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File: 2523-002

WITHOUT PREJUDICE

Toronto Transit Commission
1900 Yonge St
Toronto ON M4S 1Z2

Dear Sirs/Mesdames:

**Re: Toronto Transit Commission Request for Bids for Accessible Tax Service
Bid No. P34PN13755**

We are counsel to the Accessible Transportation Association of Ontario. We have reviewed the TTC Staff Response to ATAO Letter (Correspondence C.5 of the July 23, 2014 Board Meeting) and have the following comments for your consideration.

Current contracts can lawfully be structured in a way so as to satisfy both the drivers (a.k.a., operators) and contractors' concerns and avoid litigation from disappointed proponents.

To clarify ATAO's position, commensurate with the Commission's requirement that drivers be paid at least \$2.50 per kilometre on the basis of fairness, and given that there is apparently little willingness on their part to do so, it is proposed that an additional amount equivalent to the HST be paid to drivers such that they would be notionally paid \$2.50 plus 13% HST. ATAO has no interest in the amount paid to contractors being grossed-up by 13%.

The increased rate paid to drivers would necessarily involve a corollary credit to be paid to contractors so that the contractors would be in the same position as they are currently. Every penny of the HST addition for drivers would go to the drivers and not the contractors.

If need be, the Commission could request that the Fairness Commissioner provide an opinion on the change to the pricing after the award of the contracts.

In terms of analysis, we have the following points to make:

The Contract Documents included with the bid documents were well known to all bidders in advance. The following is from the General Conditions section of the Contract Documents:

GC2 – CONTRACT DOCUMENTS ORDER OF PRECEDENCE

The Contract Documents form the entire Contract between the parties and supersedes any undertaking or agreement, collateral, oral or otherwise existing between the parties as at the date of issuance of the Purchase Order.

All bidders knew that the Contract Documents would govern. By analogy, the section dealing with changes to taxes provides assistance. Important from this section is the following because it recognizes that changes would not necessarily involve a benefit to the contractors:

GC6 TAXES AND DUTIES

[...] No additional costs for administration or overhead and profit will be allowed on such changes and the Contractor shall supply at no cost to the Commission, sufficient documentation to permit a determination of the resulting change.

Moreover, all bidders, successful or not, were aware that the Contract Documents permitted changes to the contract itself after it was signed: see Section GC16 – Changes to the Work, which permits the TTC to make changes, including those to the Contract Price.

GC16 CHANGES TO THE WORK

16.1 The Commission may make changes to the Work, without invalidating the Contract, by altering, adding to or deducting from the Work. No change in the Work shall be undertaken without a written authorization in the form of a Contract Amendment and no change in the Contract Price or change in Contract duration shall be valid unless so ordered.

The TTC Staff Report submitted for the January 28, 2014 meeting also provides support for the proposition that the focus should be on the driver payments so long as there is no corresponding benefit to the contractors.

Affleck Greene McMurtry LLP

Barristers and Solicitors

At page 24, staff wrote:

There is a high likelihood that drivers who are not provided adequate compensation for the work will either move between owners or owners of the plates will move between taxi companies. Or, of more significant risk, the drivers or owners will simply decide not to provide service to Wheel-Trans as it is more profitable to provide service to the general public “off the street”.

The TTC will be contracting with taxi companies with an interest in maximizing return on the contract. Given our historical experience and the business model used in the taxi industry, we anticipate that the taxi companies will pay the drivers an amount which may not be considered to be adequate by the drivers. The result being the drivers will move companies causing inconsistent and unreliable service or simply stop providing service to Wheel-Trans. Therefore, the failure to adequately pay the drivers is a significant risk to the continuity and reliability of Wheel-Trans service for customers who are not ambulatory.

Given what has transpired since the contracts have been signed, the following assertion is essentially impossible to maintain:

The TTC has undertaken a financial analysis to determine a reasonable amount to be paid to AT drivers. Taking into account the approximate costs to operate an AT vehicle for the service required by the TTC, the TTC has determined that a minimum \$2.50 per kilometre is reasonable and also provides cost savings to the taxpayer. Specifically, the AT driver rate under the current contract is \$2.80 per kilometre. A reduction of \$0.30 will be savings of approximately \$2.1 million in the first year of the contract. Based on the understanding of the taxi industry, the TTC believes that, while lower than the current contract, the minimum amount of \$2.50 provides adequate compensation for drivers such that they will provide continuous and reliable Wheel-Trans service.

We trust this is satisfactory.

Sincerely,
Affleck Greene McMurtry LLP



Michael Binetti

PRESENTED TO THE BOARD

AUGUST 19, 2014