



July 11, 2016

VIA E-MAIL

Mr. Michael Pacholok
CPO & Director
City of Toronto
18th Floor, West Tower, City Hall
100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Mr. Pacholok:

**Re: City of Toronto re Proposed Revisions to Purchasing By-law
– Procurement Policy**

I am the President of the Greater Toronto Sewer and Watermain Construction Association (“GTSWCA”). The purpose of this communication is to note that the GTSWCA strongly opposes the City of Toronto’s proposed introduction of a policy which would permit the Treasurer of the City to disqualify suppliers (including contractors) who are engaged in litigation with the City.

As you are aware, the GTSWCA is joined in its opposition to this policy by other construction associations, including the Canadian Construction Association. The objection is based on two key grounds: (i) the policy represents a fundamental interference with the right of a contractor to have the courts determine legal entitlements; and (ii) the exercise of that right of judicial determination should not deprive a contractor from otherwise earning his or her livelihood.

The proposed litigation policy, contained in the draft of a new Chapter 195, unfortunately contains a number of features which are antithetical to an *open, fair, and transparent* procurement process:

1. The exercise of the City’s policy is in the absolute discretion of the Treasurer. This creates a *subjective*, rather than an objective, test for when the policy would be acted upon, which could lead to **arbitrary decision-making**;
2. The policy is intended to apply to “a supplier, or their affiliated persons”, meaning that companies who have no legal dispute with the City but who happen to be related to a company legitimately engaged in litigation with the City may nevertheless also be disqualified, which is **overly broad** in scope;



3. The policy would apply to those “in ongoing litigation with the City related to a contract awarded by the City” which would include, by definition, litigation initiated by the City itself against the contractor rather than just claims brought by the contractor against the City. This creates the possibility that the City could engage in litigation against a contractor and then invoke the policy to disqualify that contractor, which could be considered an **abuse of process or position**; and
4. The policy lists factors to be taken into account in exercising the discretion which are expressly described as “non-exclusive”, meaning that there exist other *unstated* factors which could also influence the exercise of the Treasurer’s discretion. When a contractor is engaged in an ongoing legitimate dispute with the City, the contractor would not know that whether that dispute will lead to the contractor’s disqualification on the next tender, which creates significant **uncertainty**.

For these reasons, the GTSWCA has grave concerns about the proposed policy or any similar policy in which contractors face the possibility of disqualification when they are pursuing their legal rights against the City. The City’s proposed policy is vague, uncertain, subjective, and potentially arbitrary. These characteristics are inconsistent with the essential procurement principles of good faith and fairness.

The fact that contractors bidding on City projects would not know whether they will be subsequently disqualified by the Treasurer means that the pool of bidders interested in bidding may shrink considerably. No one wants to spend time estimating and bidding on a tender only to learn, *after the fact*, that it had been a waste of resources because the Treasurer unilaterally decided to disqualify that contractor. As a result, the City may face the unintended consequence of driving away good, qualified contractors from bidding on its projects.

The problems with the proposed policy go beyond matters of principle.

As noted in the staff report of May 30, 2016, which describes the proposed changes to the procurement policies of the City, the stated intention is to implement policies that align themselves with the Broader Public Sector Procurement Directive and trade agreements. Those important sources of procurement policy emphasize the principle of “non-discrimination” in bidding opportunities. A “discriminatory practice” is defined to include the “*unjustifiable exclusion* of a qualified supplier from bidding”. From the GTSWCA’s perspective, the fact that a contractor happens to be in a dispute with the City that has gone to litigation is not itself a “justifiable exclusion” which should prevent an otherwise qualified contractor from bidding. Adopting such a policy puts the City of Toronto at risk of being offside in relation to the broad governmental procurement policies that the City is supposedly trying to align its own policies with.



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The other significant concern of the GTSWCA is with respect timing, bearing in mind the year-long review of the *Construction Lien Act* undertaken by Bruce Reynolds and Sharon Vogel of Borden Ladner Gervais LLP. Their report (and its over 100 recommendations) is currently being considered by the Provincial Government. The legislation which will likely follow from the recommendations may lead to significant changes in the way disputes are dealt with during the course of construction projects. As a result, the GTSWCA believes that it is premature to consider introducing new procurement policies at this time—especially any which relate to the relationship between claims arising on projects and possible disqualification of suppliers—until these new legislative measures are put in place.

For these reasons, the GTSWCA urges you to reconsider the proposed policy, and to instead engage in a consultation with the GTSWCA and other industry associations to develop policies to address the City's real underlying concerns.

Yours truly,

John Teahen
GTSWCA President

cc. Mayor Tory
City Councillors
Peter Wallace (City Manager)
Giovanni Cautillo (Executive Director Greater Toronto Sewer and Watermain Contractors)
Clive Thurston (President, Ontario General Contractors Association)
Ian Cunningham (President, Council of Ontario Construction Association)
John Mollenhauer (President, Toronto Construction Association)