Agenda – Executive Policy Committee – November 23, 2016

AUDIT COMMITTEE

Item No. 2 Review of Performance of the Pedestrian and Cycling Strategies Contract

WINNIPEG PUBLIC SERVICE RECOMMENDATION:

That this report be received as information.

ADMINISTRATIVE REPORT

Title: **Review of Performance of the Pedestrian and Cycling Strategies Contract**

Critical Path: **Executive Policy Committee - Council**

AUTHORIZATION

Author	Department Head	CFO	CAO
O. Momoh B. Shortt	B. Mansky K. Boryskavich	N/A	D. McNeil

EXECUTIVE SUMMARY

The scope of work for this review was divided between the Audit Department, which audited the contract for the Pedestrian and Cycling Strategies Project ("the Project") to determine that the contract was enforced, and the Legal Services Department, which reviewed the Request for Proposal ("RFP") for the Project, and the supporting contractual documents, to determine whether they contained the necessary protections for the City of Winnipeg ("the City").

Through interviews, discussions, enquiry and review of supporting documentation, the Audit Department's work evidenced that Project expectations were met and deliverables were fulfilled according to the contract. The Public Service confirmed that the deliverables met the terms of the RFP. The Project was adopted by Council with some amendments on July 15, 2015. The Project was completed within budget after a budget reduction that came at the City's request. The budget reduction resulted in a change of scope in public consultation. An independent review of the consultation process by the City's Office of Public Engagement concluded that the public consultation process was adequate, and utilized industry best practices as set out by the International Association of Public Participation.

The Audit Department assessed whether the contract was being properly enforced for clauses that the consultant was required to comply with. While the Project report was being considered by Council, several media reports observed that one of the sub-consultants for the Project had released comments through social media on the report, and on Council's process for adopting the report. The City's *General Conditions for Consultants* that are applicable to consulting engagements prohibits consultants from making public statements on work being completed for the City. However, the Public Service did not take any action to follow up with the consultants after it was notified about the social media comments. The Public Service was unsure whether the

prohibition on public statements extended to sub-consultants. As a result, the Legal Services Department has prepared revised terms and conditions, for use in future consulting engagements, to expand upon prohibitions concerning public announcements involving consulting contracts and related matters, and to expand the scope and application of terms and conditions concerning confidentiality.

In regards to the procurement process, the Project was tendered according to Council's Materials Management Policy and the Public Service's Materials Management Administrative Standard as it went through a competitive bidding process. Prior to receiving any bid submissions, the Project Manager for the Project identified a potential conflict of interest based on preliminary project clarification questions from potential bidders. One of the proposed sub-consultants was the spouse of the Manager of Transportation in the Public Works Department. This presented an increased risk of favoritism in the bid submission evaluation process and the optics of the award process. Through consultation with the Legal Services Department and the Manager of Material Management, proactive steps were taken by the Public Works Department to mitigate the risks of conflict of interest by removing the Manager of Transportation from any involvement with the Project, including the bid evaluation process and any Project oversight. The appropriate project stakeholders charged with administering the contract were made aware of the risk. The Audit Department evaluated the steps taken to address the conflict of interest risk and believes there was sufficient action and documentation to adequately address the risk. The Audit Department also evaluated the selection process by re-performing the evaluation of each bid submission to assess the fairness of the scores given. The Audit Department believes the evaluation of all proposals was conducted appropriately, and the contract was awarded fairly.

RECOMMENDATIONS

That this report be received as information.

REASON FOR THE REPORT

On September 30, 2015, Council adopted the motion concerning item No. 8 – "That the City of Winnipeg Auditor and Legal Services, as appropriate and in accordance with the City of Winnipeg Auditor's and Legal Services' respective authorities, conduct a review of the contracts with all Consultants and outside entities who were contracted with regards to the Pedestrian and Cycling Strategy, so as to ensure all aspects of the contracts contain necessary protections to the City of Winnipeg and all aspects of the contracts are being enforced, and report their findings back to the City of Winnipeg Council."

HISTORY/DISCUSSION

Background

On November 16, 2011, Council adopted the *Winnipeg Transportation Master Plan* as the long range transportation policy for the City. The plan sets out a long term strategy to guide the planning, development, renewal and maintenance of a multimodal transportation system.
Within the plan, a number of enabling strategies are listed to achieve the key strategic goals which include:

- Develop a city-wide pedestrian strategy
- Develop a city-wide cycling strategy that provides integrated guidance for the City's efforts to support cycling activity and connectivity

The purpose of the Pedestrian and Cycling Strategies Project ("the Project"), according to the Request for Proposal ("RFP"), was to produce comprehensive strategies that confirmed and expanded the community's vision for increasing the use, comfort and safety of walking and bicycling over time, and to establish detailed direction for policy, infrastructure and programming towards implementing that vision. The RFP also noted that proceeding with both strategies simultaneously recognized the opportunity to coordinate efforts across both modes of transportation, and with the City's overall multi-modal transportation system. It also provided opportunity to identify and consider synergies while addressing the distinctively different needs of pedestrians and cyclists.

The RFP for the Project was advertised publicly in December 2012. Six proposals were received in response to the RFP. All six proposals were reviewed by an Evaluation Committee consisting of the Project Manager for the Project, who is the Transportation Facilities Planning Engineer from the Public Works Department, and four other members from the City's Public Works and Planning, Property & Development Departments; the Manager of Transportation from the Public Works Department, whom the Project Manager for the Project normally reports to, was excluded from the Evaluation Committee due to the fact that his spouse was a proposed sub-consultant in one of the bids for the Project. (This matter is discussed further later in this report.) The Project was ultimately awarded to Urban Systems Ltd.

The contract with the consultant was comprised of the RFP (which details the scope of services and work to be performed by the consultant, the deliverables, and other supplemental conditions), the proposal submitted by the consultant, and the City's standard *General Conditions for Consultant Services*.

Over the following two years, work on the strategies was conducted by Urban Systems, with support from four sub-consultants identified in their bid submission, and input from City staff. The *Pedestrian and Cycling Strategies Final Report* was adopted by Council on July 15, 2015.

Project Performance

Overall the City Project Manager advised the Audit Department that the Project met the expectations of the Project team members. The Evaluation and Steering Committees, the Director of Public Works and the Chief Operating Officer confirmed this position and expressed their satisfaction with the execution of the Project and with the deliverables. All tasks were completed as proposed in the project plan and no issues were identified with regards to performance. The Project was completed within budget, even after the budget was reduced after the Project had been initiated.

After a Letter of Intent had been provided to the consultant, the City advised the consultant that the budget for the Project would have to be reduced by approximately $66,000, and that changes to the scope of services were also required. The consultant and the Project Manager worked collaboratively to make this happen. Part of the scope reduction decreased the amount of public consultation that would be completed by the consultant. This created a risk that sufficient public input would not be considered. To address this risk, Council's Executive Policy Committee directed that the Pedestrian and Cycling Strategies be referred to the City's Office of Public Engagement to review the public consultation process. The Office of Public Engagement reported that the public consultation process completed was adequate and utilized industry best practices as set out by International Association for Public Participation. This further demonstrated the satisfactory completion of the Project, and that project risks were appropriately mitigated.

Contract Enforcement

The Audit Department assessed whether the contract was properly enforced. From the Audit Department's discussions with the Public Service, neither the Project Manager for the Project nor the Steering Committee identified any contract stipulations that they believed needed to be enforced. Media reports noted that a sub-consultant made public commentary through social media on how the Project was being accepted by Council. The City's *General Conditions for Consultant Services* states that consultants "shall not make any statement of fact or opinion regarding any aspect of the Contract to the media or any member of the public without the prior written authorization of the Project Manager." The Public Service did not provide the Audit Department with a reason why the social media commentary was not followed up with the consultants; however, the Audit Department has observed that the social media comments have been removed from the forum in which they were originally issued. The Legal Services Department has created revised conditions for future RFPs to address similar situations in the future (which are discussed below).

As a protective control, the Materials Management Administrative Standard states that consulting contracts exceeding $100,000 should have annual performance evaluations completed on the consultants. These evaluations are used to assess whether the consultants should be considered for future consulting engagements. The Project

Manager informed the Audit Department that a performance evaluation was not completed for this Project due to workload constraints. This increases the likelihood that the issues encountered in this consulting engagement will not be considered in future consulting engagements; however, the revised conditions created by the Legal Services Department should mitigate the risks of future similar issues.

Revised Terms and Conditions Prepared by the Legal Services Department

The Supplemental Conditions provide protections concerning the following matters: ownership of Deliverables and information; prohibition of public announcements or press releases concerning the contract; and confidentiality. The *General Conditions for Consultant Services* provide protections concerning the following matters: survival of terms; Consultant performance of services; personnel qualifications and professional standards; compliance with legislation; ownership of intellectual property, information and Deliverables; prohibition of public announcements or press releases concerning the contract, and default and termination.

The Legal Services Department prepared the following revised terms and conditions, for use in the Supplemental Conditions (to expand upon prohibitions concerning public announcements involving consulting contracts and related matters) and in the *General Conditions for Consultant Services* (to expand the scope and application of terms and conditions concerning confidentiality):

For use in Supplemental Conditions concerning consulting engagements:

D6.2 The Consultant shall not at any time make any public announcement, or press release, nor make any statement of fact or opinion regarding the Contract, the Project, the Services or the Deliverables without the prior written authorization of the Project Manager.

For use in *General Conditions for Consultant Services*:

*C1.1(l) **"Confidential Information"** means any and all information concerning the City, the Project, and the Services, that is supplied by or to which access is given to the Consultant by the City or which in any other way comes into the possession or knowledge of the Consultant during the course of performance of the Services (regardless of format or medium), the Deliverables and this Contract.*

C7.22 The Consultant, with respect to Services to be performed under subcontract, shall:

(a) enter into contracts or written agreements with its Subconsultants to require them to comply with, and to perform their work in complete conformance with and subject to, the terms and conditions of the Contract; and

(b) be as fully responsible to the City for acts, omissions or defaults of any Subconsultants and of persons directly or indirectly employed or engaged by them as if they were the acts, omissions or defaults of the Consultant.

C7.23 The Consultant shall incorporate the terms and conditions of the Contract into all contracts or written agreements with its Subconsultants.

C16. Confidentiality

C16.1 The Consultant shall not, except in accordance with the Contract, disclose Confidential Information to any other Person without the prior written consent of the Project Manager.

C16.2 The Consultant's obligations under C16.1 shall not apply, or shall cease to apply, to any Confidential Information if or when, but only to the extent that, such Confidential Information:

(a) was in the public domain when it is received by or becomes known to the Consultant or which subsequently enters the public domain through no fault of the Consultant (but only after it enters the public domain);

(b) was already known to the Consultant at the time of its disclosure to the Consultant and is not known by the Consultant to be the subject of an obligation of confidence of any kind;

(c) is independently developed by the Consultant without any use of or reference to the Confidential Information and which such independent development can be established by evidence that would be acceptable to a court of competent jurisdiction; or

(d) is received by the Consultant in good faith without an obligation of confidence of any kind from a third party who the Consultant had no reason to believe was not lawfully in possession of such information free of any obligation of confidence of any kind, but only until the Consultant subsequently comes to have reason to believe that such information was subject to an obligation of confidence of any kind when originally received.

Confidential Information shall not be deemed to be in the public domain merely because any part(s) of the Confidential Information is embodied in general disclosures or because individual features, components or combinations of Confidential Information are now or become known to the public.

C16.3 In the event that the Consultant receives notice indicating that it may or shall be legally compelled to disclose any of the Confidential Information by reason of a duly authorized administrative or court order, it shall provide the City Solicitor with prompt notice so that the City may at the City's sole discretion seek a protective order or other appropriate remedy. In the event that such protective order or other remedy is not obtained, or in cases where a subpoena or other court order requires the Consultant to immediately comply, the Consultant shall furnish only that portion of the Confidential Information in respect of which the Consultant is legally required and compelled to disclose.

C16.4 The Consultant may disclose Confidential Information to its employee or Subconsultant who has a need to know for the purposes of the Services, provided first that prior to such disclosure each such Person shall have been made aware of the requirements of C16. The Consultant shall be responsible for any violation of C16 by any such Person.

C16.5 The Consultant shall:

(a) take reasonable steps (including those steps that the Consultant takes to protect its own information that it regards as confidential) to keep the Confidential Information confidential.

(b) use the Confidential Information only for the purpose of performing the Services and for no other purpose whatsoever.

(c) at the Project Manager's request and option, immediately return Confidential Information to the City, or certify in writing that it has been destroyed.

C16.6 In the event of a breach or threatened breach of C16, the parties agree that the harm suffered by the City would not be compensable by monetary damages alone and, accordingly, that the City shall, in addition to any other available legal or equitable remedies, be entitled to an injunction against such breach or threatened breach.

Identification of Risk of Conflict of Interest

The Project was tendered according to Council's Materials Management Policy and the Public Service's Materials Management Administrative Standard as it went through a competitive bidding process. Based on preliminary questions from potential bidders on the Project, the Project Manager identified that there could be a risk of conflict of interest involving a sub-consultant. One of the proposed sub-consultants was the spouse of the Manager of Transportation in the Public Works Department, which had the potential to increase the risk of favoritism in the bid evaluation process and the optics of the award process. Furthermore, the Project Manager for the Project is supervised by the Manager of Transportation. As a result, the Project Manager for the Project consulted with the Legal Services Department and the Manager of Materials to determine how best to proceed, and how to mitigate any potential risks on conflict of interest.

One of the potential risks was that of ownership. The *Materials Management Policy* states that "*A City employee shall be in breach of the ethical standards of this Policy who: (b) while an owner, partner, shareholder, director or officer of a business, allows such business to respond to a solicitation for or contract for a supply to or by (revenue generating) the City".* To address this risk, the Manager of Transportation declared in writing that he was not an owner of the sub-consultant's company in any way, and was not in violation of the *Materials Management Policy*.

Additional proactive steps were taken to resolve the remaining risk of influence in the bid evaluation process, and oversight of the Project. All Steering Committee members were advised that the Manager of Transportation was not to be involved in any way with the Project, including the bid selection process, project communication, or project execution, direction, or evaluation. Further, the reporting structure was altered for the duration of the Project to have the Project Manager report directly to the Director of Public Works on all matters related to the Project.

The Audit Department evaluated the steps taken to address the issue and believes there was sufficient action and documentation to adequately address the risks of conflict of interest for the Project. The Manager of Transportation asserted to the Audit Department that he did not participate in any aspect of the Project. Additionally, each member of the Project's Evaluation Committee, members of the Project's Steering Committee, the principal consultant and all four sub-consultants individually confirmed that the Manager of Transportation was not involved with any aspect of and did not provide any direction related to the Project; all direction relating to the Project's execution came from the City's Project Manager.

The Audit Department evaluated the bid selection process by reviewing bid submissions and the Evaluation Committee's evaluation and scoring documentation and noted that it followed the process outlined by Materials Management. The Audit Department also re-performed the evaluation process by reviewing and evaluating each proposal to assess the reasonability of the scores given. In our opinion, the evaluation of all proposals was

conducted appropriately and the contract was awarded fairly. Our ability to conclude on the process is limited to the documented materials provided to us. From our review of the bid evaluation materials, the Manager of Transportation did not appear to be involved in the selection process.

FINANCIAL IMPACT

Financial Impact Statement **Date:** October 26, 2016

Project Name:
Review of Performance of the Pedestrian and Cycling Strategies Contract

COMMENTS:

This report is received as information only and has no financial impact.

Original signed by R. Hodges
Ramona Hodges
Manager of Finance (Campus)
Corporate Finance Department

CONSULTATION

In preparing this report there was consultation with:

Internal
Planning, Property and Development Department
Public Works Department
Winnipeg Transit Department

External
Urban Systems Ltd.
Alta Planning and Design Inc.
Copenhagenize Design Company
Freig & Associates
MORR Transportation Consulting Ltd.

OUR WINNIPEG POLICY ALIGNMENT

01-3 Prosperity - Direction 1 - Provide Efficient and Focused Civic Administration and Governance

This report supports the demonstration of accountability through reporting and to continuously pursue innovative, streamlined service delivery and decision-making processes.

SUBMITTED BY

Department: Audit
Prepared by: O. Momoh, Senior Auditor
Date: August 30, 2016

Department: Legal Services
Prepared by: B. Shortt, Deputy City Solicitor
Date: July 7, 2016