



**City of Hamilton**  
**PROCUREMENT**  
**SUB-COMMITTEE ADDENDUM**

**Meeting #:** 21-001  
**Date:** October 29, 2021  
**Time:** 9:30 a.m.  
**Location:** Due to the COVID-19 and the Closure of City Hall (CC)

All electronic meetings can be viewed at:

City's Website:  
<https://www.hamilton.ca/council-committee/council-committee-meetings/meetings-and-agendas>

City's YouTube Channel:  
<https://www.youtube.com/user/InsideCityofHamilton> or Cable 14

Angela McRae, Legislative Coordinator (905) 546-2424 ext. 5987

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	<b>Pages</b>
<b>5. COMMUNICATIONS</b>	
*5.1. Correspondence from Howard Krupat, DLA Piper (Canada) LLP, respecting Associated Paving and Materials Ltd.	<b>3</b>
Recommendation: Be received and referred to consideration of Item 6.1.	
<b>6. DELEGATION REQUESTS</b>	
*6.1. Stan Capobianco, Marco Capobianco, Roger B. Campbell (Counsel), Howard D. Krupat (Counsel), Emma Cosgrave (Counsel), Associated Paving and Materials Ltd., respecting Item 14.2 (For today's meeting)	<b>9</b>





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October 27, 2021

FILE NUMBER: 108318-00001

**DELIVERED BY EMAIL**

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 71 Main St. W., 1st Floor  
 Hamilton, ON L8P 4Y5  
 clerk@hamilton.ca

Ms. Susan Nicholson  
 City of Hamilton  
 Legal Services  
 50 Main Street East, 4th Floor  
 Hamilton, ON L8N 1E9  
 Susan.Nicholson@hamilton.ca

Dear Sirs/Mesdames:

**Re: Associated Paving & Materials Ltd. (“Associated Paving”)  
 Contract C15-71-17 - Prequalified Contractors for Permanent Restoration of Pavement  
 Cuts in Asphalt and Concrete Pavements  
 Recommendation Letter of City of Hamilton Manager of Procurement Dated October 19,  
 2021 Pertaining to Commercial Relationship with Associated Paving (“Recommendation  
 Letter”)  
 City’s Procurement Sub-Committee Meeting on October 29, 2021 (“Procurement  
 Sub-Committee Meeting”)  
 Request for Adjournment**

I have been retained as counsel for Associated Paving with respect to the above-noted matter. I am attaching a copy of the City’s Recommendation Letter for your reference. My client has also been represented in this matter by Mr. Roger Campbell and I have reviewed Mr. Campbell’s correspondence to you dated September 3, 2021, together with enclosures. Mr. Campbell is copied on this letter.

It is my understanding that the City staff and Manager of Procurement will be presenting a report to the City’s Procurement Sub-Committee this Friday, October 29, 2021, in which a recommendation will be made that the City impose an interim ban on my client bidding for and entering into road cut restoration work contracts. I am also advised that my client has been provided with the opportunity to make a five minute submission to the Procurement Sub-Committee on the same date, to speak to this recommendation, even though it will not be provided with the opportunity to see or review the report itself.

While my client fully disputes both the recommendation and the purported basis for it, I am respectfully writing to you about process at this time. My client has been performing work for the City for years. The



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specific road cut restoration work contract at issue was entered into in 2017 (the “**Current Contract**”). My client has been expressly commended by the City for its performance and the Current Contract has been repeatedly renewed on an annual basis - to its maximum term. The structure of the Current Contract is such that neither my client nor the City knows the actual quantities of work to be performed at the outset. However, my client is expected to have the necessary resources available to complete the work on a real-time basis and within a short timeframe, even where the actual quantities vastly exceed the City’s own estimates (which I understand has regularly occurred). The purpose of providing this simplified overview is to emphasize that the issues are complex and records go back several years. Moreover, my client does not have access to the same documents that are available to the City. In anticipation of the pending Procurement Sub-Committee meeting, my client submitted a request to the Manager of Procurement on October 22, 2021 for a copy of the records upon which the October 19th Recommendation Letter is based. Just before 5 p.m. on October 26, 2021, or two days before the Procurement Sub-Committee meeting, my client was provided with a 7 MB zipfile containing an additional 38 documents for its review, including meeting minutes that I am advised were not previously provided to it.

In accordance with the process outlined in the Recommendation Letter, we have submitted a Request to Speak to a Committee of Council through the City’s website portal. Within that request, we have asked that this matter be adjourned to another date so that my client will have a fair opportunity to make fulsome written and oral submissions. In submitting this request, we would ask you to please consider that: (i) my client has invested in substantial resources to carry out this work; (ii) the decision of the Procurement Sub-Committee will have a meaningful and substantial impact upon my client’s business; (iii) as noted above, the Current Contract has been repeatedly renewed, accompanied by express compliments from the City to my client for its work; (iv) the issues are complex and involve voluminous documents, many of which my client is reviewing for the first time; and (v) despite the issues that have been alleged, it was just confirmed on October 25, 2021 that my client has been prequalified by the City to bid for Contract C14-12-21 for the performance of permanent restoration of pavement cuts.

Particularly given the serious potential impact of this matter, the long-term investment my client has made in this longstanding and valued relationship and the complexity of the issues, we respectfully request that an adjournment of the consideration of this matter is granted so that my client has sufficient time to fully and properly address these matters in a fair process in which it will also have access to informed advice based upon the available records.

Thank you for your consideration of this matter. Given the very tight timing, I would be grateful for a response at your earliest convenience.

Sincerely,  
**DLA Piper (Canada) LLP**  
Per:

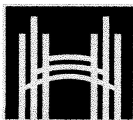
A handwritten signature in blue ink, appearing to read 'HDK', with a long horizontal flourish extending to the right.

Howard D. Krupat

HDK:cjr

c: Roger Campbell  
Marco Capobianco  
Stan Capobianco

Enclosure



Hamilton

Tina Iacoe, CPPO, CPPB  
Manager of Procurement  
Procurement Section  
Finance Division  
Phone (905) 546-2424 Ext. 2796 E-mail Tina.Iacoe@hamilton.ca

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October 19, 2021

**Sent by Email:** stan@associatedpaving.com  
**Sent by Courier**

Associated Paving & Materials Ltd.  
5365 Munro Court  
Burlington, ON  
L7L 5M7

Attention: Stan Capobianco

**Re: Commercial Relationship between the City of Hamilton and Associated Paving & Materials Ltd. ("Associated Paving")**

Dear Mr. Capobianco:

As you are aware, Associated Paving & Materials Ltd. ("Associated Paving") was awarded C15-71-17(H) Prequalified Contractors for Permanent Restoration of Pavement Cuts in Asphalt and Concrete Pavements ("Contract") in September, 2017. Since that time, and more specifically since November 19, 2020, City staff has experienced some vendor performance issues with Associated Paving on this Contract, and as a result, issued a number of Policy #8 Vendor Performance reports and one Vendor Performance - Incident Reporting Forms to Associated Paving pertaining to the Contract, detailing unsatisfactory vendor performance and non-performance, as well as missed completion dates and deficiencies in meeting specifications as set out in the Contract.

The City of Hamilton's By-law No. 20-205, Procurement Policy By-law, Policy #1 – Vendor Eligibility, Section 4.1 states, in part, the following:

*"(10) Where the Manager of Procurement has demonstrated and the Procurement Sub-Committee is satisfied that there is sufficient evidence of act(s) or omission(s) described in this Policy #1 on the part of a vendor, the Procurement Sub-Committee may impose an interim ban upon the vendor from competing or being awarded any City Contract, under the following circumstances:*

- (a) *while an investigation is being conducted by the Manager of Procurement;*
- (b) *while there is documented poor performance or non-performance that has not been resolved to the City's satisfaction and which has impaired the commercial relationship between the City and the vendor such that the vendor ought to be precluded from submitting bids on other contracts until the vendor performance issues have been rectified; or*
- (c) *when a vendor has been found to be in breach of a City Contract and which breach has impaired the commercial relationship between the City and the vendor such that an interim ban is necessary in order to preclude the vendor from submitting bids on other contracts pending Litigation or a final ban.*

*The interim ban may be imposed for a period of up to 12 months. The Procurement Sub-Committee's decision shall be final with respect to the interim ban.*

- (11) *Where an interim ban is imposed under subsection (10), the Manager of Procurement shall, prior to the expiry of the interim ban, report to the appropriate standing committee of Council the status of the investigation and any recommendations for further action."*

The full text of the City's Procurement Policy By-law can be found on the City's website: [www.hamilton.ca](http://www.hamilton.ca)

Given the issues described above, it is the view of City staff that the commercial relationship between the City and Associated Paving has been impaired. Accordingly staff will report to Procurement Sub-Committee with a recommendation that it not accept any bids nor enter into any contracts with Associated Paving, or any of its related corporate or individual entities, for road cut restoration work for a period of time to be determined by Procurement Sub-Committee.

The staff report will be considered by the City's Procurement Sub-Committee on **Friday, October 29, 2021**. Should you wish to speak to the Sub-Committee regarding the commercial relationship between the City and Associated Paving and the potential prohibition from bidding or entering into contracts on City projects, you may do so for a maximum of five minutes or such longer period of time, as may be granted by the Sub-Committee in its sole discretion, provided that you submit a Request to Speak to a Committee of Council as soon as possible but in any event, by no later than noon on Thursday, October 28, 2021. Please submit the Request to Speak to a Committee of Council form on-line. A link to the Request Form can be found on the City of Hamilton's website at:

<https://www.hamilton.ca/council-committee/council-committee-meetings/request-speak-committee-council>

Please note that should you wish to speak to the Procurement Sub-Committee, your presentation will be conducted in public session. However, the staff report related to your company is a confidential report which will be considered by Procurement Sub-Committee in closed session. You will not be able to attend the closed session portion of the Procurement Sub-Committee meeting.

In the meantime, should you choose to submit bids on City projects, please note that such bids may ultimately be rejected.

If you have any questions or concerns regarding the above, please feel free to contact me at [tina.iacoe@hamilton.ca](mailto:tina.iacoe@hamilton.ca)

Sincerely,

A handwritten signature in black ink, appearing to read 'Tina Iacoe', with a large, stylized flourish at the end.

Tina Iacoe, CPPO, CPPB  
Manager of Procurement





Submitted on Tuesday, October 26, 2021 - 11:15pm Submitted by anonymous user:  
172.70.34.62 Submitted values are:

==Committee Requested==

Committee: Other Advisory/Sub-Committee

Specify which Advisory/Sub-Committee: Procurement Sub-Committee

==Requestor Information==

Name of Individual: Stan Capobianco, Marco Capobianco, Roger B. Campbell (Counsel), Howard D. Krupat (Counsel), Emma Cosgrave (Counsel)

Name of Organization:

1. Associated Paving & Materials Ltd.;
2. Roger B. Campbell, Legal Counsel;
3. DLA Piper (Canada) LLP - Legal Counsel  
Contact Number: 416-365-3510 (Howard Krupat of DLA Piper (Canada) LLP)  
Email Address: [howard.krupat@dlapiper.com](mailto:howard.krupat@dlapiper.com)

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1. Howard D. Krupat  
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2. Roger B. Campbell  
Legal Counsel  
4145 North Service Road  
Suite 200  
Burlington, ON L7L 6A3
3. Stan Capobianco  
Associated Paving & Materials Ltd.  
5365 Munro Court  
Burlington, ON L7L 5M7

Reason(s) for delegation request:

1. To request an adjournment (to a date to be determined) of the Procurement Sub-Committee's consideration of the recommendations made by the Manager of Procurement and City Staff in the letter sent by the Manager of Procurement to Associated Paving dated October 19, 2021 (the "Recommendation Letter"), in order to facilitate a fair opportunity for Associated Paving to make fulsome written and oral submissions in response to same, including in reference to all documents received from the City through the afternoon of October 26, 2021 and any additional relevant documents that have not yet been provided;

2. Alternatively, should the adjournment request be refused, the opportunity to make submissions to the Procurement Sub-Committee for 20 minutes to:
  - (i) dispute the recommendations of the Manager of Procurement and City Staff that are set out in the Recommendation Letter;
  - (ii) address the commercial relationship between the City and Associated Paving, as invited in the Recommendation Letter;
  - (iii) request that the Procurement Sub-Committee reject the recommendations set out in the Recommendation Letter; and
  - (iv) request confirmation that Associated Paving and its related corporate or individual entities will continue to be permitted to bid for and enter into contracts for road cut restoration work.
  
3. Also in the event that the adjournment request of Associated Paving is refused, Associated Paving requests the opportunity to make further submissions for the Procurement Sub-Committee's consideration on a later date, once Associated Paving has had the opportunity to conduct a fulsome review of the relevant documents, information and recommendations put forward by City staff.

Will you be requesting funds from the City? No

Will you be submitting a formal presentation? Yes



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October 28, 2021

## DELIVERED BY EMAIL

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 Hamilton, ON L8P 4Y5  
[clerk@hamilton.ca](mailto:clerk@hamilton.ca)

Attention: City of Hamilton Procurement Subcommittee

Dear Procurement Subcommittee Members:

**Re: Associated Paving & Materials Ltd. (“APM”)  
 City of Hamilton (the “City”)  
 Contract C15-71-17 - Prequalified Contractors for Permanent Restoration of Pavement  
 Cuts in Asphalt and Concrete Pavements (the “Current Contract”)  
 Recommendation Letter of City of Hamilton Manager of Procurement Dated October 19,  
 2021 Pertaining to Commercial Relationship with Associated Paving  
 (“Recommendation Letter”)  
 City’s Procurement Sub-Committee Meeting on October 29, 2021  
 (“Procurement Subcommittee Meeting”)**

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## BACKGROUND AND EXECUTIVE SUMMARY

We are counsel for APM in this matter.

APM is family-owned and has operated for more than 50 years. It has its head office in Burlington, where its asphalt plant is located. It has a long relationship with the City, over many years and many contracts. It also has invested in the City of Hamilton, having acquired a substantial building on Lottridge Road, so that it can more effectively perform contracts with the City. APM very much values its relationship with the City.

The matter before you, as the City’s Procurement Subcommittee (the “**Subcommittee**”), is whether APM should be banned from bidding for the Permanent Restoration of Pavement Cuts contract, for which APM has recently successfully completed the City’s prequalification process and was just put out for tender yesterday. The series of events leading to this are perplexing and troubling to APM and may not be known by this Subcommittee.

Restoration of utility cuts involves hard surface (asphalt, concrete) and soft surface (sod, interlock) restoration. In 2014, APM was the successful bidder for the City’s Annual Restoration of Utility Cuts



contract. The contract was to be for one year, renewable for one-year periods up to 4 years at the option of the City. As described below, APM was advised by the City that its performance was exceptional. The City extended the contract successively, for a total of four years.

In 2017, APM was again the successful bidder for the City's Permanent Restoration of Pavement Cuts contract, after having been prequalified by the City. Again, the term was for one year, renewable successively at the City's option by one year for up to four years. Over the term of the contract, the scope was substantially increased, to the point where the restoration work that APM was asked to perform was about double the quantities which the City had estimated and were stated in the contract. As with the prior contract, the City was sufficiently pleased that it successively exercised its option to extend the term of the contract three times, extending to November 30, 2021. Again, APM's performance was commended by the City --- a little more than a year ago, particularly as to APM's assistance in the rollout of Cityworks, a new program and process which the City was trying to implement and the City recognized would present challenges.

In early August of this year, APM submitted their bid for prequalification for the new Permanent Restoration of Pavement Cuts contract. This involved consideration of APM's capability to perform the contract and their record of performance on contracts with the City, of which there have been many, including several current contracts. An "evaluation team" comprised of City representatives and City consultants was to evaluate the requests for prequalification.

On October 8th, APM was advised of the unofficial results of the City's prequalification process for the Permanent Restoration of Pavement Cuts contract. APM had been prequalified, among only five companies.

APM was therefore surprised to receive - only one week later - the City's October 15, 2021 default letter advising APM that the City staff were "*contemplating a vendor ban against APM for Permanent Restoration of Pavement Cuts in Asphalt and Concrete Pavement Work*". This was simply not consistent with the parties' longstanding and successful commercial relationship. Although the City and APM had contractual disagreements arising from: (i) how to handle a vast discrepancy between the City's estimated restoration quantities and the actual quantities encountered (about double what the Current Contract provided); and (ii) progress in sodding work that can only be performed in the spring and fall rather than the hot summer months, there was certainly no indication from APM's perspective that the parties' commercial relationship has been "impaired" such that a recommendation to this Procurement Subcommittee for any type of ban would be appropriate. Yet this was the position taken by the City in its very recent October 19, 2021 Recommendation Letter, in which the City staff advised of its intention to make a recommendation that the City not accept any bids, nor enter into any contracts with APM or related entities for road cut restoration work, for a period of time that is to be determined. We understand that the City is making this recommendation in reliance upon the Procurement Policy for the City of Hamilton, By-Law No. 20-205, dated September 30, 2020 (the "**Policy**").

Only ten days later, APM is now appearing before this Subcommittee to speak to a proposed ban that is recommended on the basis of a "confidential report" to which APM has no access and in respect of which APM was advised it would be permitted only 5 minutes to present its position. Given the serious implications of such an outcome, the minimum standard of a fair and due process is critical. However, APM has been provided only several days to prepare a submission on a matter pertaining to a relationship that goes back many years. This impossible position has been exacerbated by the City's very late production, just before 5 p.m. on Tuesday, October 26, 2021, of extensive documents which are to apparently provide the basis for the proposed ban.



Concurrently with this process, and in contrast, APM received on Wednesday of this week, October 27, 2021, the Request for Tender package for the Permanent Restoration of Pavement Cuts contract. The package includes the statement that, "*Bidders eligible to submit Bids for this Request for Tender have been previously prequalified under Project Number C14-12-21*" and stated that APM was one of the bidders which had been prequalified to bid. This procurement closes on November 10, 2021.

Confusingly, APM will therefore be speaking to this Subcommittee on a proposed ban that would ostensibly impact the very same contract for which APM was invited to bid by the City during the same week - on the basis of a very recent prequalification.

APM disputes that the commercial relationship between APM and the City has been impaired and disputes that APM should be banned from bidding for road cut restoration work at all. Moreover, APM is entitled to fairness both in the determination of whether a ban should be imposed and in this process itself.

Accordingly, we wrote to the City on APM's behalf on October 27, 2021 requesting an adjournment in order to facilitate a fair and appropriate procedure. APM is seeking sufficient time to review the City's disclosure, prepare fulsome submissions and obtain the material documents that the City has yet to provide.

In the circumstances, APM repeats its request for the Subcommittee to defer its consideration of the Recommendation Letter of October 19, 2021 from the October 29, 2021 Subcommittee meeting to a date that will facilitate an opportunity for APM to make informed, fulsome submissions. The foregoing factual background is expanded upon below.

## **APM RIGHTS AND CITY OBLIGATIONS**

### *Infringement on Duty of Fairness*

As expressly communicated to APM by the City, APM has consistently performed well under the Restoration Contracts (defined below), despite being required by the City to work with quantities that were well in excess of the initial estimates provided by the City. This recurring problem is likely attributable to the City simply not knowing its own quantities in advance. The only way that APM could possibly address such a significant discrepancy between estimated quantities and actual quantities that become known in "real time", without any impact on the progress of its work, would be to have available unlimited resources and unlimited capacity, which would often be required to sit idle while awaiting the next set of tasks. This is not practical and, as will be explained below, is inconsistent with the requirements of the Current Contract.

Although the quantity discrepancy has been a major challenge, there are numerous additional issues that APM was required to manage while still achieving its high level of performance, including:

- (i) the City's implementation of its new project administration technology, "Cityworks", in the midst of the Current Contract. This program essentially overhauled the City's payment and contract administration processes. As one of the first contractors to work under this program, APM was effectively required to serve as a test case;
- (ii) weather (temperature) limitations for laying sod that constrained the scheduling requirements imposed by the City;
- (iii) a significantly increased number of priority work orders; and
- (iv) the COVID-19 global pandemic.



If given a fair opportunity to make fulsome submissions, APM is confident that it will be able to substantiate the foregoing and demonstrate to the Sub-Committee why any ban on APM bidding for or entering into future restoration work contracts would be an improper decision.

In this administrative process, it is imperative that the Subcommittee afford APM with the procedural protections to which it is entitled at law, including APM's right to notice, APM's right to know the case it has to meet and APM's right to be heard before a decision is made. However, contrary to these rights:

- APM was provided minimal notice, on October 19, 2021, of the City staff's proposed recommendation to ban APM from future restoration work contracts;
- APM was provided with the City's voluminous disclosure two working days prior to the Subcommittee meeting, allowing minimal time to thoroughly review these documents and make complete submissions on them;
- the City's disclosure is incomplete and therefore results in a mischaracterization of the material events;
- the impact of the limitations being imposed is exacerbated by circumstances where APM is denied access to the staff report the City will be providing to the Subcommittee for consideration;
- APM has not been advised of the specific factors the City has considered in recommending a ban;
- although the City is relying upon an argument that there has been an "impairment of a commercial relationship", the Policy does not provide a definition of that phrase. Further, the Policy does not provide guidance as to how the Subcommittee is to conclude that the commercial relationship between the City and APM has been impaired and the City has not properly outlined the factors it considered in arriving at that conclusion; and
- as it stands, APM has been afforded 5 minutes, or perhaps slightly more, to address the Subcommittee on a matter that encompasses complex facts and voluminous contracts and other documents and involves a commercial relationship that goes back many years.

The nature and extent of the duty of fairness to which APM is entitled at law is informed by, among other things, the importance of the decision to those affected by it (i.e. APM and its principals) and whether the Policy provides an appeal process.

In this case, a decision of this importance, combined with the absence of a clear appeal process, requires appropriate greater procedural protections. The Restoration Contracts represent an important part of APM's business with the City. Any ban for these public contracts would have immediate repercussions. It is therefore critical that APM is not deprived of the procedural fairness it is owed and that APM is given the full opportunity to demonstrate to the Subcommittee why the City staff's conclusions and recommendations are improper and why the factual allegations underlying the Recommendation Letter are incorrect and misleading.



### Duty of Good Faith

Contracting parties have an obligation to exercise their contractual powers in good faith. Even discretionary powers expressed in a contract as being absolute must be exercised reasonably; the failure to do so is contrary to the requirements of good faith.<sup>1</sup>

However, in this case:

(i) the City is relying upon an Incident Form dated August 17, 2021 that contradicts its own evaluation of APM's work in a formal report dated June 10, 2021;

(ii) the communications relating to the Incident Report are based on APM's response time to complete sod work, which the City itself acknowledges and accepts cannot be completed in hot summer temperatures and therefore cannot possibly be completed within the six week work order completion time demanded by the City during the summer, purportedly in reliance upon the Current Contract; and

(iii) after years of consistently high performance, the City issued a default letter to APM on October 15, 2021 - just four days before the issuance of the October 19, 2021 Recommendation Letter. In so doing, the City inappropriately relied upon the impossible timetable that it alleges gave rise to a backlog of sod work. Further, in what the City stated was a contractual default letter, the City also threatened for the first time to ban APM from bidding or entering into future restoration work contracts. In our respectful submission, this is an inappropriate application of the Policy and inconsistent with the City's good faith obligations.

### **EXPANDED DISCUSSION OF THE FACTS IN THE CONTEXT OF THE CITY'S DUTY OF FAIRNESS AND OBLIGATIONS OF GOOD FAITH**

As noted above, APM has not yet had a sufficient opportunity to review all material documents and prepare a fulsome submission. Without prejudice to APM's position on its entitlement to do so on a later date, we have nonetheless set out an expanded, preliminary discussion of some of the key factual issues below, in order to provide context to APM's position.

#### Commercial Relationship Between APM and the City

APM and the City have a longstanding commercial relationship and, in addition to the extensive work that APM performs for the City in other areas, have worked together with respect to the City's Permanent Restoration of Pavement Cuts in Asphalt and Concrete Pavements contracts since 2014.

The City and APM entered into one such contract in 2014 and another in 2017 (collectively, the "**Restoration Contracts**"). The Restoration Contracts contain options for annual renewals by the City. Despite having the discretion to choose otherwise, the City has exercised its renewal option every single year under each Restoration Contract and for the maximum number of annual terms - from the inception of the Restoration Contracts through to the present. Accordingly, the City and APM have worked consistently and amicably together under these Restoration Contracts from 2014 to 2021.

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<sup>1</sup> *C.M. Callow Inc. v Zollinger*, 2020 SCC 45; *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.



Moreover, the City has commended APM on numerous occasions for its performance. Despite the disagreements that have recently arisen under the Current Contract, the commercial relationship between the parties has not been impaired. To the contrary, it remains intact.

In 2015, the City expressed the following about APM's performance:<sup>2</sup>

*I can truly state that as time has marched on, that Associated Paving's performance on this project has grown to a point that your group is now setting the bar to which others were not able to achieve.*

...

*[APM individuals]' ability to continue to plan, execute and record all the on-going works that are completed on a daily basis has given us the confidence that restorations are being completed in both a timely fashion, as well as completing a great deal of locations within the specified time line.*

*I have been told by both internal and external parties that this contract "has never been managed so efficiently"*

*Associated Paving should be very proud and honored to have such dedicated people that are striving to keep this project moving forward.*

APM was again expressly commended by the City in the summer of 2020 - in the midst of the COVID-19 pandemic:<sup>3</sup>

*I want to take a moment and update you regarding [APM Project Manager]'s performance over the past year on the City of Hamilton's Road Cut Restorations program.*

*2020 was slated to be a challenging year from the beginning with a switch to the new Cityworks project management software. This, unfortunately, was made even more difficult due to the ongoing Covid-19 pandemic. [Project Manager] has proven to be diligent in work order tracking, effectively managing both the remaining work from the old program and the incoming restorations through Cityworks. [Project Manager]'s consistent communication has been a great help keeping this program on track even with the pandemic and operational changes.*

*As you are aware this contract is a challenging one with aspects, and scheduling requirements, not often seen under other programs of a similar scope. Working on thousands of locations per year requires considerable attention to detail, and organization, which is fundamental to ensuring the program is delivered efficiently. Over the past year [Project Manager]'s consistent focus on these skills has allowed him to effectively manage and improve the road cuts program.*

*Despite the many challenges we have faced in 2020 major improvements have also been made to the program. Cityworks was been rolled out effectively largely due to [Project Manager]'s commitment to making it work and constant communication regarding updates.*

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<sup>2</sup> Letter from City Project Manager, Construction Section, Engineering Services, Public Works to APM dated April 9, 2015. Names are redacted due to privacy considerations.

<sup>3</sup> Email from City Project Manager - Restorations, to APM dated July 15, 2020. Names have been redacted due to privacy considerations. Highlights and emphasis added.





*We appreciate your teams efforts to enhance the delivery of this program and [Project Manager] has now become integral to the programs success. [Project Manager] understands the pressures of this contract and has a strong drive to provide the best end product he can. He also capably deals with site specific challenges, deadlines, work coordination, and change orders all whilst dealing with the ever incoming flow of new restorations. Please feel free to distribute this as necessary, and let me know if you have any questions.*

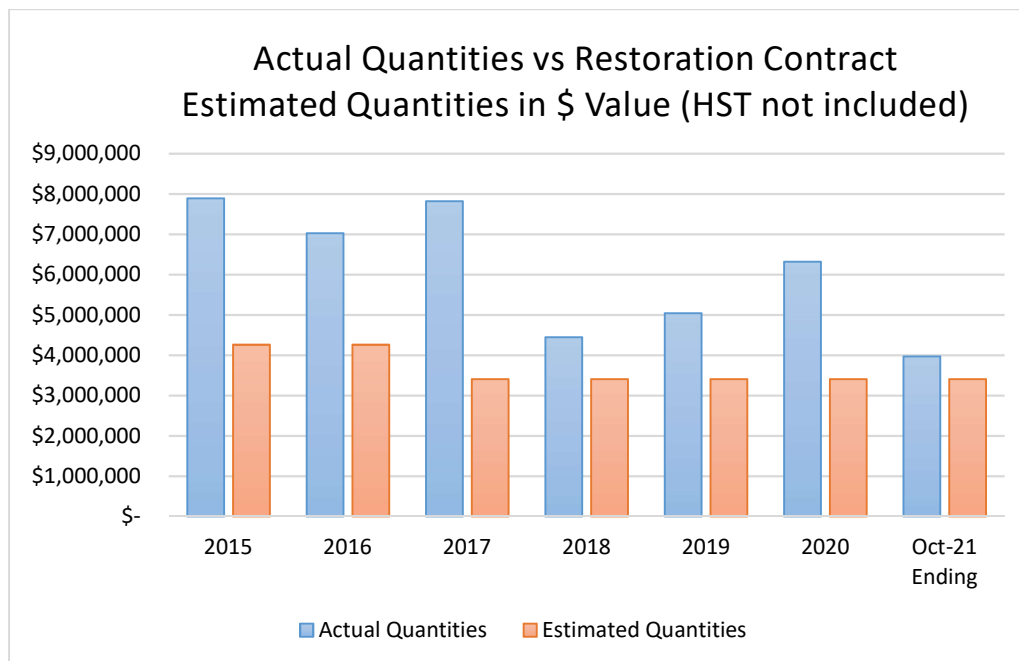
Accordingly, the sudden, present reliance upon discrete disagreements and challenges that we would submit are typical of contracts of this nature as the basis for the extreme measure of recommending any type of ban is wholly inconsistent with the parties' longstanding productive, successful and positive commercial relationship.

#### Estimated Quantities

The scope of work to be completed under the Restoration Contracts included, among other items, the completion of asphalt and concrete road restoration and the supply and placement of topsoil, seed and sod in certain annual estimated quantities. Although the City itself was unable to confirm actual quantities of material in the Restoration Contracts, Form 200.02.12 of the General Conditions provides that estimated quantities were provided for the purpose of indicating to bidders the magnitude of the work to be performed.

Moreover, Section 2 of the Special Provisions mandates that APM is required to "supply sufficient crews and equipment to undertake the **estimated** square meters of pavement cut restoration in this [2017] Contract". [emphasis added]

APM has complied with this contractual requirement and has supplied sufficient crews and equipment to undertake the estimated quantities set out in the 2017 Contract. However, since APM began performing its work in 2014, the actual quantities have greatly exceeded the estimated quantities provided by the City. APM has provided the data for the following chart, which sets out a comparison between the estimated quantities provided by the City in the Restoration Contracts and the actual quantities laid by APM, represented by the dollar value of work actually completed or estimated to be completed, as the case may be:



It is clear that, by any objective measure, the City has requested that APM perform work that is far in excess of the estimates the City provided. In four of the years between 2015 and 2020, APM completed almost double the amount of work that was estimated. As at the end of October 2021, APM has already completed the total yearly estimated amount under the 2017 Contract.

Notwithstanding APM's achievements, the City staff assert that APM is in default. They appear to be relying upon Special Provision 6 in Current Contract, which contemplates that APM will complete each list of restoration locations it receives within six weeks of receipt.

However, the magnitude by which the actual quantities exceed the estimated quantities, together with the express contractual requirement for APM to have sufficient resources to meet the **estimated** quantities renders this expectation impossible to meet. Simply stated, the City is seeking to rely upon the Current Contract in a manner that was clearly not intended and in a manner that sets expectations that are impossible to meet. Although the City staff will point to a provision which sets a weekly cap of 400 locations, the Current Contract simply does not contemplate a consistently unanticipated and unknowable variance of the magnitude encountered between estimated and actual quantities, where actual quantities are often double estimated quantities. A backlog is inevitable in this situation. The City staff's interpretation is not tenable.

The City staff have also relied in their correspondence upon Section 3 of the Special Provisions, which provides that APM shall have no claim for any compensation if the actual quantities completed exceed the estimated quantities. However, APM is not making any such claim. That provision is of no relevance here.

In good faith, APM has worked diligently and cooperatively with the City to complete restoration of the unanticipated volumes, sometimes arranging for six crews to perform restoration work. APM has further attempted to ameliorate the backlog by requesting an extension of time, pursuant to Form 200.05.04 of the General Conditions, and requesting to work on days where the City Administrative Office is closed, pursuant



to Special Provision 15 of the 2017 Contract. However, we are advised that these requests have generally gone unheeded or have been refused.

APM has made all reasonable efforts to accommodate the vast discrepancy between estimated and actual quantities and has been consistently commended by City for its work. While the parties may disagree on the resolution of what they have both acknowledged is a difficult contractual model, such a disagreement is typical of a construction contract of this nature and certainly does not represent an impairment of the parties' commercial relationship.

### Cityworks

At the beginning of 2020, in the midst of the Current Contract, the City implemented a new administrative program called Cityworks, which was created to track restoration locations (referred to in Cityworks as "work orders"). APM was the first contractor to use Cityworks and effectively acted as a test subject for the program. As a result, APM's feedback, which was the subject of praise from the City (as set out above) was in fact used to refine the program for ease of use.

For reasons that have been set out in great detail in correspondence that was previously sent by APM to the City, Cityworks ultimately required significant time and training to become an effective administrative tool, which resulted in substantial delays. Notably, Cityworks effectively tripled the time it takes APM to close out a work order.

Moreover, Cityworks creates a significant delay between the completion of a work item and a work order actually being recorded as completed in the City's system. For example, as at August 27, 2021, 303 of 474 work orders were ready for the City to enter into Cityworks. As at September 3, 2021, this data entry work had still not been completed. Accordingly, the City's records will show the work is incomplete, even though the status of the work itself has not changed. Further, Cityworks has created delays in payment to APM. Despite these frustrations, APM has continued to work with the City in good faith to demonstrate its ongoing commitment. APM has worked cooperatively with the City to fix the City's issues with Cityworks and to streamline the Cityworks approval process.

To again quote the email APM received from the City on this issue in July of 2020:<sup>4</sup>

*2020 was slated to be a challenging year from the beginning with a switch to the new Cityworks project management software. This, unfortunately, was made even more difficult due to the ongoing Covid-19 pandemic. [Project Manager] has proven to be diligent in work order tracking, effectively managing both the remaining work from the old program and the incoming restorations through Cityworks. [Project Manager]'s consistent communication has been a great help keeping this program on track even with the pandemic and operational changes.*

### Sodding

In 2020, the overall actual quantities (i.e. not just sodding) nearly doubled the estimated quantities noted in the Current Contract which, in conjunction with the constraints placed on construction activities as a result of COVID-19, created a backlog. In May of 2021, the City provided APM with work orders for most of its

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<sup>4</sup> See footnote 3 above - Email from City Project Manager - Restorations, to APM dated July 15, 2020. Names have been redacted due to privacy considerations



sodding work for the year and further expressed its expectation for APM to remediate the soft surface back log that carried over from 2020.

However, sodding cannot be completed in hot weather. This work must be completed in either the spring or the fall for the sod to survive. The City is well aware of this issue and has posted a YouTube video acknowledging it (<https://youtu.be/sANzanuweM0>).

Accordingly, the City's position that the sod work orders were required to be completed within the above-noted six-week period from the receipt of the order contradicts its own standards and is simply an improper basis for asserting a breach of contract.

In recognition of these issues, the City's 2021 Request for Prequalifications for Contractors Required to Perform Permanent Restoration of Pavement Cuts has greatly reduced the amount of sod required in comparison to the Current Contract and has instead increased the estimated amounts of topsoil and seed to be supplied.

Once again, an unrealistic expectation and a disagreement between contracting parties as to how to address it is not the same as the impairment of a commercial relationship.

#### Priority Work

The City has requested that APM perform what the City advises is priority work. This work often includes a direction to perform work orders well within the above-noted six-week timeframe (usually within 1-2 weeks after the priority work has been issued) and to prioritize these items over older work orders, regardless of the locations where APM's crews have been working. This has led to inefficiencies in the sequencing of APM's work and has caused ripple effects which have increased the overall time required to perform work orders. Further, this approach is not contemplated by the Current Contract.

In addition to the City's weekly priority lists, the City requires that APM apply their crews to urgent situations, typically water main breaks. APM has lost 9 days in 2021 due to emergency watermain repairs conducted for the City.

In good faith, APM has cooperated with the City by undertaking this priority work despite the delays it has caused APM.

The extra effort by APM to accommodate requests by the City to re-sequence its work in order to address the City's priorities is not consistent with the impairment of a commercial relationship.

### **FURTHER DISCUSSION ON THE DUTY OF FAIRNESS AND THE CITY'S GOOD FAITH OBLIGATIONS**

#### Duty of Fairness

As noted above, an important aspect of the duty of fairness is a party's entitlement to notice and the right to know the case to be met.<sup>5</sup> As has also been described above, APM has repeatedly and consistently been commended by the City for its performance and has seen its restoration work contracts renewed every year, from inception through to the maximum terms available. Although the parties have had disagreements, there has simply been no basis for APM to consider that its commercial relationship with the City has been commercially impaired. To the contrary, APM has had every reason to believe that its

<sup>5</sup> *Interpaving Limited v City of Greater Sudbury*, 2018 ONSC 3005, at para 33



commercial relationship with the City is strong. APM continues to be of the view that this is a more accurate representation of the circumstances.

In the context of eight years of contract renewals, the City appears to be relying upon: (i) a single Vendor Performance - Incident Reporting Form from August of 2021 that is based upon issues that have been addressed above and which was not issued within the time prescribed by the Policy (Section 4.8); (ii) certain "Policy #8 Reports" that I am advised were provided to APM for the first time through the City's disclosure on October 26, 2021 just before 5 p.m. or were otherwise improperly described and which APM has not had sufficient opportunity to properly review; (iii) various meeting minutes that were also provided to APM for the first time with the City's October 26, 2021 disclosure; (iv) a confidential staff report that APM is not entitled to review; and (v) incomplete email chains and threads of correspondence that were included for the first time with the City's late disclosure and mischaracterize the parties' commercial relationship.

None of these documents provide any explanation or guidance as to the factors and analysis relied upon by the City staff to come to a conclusion that directly conflicts with the actual commercial relationship between the parties and the actual performance of APM, all as described above.

Moreover, the Supreme Court of Canada has held that a factor in determining the nature and extent of the duty of fairness owed to a party is the importance of the decision to the individual or individuals affected. The more important the decision is to those affected and the greater its impact on that person, the more stringent the procedural protection that will be mandated.<sup>6</sup>

Greater procedural protections are required when no appeal procedure is provided, or when a decision is determinative of the issue and further requests cannot be submitted.<sup>7</sup> The Policy does not contain an appeals process for a decision made by the Subcommittee to ban a City vendor.

Further, the right to be heard before a decision is made is the most important aspect of the duty of procedural fairness.<sup>8</sup>

In circumstances where APM does not know the case it has to meet, it has not had sufficient opportunity to review the documents being relied upon by the City or to prepare full submissions and it has yet to receive full disclosure, it would be inherently unfair for the Subcommittee to rely upon the City's submissions at this time in order to make a final decision that will have a significant impact upon APM's business.

APM thanks you for your consideration of this matter and your request for a deferral in order to allow APM sufficient time and disclosure to complete its written and oral submissions.

Finally, as APM has expressed in its communications to the City throughout the terms of the Restoration Contracts, APM continues to value its long-term relationship with the City and hopes to work cooperatively with the City to both complete its work under the Current Contract and perform work under any future restoration contracts that may be awarded to it.

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<sup>6</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, at para 25 [*Baker*]; *Interpaving* at para 34.

<sup>7</sup> *Baker*, at para 24.

<sup>8</sup> *Queensway Excavating & Landscaping Ltd. v Toronto (City)*, 2019 ONSC 5860, at para 71.



Sincerely,  
**DLA Piper (Canada) LLP**  
Per:

A handwritten signature in blue ink, appearing to read 'HDK', with a long horizontal flourish extending to the right.

Howard D. Krupat

HDK

CAN: 38654694.4