



Toronto  
Lobbyist Registrar

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**REPORT TO COUNCIL**

**ON AN INQUIRY FOR**

**PROHIBITED COMMUNICATIONS DURING A**

**PROCUREMENT PROCESS**

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# TABLE OF CONTENTS

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**SUMMARY ..... 1**

**INTRODUCTION ..... 1**

**INQUIRY PROCESS ..... 2**

**FACTS AND EVIDENCE ..... 2**

**LAW AND POLICY..... 4**

    I. The Lobbying By-law .....4

    II. The Purchasing By-law .....5

    III. The Tender Call Document.....6

**APPLICATION OF LAW AND POLICY..... 7**

**FINDINGS ..... 9**

**DISPOSITION ..... 9**

**COMMENTS..... 10**

## SUMMARY

Lobbyists are required to register and report communications with public office holders about the procurement of goods, services or construction and awarding of a contract according to Chapter 140 of the Toronto Municipal Code, Lobbying (the "[Lobbying By-law](#)"). However, the Lobbying By-law restricts communications during an active procurement to only those permitted by the Toronto Municipal Code Chapter 195, Purchasing (the "[Purchasing By-law](#)"), applicable procurement policies and procurement documents (solicitations).

From the time the solicitation is issued, through to the time of the formal acceptance of a bid, and the resulting signed written contract between the City and the successful supplier (the "Blackout Period"), communications regarding the procurement are restricted to the Chief Purchasing Official or the employee specifically designated for that purpose in the solicitation (the "City Contact").

Communications with any public office holder, other than the City Contact during the Blackout Period, are contraventions of the Lobbying By-law. Any communications raising a dispute with the procurement process made during the Blackout Period must be made in accordance with Article 10 of the Purchasing By-law. Any communications not made in accordance with this Article are also 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 on a construction tender (the "Tender"). The Vendor's representative is the respondent in this inquiry (the "Respondent"). The Respondent was an in-house lobbyist, as defined by s. 140-20 of the Lobbying By-law. During the Blackout Period, the Respondent communicated with an Engineering & Construction Services Division Acting Manager (the "E&CS Manager") about the Tender. However, the E&CS Manager was not the City Contact permitted by the Purchasing By-law to receive communications in respect of the Tender. The Respondent, therefore, contravened s. 140-41A of the Lobbying By-law by communicating with a public office holder who was not permitted by the Purchasing By-law and Tender document to receive communications about the Tender during the Blackout Period.

## Inquiry for Prohibited Communications during a Procurement Process

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Adherence to the Purchasing By-law and all relevant Tender documents is required to preserve the integrity of the City's procurement processes. Ensuring all lobbyists comply with s. 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 April 12, 2017, when the Purchasing and Materials Management Division ("PMMD") sent the Lobbyist Registrar (the "Registrar") a copy of a communication that suggested that the Respondent communicated in contravention of the Lobbying By-law with regards to the solicitation.

At the request of the Office of the Lobbyist Registrar's Inquiries and Investigations Counsel ("OLR Counsel"), PMMD provided a copy of the Tender and related documents.

On June 6, 2017, OLR Counsel sent a Notice of Inquiry to the Respondent, setting out the allegations of lobbying about a solicitation when prohibited during the Blackout Period, and requesting copies of all related documents and providing an opportunity to respond.

On June 20, 2017, Counsel for the Respondent and Vendor replied to the Notice of Inquiry.

The proposed findings, disposition and the facts upon which they were based were sent to the Respondent and Respondent's Counsel on January 14, 2019, and they were provided an opportunity to respond.

On March 4, 2019, 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 Tender was issued on February 2, 2017. The Notice indicated a closing date of February 16, 2017; and contained provisions limiting communications to a named buyer in PMMD, the City Contact. The Purchasing By-law restricted all communications to the Chief Purchasing Official or the City Contact named in the Tender.
2. On February 3, 2017, the Respondent purchased the Tender document.

## Inquiry for Prohibited Communications during a Procurement Process

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3. On February 10, 2017, PMMD issued an addendum to the Tender.
4. In and around February 11, 2017, the Respondent, in a conversation with the E&CS Manager about another ongoing project, raised the Tender and the concern that the experience requirements were too restrictive.
5. On February 11, 2017, the Respondent emailed a question to the City Contact, asking if the City would consider reducing the experience and qualifications requirement in the Tender.
6. On February 13, 2017, PMMD issued a second addendum in which the Respondent's question, amongst others, was answered. The request to reduce the experience and qualifications requirement was denied.
7. On February 13, 2017, the Respondent again spoke to the E&CS Manager to express his concern about the City's decision, as articulated in the second addendum, to deny the request to reduce the experience and qualifications requirement.
8. The E&CS Manager was a public office holder who was not the City Contact named in the Tender as the official point of contact.
9. On February 28, 2017, the Respondent was advised that the Vendor's bid was declared non-compliant as it did not meet the mandatory requirements for experience and qualifications.
10. On March 22, 2017, the Bid Committee awarded the contract for the Tender 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.
11. On March 7, 2017, Counsel for the Vendor submitted a pre-award dispute letter to the Director PMMD regarding the declaration of non-compliance.
12. On March 10, 2017, the Director PMMD replied to the pre-award dispute letter.

## LAW AND POLICY

The Lobbying By-law, the Purchasing By-law, and the Tender document when read in concert govern communications during the Blackout Period. The relevant provisions of each have been reproduced below for ease of reference.

### I. The Lobbying By-law

#### **Section 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:

...

B. (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.

#### **Section 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.

#### **Section 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.

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

A. Lobbyists shall not communicate in relation to a procurement process except as permitted by Chapter 195, Purchasing, 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. The Purchasing By-law**

### **Section 195-2.1. Definitions.**

SOLICITATION – A written notice to suppliers, whether or not it is publically advertised or intended to result in a contract, and includes a:

...

F. Request for tenders (RFT).

ARTICLE 10: Bid Disputes

### **Section 195-10.1. Pre-award bid disputes.**

Suppliers should seek a resolution of any pre-award dispute by communicating directly with the Chief Purchasing Officer as soon as possible from the time when the basis for the dispute became known to them. The Chief Purchasing Officer may delay an award, or any interim stage of a procurement, pending the acknowledgement and resolution of any pre-award dispute.

## **Section 195-10.2. Post-award bid disputes.**

Any dispute to an award decision must be received in writing by the Chief Purchasing Officer no later than ten (10) days after the date of the award notification, or where a debriefing has been requested, no later than five (5) days after such debriefing is received. Any dispute that is not timely received or in writing will not receive further consideration.

...

ARTICLE 13: Supplier Code of Conduct

## **Section 195-13.9. Prohibited communication during the solicitation.**

No supplier, or affiliated person, may discuss or communicate either verbally, or in writing, with any employee, public office holder, or the media in relation to any solicitation between the time of the issuance of the solicitation to the award and execution of final form of contract, unless such communication is expressly permitted in the solicitation and in compliance with Chapter 140, Lobbying. All supplier communications shall be with the Chief Purchasing Official or the employee specifically designated for that purpose in the solicitation.

## **III. The Tender Call Document**

### **Section 1 – Tender Process Terms and Conditions**

#### **1. Definitions**

Throughout this Tender Call, unless inconsistent with the subject matter or context,

...

“Buyer” means the main contact person at the City for all matters related to the Tender Call process, as set out on the Tender Call Cover Page;

#### **2. Bidder’s Responsibility**

It shall be the responsibility of each Bidder:

...

- b) to examine all the components of this Tender Call, including all appendices, forms and addenda;



## Inquiry for Prohibited Communications during a Procurement Process

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- c) to become familiar and comply with all of the terms and conditions contained in this Tender Call and the policies and legislation set out on the City's website at: [www.toronto.ca/purchasing/policy.htm](http://www.toronto.ca/purchasing/policy.htm).<sup>1</sup>

The failure of any Bidder to acquire, receive or examine any document, form, addendum, or policy shall not relieve the Bidder of any obligation with respect to its Bid or any purchase order issued based on its Bid.

...

### 7. Questions

All questions concerning this Tender Call should be directed in writing to the Buyer as designated on the Tender Call Cover Page.

No other City representative, whether an official, agent or employee, is authorized to speak for the City with respect to this Tender Call, and any Bidder who uses any information, clarification or interpretation from any other representative does so entirely at the Bidder's own risk.

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 Tender Call process may be grounds for rejection of its Bid.

## APPLICATION OF LAW AND POLICY

When the Respondent communicated about the Tender with the E&CS Manager, the Respondent was not registered as a lobbyist. This, however, does not establish whether or not the Respondent was a lobbyist. Whether the Respondent was a lobbyist must be determined with reference to the definition of "lobbyist" in the Lobbying By-law.

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<sup>1</sup> This link leads to the "[Doing Business with the City](#)" webpage wherein under the drop down menu titled "[Understand the Procurement Process](#)" is a link to a sub-menu titled "[Policies, Legislation and Rules Regarding City Procurement](#)" which provides, in part, the following statement:

...

Lastly, vendors must not communicate with members of Council and their staff about a procurement. You may contact a City employee who is named as the point of contact in the procurement document. You must not contact any other City staff or officials about a procurement. For more information, see the Lobbyist Registrar's [Interpretation Bulletin, Lobbying and Procurements](#) or contact the Office of the Lobbyist Registrar at 416-338-5858, [lobbyistregistrar@toronto.ca](mailto:lobbyistregistrar@toronto.ca).

## Inquiry for Prohibited Communications during a Procurement Process

“LOBBY” is defined under s. 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 s. 140-1, in part as follows:

*LOBBYIST:*

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

An “in-house lobbyist” is defined under s. 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 Vendor’s representative, a paid employee, when he communicated with the E&CS Manager, an employee of the City, about a procurement, the Tender. Consequently, he falls within the definition of an “in-house lobbyist”. Therefore, ss. 140-10 and 140-41A applied to his communications with the E&CS Manager.

The Respondent communicated with a public office holder other than the City Contact about the Tender in and around February 11 and 13, 2017.

The Purchasing By-law and the Tender document permitted communication about the Tender, during the period from the issuance of the solicitation until the award and execution of final form of contract, with a named contact person, the City Contact. The Respondent spoke over the phone with a public office holder who was not the City Contact after the Tender was issued and before it was awarded and the final form of contract executed.

By doing so, the Respondent contravened s. 140-41A of the Lobbying By-law, which provides:

*A. Lobbyists shall not communicate in relation to a procurement process except as permitted by Chapter 195, Purchasing, applicable procurement policies and procurement documents.*

The communications the Respondent had with the E&CS Manager were not permitted by the Purchasing By-law and the Tender document and constituted lobbying that was prohibited by s. 140-41A.

Through counsel, the Respondent indicated that they construed section 1 subsection 7 of the Tender document as allowing for the communications, and hence they unwittingly

## Inquiry for Prohibited Communications during a Procurement Process

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contravened the Lobbying By-law. I accept that the Respondent had no intent to breach the Lobbying By-law and may have misunderstood section 1 subsection 7 of the Tender document. On this point, I will note that such misunderstandings should be avoided in the future as the language used in City solicitations since this Tender is more express about acceptable communications and the Lobbying By-law.

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>2</sup>

## FINDINGS

1. The Respondent was an in-house lobbyist as defined by s. 140-20 of the Lobbying By-law.
2. The Respondent contravened the Lobbying By-law, s. 140-41A when the Respondent communicated about the Tender with the E&CS Manager in and around February 11 and 13, 2017. 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

The Lobbying By-law gives the Registrar a range of enforcement powers, where there are issues of non-compliance. 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

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<sup>2</sup> 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.

## Inquiry for Prohibited Communications during a Procurement Process

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familiar with the City's Lobbying By-law. The Respondent 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 the 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 an educational course on the Lobbying By-law provided by the OLR, as required by s. 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, s. 3-7B, Toronto Municipal Code.

## COMMENTS

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

This report is made in the public interest.

Respectfully submitted,

Cristina De Caprio  
Lobbyist Registrar