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November 3, 2021

DELIVERED BY EMAIL

Office of the City Clerk
City Hall, City of Hamilton
71 Main St. W., 1st Floor
Hamilton, ON L8P 4Y5
clerk@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") -- Audit, Finance & Administration
Committee ("AFAC") Meeting on November 4, 2021 ("AFAC Committee Meeting")
Submission for Delegation

We are respectfully asking that the Audit & Finance Administration Committee and City
Council not impose a ban upon Associated Paving & Materials Ltd. (APM) from bidding
on or entering into the contract for *Contract Number C15-32-21 (H) Permanent
Restoration of Pavement Cuts in Asphalt and Concrete Pavements* (the "*2021 Road Cuts
Contract*") which was recently put out by the City for tender.

We appeared with legal counsel before the Procurement Sub-Committee about this on
October 29th. We do not know what the Sub-Committee decided. We were told by the
Clerk's Department that the Sub-Committee made some recommendation, but that they
are not permitted to tell us what the Procurement Sub-Committee has recommended.

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Who is Associated Paving & Materials Ltd. (APM)?

The APM group of companies are family-owned and have operated for more than 50 years. APM has its head office in Burlington, where its asphalt plant is located.

APM has a long relationship with the City, over many years and many contracts.

Our organization also has invested in the City of Hamilton, having acquired and done substantial clean-up remediation of a property with a substantial building on Lottridge Road. We acquired the property in 2017 and made extensive modifications to the building and added facilities so that we could more effectively perform contracts with the City, especially the road cuts restoration contracts which APM has performed for almost 8 years.

We very much value our relationship with the City.

What is Involved in Road Cuts Restoration?

Restoration of utility cuts typically involves hard surface (asphalt, concrete) restoration and soft surface (sod, interlock) restoration, which has to be done in a sequence of concrete, followed by paving, followed by soft surface. Some restorations can involve substantial work.

The City has posted on *YouTube* (at <https://youtu.be/sANzanuweMo>) an “*Inside City of Hamilton*” video which describes the road cut restoration process. In that video, it is stated that one of the major complaints of citizens about road cuts is about restoration of the sod, but that unfortunately sod can generally only be laid in spring and the fall.

The 2014 & 2017 Road Cuts Contracts and City Commendations of APM

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, extendable for one-year periods up to 4 years at the option of the City. The City was sufficiently satisfied with APM’s performance that the City exercised its option to extend the contract each year successively, for a total of four years, through 2017.

In an April 9, 2015 letter from the City which we proudly display in our offices reception area, APM was advised by the City that our performance on the 2014 Road Cuts Contract and the dedication of our people were exceptional, that “[our] group is now setting the bar to which others were not able to achieve” and we had “shown that [we] are more than capable to managing this project”.

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, extendable successively at the City's option by one year for up to four years. Again, the City was sufficiently satisfied with APM's performance that it successively exercised its option to extend the term of the contract three times, extending to November 30, 2021.

Again, we received written commendations of our performance:

- First, in a June 28, 2018 in an email from the City's Project Manager, commending the performance an APM project manager and describing the program was in the "*best state the program has been in*" since the author of the email had been managing the contract.
- Second, in a July 15, 2020 email from the City's Project Manager – Restorations. during 2020, which described 2020 as being a "challenging year" due to the City's switch to the new Cityworks project management software and the ongoing Covid-19 pandemic. The email commended the same APM project who had been commended in 2020 (and is still APM's Project Manager for the road cuts contract) on his commitment, constant communications and assistance in the rolling out of Cityworks. The email stated:

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 [APM's project manager's name] consistent focus on these skills has allowed him to effectively manage and improve the road cuts program.

The City Has Already Prequalified APM for the 2021 Road Cuts Contract

This Committee may not know that what City staff are now recommending is that APM be banned from bidding on a contract for which APM was very recently prequalified by the City.

APM is one of only 5 companies which have been prequalified by the City to bid on the *2021 Road Cuts Contract*. If APM is banned from bidding on that contract, there will be a maximum of only 4 bidders for the contract.

We submitted our bid for prequalification for the *2021 Road Cuts Contract* in early August of this year. It is important to note that the prequalification process was rigorous and comprehensive.

Over a period of two months, an "*Evaluation Team*" comprised of City staff and City consultants evaluated the following criteria:

- the construction equipment we would dedicate or use for the project;
- our material supplies, including our asphalt/concrete plant and our topsoil/sod suppliers;
- our senior office and field staff experience;
- our experience with the last 5 years in successfully completing municipal road restoration projects of similar scope and complexity, *including the road cuts restoration contracts we have performed for the City of Hamilton*;
- *Project Management*, specifically our “*proposed methodology to complete the permanent restoration of approx. 360 cut locations, including road/sidewalk/sod, in a six week period*”;

On October 8th, we were advised of the “unofficial” results of the City’s prequalification process --- APM had been prequalified for the *2021 Road Cuts Contract*.

The Series of Events Following Notification of APM Having Been Prequalified

Following notification on October 8th that APM had been prequalified to bid on the *2021 Road Cuts Contract*, a series of perplexing events has occurred.

One week later, on October 15th, we were surprised to be advised in a letter that the City was “*contemplating a vendor ban against [APM] for Permanent Restoration of Pavement Cuts in Asphalt and Concrete Pavement Work*” --- the same contract for which APM had just been prequalified by the City.

Two business days later, on October 19th, we received a letter from the City’s Manager of Procurement advising that since APM had been awarded the 2017 Road Cuts Contract “*and more specifically since November 19, 2020, City staff has experienced some vendor performance issues with Associated Paving on the [2017 Road Cuts Restoration Contract]*” and that “*it is the view of City staff that the commercial relationship between the City and Associated Paving has been impaired*”. The October 19th letter further advised that a “*staff report*” would be considered by the City’s Procurement Sub-Committee on October 29th and:

“... 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 October 19th letter further advised that the staff report was a “*confidential report*” and would be considered by Procurement Sub-Committee in closed session, which we would not be able to attend. The letter went on to state:

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

On October 25th, the prequalification of APM for the *2021 Road Cuts Contract* was made official.

On October 27th, the Request for Tenders package for the *2021 Road Cuts Contract* was made provided to APM. The Request for Tenders states: “*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. The Tender package stated that it closed on November 10th.

APM's Attempts to Obtain Fairness in the Process

Being barred from bidding will have serious implications for APM. We are entitled to fair consideration and a fair process.

That City staff have now initiated this process seems particularly unfair to us. We have just been through a rigorous process of preparing a submission as to our capability to perform the *2021 Road Cuts Contract* and as to our performance on previous road cuts contracts. After extensive review, the City's Evaluation Team decided to prequalify us to bid on the contract. Now we have to again make submissions as to why we should be permitted to bid on the contract, this time in a public process, in which anything we choose to submit to convince Committees and the Council will be made public for review by our competitors.

The October 19th letter from the Manager of Procurement states that the City's staff report as to why the staff is recommending that we be banned from bidding is to be kept confidential from us. We do not know what is stated in that staff report and whether it is fair and accurate as to what has occurred.

The October 19th letter states that the City issued to us “*a number of Policy #8 Vendor Performance reports and one Vendor Performance – Incident Reporting Forms*”. In fact, the only report we received an August 17, 2021 Vendor Performance – Incident Report form, which is the only such report we have ever received from City on any contract. On October 22nd, we asked that the Manager of Procurement provide to us all of the reports which the October 19th letter said had been issued to us.

At the end of day on Tuesday, October 26th, we received extensive documents from the City which are supposed to provide the basis for banning APM from bidding due to impairment of its commercial relationship with the City. Many of the documents had not previously been provided to us. We do not know which, if any, of those documents were provided to the Procurement Sub-Committee or have been provided to this Committee.

Legal counsel we have engaged wrote to the City emphasizing that we are entitled to fairness and full disclosure by the City and advising that we were requesting that the Procurement Sub-Committee defer consideration of this matter until we had received disclosure and an opportunity to prepare our submissions.

On October 29th, we appeared with our legal counsel before the Procurement Sub-Committee. We requested deferment by the Sub-Committee and advised that if the Sub-Committee would not grant deferment, we wished to make submissions as to why the ban ought not to be imposed. The Sub-Committee went into closed session and apparently conferred with City staff in closed session. We were then advised of what the Sub-Committee determined, which did not disclose what the Sub-Committee had actually

determined. Our legal counsel asked the Clerk's office, but was told that they were not permitted to tell us what the Sub-Committee had determined and that the City staff report would remain confidential from us.

Our legal counsel has today again requested full disclosure and that we be told what the Procurement Sub-Committee decided on October 29th.

What Happened in 2020 – 2021?

The October 19th letter from the City's Manager of Procurement makes general statements about issues relating to APM's performance on the 2017 Road Cuts Contract, but is specific that the issues have been experienced since November 19, 2020.

As stated above, we had been commended by the City for our performance on the 2017 Road Cuts Contract (and on the 2014 Road Cuts Contract), most recently only a little more than a year ago and less than 4 months prior to November 19, 2020.

So, what happened in 2020 – 2021?

As was noted by the City's Project Manager – Restorations in his July 15, 2020 email, 2020 was a particularly challenging year. This was not only due to the Covid-19 pandemic ongoing (and it still is), the City required that APM change its procedures and utilize the Cityworks program, which had not been a requirement under APM's contract with the City (but we note that this has been added as a requirement of contractors for the *2021 Road Cuts Contract* which is currently out for tender).

On top of those challenges, the quantities of restoration work which the City asked APM to perform escalated to being almost double the quantities the City had estimated and had been stated in APM's contract with the City. We have been told by the that they have no control as to the volume of restoration needed and that the City had not anticipated that the estimated quantities would be exceeded to the extent that they have. We also had not anticipated that.

The City's 2017 Tender package states and the Contract also states, in section 6:

Construction Schedule

The Contractor will be required under this Contract to **supply sufficient crews and equipment to undertake the estimated square meters of pavement cut restoration** in this Contract.

Our bid had been based on those estimated quantities. We also had relied on that (as was intended by the tender package) in determining the amount of work we took on otherwise for the City and for other municipalities and customers.

APM has complied with this contractual requirement. We have supplied sufficient crews and equipment to undertake the estimated quantities set out in the Request for Tender and Contract. However, the City insisted that we are required to complete all restoration work within six weeks regardless of the quantities we are asked to perform.

The City has pointed to the following provision in the contract:

All Works required under each weekly listing shall be completed within 6 calendar weeks of the issue date.

This wording contemplated the City issuing weekly listings of cuts to be restored. Since the City implemented the Cityworks system, it no longer issues weekly lists, but instead notifies APM of cuts needing restoration through the issuance of work orders of which APM is notified through an “In Box” in Cityworks. The City contends that APM “*is contractually given 6 weeks to complete a restoration once notified*”. Despite the clear wording of the contract that we are only required to provide sufficient crews and equipment to undertake the estimated quantities, the City told us that we are required to supply additional crews and equipment sufficient for the increased actual quantities (that is, about double the estimated quantities stated in the contract).

It seems to us that the City considers the problems caused by the actual quantities so significantly exceeding the estimated quantities in the contract to be ours alone to solve. The logical extension of the City’s interpretation of what we are required to do under the contract is that, even if the actual quantities we are asked to undertake exceed the estimates by ten-fold, we would still be required to complete the restoration of the cuts in six weeks --- even if it consumed our company’s entire workforce and equipment and beyond that.

As well, it could not reasonably have been intended that the six-week provision strictly apply to sodding, given that due to our climate and weather conditions, practically speaking there is a short window when sodding can occur. In recognition of this, there has been an understanding between APM and the City that there must be some reasonable latitude as to the six-week time period for sodding and that backlogs will occur, which will carry over into the next year. On top of that, none of the sodding restoration for road cuts done over the winter can be commenced until the weather improves in May (meaning that the winter road cuts are added to whatever backlog there was as of the end of the previous year’s sodding season).

In addition, significant time was lost due to COVID and due to weather conditions (typically, snow or rain). The City also requires that APM apply their crews to urgent situations, typically water main breaks.

Even though the restoration work the City has requested that we do has exceeded what had been stated to be our contractual obligation, in good faith we have worked diligently and cooperatively with the City to complete restoration of the unanticipated volumes and also to accommodate the increased requirements of the City’s new Cityworks process, the introduction of which partway through this Contract coincided with the challenges of the greatest increase in quantities and the COVID pandemic which began early in 2020 and continues.

We have been sensitive to the fact that residents complain to the City and to Councillors when restoration does not occur promptly. We have accommodated directions from the City to perform what the City advises is priority work (which has included often being directed to perform work orders well within the six-week timeframe instead of performing older work orders, regardless of locations where our crews have been working), although this has led to inefficiencies in the sequencing of our work and caused ripple effects which have increased the overall time required to perform work orders. The City providing to

APM weekly priority lists and requiring that APM apply their crews according to those lists was not provided for in the Contract.

We have also equipped our crews with tablets for photographing restorations. We have also kept the City informed on a daily basis of where our crews are to be working.

We did add crews and equipment for restoration work, as is clear from the fact that by year's end had approved work amounting to about double what had been agreed to. We have sometimes had six crews working on restorations.

it is important to understand that adding crews is not a simple matter. During the Covid pandemic, labour has sometimes been in short supply (industry-wide). As well, adding crew members alone is not sufficient; we have to have equipment available for additional crew(s) to utilize. As well, even if we could have crews and equipment work on Saturdays, we would also have to open up our asphalt plant, which involves significant cost.

We note that in the City's Request For Prequalifications for next year's Pavement Cuts Restoration Contract it is stated:

The Contractor will be required to maintain records on regular basis in the City of Hamilton's current project management software using Contractor provided devices to update the statuses of individual work orders, upload photos and comment as required.

There was no such requirement to maintain records, update statuses of individual work orders or upload photos in the City's project management software stated in the Request for Tender or in the Contract for 2018 (renewed by the City for 2019, 2020 and 2021). This is a significant change in the City's administrative process and from what had been required of us in the first two years of the current Contract, which the City imposed during the course of the current Contract and we have had to adjust to and accommodate.

In addition to increasing time and effort required of APM, the administrative process the City has introduced and required that APM follow has created lags and increased the steps and time before work APM have performed is considered by the City to be "complete", even though the actual restoration work may have been finished by APM weeks before the City considers APM's work to be "complete". This and the City's new system of issuing multiple work orders for each cut has led to an increase in the number of items of work which the City considers to be "incomplete".

Even though the City considered many work orders to not be closed, the City still considered APM's performance to be sufficiently satisfactory that the City chose to exercise its option to extend the term of the Contract for a further (fourth) year, through to November 30, 2021.

By the spring of 2021, through additional crews and keeping our asphalt plant open in the winter months, we had essentially caught up as to hard surface restoration. There was still a sodding carryover from 2020, plus restoration required over the winter.

We note that the June 10, 2021 Vendor Performance Evaluation Form we received from the City for the first time on October 26th rates APM's performance as "satisfactory" in all

categories and states that “*hard surface restorations have been brought to the 6 week timeline*” and that “*sod restorations are lagging*”.

We optimistically forecast that our sodding subcontractors would be able to achieve more progress than the wet and extremely hot weather after June 10th permitted.

The August 17th Vendor Incident Report

On August 17th, 2021 we received the one and only Vendor Performance Incident Reporting Form we have received from the City as to the 2017 Road Cuts Contract.

We provided detailed responses to the City on August 20th and 27th. We do not know whether those responses were provided to the Procurement Sub-Committee.

The Incident Reporting Form stated that APM “*is contractually given 6 weeks to complete a restoration once notified*”. We do not agree, as stated above. The Reporting Form also stated that the City required that 474 work orders be restored and invoiced by the end of the day on August 20th, only 3 days after City issued the Incident Report to us.

As the City knew when it issued the Reporting Form, the actual restoration work for the majority of the 474 work orders that the City indicated on the Reporting Form were “incomplete” had already been done. As the City also knew, all but a very few of the 474 work orders were for soft surface work which had been understood to not be subject to a six-week time period requirement due to the short window for performing that work and this summer’s conditions (rain and extreme heat).

Not only was that unreasonable and unfair for the City to require that the 474 work orders be “restored and invoiced” by August 20th, that was practically speaking impossible.

As described in APM’s August 27th letter, under the City’s administrative process, APM does not “*invoice*” and the administrative measure of “complete” for a work order which the City imposed during the term of the Contract depends on the City performing the step of entering line items (the actual quantities supplied) in Cityworks for each work order. In their August 20th letter, APM stated that 303 of the 474 work orders were as of that date ready for the City to enter line items in Cityworks. From APM’s review of Cityworks, there had been significant delay in the City completing the entering of line items in Cityworks for those 303 work orders.

The City’s insistence that all work orders issued up to July 31st be “*restored and invoiced*” by September 11th was also unreasonable and unfair, particularly considering:

- the quantities required to fulfill the work orders;
- the extremely hot weather, which continued until August 27th;
- the City’s continued issuance of weekly priority lists;
- the administrative process implemented by the City during this Contract;
- ongoing COVID precautions and restrictions.



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APM has since provided schedules for restoration which are realistic, in the face of weather constraints and priority lists, not to mention emergency work the City requires that APM perform.

Has the Commercial Relationship Between APM and the City Been Impaired?

We do not believe that the commercial relationship between APM and the City has been impaired such that APM should be banned from bidding for the 2021 Road Cuts Contract.

We believe that a more correct characterization of what has occurred that a disagreement arose between the City and APM in challenging and unanticipated circumstances that arose in 2020 and continued into 2021.

We have applied ourselves with commitment and in good faith, such that the only significant issue is the sodding backlog, which unfortunately was inevitable.

There is no reason to doubt that APM can satisfactorily perform what is required under the 2021 Road Cuts Contract. This has already been the determination of the prequalification Evaluation Team.

We have the same project management team in place that the City has commended for our competence and dedication.

It is important to note that the stated quantities for the 2021 Road Cuts Contract are significantly higher than the quantities which had been estimated for the 2017 Road Cuts Contract. As well, the requirement for sodding restoration has essentially been replaced by restoration through placement of topsoil and seed. We are particularly well-qualified for that, as we are able to keep topsoil in our climate-controlled Lottridge Rd. facility.

Is It Fair and in the Public Interest that APM Be Banned from Bidding?

We feel that banning us would not be fair. We also feel that it would not be in the interests of the City to reduce competition for the upcoming contract. We plan on submitting a competitive bid and if we are banned the result might be that the City will have to pay a higher contract price than would be the case if we are permitted to bid.

The qualifications of APM and its performance have been rigorously reviewed by the City's Evaluation Team, in deciding to prequalify APM for the 2021 Road Cuts Contract. That review was far more comprehensive than any review that this Committee or the Council will be engaging in. There is no reason to override the determination by the Evaluation Team.



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We respectfully ask that we not be banned from bidding for the 2021 Road Cust Contract.

Sincerely,

Stan Capobianco, President

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