



## STAFF REPORT ACTION REQUIRED

### Response to Lobbyist Registrar Inquiries: Lobbying in Relation to a Procurement Process

<b>Date:</b>	September 24, 2013
<b>To:</b>	City Council
<b>From:</b>	City Manager
<b>Wards:</b>	All
<b>Reference Number:</b>	P:\2013\Internal Services\pmmd\cc13008pmmd (AFS18207)

#### SUMMARY

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City Council referred the following two reports to the City Manager for consideration and a report back to the October 2013 City Council meeting:

- a) CC37.6 "Report on an Inquiry: Lobbying in Relation to a Procurement Process for the Beneficial Use of Biosolids - Connect Consulting Solutions and Orgaworld Canada Ltd." (the "Orgaworld/CCS Report"); and
- b) CC37.7 "Report on an Inquiry: Lobbying in Relation to a Procurement Process for the Beneficial Use of Biosolids - Connect Consulting Solutions and Lystek International Inc." (the "Lystek/CCS Report").

City staff, including the Treasurer's Office, the Director, Purchasing and Materials Management ("PMMD"), the City Solicitor's Office, Toronto Water and the Lobbyist Registrar's Office, considered both reports in light of the City's Lobbying By-law and the Procurement Process Policy to determine if further action needs to be taken against the vendors involved to suspend them from future calls. The Procurement Process Policy prohibits vendors and their representatives from communicating with City staff, officials and members of City Council with respect to any procurement call, from the time of issuance until the time of award, except for the Official Point of Contact as noted in the procurement call. A breach of this prohibition can lead to the vendor to be suspended from future calls, even if the breach was done by a hired lobbying consultant.

Based on a review of the facts as outlined in the Lobbyist's reports, staff are not recommending any further action be taken at this time to suspend the vendors from future calls. Moving forward, the Lobbyist Registrar has agreed to notify the Director, Purchasing and Materials Management Division when she has suspended, revoked or

removed a registration about a procurement-related subject matter and this information appears in the lobbyist registry.

## **RECOMMENDATIONS**

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### **The City Manager recommends that:**

1. City Council receive this report for information.

### **Financial Impact**

The recommendations in this report will have no financial impact beyond what has already been approved in the current year's budget.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

### **DECISION HISTORY**

At its meeting of July 16 to 19, 2013, City Council referred the following two reports from the Lobbyist Registrar to the City Manager for consideration and report back to the October 8 and 9, 2013 Council meeting:

- CC37.6: Report on an Inquiry: Lobbying in Relation to a Procurement Process for the Beneficial Use of Biosolids - Connect Consulting Solutions and Orgaworld Canada Ltd.  
(<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CC37.6>)
- CC37.7: Report on an Inquiry: Lobbying in Relation to a Procurement Process for the Beneficial Use of Biosolids - Connect Consulting Solutions and Lystek International Inc. Referred to as the Lystek/CCS Report herein.  
(<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CC37.7>)

At its meeting held on June 11 to 13, 2013, City Council received a report from the Lobbyist Registrar advising that for the first time the City obtained a conviction under the *Provincial Offences Act* for breach of the Lobbying By-law with respect to a corporate lobbyist illegally communicating in relation of a procurement process when not permitted to do so (re: CC36.1 "Report on a Prosecution for Breach of the Lobbying By-law").  
(<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CC36.1>)

City Council last revised the Procurement Processes Policy with respect to Section 5.0 "Official Point of Contact and Lobbying Prohibition" by adopting Administration Committee Report 6, Clause 6 titled "Amend and Repeal Various Purchasing Policies" at its meeting held on September 25, 26 and 27, 2006.  
(<http://www.toronto.ca/legdocs/2006/agendas/council/cc060925/adm6rpt/cl006.pdf>)

## **ISSUE BACKGROUND**

City Council has taken a number of significant steps to ensure that the lobbying is done in an ethical and transparent manner and to protect the integrity of the City's procurement processes by enacting the Lobbying By-law and adopting the City's Procurement Processes Policy both of which prohibit vendors and their representatives / lobbyists from communicating with any City staff, City official or member of City Council with respect to any procurement call from the time of issuance until the time of award.

A breach of the Lobbying By-law is a provincial offence for which a person is liable to a maximum fine of \$25,000 on a first conviction and \$100,000 on each subsequent conviction. The Lobbyist Registrar may suspend or revoke a registration that is found not to comply with the requirements of the by-law.

Section 5.0 of the Procurement Process Policy ("Section 5.0") sets out that during a procurement call, an official point of contact will be set out in the call document for all questions about the procurement to be directed. Section 5.0 also prohibits vendors and their representatives from communicating with any City staff, City official or member of City Council except for the Official Point of Contact from the time the call is issued until the time of award. A breach of this policy will subject a vendor to disqualification from the call or future calls in the discretion of Council. Attachment 1 sets out the current Section 5.0.

## **COMMENTS**

The City of Toronto is relatively unique in that it has a specific policy that prohibits lobbying during the procurement and indicates that someone in breach may be disqualified on that specific call and on future calls at the discretion of Council. Other municipalities include a prohibition on lobbying but do not include a penalty, while some municipalities do not have a specific section prohibiting lobbying at all. Further, the Provincial Government and the Federal Government do not prohibit lobbying during a procurement process. Both levels of government only require that the lobbying be registered on the respective lobbyist registries.

PMMD's primary concern when reviewing a violation of Section 5.0 is its impact on the procurement process. Specifically, did the lobbying result in unfairness by giving the vendor an advantage or changing the results of the award of the procurement. PMMD also considers whether the individual or company has violated Section 5.0 previously, which since the creation of the Lobbyist Registrar can also include any findings by the Lobbyist Registrar.

Where PMMD is aware of a violation of Section 5.0, it often arises where an individual or company could be appealing the decision to declare their bid or proposal as non-compliant to the Chief Purchasing Official or they are asking for a change to a specification or requirement of the call, where at the same time, they copy a member of

Council or the Mayor's Office or other City staff. When this occurs, PMMD will first remind the individual or company about Section 5.0, and the potential implications under the Lobbying By-law. PMMD will copy the Lobbyist Registrar's office on that email. PMMD will still investigate and respond properly to the original communication. Typically, the individual or company complies with Section 5.0 on subsequent communications with PMMD as their issue is being considered.

Second, the company may contact other City staff or a member of Council or the Mayor's office about a subject matter that may be related to an active procurement call but that may not be clear to the City staff or member of Council contacted by the company. When this comes to light, that member of Council may contact the Lobbyist Registrar to investigate but PMMD may not be aware of the investigation. This situation has arisen in the Lystek/CCS Report where the Lobbyist Registrar launched an investigation into Lystek's communications with members of Council that PMMD was not aware of until the Lystek/CCS Report came before Council.

City staff have had discussions with the Office of the Lobbyist Registrar to determine whether the Lobbyist Registrar can alert PMMD to an investigation of a particular individual potential violation of the Lobbyist By-law as it relates to a procurement process in advance, preferably before the call closes and the award decision has been made. Under the *City of Toronto Act, 2006*, subsection 169(3), the Lobbyist Registrar shall "preserve secrecy" with respect to all matters that come to her knowledge during the course of the investigation. As such, the Lobbyist Registrar is not able to provide PMMD with specific information about an ongoing investigation. The Lobbyist Registrar, however, has agreed to notify the Director of PMMD when she has suspended, revoked or removed a registration about a procurement-related subject matter and this information appears in the lobbyist registry. This can be done once the information appears in the registry because it is then public information. A suspension, revocation or removal does not mean that the Registrar has found a violation of the Lobbyist By-law or Section 5.0. However, such notice may give PMMD an opportunity to investigate whether there is any issue with the procurement process of a call that is related to the subject matter in the suspended registration, or may show a vendor who has been warned before of violations of Section 5.0.

In addition, PMMD will review the existing templates for RFPs, RFQs and Tenders with the City Solicitor to see if any further changes need to be made to add any additional contract language to the standard terms and conditions to be able to address the situation where a vendor who has been awarded a contract through compromising the integrity of the procurement process can be terminated.

### **Recent violations of Section 5.0 and the Lobbyist By-law**

In the two reports that were referred to the City Manager, PMMD has reviewed them with respect to the violation of Section 5.0 to determine whether to recommend to Council any further action.

*Orgaworld Canada Ltd.*

The Lobbyist Registrar, in the Orgaworld/CCS Report, found that Orgaworld Canada Ltd., did not violate the Lobbying By-law in relation to a procurement process. As such, staff are not recommending any action with respect to Orgaworld Canada Ltd.

*Lystek International Inc.*

The Lobbyist Registrar, in the Lystek/CCS Report, found that Lystek International Inc. ("Lystek") did violate the Lobbying By-law in relation to Request for Proposal 9155-11-7185 for the beneficial use of biosolids generated at Ashbridges Bay Treatment Plant (the "RFP"). The RFP was issued on June 30, 2011 and was awarded on October 27, 2011 (the "RFP Blackout Period"). Five companies submitted proposals for the RFP. One company was disqualified for not meeting the mandatory criteria. The other four proponents, including Lystek, met the 75% technical scoring threshold and were awarded contracts.

Although the Lystek/CCS Report states that "Lystek met with public office holders who might play a role in the decision to award of [sic] the RFP", Council/Councillors had no part in the award of the contract. Toronto Water and PMMD had authority to make the award and were unaware of any lobbying.

According to the Lystek/CCS Report, Lystek and Connect Consulting Solution ("CCS"), Lystek's consultant lobbyist, met with two Councillors and attempted to meet with four other Councillors during the RFP Blackout Period. None of those Councillors approached PMMD or Toronto Water during this period to discuss what they had learned from Lystek and CCS. Lystek and CCS did not lobby any senior City employees during the RFP Blackout Period.

The Office of the Lobbyist Registrar did not notify PMMD of the lobbying due to the secrecy provision referred to above (*COTA* s. 169(3)). The lobbying investigation only began after the award was made. As a result, the evaluation and award of the RFP was not influenced by Lystek's breach of the Lobbying By-law and Section 5.0. While the Lobbyist Registrar found that Lystek was in breach of the Lobbying By-law, the Lobbyist Registrar also accepted Lystek's explanation that it had relied on CCS (its lobbying consultant) to ensure that Lystek was in compliance with the Lobbying By-law. The Lobbyist Registrar found that CCS breached the Lobbying By-law by failing to inform Lystek of the obligations under the Lobbying By-law.

Staff are not recommending Lystek be disqualified from future procurement calls at this time based on the following facts: Lystek has not previously been in breach of Section 5.0; the breach did not impact the procurement process for the RFP as it had no influence on the evaluation process; the Lobbyist Registrar concluded that Lystek had relied on CCS to ensure compliance; and Lystek has agreed to the requirement of training by the Lobbyist Registrar on lobbying with the City. PMMD will watch Lystek closely to ensure that there are no further breaches of Section 5.0.

Therefore, based on the above rationale, and consultation with Toronto Water and the City Solicitor, staff are not recommending that the contract with Lystek be terminated.

#### *Rescue 7 Inc.*

City Council did not refer CC36.1 to the City Manager to review and report back on, however, since this is another example of a violation of Section 5.0, staff felt it prudent to comment on the situation with Rescue 7 Inc.

The Lobbyist Registrar in CC36.1 reported that Rescue 7 Inc. had plead guilty to a charge that on January 12, 2012, being a lobbyist, Rescue 7 Inc. communicated in relation to a procurement process when not permitted to do so by the applicable procurement policies and documents. The procurement process was Request for Quotations 0505-11-0250 (the "RFQ") for the purchase of automated external defibrillators ("AEDs") which was issued on December 13, 2011 and awarded on January 18, 2012 (the "RFQ Blackout Period").

During the RFQ Blackout Period, Rescue 7 Inc. sent several emails to the Mayor's Office, which the Mayor's Office forwarded to PMMD. Rescue 7 Inc.'s emails requested that the specifications for the AEDs in the RFQ be amended so that Rescue 7 could participate in the RFQ. PMMD warned Rescue 7 Inc. of the consequences of violating Section 5.0 and the Lobbying By-law. Rescue 7 Inc. persisted which led to the charge by the Lobbyist Registrar and the guilty plea.

Overall, Rescue 7 failed to abide by the warnings from PMMD about communicating during the RFQ Blackout Period. The breach by Rescue 7 Inc. had no impact on the award of the RFQ as Rescue 7 Inc. did not submit a bid. This was also the first offence by Rescue 7 Inc. under the Lobbyist By-law. Therefore, PMMD is not recommending that Rescue 7 Inc. be disqualified from future calls at this time. On any future calls where Rescue 7 Inc. may be involved, PMMD will monitor its activities closely to ensure that it abides by Section 5.0 and the Lobbying By-law.

#### **CONTACT**

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#### **SIGNATURE**

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Joseph P. Pennachetti  
City Manager

#### **ATTACHMENTS**

ATTACHMENT 1 - Extract from the Procurement Processes Policy & from Chapter 140, Lobbying By-law.

## **ATTACHMENT 1**

### **Extract from the Procurement Processes Policy**

#### 5.0 Official Point of Contact and Lobbying Prohibition

The City of Toronto is committed to the highest standards of integrity with respect to the purchase of goods and services and managing the processes by which goods and services are acquired.

An official point of contact shall be named in all calls to respond to all communications in respect of the call from the time of issuance, during the competitive process, and up to and including the announcement of award. The official point of contact shall be the Chief Purchasing Official or designate. Should it be necessary or desirable to have contact person to respond to technical issues that person shall also be named. All communications with respect to a call must be made to an official point of contact named in the call.

Vendors, or any representatives employed or retained by them, and any unpaid representatives acting on behalf of either, are strictly prohibited from communicating, either verbally or in writing, with any other City staff, City official or member of City Council with respect to any call from the time of its issuance until the time of award.

Any vendor found to be in breach of the policy will be subject to disqualification from the call or a future call or calls in the discretion of Council.

### **Extract from Chapter 140, Lobbying, of the Toronto Municipal Code**

Section 140-41A of the Lobbying By-law provides:

- A. Lobbyists shall not communicate in relation to a procurement process except as permitted by applicable procurement policies