



CITY OF HAMILTON
CORPORATE SERVICES DEPARTMENT
Financial Services Division

TO:	Chair and Members Audit, Finance and Administration Committee
COMMITTEE DATE:	May 9, 2016
SUBJECT/REPORT NO:	Request to Ban Due to Non-Adherence to Fair Wage Policy and Fair Wage Schedule (FCS16027) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Rick Male (905) 546-2424 ext. 4157
SUBMITTED BY:	Mike Zegarac General Manager Finance and Corporate Services Department
SIGNATURE:	

RECOMMENDATION

- (a) That, due to Bondfield Construction Company Ltd. (“Bondfield”) being found non-compliant with the Fair Wage Policy and Fair Wage Schedule three times within a three year period, and in accordance with the City’s Procurement Policy, staff be directed to reject any current and future bids, proposals or quotations received from Bondfield, or any of its related corporate or individual entities, until and including May 11, 2026;
- (b) That the City of Hamilton not enter into any contract with Bondfield Construction Company Ltd. or any of its related corporate or individual entities, until and including May 11, 2026.

EXECUTIVE SUMMARY

The City’s Fair Wage Policy and Fair Wage Schedule (“FW Policy”) requires that every contractor and sub-contractor compensate their employees in accordance with the FW Policy on all applicable construction contracts with the City. Under the requirements of the FW Policy, a contractor is not only responsible for violations or non-compliance of their own actions, but also for those actions of their sub-contractors retained for the contract. Therefore the contractor carries the full responsibility for ensuring compliance with the obligations under the FW Policy.

Since 2010, the City has received four complaints regarding non-compliance with the FW Policy against Bondfield on three separate contracts. Of the four complaints, one

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complaint was withdrawn by the initiator of the complaint and three complaints were investigated by either the City's internal Audit Services Division or an external auditor and found to be valid. For all three valid complaints, the City found Bondfield to be non-compliant with the FW Policy. The result was an additional \$141,045.28 paid out to employees in short paid wages and benefits.

As a result of the three non-compliances, City Procurement staff advised Bondfield that the FW Policy required Bondfield to submit a licensed public accountant report on three on-going or new construction contracts awarded to them. The intent of the required accountant reports would be a measure used to ensure that the contractor comply on an on-going basis with their obligations under the FW Policy. The imposed requirement is in accordance with the FW Policy as defined under the *Consequences of Non-Compliance* section.

As of the date of this Report, Bondfield has failed to provide the required accountant reports. In fact, Bondfield has further advised the Procurement Section that Bondfield will not be submitting a report and also have acknowledged that, in doing so may result in a recommendation by the City to ban Bondfield from bidding on future contracts or entering into any contracts outside of the competitive bidding process. In refusing to comply with the FW Policy, Bondfield is in contravention of the City's Procurement Policy in not following direction provided by the City and refusing to cure a default under the construction contracts Bondfield has entered into with the City.

Further details surrounding the events leading up to the recommendation to ban Bondfield is summarized in the Historical Background section of this Report. A summary of the complaints received against Bondfield, and associated audit results, have been summarized and provided in Appendix "A" to Report FCS16027.

Alternatives for Consideration – See Page 8

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial:

Banning Bondfield from the competitive bidding process would decrease the potential number of bidders on City construction projects, which could result in the City paying more than it would otherwise have paid on such contracts. However, based on the City's past experience with Bondfield and the complaints made against them, any potential savings as a result of awarding them any future contracts may be neutralized considering the extra staff time and resources as well as the costs of engaging an external auditing firm to investigate the FW Policy complaints.

Staffing: None

Legal: None

HISTORICAL BACKGROUND

Since 2010, the City has received four complaints regarding non-compliance with the FW Policy against Bondfield on three separate contracts. The significant events outlining the investigation and determination of non-compliance and ultimately staff's rationale for the recommendation to ban Bondfield are as follows:

Fair Wage Complaint # FW8-2012

C14-36-10 – General Contractor Required for the Construction of the New Westmount Recreation Centre

- April 13, 2012 - Complaint received alleging Bondfield's sub-contractor, PHE Contractor Ltd. who had retained Elite Electrical Solutions Ltd. ("Elite") to perform services on the contract, was not in compliance with the FW Policy.
- June 1, 2012 - Complaint was investigated and found that Elite was not paying in accordance with the FW Policy. 4 employees were owed monies for wages and benefits as per the rates set out in the Fair Wage Schedule totalling \$71,585.90.
- June 20, 2012 – The City met with Bondfield to discuss the audit results and the contractor's obligations under the FW Policy.
- September 10, 2012 – Bondfield submitted to the City a signed declaration stating the following:
 - (a) Bondfield has and will continue to honour the Fair Wage Policy and Schedule of the City of Hamilton with all of our employees;
 - (b) The policy is clearly posted in the site trailer of our ongoing projects for the City; and,
 - (c) Bondfield has and continues to advise our subcontractors of their contractual obligation to abide by these policies.

As a result of the non-compliance, the shortfall in wages and benefits were required to be paid to employees and the cost of the audit was collected. No further sanctions were imposed.

Fair Wage Complaint # FW14-2012

C14-36-10 – General Contractor Required for the Construction of the New Westmount Recreation Centre

- July 6, 2012 - Complaint received alleging Bondfield's sub-contractor, Nekison Engineering & Contractors Ltd., was not in compliance with FW Policy.

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- January 28, 2013 – An initial audit was conducted on the complaint which found that the sub-contractor was compliant with the FW Policy.
- September 12, 2013 – New information was uncovered and a subsequent audit was conducted. The second investigation found that the sub-contractor was not paying in accordance with the FW Policy. 7 employees were owed monies for wages and benefits as per the rates set out in the Fair Wage Schedule totalling \$66,451.23.

As a result of the non-compliance, the shortfall in wages and benefits were required to be paid to employees and the cost of the audit was collected. In addition, as a result of being non-compliant for a second time in less than a five year period, Bondfield was required to submit licensed public accountant reports on three construction contracts in order to verify compliance with the FW Policy. This is in accordance with *Consequences of Non-Compliance* section of the FW Policy.

- November 28, 2013 - The City met with Bondfield to discuss the audit results and the contractor's obligations under the FW Policy as well as re-confirm the requirement for Bondfield to provide licensed public account reports on three construction contracts.

Bondfield confirmed that audits would be completed on contract C13-03-13 Construction of the New Waterdown Library and Civic Centre and contract C13-28-10 Primary Clarifier and Disinfection Upgrades at the Woodward Avenue Wastewater Treatment Plant. Bondfield confirmed that the third contract to be audited was to be determined when/if Bondfield was awarded another contract with the City. Reports were to be submitted at the completion of the contracts.

Fair Wage Complaint # FW18-2014

C13-03-13 - Construction of the New Waterdown Library and Civic Centre

- April 22, 2014 - Complaint received alleging Bondfield's sub-contractor, Avon Electric Company Ltd. ("Avon"), was not in compliance with FW Policy.
- September 3, 2014 - Complaint was investigated and found that the sub-contractor was not paying in accordance with the FW Policy. 1 employee was owed monies for wages and benefits as per the rates set out in the Fair Wage Schedule totalling \$3,008.15.

As a result of the non-compliance, the shortfall in wages and benefits was required to be paid to employees and the cost of the audit was collected.

- October 10, 2014 – The City met with Bondfield to discuss the measures Bondfield had implemented to ensure sub-contractors were aware of the Fair Wage requirements. Bondfield advised staff that sub-contractors were notified of the FW

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Policy prior to submitting a bid to Bondfield. At the time of this meeting, Bondfield was requested to confirm if Avon was notified of the FW Policy requirement.

Subsequent to this meeting, Bondfield advised City staff that the contract between Bondfield and Avon noted the City's FW Policy in the appendix of the contract. The appendix did not elaborate on the requirements of the City's FW Policy or reference where the FW Policy could be accessed. However, Bondfield did not provide evidence confirming that Avon was aware of this requirement prior to submitting a bid to Bondfield.

- October 6, 2015 - Bondfield advised that an auditor had been retained and they would endeavour to provide the requested public accountant report by November 5, 2015 as requested by the City. The City allowed for additional time to complete the audit report due to the size of the contract being audited.
- December 9, 2015 – Bondfield advised that they would not be submitting the required report and acknowledged in doing so may result in the recommendation of banning Bondfield from future contracts with the City.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

The City may exercise its discretion to reject any future bid, proposal or quotation from Bondfield and any of its related corporate or individual entities in accordance with the terms of the City's Procurement Policy and the Fair Wage Policy until such time Council considers that the commercial relationship between the parties is no longer impaired. The relevant portions of the City's Procurement Policy and FW Policy appear in the Analysis and Rational for Recommendation section below.

RELEVANT CONSULTATION

City Manager's Office - Legal Services

ANALYSIS AND RATIONALE FOR RECOMMENDATION

Council's Authority to Ban

Both the City's Procurement Policy and the FW Policy allow Council the authority to ban a vendor from doing business with the City. This authority is set out below.

The City of Hamilton's By-Law No. 16-070, Procurement Policy, Policy # 1 – *Vendor Eligibility*, Section 4.1 (2) (a) states, in part, the following:

- (2) *Without limiting or restricting any other right or privilege of the City and regardless of whether or not a Bid otherwise satisfies the requirements of a*

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*Request for Prequalifications, RFP or RFT, **the City may reject any Bid from a vendor where,***

(a) in the opinion of the City, the commercial relationship between the City and the vendor has been impaired by the act(s) or omission(s) of such vendor including but not limited to any one or more of the following having occurred within the five year period immediately preceding either the date on which the RFP or RFT is awarded or the date on which the vendor has been shortlisted pursuant to a Request for Prequalifications:

(iv) the vendor's refusal to follow reasonable directions of the City or to cure a default under any Contract with the City as and when required by the City;

Section (5) of Procurement Policy, Policy # 1 states the following:

*(5) Without limiting or restricting any other right or privilege of the City, the City may refuse to enter into a Contract with a vendor where any of the circumstances described in (2)(a), (2)(b) or (8) of this Policy # 1 have occurred within the five year period preceding the date on which the refusal to enter into the Contract is approved by Council. In addition or in the alternative to refusing to enter into the Contract, **the City may ban a vendor from competing for or being awarded any City Contract for a period of up to ten years.***

The applicable City of Hamilton's Fair Wage Policy approved by Council on August 13, 2009, Section *Consequences of Non-compliance*, 3 states, in part, the following:

3. *Where a Contractor or Sub-Contractor has been determined to be in non-compliance with the Fair Wage Policy and/or Fair Wage Schedule for a second or subsequent time within a five (5) year period from the date of the first determination of non-compliance by the Manager of Purchasing or designate, the City, as approved by City Council, may:*

*(a) **refuse to accept any bid, quotation or proposal from such Contractor on any City contracts, for a period of two (2) years from the date of City Council approval, save and except any Construction Contract the Contractor may currently have with the City.***

Rationale for Ban

Since 2010, Procurement staff has spent a significant amount of time and resources in tending to the complaints raised against Bondfield. Procurement staff has had to engage in numerous email and letter correspondence with Bondfield in order to discuss the complaints, facilitate the investigations and gather information if required. At times staff has also had to contact Bondfield's sub-contractors for the same. In addition to

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contacting individuals from these companies, Procurement staff has also had to liaise with the initiators of the complaints where required and more importantly, correspond with the City's internal Audit Services division and external auditing firm performing the audits.

The timelines and events set out in the Historical Background section within this Report; identify the long time periods in which the FW Policy complaint process takes. Much of the correspondence or additional information from Bondfield or their sub-contractors is slow in forthcoming and makes the process of the investigation long and arduous.

Staff has performed its due diligence with Bondfield in three separate meetings to ensure that Bondfield understands its responsibilities to relay the requirements of the FW Policy to its sub-contractors. As evidenced in the last correspondence received by staff, it is now apparent that Bondfield has openly stated they do not wish to comply with the City's FW Policy and would rather run the risk of being banned from working with the City. In refusing to comply with the FW Policy, Bondfield is also in contravention of the City's Procurement Policy in not following direction provided by the City and refusing to cure a default under the construction contracts Bondfield had entered into with the City.

Under the requirements of the FW Policy, a contractor is not only responsible for violations or non-compliance of their own actions, but also for those actions of the sub-contractors retained for the contract. Therefore, in all three complaints found valid, Bondfield as the contractor for the project carries the full responsibility for ensuring compliance with the obligations under the FW Policy.

Allowing Bondfield to continue the practice of not complying with the FW Policy on future City contracts may jeopardize the City's position in upholding the integrity of the Fair Wage Policy and Fair Wage Schedule. Bondfield may see the City's willingness to continue to employ their services as an admission, in whole or in part, to retain sub-contractors that do not compensate in accordance with the FW Policy. Similarly, allowing this practice to continue may also be seen by other bidders within the vendor construction community as reluctance by the City to act upon its rights and authority to uphold its own policies.

Staff is recommending that a ban against Bondfield and its related corporate or individual entities be implemented until May 11, 2026, whereby:

- Any current and future bids, proposals or quotations received from Bondfield or any of its related corporate or individual entities, would be rejected; and,
- That the City refrain from entering into any contract with Bondfield or any of its related corporate or individual entities.

ALTERNATIVES FOR CONSIDERATION

Council could allow Bondfield to continue to submit bids on City projects despite the fact that Bondfield and its sub-contractors may continue to not pay their employees in accordance with the FW Policy. By allowing this, Council would ensure that the total number of bidders on any City project would not be affected. It is also possible that Bondfield could be the lowest bidder on one or more future projects and allowing Bondfield to bid might result in a cost-savings to the City. However, permitting Bondfield to continue would entail the risks enumerated above in the Analysis and Rationale for Recommendation section of this Report.

Council could enter into a contract with Bondfield outside of the competitive process. However, this option would be undesirable to enforce a ban for the competitive process and then not follow it by entering into contracts directly with Bondfield for certain projects. Therefore it is recommended that a consistent approach be taken regarding Bondfield for all types of contracts.

Council may wish to consider a shorter or longer ban than the proposed ten-year ban.

ALIGNMENT TO THE 2012 – 2015 STRATEGIC PLAN

Strategic Priority #1

A Prosperous & Healthy Community

WE enhance our image, economy and well-being by demonstrating that Hamilton is a great place to live, work, play and learn.

Strategic Objective

1.6 Enhance Overall Sustainability (financial, economic, social and environmental).

Strategic Priority #2

Valued & Sustainable Services

WE deliver high quality services that meet citizen needs and expectations, in a cost effective and responsible manner.

Strategic Objective

2.1 Implement processes to improve services, leverage technology and validate cost effectiveness and efficiencies across the Corporation.

Strategic Priority #3

Leadership & Governance

WE work together to ensure we are a government that is respectful towards each other and that the community has confidence and trust in.

Strategic Objective

- 3.1 Engage in a range of inter-governmental relations (IGR) work that will advance partnerships and projects that benefit the City of Hamilton.
- 3.4 Enhance opportunities for administrative and operational efficiencies.

APPENDICES AND SCHEDULES ATTACHED

Appendix "A" to Report FCS16027 - Summary of Fair Wage Complaints Against Bondfield Construction Company Ltd. from 2010 to 2015