June 28, 2006

URGENT

HAND DELIVERED

Office of the City Clerk
71 Main Street West
City Hall
2nd Floor
Hamilton, Ontario
L3P 4Y5

Attention: Ms. Rose Catarini, Deputy Clerk

Dear Ms. Catarini:

Re: Lafarge Canada Inc.
   Contract No. PW - 06 -243 (RHV)
   Red Hill Valley Project
   Mud Street Interchange to QEW Interchange, Hamilton
   Our File No.: 62/06

Further to our telephone discussion of this morning, enclosed, please find the amended Executive Summary and Submission to Council for this evening’s Council Meeting.

Kindly provide our clerk with the original copy of the Executive Summary and Submission to Council.
The amended copy of each is being provided to him under separate cover.

As advised this morning in our telephone discussion, kindly e-mail all members of Council that they are to delete the e-mail circulated, at our request, by your office yesterday attaching the Executive Summary and Submission to Council, and that an amended Executive Summary and Submission to Council will be provided today.

Thank you for your assistance with this matter.

Yours very truly,

GLAHOLT LLP

John Margie
JM/lg

Enclosure

cc: City Solicitor
    Mr. Peter Barkwell
Executive Summary

Summary:

1. Lafarge is Lowest Compliant Bidder for this Contract and is therefore entitled to Council’s award.

2. Council should have sufficient confidence in its purchasing policy and principles to make this award to Lafarge.

3. Lafarge appeared before the City’s purchasing department under Policy #18 and made a deputation to the City’s Corporate Administration Committee, but neither would make any recommendation, one way or the other.

4. Council has both the power and opportunity to correct this situation. In the absence of a Policy #18 or CAC recommendation, Council also has the duty to correct this situation.

5. The City does not need to gamble on outcomes. As an alternative, Lafarge offered the CAC an opportunity to summarily and finally determine the issue of Lafarge’s compliance before this major ($30 million) roadwork contract is awarded, thus saving both parties needless litigation risk and exposure.

Issue:

6. Lafarge was Lowest Compliant Bidder at the City’s May 25, 2006 tender close.

7. Lafarge was ruled “non-compliant” fifteen days later on June 9, 2006, after the City held private discussions [redacted at suggestion of City Solicitor, Barkwell, on a “without prejudice” basis].

Without Prejudice
8. For the first time in a long commercial history, the City applied a “strict” compliance test to Lafarge’s tender. This “strict” standard is not found anywhere in the City’s tender documents, nor is it consistent with the City’s past practice. Substantial compliance is the City’s rule.

9. The City then conducted a post tender process to get Dufferin’s price down, which it did. This process was seriously flawed and fell far short of the City’s own purchasing guidelines and policies.

10. As an alternative, Lafarge offered summary final and binding arbitration of the “compliance” issue, but the City’s Corporate Administration Committee declined.

11. The consequences of the City later being found wrong in disqualifying Lafarge’s tender are disproportionate to the relatively small expense and time involved now in a summary final and binding arbitration.

Key facts, questions and answers:

12. Q: How can Lafarge be “Lowest Compliant Bidder” if its bid was disqualified?

   A: Lafarge was disqualified wrongly fifteen days after tender opening.

   The City disqualified Lafarge after the City met [redacted at suggestion of City Solicitor, Barkwell, on a “without prejudice” basis].

   Dufferin now admits that its original tender was properly disqualified.

   Lafarge put two initials against three strike throughs in one unit rate box in its tender.

   The City says that there should have been three initials for three strike throughs in the Lafarge tender.

   Unlike Lafarge, Dufferin had no initials at all in one unit rate box for one strike through.

   Unlike Lafarge, Aecon had no initials at all in one unit rate box for one write over.

   Lafarge was substantially compliant. The other two bidders were not.
13. Q: How can Lafarge complain if the City treated all three bidders the same after the original tender closed?

A: All bidders were not treated the same after the original tender closed.

Dufferin and Aecon did not “substantially comply” with the City’s tender; only Lafarge substantially complied. Therefore Lafarge acquired rights under this first tender and the others did not.

As Lafarge was substantially compliant with the City’s original tender call, it was fundamentally wrong for the City to give Dufferin and Aecon a chance to “correct” their non-compliant bids or re-tender new prices.

The effect of the City’s whole post tender process was to “shop” Dufferin’s original non-compliant bid to obtain a lower price.

14. Q: How do we know that the City was applying a “substantial compliance” test before this tender?

A: In April, 2006, a month prior to this tender, Lafarge had tendered another City project using the same City specification.

Lafarge’s tender on this other City project had one initial for two strike throughs in one unit rate box. Lafarge was not disqualified for this or any other reason.

The City in this case does not seem to dispute that Lafarge’s bid was “substantially compliant”.

Lafarge’s lump sum extension in its tender in this case was initialed, confirming the initialed unit rate in the adjacent box. Once again, Lafarge’s bid was substantially compliant.

15. Q: Some say that second bids (like the example above) are not examined for compliance and therefore Lafarge’s example is irrelevant. Is this true?

A: No. Second bids and later bids are often examined for compliance.

Lafarge is aware of at least one City of Hamilton bid where a bidder was third and was told that it was non-compliant. This was a tender closing June 2, 2006 in respect of Contract PW – 06 - 32 (H).
16. **Q:** [Redacted at suggestion of City Solicitor, Barkwell, on a “without prejudice” basis].

We also have learned that Dufferin wanted to be placed on the agenda of the Corporate Administration Committee meeting the next day, June 7, but according to Chairman Samson, Dufferin was put off until the June 21, 2006 meeting, where they did attend and make submissions.

We know that Lafarge was told by telephone on Friday, June 9, three days after the [redacted at suggestion of City Solicitor, Barkwell, on a “without prejudice” basis]./City meeting, to expect disqualification. The City’s letter disqualifying Lafarge was received around noon on Monday, June 12, 2006.

17. **Q:** What are the consequences of all of this?

**A:** If the City is **right** about disqualifying Lafarge, it may be able to defend the bid shopping that followed.

If the City is **wrong**, the consequences are far more serious.

If the City is wrong, Lafarge has a right to this contract. The City has waived its privilege clause and either the contract has to be awarded to Lafarge, or Lafarge has to be compensated as if it was.

18. **Q:** If the Council will not award to Lafarge outright, should the City accept summary, final and binding arbitration prior to award?

**A:** Yes.

This arbitration could take place over two days, with a reasoned award to follow within two or three days thereafter, a total elapsed time of a week or so.
19. As this is one of the largest roadwork contracts to be let in Ontario this year, it is imperative that the City reconsider its present course of action and apply its purchasing principles and policies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

June 28, 2006

LAFARGE CANADA INC.
by its solicitors GLAHOLT LLP

[Signatures]

Duncan W. Glaholt

John Margie

Without Prejudice