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May 20, 2015

VIA EMAIL: mpachol@toronto.ca

Purchasing and Materials Management Division

City Hall 18th Floor

West Tower

100 Queen Street West

Toronto, Ontario M5H 2N2

Attention: M. Pacholok

VIA EMAIL: rblake@toronto.ca

City of Toronto, Legal Services

City Hall, West Tower

100 Queen Street West

Toronto, Ontario M5H 2N2

Attention: Rob Blake

Dear Sirs:

Re: Aquagran Landscaping and Construction Ltd. and City of Toronto
RFQ 6032-15-0095 and 6032-15-0096

I have your letter of May 15, 2015, which improperly declares as non-compliant, my client's quotes for RFQs 6032-15-0091 to 6032-15-0105. The following is my client's reply to the issues raised in your letter and as also discussed with Mr. Blake yesterday which we request that you provide to the members of the Committee for use during the hearing on May 28, 2015:

1. It is true that Aquagran's bid includes 3 references from Bevcon in respect of work it performed as a sub-contractor to Bevcon and there was never an attempt to conceal this fact. **All of the subject work completed by Aquagran as subcontractor, was completed for Departments of the City of Toronto and most of the communication during Aquagran's performance of the work occurred directly between the relevant City Departments and Aquagran, not Bevcon.** Accordingly, these references should not be treated as non-compliant by the City.

2. Significantly, Christine of the City's Purchasing Department called to verify Aquagran's Bevcon references. Christine spoke at length to Massimo Tutino of Bevcon ("Tutino"), asking him if Aquagran had ever worked for Bevcon in snow works. Tutino advised Christine that Aquagran had worked under subcontract to Bevcon to perform works for the City of Toronto's Transportation Department, Parks Department, BIA's and Clean, Beautiful Streets Department and Solid Waste Management Department. Tutino told Christine that Aquagran's work had earned high ratings in each case and he suggested that Christine speak with the managers of each of these City Departments who would confirm that Aquagran was both effective and reliable. Christine indicated that she was satisfied with the references.
3. The City, acting in good faith, when assessing Aquagran's capacity to perform, is required to consider the **substance rather than the form** of these references and accordingly, should have made inquiries of the City Departments for whom the work was completed. Whether the work was performed by Aquagran as a sub-contractor to Bevcon or as a contractor, ignores the substance of the matter, which is that Aquagran performed the work, did so to a high standard and the City was the beneficiary of Aquagran's work in each case.
4. Aquagran provided a City of Toronto reference for the work it performed during the ice storm of the winter of 2013. **Aquagran acted directly under contract to the City** for this work that it performed for the Transportation Department and for which it received high ratings.
5. A reference from a non-affiliated company, such as Bevcon does not offend any rule or principle of fairness. **In this case, there is no reliance on Bevcon's or on any "affiliated/related legal entity's past experience" to support Aquagran's bid. There is also no reliance on any "transfer" of Bevcon's past experience to Aquagran in an attempt to support Aquagran's bid.** Further, there is no rule that prohibits a successful bidder from sub-contracting work, a common practice in most contracts awarded by the City, nor is there any reason that work completed in the capacity of sub-contractor, should be treated differently as a measure of a bidder's capacity to perform.
6. While the City has the discretion to determine whether references confirm a bidder's experience, it must exercise that discretion reasonably and in good faith. In exercising its discretion, it is improper for the City to focus only on the fact that Bevcon is provided as a reference and on nothing else, in order to choose to disallow Aquagran's bid.
7. There is no Conflict of Interest apparent or actual, by virtue of the fact that Aquagran used Bevcon as a reference for work it completed for the City under contract to Bevcon and the City, acting in good faith, is not entitled to refuse the bid for this reason.

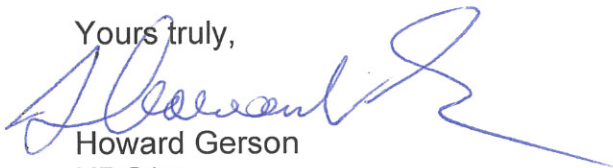
8. There is no evidence or good reason to assume, that Bevcon and/or Aquagran discussed or communicated the contents of their Quotations in the course of preparing their Quotations, or at any time, to give either an advantage in the bidding process, **or at all**. Significantly, neither company pulled its bid, nor is there any reason to believe that either company benefited from the presence of the other's bid. We disagree that the "acknowledged relationship" between Aquagran and Bevcon suggests any previous communication between them as to the contents of their Quotation.
9. In fact, entirely different factors would have influenced the price submitted by Aquagran, including but not limited to the difference in the geographic location where the work would be carried out, and the fact that Aquagran is not an incumbent bidder.
10. The indicia of my client's ability to perform its obligations, include its past work performed (eg. during the 2013 Ice Storm), its strong City of Toronto and other references for work performed directly and indirectly for the City, as well as from its ability to provide a 7 year bond to guarantee the performance of its obligations.

Finally, the comments contained in your letter in support of a finding of non-compliance make little sense, particularly given that the process resulting in the acceptance of my client's bid, involved a highly competitive lottery among 15 bidders, in which my client was the lowest bidder. My client's participation in that process was, in all material respects, compliant and free from conflict or collusion of any kind whatsoever. A decision to Disqualify Aquagran's lowest bid for the reasons disclosed in your letter, would, in the circumstances, amount to an unfair breach of the City's obligations of fairness and good faith owed both to Aquagran and to the City's taxpayers. It also undermines the policies and objectives that underlie competitive bidding, making a mockery of that process.

For these reasons, Aquagran objects to your decision to disqualify its bid and points out that such decision will result in the loss to it of approximately \$10,000,000.00 in revenue over a 7 year period, and that the City's taxpayers will unnecessarily be forced to shoulder the burden of paying substantially more for the service, if the contract is awarded to the next lowest bidder.

Please accept the contents of this letter as written submissions and provide this letter to the Committee for use at the upcoming hearing, in which my client will be a deputant.

Yours truly,



Howard Gerson

HDG/gc

cc: Client