Minutes – Executive Policy Committee – February 13, 2018

REPORTS

Item No. 2 Deacon Water Treatment Plant Deficiencies Review

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

The Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and recommended to Council:

1. That the report be received as information.

Minutes – Executive Policy Committee – February 13, 2018

DECISION MAKING HISTORY:

Moved by Councillor Mayes,

That the recommendation of the Winnipeg Public Service be concurred in and forwarded to Council.

Carried

COUNCIL DECISION:

On October 25, 2017, Council concurred in the recommendation of the Executive Policy Committee and adopted the following:

That the Chief Administrative Officer be directed to:

1. Produce a report for Council that provides a detailed chronology of events including administrative actions and inactions that ultimately resulted in a failure to meet key deadlines to pursue cost recovery through the courts for construction deficiencies at the Deacon Water treatment plant;

2. Request the City's Internal Auditor conduct a review of the City's Legal Services Department including an examination of the current systems and processes for pursuing legal action against contractors and develop recommendations to ensure that critical deadlines are not missed in the future;

3. Retain outside legal counsel to examine the court proceedings related to the construction deficiencies at the Deacon Water treatment plant and review the possibility of recovering a portion of the damages through the Law Society of Manitoba Professional Liability Claims Fund or any other means;

4. Review the City's current policy of self-insuring its lawyers versus other professional liability insurance mechanisms to ensure protection of taxpayers.

5. Report back to the appropriate committees within 120 days.

DECISION MAKING HISTORY (continued):

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On October 11, 2017, the Executive Policy Committee passed the following motion:

WHEREAS the Winnipeg public service has reported missing a deadline to initiate a claim in the Court of Queen's Bench to recover damages related to construction deficiencies at the Deacon Water Treatment plant;

And WHEREAS this claim has been discontinued in the Court of Queen's Bench;

AND WHEREAS the repair costs for these deficiencies are estimated to cost in the range of $6M to $20M;

AND WHEREAS this incident has raised significant concerns from the citizens of Winnipeg and members of Council regarding the City's internal processes and accountability measures;

AND WHEREAS there have been previous motions tabled on this matter by Councillors Gillingham, Wyatt and Lukes that have requested the public service provide detailed information on the chronology of events that led to this matter, and for the public service to investigate other options to recover funds through the courts from the contractors that are responsible for these construction deficiencies;

THEREFORE BE IT RESOLVED THAT the Chief Administrative Officer be directed to:

1. Produce a report for Council that provides a detailed chronology of events including administrative actions and inactions that ultimately resulted in a failure to meet key deadlines to pursue cost recovery through the courts for construction deficiencies at the Deacon Water treatment plant;

2. Request the City's Internal Auditor conduct a review of the City's Legal Services Department including an examination of the current systems and processes for pursuing legal action against contractors and develop recommendations to ensure that critical deadlines are not missed in the future;

3. Retain outside legal counsel to examine the court proceedings related to the construction deficiencies at the Deacon Water treatment plant and review the possibility of recovering a portion of the damages through the Law Society of Manitoba Professional Liability Claims Fund or any other means;

DECISION MAKING HISTORY (continued):

EXECUTIVE POLICY COMMITTEE RECOMMENDATION (continued):

4. Review the City's current policy of self-insuring its lawyers versus other professional liability insurance mechanisms to ensure protection of taxpayers.

5. Report back to the appropriate committees within 120 days.

and forwarded the matter to Council.

ADMINISTRATIVE REPORT

Title: Deacon Water Treatment Plant Deficiencies Review

Critical Path: Executive Policy Committee - Council

AUTHORIZATION

Author	Department Head	CFO	CAO
M. Jack	M. Jack	N/A	D. McNeil

EXECUTIVE SUMMARY

This report responds to City Council's request for information regarding the Deacon Water Treatment Plant (the "Water Treatment Plant") deficiencies.

RECOMMENDATIONS

1. That this report be received as information.

REASON FOR THE REPORT

At its October 25, 2017 meeting, Council concurred in the recommendation of the Executive Policy Committee and directed the Chief Administrative Officer to:

1. Produce a report for Council that provides a detailed chronology of events including administrative actions and inactions that ultimately resulted in a failure to meet key deadlines to pursue cost recovery through the courts for construction deficiencies at the Deacon Water treatment plant;

2. Request the City's Internal Auditor conduct a review of the City's Legal Services Department including an examination of the current systems and processes for pursuing legal action against contractors and develop recommendations to ensure that critical deadlines are not missed in the future;

3. Retain outside legal counsel to examine the court proceedings related to the construction deficiencies at the Deacon Water treatment plant and review the possibility of recovering a portion of the damages through the Law Society of Manitoba Professional Liability Claims Fund or any other means;

4. Review the City's current policy of self-insuring its lawyers versus other professional liability insurance mechanisms to ensure protection of taxpayers.

5. Report back to the appropriate committees within 120 days.

This report responds to Council's request to report back with respect to Recommendations 1, 3 and 4 (the City Auditor will be submitting a separate report with respect to Recommendation 2).

IMPLICATIONS OF THE RECOMMENDATIONS

There are no implications with receiving this report as information.

HISTORY/DISCUSSION

In April 2004, the City issued a request for Expression of Interest for design consultant and construction management services for the construction of the new Deacon Water Treatment Plant. In May 2005, construction commenced and the Water Treatment Plant was put into service on December 9, 2009.

Subsequently a number of construction deficiencies were identified as follows:

- deficiencies with the roofing of the main building of the plant;
- deficiencies with the roofing of the chemical storage buildings of the plant;
- failure of a stand-by generator;
- catastrophic failure of two of the hypochlorite generators used as part of the water disinfection treatment process;
- surface distress to concrete surfaces exposed to treated water; and
- design deficiencies noted with the plant's dewatering cells.

On December 7, 2015, the City commenced legal proceedings in the Manitoba Court of Queen's Bench against several of the contractors involved in the design and construction of the plant. The defendants are as follows:

- AECOM Canada Ltd, design consultant for the plant;
- AECOM Canada Projects (CM) Ltd., contractor administrator for the plant;
- Oakwood Roofing and Sheet Metal Co. Ltd., contractor responsible for the installation of the main building roof;
- Bird Construction Co. Ltd., contractor responsible for construction of the chemical storage buildings, including the roofing;
- Metcon Sales and Engineering Ltd., contractor responsible for the supply of the hypochlorite generators (Note: the claim has been discontinued as against Metcon);

- Comstock Canada Ltd, contractor responsible for the installation of the hypochlorite generators (Note: Comstock has filed for protection under the *Companies' Creditors Arrangement Act*, and as such the claim against it has been permanently stayed by Order of the Ontario Superior Court of Justice);
- Severen Trent Water Purification Inc., sub-contractor responsible for the installation of the hypochlorite generators (Note: Severen Trent is an U.S.A. corporation based in Texas and service of the claim has not been effected as it appears to no longer be in business)
- Toromont Industries Ltd, contactor responsible for the supply of the stand-by generators;
- Hugh Munro Construction Ltd., contractor responsible for the construction for the dewatering cells; and
- PCL Contractors Canada Ltd., contractor responsible for the plant foundations and concrete structure of the plant.

The claim against each defendant was based on allegations of breach of contract, or alternatively allegations of negligence against certain defendants concerning the hypochlorite generators.

In May-August, 2017, a number of defendants brought motions to dismiss the claim based on the defense that the City had not filed its Statement of Claim within the applicable limitation period. The limitation periods for commencing an action expired for each contract between 2014 and 2015.
Limitations legislation (such as Manitoba's Limitation of Actions Act) sets the maximum time after an event within which legal proceedings may be initiated. When the period of time specified in the legislation has passed, a claim may no longer be filed; or alternatively, if it is filed after the applicable limitation date, the claim may be struck out for having been filed after the applicable date.
Following internal review and discussion, the Legal Services Department recommended that the City discontinue the action against all defendants and received instructions to do so.

DISCUSSION

Chronology of Events:

The following is a detailed chronology of events including administrative actions and inactions that ultimately resulted in a failure to meet key deadlines to pursue cost recovery through the courts for construction deficiencies at the Water Treatment Plant:

December 9, 2009: The Water Treatment Plant is put into operation.

January 18, 2010: Corrosion of concrete is observed by the Water and Waste Department on a concrete trough within the Water Treatment Plant.

March 2010: Roof leaks are identified on the main Water Treatment Plant Building. Repairs are conducted under warranty by the contractor.

Spring, Summer and Fall 2011: Roof leaks are identified on the main Water Treatment Plant Building and Chemical Storage and Sodium Hypochlorite Buildings. Repairs are undertaken by City staff.

March 19, 2012: Significant roof leaks on the main Water Treatment Plant Building and the Chemical Storage and Sodium Hypochlorite Buildings are identified.

June 2012: Water and Waste Department contacts Legal Services regarding the deficiencies identified to date; Lawyer 1 (the procurement lawyer responsible for the original contracts) works with Water and Waste to attempt to address the deficiencies within the existing contractual framework, but no litigation lawyer was consulted at this point in time.

June 2012: Additional roof leaks are identified on the main Water Treatment Plant Building. Repairs are undertaken by City staff.

August 7, 2012: Deficiencies associated with the dewatering cells are identified.

August 28, 2012: The first failure of the sodium hypochlorite generation system occurs. Repairs are conducted by City maintenance staff and the system is returned to service.

October 2012: Additional roof leaks are identified on the Chemical Storage Building. Repairs are undertaken by City staff.

February 3, 2013: The second failure of the sodium hypochlorite generation system occurs. Water and Waste Department abandons the onsite production of sodium hypochlorite.

April 17, 2013: Water and Waste Department contacts the Risk Management Branch regarding the Water Treatment Plant deficiencies identified to date.

May 10, 2013: Water and Waste Department provides additional details to the Risk Management Branch regarding the Water Treatment Plant deficiencies. The Risk

Management Branch refers the matter to Legal Services and Legal Services assigns a litigation lawyer to the file (Lawyer 2).

August 30, 2013: A failure of the standby generator occurs.

2013-2015: Lawyer 2 works with Water and Waste Department and Lawyer 1 to explore legal remedies and prepare the Statement of Claim. File documentation indicates that Lawyer 2 concluded they had until December 9, 2015 to file the Statement of Claim.

October 29, 2015: Legal Services submits a report (written by Lawyer 2 and signed off on by the Water and Waste Department and the City Solicitor) to the CAO seeking approval to obtain consent from the Mayor and Chair of the Standing Policy Committee on Infrastructure Renewal and Public Works to file the Statement of Claim. The report does not reference applicable limitation periods.

October 30, 2015: The CAO approves the report to obtain consent from the Mayor and Chair of the Standing Policy Committee on Infrastructure Renewal and Public Works to file the Statement of Claim.

November 26, 2015: The Mayor and Chair of the Standing Policy Committee on Infrastructure Renewal and Public Works approve filing of Statement of Claim.

December 7, 2015: Lawyer 2 files a Statement of Claim on behalf of the City with the Manitoba Court of Queen's Bench for the Water Treatment Plant deficiencies.

January, 2016: Lawyer 3 is assigned the Water Treatment Plant file as a result of workload reassignments (to ensure equitable workload amongst all litigation lawyers).

May-August, 2017: Motions for summary judgement seeking dismissal of the Statement of Claim on the basis of a missed limitation period are brought by PCL Constructors Canada Inc., AECOM Canada Ltd. and AECOM Canada Projects (CM) Ltd., Oakwood Roofing and Sheet Metal Co. Ltd., and Bird Construction Company. Toromont Industries Ltd. and Hugh Munro Construction Limited give notice of their intention to bring similar motions.

May, 2017: Lawyer 3 informs the City Solicitor of the issue raised by the defendants with respect to missed limitation periods, and is instructed to work with Water and Waste Department to prepare a briefing note for the CAO's Office setting forth Legal Services' position on the issue (i.e. that Lawyer 2 had not filed the Statement of Claim before the applicable limitation periods expired) and seeking instructions with respect to a response to the defendants' motions.

June 19, 2017: Legal Services submits a briefing note to the CAO's Office, seeking instructions with respect to a response to the defendants' motions.

August 16, 2017: The City Solicitor meets with Lawyer 2 and Lawyer 3 to further discuss legal position prior to the court hearing with respect to the defendants' motions (scheduled for August 25). It is determined that Lawyer 2 had not conducted any research into the applicable limitation period.

August 25, 2017: The court hearing with respect to the defendants' motions is adjourned to September 19, 2017, pending formal instructions to Legal Services.

September 12, 2017: Lawyer 2's employment with the City is terminated.

September 18, 2017: Legal Services is provided with instructions to agree to abandon the Statement of Claim.

October-November, 2017: Court Orders dismissing or otherwise discontinuing the action are issued by the Court.

Litigation File Management

Over the past six months, the City Solicitor has taken steps to ensure that litigation file management processes and expectations are clearly documented and understood by litigation lawyers within Legal Services, and that there is additional oversight for files that pose significant risk. Specific steps include:

- a file cover sheet is required for all litigation files that requires various information to be inputted, including the applicable limitation date for the matter and the statutory provision giving rise to such limitation date
- a litigation lawyer is assigned to potential contract liability issues immediately as such issues are brought to the attention of Legal Services, to provide litigation assistance to the relevant department and the procurement lawyer responsible for the contract
- the litigation group is required to hold monthly meetings to discuss litigation-specific matters including: (i) court rules; (ii) new municipal case law; (iii) significant files
- a review of current checklists and procedures followed for various types of litigation files (i.e. by-law prosecutions, small claims, general litigation (plaintiff and defendant), personal injury litigation, tribunal hearings, etc.) was undertaken; checklists are currently being reviewed and up-dated, with gaps identified where new checklists are required
- the City Solicitor has initiated monthly meetings with the entire litigation group to review files that pose significant risk, and has initiated weekly check-in meetings with each litigation lawyer to obtain a status up-date on issues that have arisen in their respective practices which require guidance and/or oversight

Internal Auditor Review of Legal Services Department:

With respect to the request that the City's Internal Auditor conduct a review of the City's Legal Services Department including an examination of the current systems and processes for pursuing legal action against contractors and develop recommendations to ensure that critical deadlines are not missed in the future, the Public Service can advise that the project is in progress and the City's Internal Auditor will have an independent report to bring forward in February 2018.

External Legal Counsel Opinion:

The Chief Administrative Officer engaged Hill Sokalski Walsh Olson LLP to provide external legal advice with respect to the court proceedings related to the construction

deficiencies at the Water Treatment Plant and the possibility of recovering a portion of the damages through the Law Society of Manitoba Professional Liability Claims Fund or any other means. The legal opinion has been received by the Chief Administrative Officer.

City's Current Policy of Self-Insuring its Lawyers**:**

Legal Services does not provide legal counsel to external parties (outside of the City's organization) therefore a professional liability policy covering the actions of the City lawyers is not required. Professional liability insurance will protect organizations, such as the City and their employees who provide professional services against claims made by third parties (external to the organization), arising out of negligent acts, errors and omissions in rendering or failing to render professional services. Legal Services lawyers are employees of the City and all advice is internally within the City. An organization cannot sue itself in hopes that a third party liability policy will respond to cover the negligent actions of its employees.

At the current time, the City of Winnipeg does not purchase professional liability insurance. The City has chosen to self-insure several risks, either departmentally or through the Insurance Reserve Fund or a combination of both, including all professional Liability exposures. The types of exposure to professional liability losses or errors and omission that could be insured could include, for example, claims resulting from advice or expertise given to external parties involving mapping, surveys, permits and inspections. There is some limited protection from liability to municipal professionals pursuant to the City of Winnipeg Charter.

FINANCIAL IMPACT

Financial Impact Statement **Date:** February 1, 2018

Project Name:

Deacon Water Treatment Plant Deficiencies Review

COMMENTS:

There is no financial impact associated with receiving this report as information.

original signed by
Tanis Yanchishyn
Manager of Finance (Campus)
Corporate Finance Department

CONSULTATION

This Report has been prepared in consultation with:

Audit Department
Corporate Finance – Risk Management

OURWINNIPEG POLICY ALIGNMENT

N/A

SUBMITTED BY

Department: Office of the Chief Administrative Officer
Prepared by: Michael Jack
Date: January 2018