



## **EXECUTIVE SUMMARY**

On November 9, 2017, the Procurement Sub-Committee met to discuss Report FCS17085/BOH17042, which recommended an interim ban be imposed upon Wise and Hammer for a period of up to 12 months. At that meeting, the Procurement Sub-Committee approved the Report and further directed staff to report back to the Audit, Finance and Administrative Committee before the end of the 12 month term in order to impose a ban for a longer period of time.

The purpose of this Report is to comply with the Procurement's Sub-Committee direct and recommend a ban against Ontario Inc. 2380585, c/o Wise and Hammer Inc. (Wise and Hammer), as well as any of its related corporate or individual entities, from competing or being awarded any City of Hamilton (City) Contract, due to documented poor performance and non-performance which has impaired the commercial relationship between the City and the vendor.

***Alternatives for Consideration – See Page 6***

## **FINANCIAL – STAFFING – LEGAL IMPLICATIONS**

**Financial:** Banning Wise and Hammer from the competitive bidding process would decrease the potential number of bidders for marketing and design related projects. However, it must be noted that all of the contracts in which Wise and Hammer have been awarded to date have been through direct award or through a non-competitive process.

**Staffing:** None

**Legal:** The City's right to ban a vendor from future bids or from entering into contracts with the City, where the commercial relationship between the City and vendor has been impaired due to the vendor's conduct, is set out in the Procurement Policy By-law No. 17-064.

## **HISTORICAL BACKGROUND**

In July, 2016, Wise and Hammer were engaged by the Tobacco Control Program (TCP) Section of Hamilton Public Health Services to complete four graphic/web design projects, two of which were directly for use by the City of Hamilton's TCP Section and two were for use by other Ontario Provincial Tobacco Control network partners, paid for by the Kingston, Frontenac and Lennox and Addington Public Health ("KFL&A").

From July to October 2016, Public Health staff met with Wise and Hammer to finalize the scope for the four projects and to create estimates for the work involved in each of

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**SUBJECT: Commercial Relationship Between the City of Hamilton and Ontario Inc. 2380585, c/o Wise and Hammer Inc. and Related Entities (FCS170805(a)/ BOH17042(a)) (City Wide) - Page 3 of 7**

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the projects. City staff was of the understanding that Wise and Hammer was to develop a template for the first project and then replicate it for the remaining three projects. As a result of these discussions, the scope of work was finalized and Wise and Hammer issued four invoices: two to City of Hamilton and two to KFL&A for payment. All invoices indicated that they were due 30 days upon issuance. Full payment of the two respective City invoices (#397 and #398) was made to the vendor on or around October 21, 2016, for the total amount of \$19,323.00.

The invoices included the following term and condition:

*“Any items not outlined in this proposal shall be considered beyond the Scope of Work and will exceed the Estimated Fees. Out-of-scope items will require prior Client approval in the form of a Change Order (Change Request) before being added to the Scope of Work.”*

In January 2017, Wise and Hammer advised City staff via email that additional hours had been spent on the projects and that they were *“now 4x the agreed upon original budget in the hours used and over a month past the deliverables to be completed originally discussed”*. Prior to this communication with City staff, Wise and Hammer failed to advise or request approval from City staff for additional hours or extra work to be completed on the projects, as set out in the term and condition of their invoices.

Through the email communication dated January 13, 2017, City staff became aware that all work to date had been expended towards the first templated project being the KFL&A project *“Freeze the Industry”*. No other work had been completed on any of the three remaining projects.

In an effort to gain an understanding of the additional hours worked on the projects, City staff made repeated attempts to discuss the hours and request further information from Wise and Hammer to distinguish work that was completed from work not completed. Although no request for approval of additional hours or extra work had formally been made by the vendor, City staff indicated to Wise and Hammer that staff were willing to re-quote/re-scope the work as needed based on learnings from 1st campaign template package and bill accordingly, however, the vendor was non-responsive to the request to meet or discuss.

In February 2017, Wise and Hammer provided staff with information regarding work completed to date and work in progress. They noted that all items related to the City's invoices #397 & #398 were listed as “not started”. Only work related to the KFL&A project *Freeze the Industry* had been completed. On March 3, 2017, staff was finally provided with a “Detail Time Report” generated by Wise and Hammer. Although the report included project details and the number of hours worked from August 4, 2016 to February

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17, 2017, the information that was provided was blended for all four projects without any separation of work completed by project.

After the receipt of the report, City staff requested a further breakdown of the information to delineate the projects. The vendor was again non-responsive to this request.

In April, 2017 City staff found it prudent to complete a Vendor Performance - Incident Reporting Form ("VP Form") and formally document the poor and non-responsiveness of the vendor. Wise and Hammer were given the opportunity to respond and as a result of that response, City staff requested a face-to-face meeting to discuss the VP Form and try to resolve the issue.

Representatives from Wise and Hammer along with City staff from the TCP Section and the Procurement Section met to discuss the vendor performance and non-performance issues and how best to proceed with the projects. It became apparent at that meeting that Wise and Hammer were not willing to complete the three remaining projects without further compensation. At the meeting, City staff once again requested the vendor to provide a breakdown of hours and notations to reflect the work that had taken place on the respective four projects. Wise and Hammer agreed to provide this detailed information. The City advised the vendor that the information was to be provided within two weeks (July 24, 2017).

On August 26, 2017, Wise and Hammer submitted Invoice #496 via email, entitled *FACT-1115-02 - Final Account Balance – Invoice*. All notations and information within the invoice reflected nearly the same information and level of detail as was provided by Wise and Hammer in the Detailed Time Report that they previously provided. The vendor also appears to have included additional hours in the details that were not previously reported or documented. As a result, staff was still neither able to determine which hours were expended towards work on the specific KFL&A projects or the City of Hamilton projects nor how much work is outstanding against the invoices that were previously paid.

Invoice #496 reflected an outstanding amount of \$15,460.66 charged to the City of Hamilton for additional hours that were spent on all four projects.

## **POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS**

The City may exercise its discretion to reject any future bid, proposal or quotation from and to not enter into any contract with Wise and Hammer or any of its related corporate or individual entities, in accordance with the terms of the City's Procurement Policy until such time Council considers that the commercial relationship of the parties is no longer impaired. The relevant portions of the Policy appear in the Analysis section below.

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## **RELEVANT CONSULTATION**

Staff from the Tobacco Control Program Section has been involved in the discussions with the vendor and attended the meeting to discuss the vendor performance and non-performance issues. They have also been consulted with respect to the contents and recommendations set out in this Report.

## **ANALYSIS AND RATIONALE FOR RECOMMENDATION**

### Procurement Policy

The City of Hamilton's By-Law No. 17-064, Procurement Policy, Policy #1 – Vendor Eligibility, Section 4.1 (10) and (11) state 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.*

### Proposed Ban

In accordance with the Procurement Sub-Committee's direction to staff, this Report recommends a ban upon Wise and Hammer for a period of up to five years for documented poor performance and non-performance. At the time of this Report and to City staff's knowledge, no further work has been done on any of the remaining three projects since August 26, 2017. The only communication staff has received from Wise and Hammer has been monthly past due invoice reminders requesting payment of \$15,460.66.

The poor performance and non-performance demonstrated by Wise and Hammer has not been resolved to the City's satisfaction and 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 resolved. It continues to be City staff's opinion that the vendor has demonstrated an unwillingness to work with the TCP Section staff to complete the projects in accordance with the scope of work and cost estimate developed in October 2016 and which cost estimate was prepaid to them in October 2016.

Allowing Wise and Hammer and any of its related corporate and individual entities to bid on further City projects or enter into new City contracts at this time would remove any incentive for them to complete the work and would excuse the vendor's poor performance, non-performance and work refusal which would likely impose additional strain on the commercial relationship between the City and the vendor.

### **ALTERNATIVES FOR CONSIDERATION**

Council could lift the interim ban and continue to allow Wise and Hammer and any of its related corporate and individual entities to continue to bid on City projects despite the City staff recommendation. This alternative is not recommended given the significant difficulties that City staff has experienced with the vendor as set forth in this Report.

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

**ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN**

**Community Engagement & Participation**

*Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community.*

**Our People and Performance**

*Hamiltonians have a high level of trust and confidence in their City government.*

**APPENDICES AND SCHEDULES ATTACHED**

Appendix “A” to Report FCS170805(a)/BOH17042(a) - Chronology of Events for Vendor Performance Issues with Wise and Hammer

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