waiver, in a form acceptable to the Commission, of moral rights of every author who contributed to such copyrighted materials.</p>	
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GC32 RECORDS AND AUDIT

Original Clause	Agreed Clause	Impact
<p>32.1 The Commission may inspect and audit the books, payrolls, account and records of the Contractor at any time as deemed necessary by the Commission prior to Contract Completion and thereafter for a period of two years, to verify the Contractor's valuations of Contract Changes, cancelled Work and claims, and the Contractor shall supply certified copies of the books, payrolls, accounts and any other records to the Commission or access to same as required by the Commission.</p> <p>32.2 In the case of the Contractor's neglect or failure to observe fully and faithfully the provision of documentation to validate such Contract Changes, cancelled Work and claims, the Contractor shall forfeit all right to payment there for, which it otherwise might have had and shall not make any claim in respect thereof; and if made, the Commission may reject the same as invalid, and the Contractor shall not have any right of recovery in respect thereof at law or otherwise, unless written consent of the Commission's Representative to the making of such a claim is obtained.</p> <p>32.3 Should an audit disclose any overbilling on the part of the Contractor, the Contractor shall be responsible to repay to the Commission all monies owed by the Contractor as a result of the overbilling or the Commission at its discretion may deduct the overbilling from monies owed to the Contractor. Further the Commission shall have the right at its sole discretion to restrict the Contractor, from submitting a bid on future Commission Bid Requests, for a period of time deemed appropriate by the Commission.</p>	<p>32.1 The Commission may inspect and audit the books, payrolls, account and records of the Contractor <i>pertaining to Contract Changes that are not priced under Section 27.4</i> at any time as deemed necessary by the Commission prior to Contract Completion and thereafter for a period of two years, to verify the Contractor's valuations of Contract Changes, cancelled Work and claims, and the Contractor shall supply certified copies of the books, payrolls, accounts and any other records to the Commission or access to same as required by the Commission.</p> <p>32.2 In the case of the Contractor's neglect or failure to observe fully and faithfully the provision of documentation to validate such Contract Changes, cancelled Work and claims, the Contractor shall forfeit all right to payment there for, which it otherwise might have had and shall not make any claim in respect thereof; and if made, the Commission may reject the same as invalid, and the Contractor shall not have any right of recovery in respect thereof at law or otherwise, unless written consent of the Commission's Representative to the making of such a claim is obtained.</p> <p>32.3 <i>(Deleted)</i></p>	<p>The Contractor agrees to have audited only changes performed on a lump sum basis.</p>

SC15 - Indemnification

Original Clause	Agreed Clause	Impact
<p>15.1 The Contractor shall hereby assume the defense of, fully indemnify and hold harmless the Commission, its Commission's Representative, consultants, agents and employees in respect of the amount of any claim, demand, loss, cost, expense (including reasonable legal expenses), action, suit, proceeding, liability, fine, penalty, interest, payment or damage by whomsoever (including, without limitation, the Commission) which is made, sustained, brought or prosecuted in any manner based upon, occasioned by or attributable to any breach of the Contract by the Contractor, or to any willful misconduct, fault, or negligent act or omission of the Contractor or any person, agent, consultant, firm or corporation for whose acts the Contractor is liable at law (collectively referred to as "Claims"). Further, the Contractor shall pay any amount of Claims incurred by the Commission on account of any injuries, including death or damages, received or sustained by any persons or property and if it fails to do so, the Commission may pay such Claims and deduct the amount thereof from any monies due, or to become due, to the Contractor, or otherwise recover such amounts or any balance thereof from the Contractor.</p> <p>15.2 Subject to any Supplementary Condition with respect to the payment of liquidated damages, if applicable, neither party shall be liable to the other party for any consequential damages, including, but not limited to, claims for loss of profit or reputation.</p> <p>15.3 Notwithstanding anything to the contrary contained in the Contract, the Contractor's liability to the Commission will not exceed the total Contract Price ("Limitation on Indemnity") for the Products or Work as set forth herein provided, however, this Limitation on Indemnity will not apply to:</p> <ul style="list-style-type: none"> i) any obligation of Contractor to indemnify the Commission based on claims of third parties on account of personal injury or property damage; ii) to the amount of liquidated damages available to the Commission hereunder; iii) any liability related to the Contractor's gross negligence or willful misconduct; and iv) any injury to Commission's Representatives, consultants, agents, employees or Commission's property to the extent caused by the gross negligence or willful misconduct of the Contractor or its agents. 	<p>15.1 <i>The Contractor shall assume the defense of, fully indemnify and hold harmless the Commission, its Commission's Representative, consultants, agents and employees, from and against claims, demands, losses, costs, damages, actions, suits or proceedings by third parties which is made, sustained, brought or prosecuted in any manner based upon, occasioned by or attributable to any breach of the Contract by the Contractor, or to any willful misconduct, fault, or negligent act or omission of the Contractor or any person, agent, consultant, firm or corporation for whose acts the Contractor is liable at law, further, the Contractor shall pay any liabilities, costs, damages, or expenses incurred by the Commission on account of any injuries, including death or damages, received or sustained by any third persons or property, including consequential losses, and if it fails to do so, the Commission may pay such liabilities, costs, damages or expenses and deduct the amount thereof from any monies due, or to become due, to the Contractor, or otherwise recover such amounts or any balance thereof from the Contractor.</i></p> <p>15.1 <i>(Deleted)</i></p> <p>15.2 <i>(Deleted)</i></p> <p>15.3 <i>(Deleted)</i></p> <ul style="list-style-type: none"> iii) <i>(Deleted)</i> iv) <i>(Deleted)</i> iii) <i>(Deleted)</i> v) <i>(Deleted)</i> 	<p>The Contractor will only take over TTC's defence and indemnify TTC if the claim made by the third party arises out of the Contractor's negligence or willful misconduct.</p>