



Toronto
Lobbyist Registrar

**REPORT TO COUNCIL
ON AN INQUIRY FOR
PROHIBITED COMMUNICATIONS ON
A REQUEST FOR PROPOSAL**

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Lobbyist Registrar

November 24, 2022

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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, on the public, online Lobbyist Registry (the "Registry") according to Chapter 140 of the Toronto Municipal Code, Lobbying (the "Lobbying By law"). Lobbyists are required to report all lobbying communications on their registration within three business days after the lobbying occurs. 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 (the "CPO") or the employee specifically designated for that purpose in the solicitation (the "City Contact").

Communications with any public office holder, other than the CPO or the City Contact during the Blackout Period, are contraventions of the Lobbying By-law. Compliance with the Lobbying By-law, and all relevant procurement rules are 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 that occurred after the issuance of a Notice of Intended Procurement ("NOIP") but before the issuance of the solicitation contravened the prohibition on lobbying during the Blackout Period of a procurement. A Vendor (the "Vendor") participated in a procurement as a bidder for a negotiated Request for Proposal (the "nRFP"). The Country Manager for the Vendor 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. After the issuance of the NOIP but before the issuance of the nRFP, the Respondent communicated with a staff member in the Mayor's office (the "Staff Member") regarding the good the City intended to procure in the NOIP. However, the Staff Member was not the CPO or the City Contact authorized by the procurement process to receive communications in respect of the RFP. The Respondent was registered as an in-house lobbyist but failed to report their lobbying activities on the Registry.

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INQUIRY PROCESS

On May 10, 2022 Toronto Lobbyist Registrar Inquiries and Investigations Counsel (“TLR Counsel”) requested and received a copy of the NOIP and RFP from the Purchasing and Materials Management Division (“PMMD”).

On May 16, 2022 TLR Counsel commenced an Inquiry and summonsed electronic documents related to the Respondent's communication with the Staff Member.

On May 24, 2022 the summonsed documents were received.

On May 26, 2022 TLR Counsel summonsed further electronic documents related to the Respondent's communication with the Staff Member.


On May 26, 2022 the summonsed documents were received.

On May 27, 2022, TLR Inquiries and Investigations Counsel sent a Notice of Inquiry to the Respondent with an opportunity to respond to the allegations set out in it.

On June 10, 2022, the Respondent replied to the Notice of Inquiry.

FACTS AND EVIDENCE

1. On September 9, 2020 the Respondent, through a consultant lobbyist, requested a meeting with the Staff Member.
2. A NOIP was issued by PMMD on September 10, 2020.

 **Toronto**

Michael Pacholik, Chief Procurement Officer
Purchasing and Materials Management Division
City Hall, 18th Floor, West Tower
100 Queen Street West
Toronto, Ontario M5H 2N2

Elena Caruso, Manager
Goods and Services

September 10, 2020

NOTICE OF INTENDED PROCUREMENT

For: [REDACTED]
Arriba Door

This Solicitation is posted as a Sourcing Event through SAP Arriba
To participate in this Solicitation, suppliers must do the following:
1) First be registered with SAP Arriba as a City of Toronto supplier
2) Access the following link to respond on SAP Arriba:
To be provided once RFP is issued. Estimated issue date is early October 2020.

Division Contact for More Information:	[REDACTED] Senior Corporate Buyer Purchasing and Materials Management Division (t) [REDACTED] (e) [REDACTED]@toronto.ca
Cost of Document(s) & Terms of Payment:	N/A
Description of Procurement:	A Negotiable Request for Proposal (RFP) is to be issued for the procurement of [REDACTED]
Recurrent Contract?	Not Applicable
Delivery Schedule for Goods or Services OR Contract Duration:	The term of the Agreement is estimated to be for 120 months.
Procurement Method:	Request For Proposal
Language(s) Permitted for Response by Supplier:	English
Limited # of Suppliers?	1
Name of Trade Agreement(s) that is Applicable to the procurement	Chapter 19 of Comprehensive Economic and Trade Agreement (CETA); Chapter 5 of Canada Free Trade Agreement (CFTA); and Chapter 9 Trade and Cooperation Agreement between Ontario and Quebec (OQTCA).
ESTIMATED DEADLINE FOR SUBMITTING TO SOLICITATION:	[REDACTED] 2020 – 12:00 PM (Eastern Standard Time)

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3. On September 16, 2020 the Respondent, through a consultant lobbyist, again requested a meeting with the Staff Member.
4. On September 16, 2020 the Staff Member arranged a September 22, 2020 WebEx meeting with the Respondent.
5. On September 22, 2020 the Respondent and the Staff Member had a WebEx meeting.
6. On November 10, 2020 PMMD issued an RFP with a closing date of December 15, 2020.
7. On November 9, 2021 the RFP was awarded.
8. In his reply, the Respondent, by way of explanation, provided as follows:

Thank you for your letter on May 27, 2022, and the opportunity to address your inquiry. In your letter you ask about a meeting that occurred on September 22, 2020. It does appear that I mistakenly and unintentionally failed to update subject matter to include this communication.

...

During the timeframe in question there was a changeover in staff from (name redacted) to myself. Mr. (name redacted) was previously responsible for the registrations and lobbying designations on behalf of (name redacted). As (name redacted) ceased his employment with (name redacted) these responsibilities passed over to me. While attempting to navigate changing the registration to myself, we determined a new account was required. Unfortunately, with this being a new process and myself being new to the municipal lobbying framework; I was learning how to update subject matter during this timeframe within the registry.

LAW AND POLICY

The Lobbying By-law, the Purchasing By-law, and the Solicitation 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.

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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.

140-21. Duty to file return; transitional.

- D. The senior office holder shall register in the return the information required under S.140- 22N, O, P and P.1(2) not later than three business days after an in-house lobbyist or committee has lobbied a public office holder.

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.

City of Toronto Act, 2006

Definitions

[156](#) In this Part,

“public office holder” means,

...

- (a) a member of city council and any person on his or her staff,

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II. The Purchasing By-law

Section 195-2.1. Definitions.

NOTICE OF INTENDED PROCUREMENT - A written notice published by the City, inviting interested suppliers to submit a bid in response to a solicitation.

...

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

...

D. Request for proposals (RFP).

...

Section 195-6.4. Notices of intended procurement.

A notice of intended procurement must be advertised and published on an electronic tendering system easily accessible to suppliers of the City for the following solicitations:

A. Procurements valued over \$100,000; or

B. A request for supplier pre-qualification for selective solicitations.

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 RFP Document

1.2 Procurement Contact

- .1 The contact Person at the City for all matters related to the nRFP process (the “**Procurement Contact**”) is set out below:

Name and Title
Name: (name redacted)

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Title: Senior Corporate Buyer

- .2 All communications relating to this nRFP must be submitted to the Procurement Contact using the internal messaging function of the City Online Procurement System.
- .3 Only communications received by the Procurement Contact in the manner permitted by this Section 1.2 (Procurement Contact) will be considered in the nRFP process. Communications with any individual other than the Procurement Contact may result in the disqualification of the Supplier in accordance with 195-13.9 of the Toronto Municipal Code, Chapter 195, Purchasing.
- .4 All permitted communications with the Procurement Contact will be deemed as having been received by the Procurement Contact on the dates and times indicated by the City Online Procurement System.

1.4 Responding to the nRFP and Prohibited Communications

...

Prohibited Communications

- .7 Suppliers (including potential Suppliers) shall not, and shall cause their representatives not to discuss, disclose or communicate, directly or indirectly, any details pertaining to or in connection with their Bid or this nRFP to:
 - any employee, official, agent, elected or appointed official or other representative of the City other than the Procurement Contact; or
 - anyone not specifically involved in their Bid (including, without limitation, any other Supplier),except as may be authorized in writing by the Procurement Contact through the City Online Procurement System.
- .8 Other than the Procurement Contact, no City representative, whether an official, agent or employee, is authorized to speak for the City with respect to this nRFP. Any Supplier who uses or relies on any representation, information, clarification, correspondence or other communication from any other City representative does so entirely at the Supplier's own risk and the City shall not be bound by such representation, information, clarification, correspondence or other communication.
- .9 Notwithstanding anything to the contrary set out in this nRFP, each Supplier shall comply with the obligations with respect to lobbying as set out in the City of Toronto Municipal Code, Chapter 140. The links to the City's Lobbying By-Law and Interpretive Bulletin on Lobbying and Procurement are as follows:

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- http://www.toronto.ca/legdocs/municode/1184_140.pdf
 - <https://www.toronto.ca/city-government/accountability-operations-customer-service/accountability-officers/lobbyist-registrar/guidelines-regulatory-bulletins/interpretation-and-advisory-bulletins/>
- .10 Communications in relation to this nRFP outside of those permitted by the applicable procurement policies and this nRFP 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 Supplier Code of Conduct provides that any Supplier found in breach of the provisions therein respecting prohibited communications may be subject to disqualification from this nRFP or suspended from future procurements in the sole and absolute discretion of the City.
- .11 Without limiting any other provision of this Section 1.4. (Responding to the nRFP and Prohibited Communications), any attempt by a Supplier to bypass the nRFP process may be grounds for rejection of its Bid.

APPLICATION OF LAW AND POLICY

When the Respondent communicated with the Staff Member regarding the good the city intended to procure in the NOIP, he was lobbying. What remains is the question of whether the blackout period was triggered at the time of the lobbying by the issuance of the NOIP and consequently, whether the Respondent is in breach of Section 140-41A of the Lobbying By-law.

“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.

A member of council’s staff is included in the definition of “public office holder”.

The Respondent was the Country Manager for the Vendor, a paid employee, when he communicated to the member of council’s staff, about the good, the City intended to procure in the NOIP. Consequently, he falls within the definition of an “in-house lobbyist.” Therefore, S. 140-21D the duty to report the communication within three days clearly applies. However, if the NOIP triggered the Blackout Period, then the more serious breach of S. 140-41A applied to his communications with the Staff Member.

The Blackout Period is a creature of the Purchasing By-law; the trigger and end are found in Section 195-13.9. The solicitation is the trigger and the award and execution of final form of contract is the end. Between these goalposts, no communication is allowed under both the Purchasing By-law and the Lobbying By-law. The exceptions are permissible communications under the Purchasing By-law, those being communications with the Chief Purchasing Official, or the employee specifically designated for that purpose in the solicitation.

The definition of “Solicitation” in the Purchasing By-law provides, in part, that a solicitation is a “written notice to suppliers, whether or not it is publicly advertised” and then articulates a non-exhaustive list of examples such as RFPs and RFQs; an NOIP is not a listed example. The definition of “Notice of Intended Procurement” provides, in part, that it is a “written notice published by the City.” Arguably, an NOIP as a “written notice” is a “written notice to suppliers” as contemplated in the definition of solicitation and as such, triggers the Blackout Period.

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The question of whether an NOIP triggers the Blackout Period is a novel one. NOIPs were introduced in the 2017 revision of the Purchasing By-law, and the question of whether it triggers the Blackout Period has risen only once in the intervening years for the Toronto Lobbyist Registry Office and was not definitively answered. This was in large part due to the fact that NOIPs are usually issued contemporaneously with the solicitations to which they give notice, solicitations that contain explicit language confirming they trigger the Purchasing By-law Blackout Period and as well, cross-reference the Lobbying By-law requirements. The result being that lobbyists did not lobby, not because they were aware that the NOIP was the start of the Blackout Period, but because they knew the contemporaneous solicitation triggered the Blackout Period.

The Lobbying By-law interpretation bulletin, titled Lobbying and Procurements clearly states that a solicitation triggers the Blackout Period. However, it does not explicitly mention that an NOIP is a type of solicitation. While not required, it was an oversight to have not clearly indicated what to many would be considered a subtle legal point. In light of the understandable confusion, both internally and externally, as to whether an NOIP triggers the Blackout Period, I am of the opinion that for the purposes of this matter, the Respondent has not breached S. 140-41A of the Lobbying By-law.

FINDINGS

1. The Respondent contravened the Lobbying By-law, S. 140-21 when he failed to report the lobbying communication on his registration.
2. The Respondent did not contravene the Lobbying By-law, S. 140-41A when he communicated with the Staff Member, about the good the City intended to procure in the NOIP.

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 has co-operated fully with this inquiry. The Respondent had not been in contact with the TLR before and was not familiar with the City's Lobbying By-law. He meets the criteria for late registration found in the TLR's Interpretation Bulletin titled [Late Registrations and Updates](#). The Respondent has shown good faith and intent to comply with the Lobbying By-law in the future.

1. Although the communication in this report was late in being reported, in the interest of transparency, the Respondent was permitted to update his registration in order to report this lobbying activity in the Registry.

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2. The Respondent, as a condition of continued registration with the TLR, attended training on the Lobbying By-law, 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

The Blackout Period on lobbying articulated in S. 140-41A of the Lobbying By-law is integral in ensuring the ethical operation of the City's procurement process. To operate at its most robust it must be clear to the public, the profession and to public office holders, what triggers and ends a Blackout Period. This matter is being reported to highlight a trigger few were aware of and to give notice that the TLR and PMMD are working together to ensure that their complimentary By-law sections and documentation on the subject of the Blackout Period are updated to reflect the NOIP as one such trigger.

This report is made in the public interest.

Respectfully submitted,



Cristina De Caprio
Lobbyist Registrar