Minutes – Executive Policy Committee – February 13, 2018

REPORTS

Item No. 8 Single Source Negotiation and Award of Contract for Legal Services related to a Commercial Arbitration

EXECUTIVE POLICY COMMITTEE DECISION:

The Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and received the report as information.

DECISION MAKING HISTORY:

Moved by Councillor Gillingham,

That the recommendation of the Winnipeg Public Service be concurred in.

Carried

ADMINISTRATIVE REPORT

Title: **SINGLE SOURCE NEGOTIATION AND AWARD OF CONTRACT FOR LEGAL SERVICES RELATED TO A COMMERCIAL ARBITRATION**

Critical Path: Executive Policy Committee

AUTHORIZATION

Author	Department Head	CFO	CAO
K. Boryskavich	K. Boryskavich	M. Ruta	D. McNeil

EXECUTIVE SUMMARY

The City of Winnipeg engages external legal consultants on an as-required basis when: (i) specialized expertise is required; (ii) additional legal resources beyond the scope of the Legal Services Department are required; or (iii) the Legal Services Department is in a position of conflict.

The report provides information regarding the single source negotiation and award for legal services related to a commercial arbitration matter to Darcy Deacon LLP in the amount of $157,993.59 (including GST and MRST) which has been paid out of the approved Transit Department budget.

In addition, this report also provides information on steps Legal Services has taken to ensure that all external counsel retainers are carried out in accordance with all relevant City policies, and has implemented processes to clarify roles and responsibilities with respect to external counsel retainers. As well, a comprehensive administrative standard that will govern external counsel retainers is currently being developed.

RECOMMENDATIONS

1. That this report be received as information.

REASON FOR THE REPORT

Pursuant to Administrative Standard FM-002, Section B1.1, The Chief Administrative Officer requires that any single source negotiation for consultant services be approved by Executive Policy Committee where the estimated value exceeds $100,000 in total, including all phases of any given project, and is related to a capital project included in the capital budget. As EPC authorization for the retainer was not obtained at the time of engagement and all services have been concluded and paid for, this report is provided for information only.

IMPLICATIONS OF THE RECOMMENDATIONS

There are no implications of the recommendation to receive the report as information.

HISTORY/DISCUSSION

The City engages external legal consultants on an as-required basis when: (i) specialized expertise is required; (ii) additional legal resources beyond the scope of the Legal Services Department are required; or (iii) the Legal Services Department is in a position of conflict.

Darcy Deacon LLP ("DD") was retained by the City in March, 2016 with respect to a commercial arbitration matter regarding construction costs claimed by Gem Equities Ltd. The Public Service authority to retain external counsel for this matter was $100,000; any retainer in excess of that amount required Executive Policy Committee approval. Due to the nature of the litigation process, the ultimate costs of such external counsel retainer were neither known nor was an estimate obtained at the time of engagement. In addition, this external counsel engagement occurred during a time period in which the engagement and contract management of external counsel had been decentralized throughout the City organization and was only in the early stages of being centralized in the Legal Services Department, which did not at that time have the necessary processes in place to proactively track the external counsel spend. As a result, Executive Policy Committee approval for the retainer was not obtained at the time of engagement. The contract with DD was concluded as of December 31, 2016, with costs of $157,993.59 (including GST and MRST) incurred and paid.

A public bid solicitation is not required pursuant to the Canadian Free Trade Agreement (2017) ("CFTA") (formerly the Agreement on Internal Trade ("AIT")), as the procurement is one of services that may, under applicable law, only be provided by licensed lawyers. The procurement is therefore exempt from the public bid solicitation requirements of the CFTA by virtue of CFTA Article 504.11 (h) (iii).

When the lawyer handling the commercial arbitration left DD to join Marr Finlayson Pollock ("MFP") in January, 2017, the Legal Services Department reviewed the matter to determine whether the external counsel retainer should remain with DD or whether a new retainer should be entered into with MFP. Based on the skill and competence of the lawyer handling the file and the advanced stage of the matter, a determination was made to engage MFP and ensure continuity of the matter with the lawyer who had handled it to date. The engagement with DD was concluded and a new engagement was entered into with MFP pursuant to the Public Service authority to retain external consultants to a maximum of $100,000. To date, costs incurred and paid on the MFP contract are $61,284.72 and are not anticipated to exceed the Public Service authority.

Over the past year, Legal Services has taken steps to ensure that all external counsel retainers are carried out in accordance with all relevant City policies, and has implemented processes to clarify roles and responsibilities with respect to external counsel retainers, including:

- ensuring all external counsel engagements have formal contracts, to be signed prior to the commencement of work, that include an overall fee cap to the limits of approval authority

- ensuring each external counsel engagement is assigned a Legal Services lawyer as contract administrator to be the City's liaison with external counsel and provide required instructions
- ensuring all bills arising pursuant to external counsel engagements are sent directly to Legal Services for review and payment
- ensuring external counsel submit bills on a monthly basis, rather than at key milestones in the legal matter
- setting up an internal tracking system for external counsel bills where each retainer is reviewed on a weekly basis to ensure the legal spend does not exceed approval authority

In addition, Legal Services is currently in the process of creating a comprehensive administrative standard that will govern external counsel retainers including matters such as: (i) approval process and authorities; (ii) external counsel contracts and contract management; (iii) external counsel budget process (including bill review and payment).

The actions that have been taken within the last year to clarify roles and responsibilities for external counsel engagements will prevent a situation like this from happening again, in that:

- each formal contract contains a maximum fee amount that is brought to external counsel's attention up-front; if this amount is exceeded, the City would take the position that the City is not liable for any additional fees;
- the weekly review of legal spend allows for an early identification of mounting legal costs and allows for an objective review of whether to terminate the retainer once maximum approval amount has been reached or whether to seek further approval for the engagement to continue.

FINANCIAL IMPACT

SINGLE SOURCE NEGOTIATION AND AWARD OF CONTRACT FOR LEGAL SERVICES RELATED TO A COMMERCIAL ARBITRATION

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:

Transit
Materials Management

OURWINNIPEG POLICY ALIGNMENT

n/a

SUBMITTED BY

Department: Legal Services Department
Division: n/a
Prepared by: K. Boryskavich
Date: January 16, 2018
File No: