



Office of the  
Lobbyist Registrar

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**REPORT TO COUNCIL**

**ON AN INQUIRY FOR**

**PROHIBITED COMMUNICATIONS ON**

**A REQUEST FOR QUOTATION**

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Lobbyist Registrar

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## SUMMARY

Chapter 140 of the Toronto Municipal Code, Lobbying (the “Lobbying By-law”) requires lobbyists to register and report communications with public office holders about the procurement of goods, services or construction and awarding of a contract. However, the Lobbying By-law restricts communications during an active procurement to only those permitted by the City’s procurement process. The Lobbying By-law, all relevant documents to the procurement, and the City’s Procurement Policies clearly state this restriction. From the time the procurement is issued, through to the time of the award (the “Blackout Period”), communications regarding the procurement are restricted to the procurement’s official point of contact (the “City Contact”). During the Blackout Period, communications with any public office holder, other than the City Contact, are contraventions of the Lobbying By-law. Compliance with the Lobbying By-law, and all relevant procurement rules is required to preserve both, lobbying transparency and the integrity of the City’s procurement processes.

## INTRODUCTION

This is a report on an inquiry into whether communications during the Blackout Period of a procurement were in breach of the Lobbying By-law. A Vendor (the “Vendor”) participated in a procurement as a bidder for a Request for Quotation (the “RFQ”). The Territory Manager for the Vendor is the respondent in this inquiry (the “Respondent”). The Respondent was an in-house lobbyist, as defined by § 140-20 of the Lobbying By-law. During the Blackout Period, the Respondent communicated with a Parks, Forestry and Recreation Supervisor (the “PF&R Supervisor”) about the RFQ. However, the PF&R Supervisor was not the City Contact authorized by the procurement process to receive communications in respect of the RFQ. The Respondent, therefore, contravened § 140-41A of the Lobbying By-law by communicating with a public office holder who was not authorized by the applicable procurement policies and procurement documents to receive communications about the RFQ during the Blackout Period.

Adherence to the Procurement Policy and all relevant documents to a procurement is required to preserve the integrity of the City’s procurement processes. Ensuring all lobbyists comply with § 140-41A of the Lobbying By-law guarantees lobbying transparency in the context of the City’s procurement processes.

### INQUIRY PROCESS

This inquiry was initiated on December 7, 2016, when the Purchasing and Materials Management Division (“PMMD”) sent the Lobbyist Registrar (the “Registrar”) copies of communications by the Respondent relating to the RFQ.

At the request of the Office of the Lobbyist Registrar’s Inquiries and Investigations Counsel (“OLR Counsel”), PMMD provided a copy of the RFQ and related documents.

On March 15, 2017, OLR Counsel sent a Notice of Inquiry to the Respondent, setting out the allegations of lobbying about a RFQ when prohibited during the Blackout Period, and requesting copies of all related documents and providing him an opportunity to respond.

On March 28, 2017, the Respondent informed OLR Counsel that he had retained legal counsel regarding this inquiry (the “Respondent’s Counsel”).

On April 18, 2017, Respondent’s Counsel provided a responding memorandum and an affidavit from the Respondent in response to the Notice of Inquiry.

On July 5, 2017, OLR Counsel summonsed electronic documents related to the RFQ from internal servers. On July 18, 2017, the summonsed documents were received.

On September 15, 2017, OLR Counsel spoke to the PF&R Supervisor who had been contacted by the Respondent. After that conversation, OLR Counsel requested documentation from the Parks, Forestry and Recreation Division (the “PF&R”). On September 19, 2017, the requested documentation was received.

The proposed findings, disposition and the facts upon which they were based were sent to the Respondent and Respondent’s Counsel on November 16, 2017, and they were provided an opportunity to respond.

On November 24, 2017, the Respondent through Counsel accepted the proposed findings and disposition as outlined in this report.

### FACTS AND EVIDENCE

1. A Notice to Potential Bidders concerning the RFQ was issued on a date in May of 2016. The Notice indicated a closing deadline sixteen days hence; and contained provisions restricting communications to a named buyer in PMMD, the City Contact. The City’s 2008 Procurement Processes Policy (the “Procurement Policy”), section 5.0 restricted all communications to the official point of contact named in the RFQ, that being the City Contact, or the Chief Purchasing Official, or his designate.
2. On May 13, 2016, the Respondent purchased and downloaded the RFQ.
3. On May 19, 2016, the Vendor submitted a bid on the RFQ.

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4. On June 17, 2016, the City Contact emailed the VP of Finance for the Vendor, requesting, as per the RFQ, that a sample ... (the "Sample") be delivered to an address in Toronto to the attention of the PF&R Supervisor.
5. On June 24, 2016, the Respondent and the VP of Sales for the Vendor, delivered the Sample as requested.
6. The Respondent sent six emails to the PF&R Supervisor, interspersed through the following dates: July 5, July 13, August 18 and August 22, 2016. The exchange of emails between the Respondent and the PF&R Supervisor has been reproduced below:
  - a. On July 5, 2016, the Respondent emailed the PF&R Supervisor, stating:

*Good Afternoon (name redacted),*

*I am emailing to follow up on the ... RFQ for the City of Toronto. We had delivered our sample ... to your office on Friday June 24th, and wanted to follow up to see if there were any updates on the evaluation process? You had indicated on the phone this morning that the evaluation had not yet taken place.*

*Please feel free to contact us during the evaluation process at anytime, as we are happy to provide any other necessary information that may be required regarding this RFQ ....*

*A few points of clarification regarding the sample ... that was delivered:*

1) Assembly Hardware Specification – *The sample ... was delivered with upgraded assembly screws that exceed the required specification. The screws that are used to attach the ... are #1/4 – 15 x 1.00", High-Low screw, 18-8 stainless steel. This is a screw that we have previously used on many other projects, as it offers superior strength and hold. **Please note:** if the City of Toronto would prefer that the ... are installed using the #12 Robertson, 1.00", 18-8 stainless steel; we are happy to provide the ... with this type of screw.*

2) Paint Specification – *All finishes are to be a **Tiger Drylac, exterior grade Super-durable powder coat**, applied to a minimum thickness of 4mm.*

*– Primer is to be **Tiger Drylac 69/90701 epoxy zinc rich primer** applied to a minimum thickness of 1mm.*

*Colours are to be: RAL 9017 – Traffic Black (matches Pantone Black C)*

*: RAL 6005 – Moss Green*

*: RAL 5019 – Capri Blue (matches Pantone 647C)*

*: Samples are available upon request*

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- 3) Solid Cast Aluminum ... Specification – The cast aluminum ends that are included in the sample ... that has been delivered to your facility include minor variations in order to meet the height specifications, while at the same time not infringing on the copyright of the existing casting design.

*Please note that the sample that has been provided does show a welded piece that will only exist on the sample; as the ends that would be used in regular production (if awarded) will be a single solid cast aluminum piece, as per the specification.*

- 4) ...t Reinforcements – The sample provided has been built using **stainless steel ... reinforcement** pieces. This material exceeds the minimum standard of galvanized or painted steel. Stainless steel reinforcements will ensure that this component of the ... is completely protected from corrosion, and maintenance free, for the life of the ....

*Hopefully this helps provide additional clarification with regards to the product that **the Vendor** (name redacted) can provide for the City of Toronto. We look forward to working together on this project and others in the future. Thank you for your consideration.*

- b. On July 13, 2016, the Respondent emailed the PF&R Supervisor, stating as follows:

*Good Morning (name redacted),*

*I just thought I would check in and see if there were any updates on the Toronto ... RFQ? Please let me know if there's anything that you may need from us. Thanks.*

- c. On July 13, 2016, the PF&R Supervisor responded to the Respondent's email as follows:

*The city engineer reviewed the ... last week I sent him your email from last week also. I am waiting on his report.*

- d. On July 13, 2016, the Respondent in a response email to the PF&R Supervisor, wrote as follows:

*Thanks (name redacted). I appreciate the update, and thanks for passing on the additional info.*

*Have a great afternoon.*

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- e. On August 18, 2016, the Respondent emailed the PF&R Supervisor, stating as follows:

*Good Afternoon (name redacted),*

*I am emailing to follow up on the RFQ to supply ... for the city of Toronto. We had dropped off a sample ... back in June as well as provided some requested documentation, and we were wondering if there were any updates on this project. Any info you could provide, would be greatly appreciated. Thanks (name redacted).*

- f. On August 22, 2016, the PF&R Supervisor responded to the Respondent's email as follows:

*I still have not seen a report from the purchasing department. I believe it is still in the engineers hands.*

*(name redacted)*

- g. On August 22, 2016, the Respondent in a response email to the PF&R Supervisor, wrote as follows:

*(name redacted),*

*Thanks for getting back to me. We are looking forward to proceeding with the next step on this project, and just want to make sure that any necessary information is available. Is there someone in the engineering dept that you think we could follow up with, regarding this tender?*

- h. On August 22, 2016, the PF&R Supervisor responded to the Respondent's reply email as follows:

*Has anyone contacted you to ask for information*

- i. On August 22, 2016, the Respondent responded to the PF&R Supervisor's reply as follows:

*We have provided some additional information to (name redacted) in the purchasing dept. earlier in the summer, and we have been trying to keep in touch with her as well.*

*We hadn't heard anything for a while and just wanted to make sure we hadn't missed anything. We will wait to hear from someone at the City.*

7. The PF&R Supervisor was a public office holder who was not the City Contact named in the RFQ as the official point of contact.

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8. Bid Committee awarded the contract for the RFQ to another bidder. In the report before the Bid Committee the Director, Purchasing and Materials Management (the "Director PMMD") declared the Vendor's bid non-compliant.
9. There is no record of the Vendor being advised before the release of the Bid Committee Meeting Agenda that their bid was declared non-compliant.
10. In and around November 25, 2016, the VP of Sales for the Vendor contacted the Director PMMD to enquire into the declaration of non-compliance.
11. On November 30, 2016, in response to a request from the Director PMMD, the VP of Sales for the Vendor provided all of the email correspondence between the Vendor and the City of Toronto.
12. On December 2, 2016, the Director PMMD emailed the VP of Sales for the Vendor stating in part as follows:

...

*Further, I would note that you have considerable emails to what appears to be Parks, Forestry and Recreation staff. This is contrary to the Procurement Processes Policy and the Lobbying By-law. The Procurement Processes policy prohibits communications during a procurement process with any staff except for the buyer or the Chief Purchasing Official. It is also a violation of the lobbying by-law which prohibits communication during a procurement process. The violation of the lobbying by-law can lead to a fine, while the violation of the Procurement Processes Policy can lead to disqualification or suspension from future bids. I am obligated to inform the Lobbyist Registrar of this situation.*

## LAW AND POLICY

The Lobbying By-law, the Procurement Policy, and the RFQ document each outline restrictions on communications during the Blackout Period. The relevant provisions of each have been reproduced below for ease of reference.

### I. The Lobbying By-law

#### **§ 140-1. Definitions.**

COMMUNICATION — Any form of expressive contact, and includes oral, written or electronic communication.

LOBBY — To communicate with a public office holder on any of the following subject matters:

...



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(2) Procurement of goods, services or construction and awarding a contract

PUBLIC OFFICE HOLDER:

A. The same meaning as a public office holder as defined in section 156 of the *City of Toronto Act, 2006*.

### **§ 140-10. Registration requirement.**

No person shall lobby a public office holder without being registered as required under Articles II, III or IV, unless otherwise exempted under this chapter.

### **§ 140-20. Definitions.**

EMPLOYEE – Includes an officer who is compensated for the performance of his or her duties.

IN-HOUSE LOBBYIST:

A. An individual who is employed by an individual, corporation, organization or other person, or a partnership, a part of whose duties as an employee is to lobby on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary.

### **§ 140-41. Compliance with policies restricting communication.**

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

...

C. In the event of a conflict or inconsistency between Subsection A and any other provision of this chapter, Subsection A prevails.

### **City of Toronto Act, 2006**

Definitions

[156](#) In this Part,

“public office holder” means,

(b) an officer or employee of the City,

## **II. Procurement Processes Policy (2008)**

### **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.

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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.

The RFQ, s.6.7 states in part:

### 6.7 Samples

6.7.1 If requested, the Bidder shall submit a sample of the Products offered for evaluation against the requirements provided in Appendix "C" – Price Form, within five (5) Business Days of request at no cost to the City. Failure to provide the sample within the specified period may result in the Bidder being declared non-compliant. The sample shall include all related operating and warranty manuals as applicable. Should the Products offered fail to meet the specifications in this RFQ, the Quotation will be declared Non-Compliant.

6.7.2 Samples may be returned to all unsuccessful Bidders provided for evaluation in an "as is" condition. The City will not be responsible for any damage to samples during the evaluation testing process.

All samples must be delivered to, Attention: (name redacted, the PF&R Supervisor), 27 Toryork Drive, Toronto, Ontario M9L 1X9.

The RFQ, APPENDIX A, s.1 states in part:

### **1. Bidder's Responsibility**

- (1) It shall be the responsibility of each Bidder:
  - a) to examine all the components of this Request for Quotations (RFQ), including all appendices, forms and Addenda;

### III. The RFQ, APPENDIX A, 2. City Contact and Questions, states:

#### **2. City Contact and Questions**

- (1) All contact and questions concerning this RFQ should be directed in writing to the City employee(s) designated as "Buyer" in the RFQ.

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- (2) No City representative, whether an official, agent or employee, other than those identified as “Buyer” or the Chief Purchasing Official or his/her delegate are authorized to speak for the City with respect to this RFQ, and any Bidder who uses any information, clarification or interpretation from any other representative does so entirely at the Bidder’s own risk.
- (3) Not only shall the City not be bound by any representation made by an unauthorized person, but any attempt by a Bidder to bypass the RFQ process may be grounds for rejection of its Quotation.
- (4) Commencing from the issue date of this RFQ until the time of any ensuing Award, no communication shall be made by any person, including potential Bidders, or its representatives, including a third-person representative employed or retained by it (or any unpaid representatives acting on behalf of either), to promote its Quotation or oppose any competing Quotation, nor shall any potential Bidder, or its representatives, including a third-person representative employed or retained by it (or any unpaid representatives acting on behalf of either), discuss this RFQ or its Quotation with any City staff, City officials or Council member(s), other than a communication with the “City Contact” identified on page 1 on this RFQ.
- (5) Communications in relation to this RFQ outside of those permitted by the applicable procurement policies and this RFQ document contravene the Lobbying By-law, an offence for which a person is liable to a maximum fine of \$25,000.00 on a first conviction and \$100,000.00 on each subsequent conviction. In addition, the City’s Procurement Processes Policy provides that any Bidder found in breach of the policy may be subject to disqualification from the call or a future call or calls at the discretion of Council.
- (6) Notwithstanding anything to the contrary set out in this document, the obligations with respect to lobbying as set out in the City of Toronto Municipal Code, Chapter 140 shall apply. The links to the City’s Procurement Processes Policy, Lobbying By-law and Interpretive [Interpretation] Bulletin on Lobbying and Procurement are as follows:

[http://www.toronto.ca/citybusiness/pdf/policy\\_procurement\\_process.pdf](http://www.toronto.ca/citybusiness/pdf/policy_procurement_process.pdf)  
[http://www.toronto.ca/legdocs/municode/1184\\_140.pdf](http://www.toronto.ca/legdocs/municode/1184_140.pdf)  
[http://www.toronto.ca/lobbying/pdf/interpretation-bulleting\\_lobbying-procurements.pdf](http://www.toronto.ca/lobbying/pdf/interpretation-bulleting_lobbying-procurements.pdf)

## APPLICATION OF LAW AND POLICY

When the Respondent communicated about the RFQ with the PF&R Supervisor, he was not registered as a lobbyist. This, however, does not establish whether or not he was a lobbyist. Whether he was a lobbyist must be determined with reference to the definition of “lobbyist” in the Lobbying By-law.

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“LOBBY” is defined under § 140-1B(2) as including communication with a public office holder about “Procurement of goods, services or construction and awarding of a contract.”

“LOBBYIST” is defined under § 140-1, in part as follows:

*LOBBYIST:*

*B. An in-house lobbyist as defined in § 140-20.*

An “in-house lobbyist” is defined under § 140-20 as including an employee who is compensated for the performance of his or her duties, a part of whose duties is to lobby on behalf of the corporation of which he or she is an employee.

An employee of the City is included in the definition of “public office holder”.

The Respondent was the Territory Manager for the Vendor, a paid employee, when he communicated with the PF&R Supervisor, an employee of the City, about a procurement, the RFQ. Consequently, he falls within the definition of an “in-house lobbyist”. Therefore, §§ 140-10 and 140-41A applied to his communications with the PF&R Supervisor.

The Respondent communicated with a public office holder other than the City Contact about the RFQ on July 5, July 13, August 18 and August 22, 2016.

The Procurement Policy, section 5.0, and the RFQ document restricted all communications about the RFQ during the period from its issue until its award to a named contact person, the City Contact. The Respondent sent emails and spoke over the phone with a public office holder who was not the City Contact after the RFQ was issued and before the award of the RFQ.

By doing so, he contravened § 140-41A of the Lobbying By-law, which provides:

*Lobbyists shall not communicate in relation to a procurement process except as permitted by applicable procurement policies and procurement documents.*

The communications he had with the PF&R Supervisor were prohibited by the Procurement Policy and the RFQ document and constituted lobbying that was prohibited by § 140-41A.

In response to this inquiry, the Respondent’s Counsel submitted that without prior knowledge of the Lobbyist Registry and the Lobbying By-law or knowledge of the combined effect of the Lobbying By-law and the Procurement Processes Policy, one would not know that the prohibition on lobbying during the blackout period applied to communications relating to the provision of information about a bidder’s quote or to requests by a bidder as to the status of a call.

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The RFQ document, which the Vendor downloaded and responded to with a bid, in section 1 of Appendix A advised bidders that it was their responsibility to examine all the components of the RFQ including all appendices. Section 2 of this same document made clear that all contact and questions concerning this RFQ should be directed in writing to the City employee(s) designated as “Buyer” in the RFQ, also referred to as the named City Contact. Subsection 6 of section 2 of the Appendix provided links to all the relevant documents, the Lobbying By-law, the Procurement Policy and an Interpretation Bulletin that spoke to the interplay of the two.

It was the Vendor’s responsibility to examine the RFQ, including Appendix A. The Vendor was in possession of this document for a period of in and around two months before the Respondent’s first communication with the PF&R Supervisor. The RFQ document provided all the information necessary to understand the scope or breadth of the prohibition on communications during a procurement process. The Vendor had both the responsibility and the time to become acquainted with the same.

The Respondent’s Counsel also sought to distinguish the July 5, 2016 communication from other cases of contact during a blackout period on the basis that the information provided in the email related specifically to the Sample provided in accordance with the bid documents and process.

The RFQ document, section 6.7 and the email from the buyer evoking the City’s right under the RFQ to request a Sample was clear, indicating that the Sample was to be delivered to the attention of the PF&R Supervisor at the address provided. The language in both documents did not state or imply that contact with the PF&R Supervisor regarding the Sample was permitted. The direction articulated in Appendix A with regard to all contact and questions still applied. The specifics of the subject matter of a procurement-related communication made during a blackout period to anyone other than the City Contact are not material to whether or not there has been a breach of the Lobbying By-law. Provided that the communication relates to an active procurement process, the contravention of the Lobbying By-law is the communication itself, when it is made to a person other than the City Contact named as the official point of contact.

The purpose for restricting communications about procurements is to preserve the integrity and fairness of the City’s procurements process. Section 140-41A of the Lobbying By-law, by requiring that lobbyists comply with the City’s procurement policies and documents when communicating with public office holders, supports the integrity and fairness of the City’s procurements. This provision ensures adherence to Recommendation 107 of Madam Justice Bellamy in her Report on the Toronto Computer Leasing Inquiry:

*“There should be no lobbying of any kind at any time during a City procurement process.”<sup>1</sup>*

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The Honourable Madam Justice Denise E. Bellamy, Commissioner, Report, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry, (2005, City of Toronto) Volume 4, page 94.

## FINDINGS

1. The Respondent was an in-house lobbyist as defined § 140-20 of the Lobbying By-law.
2. The Respondent contravened the Lobbying By-law, § 140-41A when he communicated about the RFQ with the PF&R Supervisor on July 5, July 13, August 18 and August 22, 2016. These communications occurred during the Blackout Period and were made to a public office holder who was not the City Contact named in the procurement documents.

## DISPOSITION

Where there are issues of non-compliance, the Lobbying By-law gives the Registrar a range of enforcement powers, these include: prosecution under the *Provincial Offences Act* (POA); the imposition of temporary bans; the imposition of conditions for registration, continued registration or renewal of registration; and the ability to suspend, revoke, or remove a registration.

The Respondent and the Vendor have co-operated fully with this inquiry. The Respondent had not been in contact with the Lobbyist Registry before and was not familiar with the City's Lobbying By-law. He meets the criteria for late registration found in the OLR Interpretation Bulletin, Late Registrations and Updates. The Respondent and the Vendor, through their Counsel, have shown good faith and intent to comply with the Lobbying By-law in the future.

1. Although the communications in this report are prohibited under the Lobbying By-law, in the interest of transparency, the Respondent will be permitted to register in order to report all his lobbying activities in the public lobbyist registry.
2. The Respondent, as a condition of continued registration with the OLR, within six months of the date of this report, shall attend training on the Lobbying By-law provided by the OLR, as required by § 140-36.2B(1) of the Lobbying By-law which provides:
  - B. Without limiting the generality of Subsection A, conditions for registration, continued registration or a renewal of registration of a lobbyist may include:
    - (1) a requirement to attend training and other educational courses;
3. The results of this inquiry shall be reported to Toronto City Council in accordance with s. 169, *City of Toronto Act, 2006* and Chapter 3, § 3-7B, Toronto Municipal Code.

## COMMENTS

Preserving the integrity of the City's procurement processes is foundational to building public trust in City government. Lobbyists must comply with § 140-41A of the Lobbying By-law in order to ensure lobbying transparency in the context of the City's procurement processes.

This report is made in the public interest.

Respectfully submitted,

Cristina De Caprio  
Lobbyist Registrar