



CITY OF HAMILTON
CORPORATE SERVICES DEPARTMENT
Financial Services and Taxation Division

TO:	Chair and Members Audit, Finance and Administration Committee
COMMITTEE DATE:	December 09, 2021
SUBJECT/REPORT NO:	Information Regarding Calculation of Audit Fee for Fair Wage Compliant FW26-2017 FCS21117 (City Wide) – Outstanding List
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Tina Iacoe (905) 546-2424 Ext. 2796
SUBMITTED BY:	Rick Male Director, Financial Services and Taxation and Corporate Controller Corporate Services Department
SIGNATURE:	

RECOMMENDATIONS

- (a) That Network Sewer and Watermain Ltd. be charged \$8,555.96 for the costs associated with FW26-2017 Fair Wage audit;
- (b) That the item respecting the delegation by Kenneth Ukrainec, on behalf of Network Sewer and Watermain Ltd., respecting the Fair Wage Policy and Fair Wage Schedule Complaints Annual Report (FCS20084) be considered complete and removed from the Audit, Finance & Administration Committee's Outstanding Business List.

EXECUTIVE SUMMARY

At its meeting of October 22, 2020, the Audit, Finance and Administration Committee ("AFA") approved the following motion:

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“That Procurement staff be directed to investigate whether the Audit Fee to be charged to Network Sewer and Watermain Ltd., is reasonable and report back to the Audit, Finance and Administration Committee.”

The purpose of this Report is to comply with the direction given by AFA and recommend that the initial Audit Fee of \$9197.26 charged to Network Sewer and Watermain Ltd (Network”) be reduced to \$8,555.96.

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FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: None

Staffing: None

Legal: None

HISTORICAL BACKGROUND

Request for Tenders C15-56-16 for the reconstruction of Upper Sherman Road Reconstruction was awarded to Network Sewer and Watermain Ltd. (“Network”) in February 2017. The scope of work included the supply and installation of sewer, watermains, water valves, roadway, curb and sidewalk reconstruction and the contract award to Network was in the amount \$3,990,560.04.

In late 2017, complaint FW26-2017 was lodged against Network on Contract C15-56-16. The complaint submitted for this Contract was a bit unusual in terms of the size of the request. Fair Wage complaints received prior to this had been for specific employees working in one trade for a contractor or sub-contractor. However, complaint FW26-2017 identified all employees that had been working in four sections of the Fair Wage Policy and Fair Wage Schedule (“FW Policy”):

- Road Work;
- Road Work, Open Cut Work for Sewer and Watermain Construction;
- Open Cut Work for Sewer and Watermain Construction;
- Labourers - Sewer Watermain, Roads Building Paving, Parking Lots, Bridge Rehab.

City of Hamilton’s (City) Procurement staff sought verification of the size of request with the initiator, indicating that if the complaint was found to be unsubstantiated the initiator would be responsible for all costs of the audit and that considering the size of the audit,

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the cost was expected to be significant. The initiator confirmed their complaint to be correct.

28 Network employees were identified and included in the audit. The audit took a significant amount of time to complete and KPMG, the City's external auditor, was requested to review their findings in light of disputes raised by Network with new or corrected information. The confidential Appendix attached to this Report gives a succinct list of events with respect to the audit and the costs associated.

At its meeting of October 22, 2020, the Audit, Finance and Administration Committee ("AFA") received a delegation from, Kenneth Ukrainec, on behalf of Network respecting the Fair Wage Policy and Fair Wage Schedule Complaints Annual Report (FCS20084) (Added Item 7.2). Mr. Ukrainec addressed the procedural process of the complaint process of the City's Fair Wage Policy (FW Policy) and requested:

"that the City declare the following:

- 5.1.1. Network should only be subject to pay for the alleged outstanding amounts owed to the employees in question; and
- 5.1.2. That any further penalty typically imposed pursuant to the FW Policy be waived for Network in this instance."

Following to the delegation, AFA approved the following motion:

"That Procurement staff be directed to investigate whether the Audit Fee to be charged to Network Sewer and Watermain Ltd., is reasonable and report back to the Audit, Finance and Administration Committee."

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

Fair Wage Policy and Fair Wage Schedule

RELEVANT CONSULTATION

The Manager of Procurement consulted with the following municipalities with respect to their current or impending fair wage policy: City of Oshawa, the City of Brampton, the City of Greater Sudbury, City of Sarnia.

ANALYSIS AND RATIONALE FOR RECOMMENDATION

Fair Wage Policies Throughout Ontario

Hamilton is one of seven known municipalities in Ontario that currently have a Fair Wage Policy: City of Toronto, City of Thunder Bay, City of Greater Sudbury, City of Oshawa and more recently the City of Vaughan and the City of Sarnia.

With the exception of the City of Toronto, all of the policies are similar (“Similar Policies”) in that complaint processes are driven by an initiator submitting a complaint to the municipality regarding a contractor or sub-contractor. All of the Similar Policies include a fee to be paid, either upon receipt of the complaint or after determination of compliance/non-compliance and depending on the outcome of the audit, all Similar Policies require either the initiator or the contractor to pay a fee. With the exception of the City of Thunder Bay, all the Similar Policies indicate that should the contractor be found to be in non-compliance, the contractor shall be responsible for payment of all costs including those beyond the minimum cost of the fee.

Cost in Excess of \$5,000 for the Audit

Procurement staff recognize that the audit on Contract C15-56-16 was significant in terms of size (28 employees). KPMG’s initial estimated cost to complete the audit was \$6,000 and based on the number of employees and corresponding hours to complete the work. However, the actual cost of KPMG’s services was \$9,197.26, which was directly impacted by the additional hours required to complete the initial audit than originally expected as well as two revisions requiring recalculations of information.

KPMG indicated that key contributing factors impacting “the time related to this audit was the number of employees and how poor Network’s record keeping was.” KPMG confirmed that time sheets and payroll information did not agree with the hours submitted for the audit for all employees. Discrepancies by employee required considerable back and forth correspondence between KPMG and Network and it took Network the “summer of 2018” to reconcile the information. These actions by Network made it necessary for KPMG staff to re-audit many employees.

Element of Fairness

When determining the reasonableness of who should bear the cost of a fair wage audit, there are three parties to which the element of fairness needs to be applied.

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The Contractor

The contractor bears the costs of the audit when the complaint is found to be non-compliant.

Network was found to have underpaid its employees \$349.62 on completion of a contract valued at \$3,990,560.04. While the amount of the underpayment may seem trivial in comparison to the overall value of the contract (\$349.62 versus \$3,990,560.04) and the cost of the audit may seem unreasonable in comparison to the dollar value of the non-compliance (\$9,197.26 versus \$349.62) it does not negate the fact that Network was found non-compliant with the FW Policy.

All of the fair wage policies previously mentioned are definitive with respect to compliance and non-compliance. There is no threshold of an allowable acceptance of error or an allowable measured degree of compliance for the contractor to come within in order to be “considered” compliant. Furthermore, there is no consideration given in any of the policies for the dollar value or size of the project to be audited and the amount of compliance to be achieved. The contractor is either complaint or non-compliant.

The Initiator

The initiator bears the costs of the audit when the complaint is found to be compliant. Whether knowingly or unknowingly, the contractor has some degree of control over how easily and straightforward the audit is carried out. It is the contractor who provides the information to the external auditor. The accuracy of that information and the speed with which it is provided to the auditor is what drives much of the cost of the audit.

A contractor who is unprepared and unwilling to cooperate with the auditor can directly affect the time and resources the auditor needs to expend. Procurement staff are aware of and have experienced contractors that, when faced with a fair wage audit, have acted uncooperative, provided inaccurate and disorganized files, were evasive by being continuously unavailable to meet with the auditor and at times acted bullish with auditing staff.

This “control” over the process allows a disadvantage to the initiator by allowing the contractor to drive up the costs of the audit as a direct result of the contractor’s negligence or uncooperativeness. The initiator has no control over how the contractor and sub-contractor participate in the audit.

Hypothetically, should Network have been found to be compliant, the initiator would have been responsible to pay the estimated cost of \$6,000 plus the additional \$3,197.26. This would be unfair to the initiator since they were initially advised that the

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estimated cost was \$6,000 however that cost increased significantly due to Network's poor record keeping.

The City

With the exception of City Procurement staff who administer the FW Policy and where the minimum fee is waived because the complaint is submitted by an employee of the contractor or sub-contractor, the City is not responsible for any costs incurred as a result of a fair wage audit.

Should Council agree to Network's request to allow Network to only pay for the outstanding amounts owed to the employees in question, it would be unfair to charge the initiator the balance of the costs since the initiator's complaint was valid. Alternatively, it would be also unfair to require the City to pay the differential amount seeing as the City has no responsibility or control on what or how contractors and sub-contractors:

- 1) pay their employees;
- 2) keep their payroll records organized and provide correct information to the auditor; and
- 3) cooperate with the audit.

Staff Recommendation

Although the disparity in the dollar value of the project completed and the amount the employees were short paid is rather great, staff is not recommending any change to the FW Policy in light of FW26-2017. Staff is however, recommending that Network be responsible for all the costs associated with the audit, save and except those costs associated with the recalculation of the proper ESA threshold for overtime in the first audit revision. KPMG has confirmed that the cost to perform the recalculation was \$641.30. Since this recalculation was not a result of Network's actions or inactions, staff is recommending that Network be responsible to pay \$8,555.96 (\$9,197.26 - \$641.30 = \$8,555.96).

Maintaining the requirements of the FW Policy with contractors and sub-contractors being either in compliance or not allows the simplest and easiest method to administer the FW Policy and, for all three parties involved, the clearest to understand. Contractors know they have to comply with the FW Policy and will have to pay a fee should they be non-compliant; initiators know that they will have to pay the fee should their complaint be frivolous; and the City does not have to pay or be responsible for either the contractor's or initiator's actions as a result.

ALTERNATIVES FOR CONSIDERATION

Council may wish to grant Network's request and allow Network to only pay the outstanding amounts owed to their employees and waive the requirement for Network to pay the costs of the audit. This alternative is not recommended as another party, either the initiator or the City, would be responsible to pay the costs of the audit to KPMG.

The FW Policy does not indicate a cost-sharing model or indicate that the initiator would be responsible for any of the fees should the contractor be non-compliant. Therefore, charging the initiator would be against the FW Policy as currently written.

Furthermore, the FW Policy does not allow the contractor to come within for a measured degree of compliance and charging some or all of the costs to City taxpayers as a result of the contractor's or sub-contractor's non-compliance would be unreasonable.

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 FCS21117 - Summary of Fair Wage Complaint FW26-2017

TI/dw