

Agenda – Council – September 30, 2020

Report – Executive Policy Committee – September 21, 2020

**Item No. 18 Over-Expenditure Authorization for Legal Services Department 2020
Operating Budget and Approval of Single Source Negotiation and
Award of Contract – Winnipeg Police Service Headquarters Fraud
Matter**

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 21, 2020, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submitted the following to Council:

1. That approval be given to the Legal Services Department to over-expend its 2020 operating expenditures budget by \$2,250,000 to engage external legal counsel and forensic accounting services to assist with civil litigation matters in regards to the Winnipeg Police Service Headquarters Fraud Matter.
2. That, subject to approval of Recommendation 1, that single source negotiation and award of contract be approved with Deloitte LLP related to forensic accounting services required for the litigation and use at trial, in the estimated amount of \$1,050,000 MRST inclusive, GST additional.
3. That the Proper Officers of the City do all things necessary to implement the intent of the foregoing.

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DECISION MAKING HISTORY:

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 21, 2020, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submitted the matter to Council.

ADMINISTRATIVE REPORT

Title: Over-Expenditure Authorization for Legal Services Department 2020 Operating Budget and Approval of Single Source Negotiation and Award of Contract – Winnipeg Police Service Headquarters Fraud Matter

Critical Path: Executive Policy Committee - Council

AUTHORIZATION

Author	Department Head	CFO	CAO
D. Brown	D. Brown	P. Olafson, Interim CFO	M. Ruta, Interim CAO

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.

This report requests an increase in the Legal Services Department budget in the amount of \$2,250,000 which is required for external legal counsel and for forensic accounting services to be used in the litigation proceedings or in court. The amount requested will be applied to legal fees, as well as the costs to conduct the forensic work required to review and catalogue the documents required for civil litigation commenced in the Court of Queen's Bench involving the Winnipeg Police Service Headquarters Fraud Matter ("WPS HQ Fraud Matter"). The Recommendations of this Report are not compliant with the Materials Management Policy and may not be compliant with all Trade Agreements, but are compliant with the Canadian Free Trade Agreement. Further details are provided in the History/Discussion section.

RECOMMENDATIONS

1. That approval be given to the Legal Services Department to over-expend its 2020 operating expenditures budget by \$2,250,000 to engage external legal counsel and forensic accounting services to assist with civil litigation matters in regards to the Winnipeg Police Service Headquarters Fraud Matter.
2. That, subject to approval of Recommendation 1, that single source negotiation and award of contract be approved with Deloitte LLP related to forensic accounting services required for the litigation and use at trial, in the estimated amount of \$1,050,000 MRST inclusive, GST additional.
3. That the proper officers of the City do all things necessary to implement the intent of the foregoing.

REASON FOR THE REPORT

Council approval is required where the department requires additional budget funds. Council can approve single source negotiations and award of contract where the recommendation does not comply with the Materials Management Policy or Trade Agreements.

The single-source negotiation and award of contract to Deloitte LLP requires Council approval.

IMPLICATIONS OF THE RECOMMENDATIONS

If approved, the additional operating budget allocation will enable the Legal Services Department to continue to engage the legal and expert resources required for the conduct of the WPS HQ Fraud Matter. The recommendation will ensure proper funding of the next phases of the action.

HISTORY/DISCUSSION

On July 9, 2019, Executive Policy Committee approved:

“That, subject to budget approval, and subject to authorization to commence a claim on behalf of the City, the further single source negotiation of a contract for legal services be approved with Marr, Finlayson, Pollock LLP for legal services related to the WPS HQ Fraud Matter in the amount of up to \$600,000 inclusion of MRST, GST additional”.

On January 6, 2020 the City commenced an action in the Court of Queen’s Bench (the “WPS HQ Fraud Matter”) seeking recovery for loss and damages related to the construction of the WPS Headquarters. The action includes allegations of fraud by one or more of the defendants.

The City’s Legal Services Department currently has 4 full-time permanent civil litigation positions: (1) a by-law prosecutor; (2) two junior litigators; (3) one senior litigator. Currently one of the junior litigator positions is vacant.

Given the size and composition of the Legal Services department it is necessary to retain external legal counsel to conduct matters which require a significant amount of resources and/or specialized expertise.

In order to proceed with the WPS HQ Fraud Matter it is necessary to continue to pay the costs incurred by outside legal counsel as well as the costs required to obtain the forensic accounting expertise needed to identify, categorize and disclose the large volume of relevant documentation. Forensic accounting expertise is also required to review and analyze the documentation in order to identify patterns of conduct which support the allegations made in the claim and provide that analysis to the court in the event the matter proceeds to trial.

The specialized expertise required for this type of action is provided by forensic accountants. The use of forensic accountants is for two purposes:

- i. To allow for the expeditious review of all documentation related to the WPS HQ Fraud Matter and the organizing of that information in a way that meets court rules for disclosure, and
- ii. Forensic accounting expertise is also used to identify patterns of conduct and any discrepancies which could support a finding of misconduct or fraud by one or more of the Defendants.

The WPS HQ Fraud Matter was commenced by way of a Statement of Claim in the Court of Queen's Bench on January 6, 2020. The claim names multiple defendants involved in the WPS headquarters construction project. In addition to the claim, a Notice of Motion was filed by the City requesting an order to access documentation in the possession of the R.C.M.P. related to the project.

Several of the Defendants named in the action filed a series of motions with the court to challenge various aspects of the Statement of Claim brought by the City, including the right of the City to obtain documentation in the possession of the R.C.M.P. The decisions of the court to date on those motions have not negatively impacted the ability of the City to continue with the court action.

On August 7, 2020 the Court made a ruling the WPS HQ Fraud Matter as set out by the City in the Statement of Claim could continue. The Court also ordered that the City be given access to information gathered by the R.C.M.P. during its investigation of the WPS Headquarters construction project.

There has been an appeal filed by the Defendants Caspian Projects Inc., Caspian Construction Inc., Triple D Consulting Services Inc., 4816774 Manitoba Ltd. operating as Mountain Construction, JAGS Development Ltd., Brooke Holdings Ltd., Logistic Holdings Inc., JAW Enterprises Inc., Armik Babakhanians, Shaun Andre Babakhanians, Jenik Babakhanians and Pamela Anderson (the "Caspian Defendants") to the Court of Appeal with respect to the order issued by The Court of Queen's Bench.

The Caspian Defendants also made an application to the Court of Queen's Bench requesting a stay of the August 7th, 2020 Court order granting the City access to the documentation held by the R.C.M.P., until its appeal can be heard by the Court of Appeal. On September 11, 2020 the Court of Queen's Bench ruled it was not prepared to issue a stay. This means that the City can now obtain the documentation in the possession of the R.C.M.P. relating to the WPS Headquarters construction project.

All civil court matters are governed by the rules of the court. Prior to a trial all parties to an action must provide disclosure of documents and information relevant to the action, the opportunity to question opposing parties through examinations for discovery and written interrogatories, as well as providing any expert reports to be used to assist the court during trial.

In the present case, the size, nature and complexity of the WPS Headquarters project requires external legal counsel to secure forensic accounting expertise to organize the documentation and information required, as well as prepare a report to assist the court in identifying activities which support the allegations one or more of the defendants acted in a manner which was designed to inflate the costs of the WPS Headquarters project. The need to obtain these services without delay is also necessitated by the fact the Court has directed that the parties to the action must comply with strict timelines for disclosure of information relevant to the action.

There are two broad categories of documentation related to the WPS HQ Fraud Matter that require the services of a forensic accounting firm:

i. City Records

It is estimated there are 1,000,000 documents (primarily emails) which are relevant to the action. It would be impossible to organize these materials manually. Forensic accounting services are in a position to use their expertise, as well as specialized technologies, to review, eliminate duplications and organize those documents.

ii. Investigation Documents

The R.C.M.P. obtained tens of millions of pages of documentation during its investigation. This includes documents in paper and electronic form from a variety of sources.

It would be impossible to manually organize and categorize these documents without the assistance of a forensic accounting firm.

Discussions were held with two firms with the expertise and capacity to do the work required to manage and organize the large volume of documentation relevant to the WPS HQ Fraud Matter. It was determined that Deloitte is in the strongest position to conduct this work in a timely and efficient manner.

The cost estimates provided by Deloitte are based on an estimate of the volume of documentation to be reviewed (both paper and electronic) as well as past experience with respect to what will be required to complete the review and analysis required. It is estimated the cost to review documentation provided by the City will be \$500,000. The estimated cost of reviewing and analyzing documentation currently in the possession of the R.C.M.P. is \$550,000. The total for Deloitte is \$1,050,000.

The remainder of the over-expenditure (\$1,200,000) will be added to the existing contract with Marr, Finlayson, Pollock LLP. While at any stage of a court action it is possible for one or more of the parties to reach a settlement (which potentially reduces the cost of proceeding with an action), it is also possible one or more of the parties will make motions or take other procedural steps that raise matters which will increase the legal and associated costs of proceeding with the action. The current recommendations balance those factors and represent a realistic assessment of costs that are required to move the action forward to the completion of examinations for discovery.

If the action results in a decision in favour of the City, the Court can order costs incurred by the City be repaid.

This request for the budget over-expenditure is required to support the costs of proceeding with the WPS HQ action to the end of examinations for discovery. Note that this budget over-expenditure request is in addition to the \$728,000 approved by Standing Policy Committee on Finance on September 15, 2020.

The Department has not identified a funding source for this over-expenditure. In the event the General Revenue Fund reports a deficit at year-end, the Financial Stabilization Reserve Fund will transfer to the General Revenue Fund that amount required to avoid a deficit in the General Revenue Fund (approved by Council, April 3, 2020).

It is very unlikely the \$2,250,000 over-expenditure requested will be expended for services rendered in 2020. Any unexpended amount associated with this request will be transferred to the Commitment Reserve Fund.

The Materials Management Policy does not have an applicable exception for this procurement, but Council has the authority to supersede the Materials Management Policy.

This procurement is subject to the *New West Partnership Trade Agreement* (“**NWPTA**”), which incorporates the requirements of the *Canadian Free Trade Agreement* (“**CFTA**”), and the *Comprehensive Economic and Trade Agreement* (“**CETA**”). Article 504.11(h) of CFTA provides for a trade agreement exception as follows:

(h) procurement of:

(iv) services of expert witnesses or factual witnesses used in court or legal proceedings;

Procurement of accounting, auditing and bookkeeping services by municipalities may be exempt from the application of CETA, by virtue of Annex 19-5 – Services, section 2. However, notwithstanding these exceptions in CFTA and CETA, there does not appear to be an applicable exception in NWPTA that would permit the actions in Recommendation 2 of this Report. In the opinion of the Public Service, there is a risk a complaint could be brought against the City pursuant to that Trade Agreement should Council approve the Recommendation.

FINANCIAL IMPACT**Financial Impact Statement**Date: **September 16, 2020****Project Name:****First Year of Program 2020**

Over-Expenditure Authorization for Legal Services Department 2020 Operating Budget and
Approval of Single Source Negotiation and Award of Contract – Winnipeg Police Service
Headquarters Fraud Matter

	<u>2020</u>	<u>2021</u>	<u>2022</u>	<u>2023</u>	<u>2024</u>
Capital					
Capital Expenditures Required	\$ -	\$ -	\$ -	\$ -	\$ -
Less: Existing Budgeted Costs	-	-	-	-	-
Additional Capital Budget Required	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>
Funding Sources:					
Debt - Internal	\$ -	\$ -	\$ -	\$ -	\$ -
Debt - External	-	-	-	-	-
Grants (Enter Description Here)	-	-	-	-	-
Reserves, Equity, Surplus	-	-	-	-	-
Other - Enter Description Here	-	-	-	-	-
Total Funding	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>
Total Additional Capital Budget Required	<u>\$ -</u>				
Total Additional Debt Required	<u>\$ -</u>				
Current Expenditures/Revenues					
Direct Costs	\$ 2,250,000	\$ -	\$ -	\$ -	\$ -
Less: Incremental Revenue/Recovery	-	-	-	-	-
Net Cost/(Benefit)	<u>\$ 2,250,000</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>
Less: Existing Budget Amounts	-	-	-	-	-
Net Budget Adjustment Required	<u>\$ 2,250,000</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>
Additional Comments: Direct costs represents the amount of costs anticipated to be spent on external legal counsel and forensic accounting services of \$2,250,000. The Legal Services Department requires an increase in budget of this amount to fund the work. Any unspent amount at the end of 2020 will be requested to be carried forward to 2021 through the Commitment Reserve process.					

original signed by T. Yanchishyn

Tanis Yanchishyn, CPA, CA
Manager of Finance (Campus)
Corporate Finance Department

CONSULTATION

This Report has been prepared in consultation with:

Legal Services Department (as to legal issues)
Director of Legal Services Department as to approval to engage external legal services
(per FM-002 Appendix 1)
Corporate Finance Department

OURWINNIPEG POLICY ALIGNMENT

N/A

WINNIPEG CLIMATE ACTION PLAN ALIGNMENT

N/A

SUBMITTED BY

Department: Legal Services
Prepared by: D. Brown, Director of Legal Services & City Solicitor
Date: September 16th, 2020