



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Court Overturned Fair Wage Office Decision & Council Suspension of Queensway Excavating

Date: June 19, 2020

To: General Government and Licensing Committee

From: City Solicitor

Wards: All

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City of Toronto.

The attachment to this report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

On October 15, 2019, the Divisional Court set aside the 2018 decision of the Fair Wage Office (the "Office") that Queensway Excavating and Landscaping Ltd. ("Queensway") had violated the City's Fair Wage Policy (the "Policy"). In consequence, the Court also set aside Council's decision to disqualify Queensway from bidding on City contracts for two years. The Court also remitted the original issue of whether Queensway had operated in breach of the Policy back to the Office for reconsideration in accordance with the principles set out in the decision. The results of the Office's reconsideration are set out in the report entitled Queensway Excavating & Landscaping Ltd. - Reconsideration of Disqualification from City Contracts for Fair Wage Policy Non-Compliance, which has also been submitted to the Committee for consideration.

Subsequently, Queensway brought two separate legal proceedings against the City. The first legal proceeding was for payment of monies owed to it for work performed prior to its suspension, which had been held by the City pending the Office's determination of the amounts owed to Queensway's employees. The second was a claim for damages that Queensway alleged it incurred as a result of the fact it was unable to bid on City contracts in the interval between March, 2018, when Council decided to suspend Queensway from bidding, and October, 2019, when the Court set aside Council's decision.

This report summarizes the Court's decision and the issues raised in the other legal proceedings. Confidential Attachment 1 provides legal advice relating to Queensway's current legal proceedings.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it is about litigation or potential litigation that affects the City of Toronto and contains advice which is subject to solicitor-client privilege.

FINANCIAL IMPACT

The Court awarded Queensway costs of \$18,000, which the City has paid. Other financial impacts are discussed in Confidential Attachment 1. The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

At its meeting on May 22, 23 and 24, 2018, Council directed that Queensway be disqualified from conducting business on City projects for two years. Council's decision is at: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.GM27.16>

COMMENTS

History of Queensway's Contracting Relationship with the City

Queensway has a long history of successfully bidding on contracts for backhoe work for Toronto Water. Queensway provided backhoe equipment and operators to excavate city streets, so that Toronto Water crews could install, repair, or replace water infrastructure.

The Office investigated Queensway in 2016, and concluded that it had breached the Policy by not paying its employees at the applicable Fair Wage rate. Queensway did not contest that decision.

In early 2018, the Office investigated fresh complaints it received from Queensway employees, and concluded that the company had not paid its employees for all their hours worked, thereby failing to pay them a fair wage as defined in the Policy. It, therefore, ordered Queensway to pay back wages. As the Office determined this was

Queensway's second breach of the Policy in three years, the Office recommended that Queensway be disqualified from doing business with the City for two years.

At its meeting in April, 2018, the Committee considered the Office's report, and heard from Queensway's lawyer, the Office, and City staff. The Committee recommend disqualification to Council.

Council received and accepted the Committee's recommendation without debate at its meeting on May 22, 2018, and disqualified Queensway from work on City contracts for two years.

Queensway's Court Application to Quash the City's Decisions

Queensway filed an application for judicial review in the Divisional Court, challenging both the reasonableness of the decisions of the Office and Council, and the procedures used by the Office, the Committee and Council. It sought to have the decisions set aside, and claimed \$998,730 in damages for lost revenue it alleged it would have earned but for the impugned decisions.

The Divisional Court heard the application over two days in May 2019. In its decision,¹ rendered October 15, 2019, the Court set aside the decisions of both the Office and Council. Specifically, the Court concluded that the Office had not provided Queensway with sufficient notice of its investigation or disclosure of its conclusions prior to rendering its decision. It, therefore, deprived Queensway of the right to be heard. Accordingly, because the Office breached Queensway's right to procedural fairness, its decision was set aside.

Because Council's decision to disqualify Queensway from bidding on City contracts depended on the Office's conclusion that the company had breached the Policy, it was also set aside. Notably, the Court did not make any comment on the reasonableness of the decisions of either the Office or Council, and did not consider Queensway's arguments challenging provisions of the City's procedural bylaw. The Court refused Queensway's claim for damages, holding that such relief is not available on an application for judicial review.

The Court remitted the matter back to the Office for reconsideration based on the Court's reasons.

Further Review Conducted by the Fair Wage Office

Given the Court's decision, the Fair Wage Office conducted another review to assess whether or not Queensway had been operating in compliance with the Fair Wage Policy. The Fair Wage Office's report summarizing the results of this second review, entitled Queensway Excavating & Landscaping Ltd. - Reconsideration of

¹ Queensway Excavating & Landscaping Ltd v. Toronto (City), 2019 ONSC 5860 (Div. Ct.)

Disqualification from City Contracts for Fair Wage Policy Non-Compliance, is also before the Committee for consideration.

Additional Legal Proceedings Commenced by Queensway

Two weeks after the Divisional Court released its decision, Queensway brought a fresh application in the Superior Court of Justice for payment of \$396,232.80 for work already performed pursuant to contracts with the City.

Queensway also subsequently brought an action against the City in the Superior Court claiming \$200,000 in damages resulting from the decisions that it was operating in violation of the Policy and to suspend it from bidding.

CONTACT

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SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Settlement of Queensway's Application for Payment for Work Performed