Minutes – Executive Policy Committee – March 15, 2023

REPORTS

Item No. 1 Winnipeg Police Service Headquarters Litigation

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

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

1. That the City agree to a full settlement of both the Deficiencies Action (CI 18-01-14533) and the Fraud Action (CI 20-01-25295) and all associated claims currently filed in Court of King's Bench in respect of all parties in those Actions (excepting the City's severed claim against the Sheegl defendants, as defined below) on the following basis:

    A. Payment to the City of the following:

        i. $21.5 million if payment in full is made within 12 months of Council's approval of the settlement proposed herein;

        ii. $22.5 million if payment in full is made within 24 months of Council's approval of the settlement proposed herein;

        iii. $23.5 million if payment in full is made within 36 months of Council's approval of the settlement proposed herein.

    B. If full payment is not made within 36 months of Council's approval of the settlement proposed herein, consent judgment in favour of the City to be filed with the Court of King's Bench in the amount of $28 million; and

    C. Security to be registered on real property and/or other security arrangements in place sufficient in the opinion of the Chief Administrative Officer to secure full payment of the above amounts to the City.

2. That the City enter into, execute and deliver such agreements with some or all of the parties to the Actions referred to in Recommendation 1 as are determined to be reasonable by the Director of Legal Services and City Solicitor to implement the intent of the foregoing.

3. That authority be delegated to the Chief Administrative Officer to negotiate and approve the terms and conditions of the agreements referred to in Recommendation 2 in accordance with this report and such other terms and conditions deemed necessary by the Director of Legal Services and City Solicitor to protect the interests of the City.

EXECUTIVE POLICY COMMITTEE RECOMMENDATION (continued):

4. That, in the event Recommendations 1 - 3 are not approved, an over-expenditure be approved to the Legal Services Department 2023 operating budget of a total of $6,407,750 in order to continue the engagement of external legal counsel as well as document management and forensic accounting services and other experts required to complete the trials of the Deficiencies Action and the Fraud Action as further detailed in this report.

5. That subject to the approval of Recommendation 4, that contractual over-expenditures be approved as follows:

    A. $4,035,000 on the contract to Marr Finlayson Pollock LLP for a total contract value of $6,435,000 in connection with the Fraud Action (as defined below);

    B. $750,000 on the contract to Marr Finlayson Pollock LLP for a total contract value of $1,100,000 in connection with the Deficiencies Action (as defined below);

    C. $1,622,750 on the contract to Deloitte LLP for a total contract value of $3,270,750.

6. That the Proper Officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

DECISION MAKING HISTORY:

The Chairperson called Councillor Lukes to the Chair in order to move the following motion:

Moved by His Worship Mayor Gillingham,

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

Yea:	Gillingham, Browaty, Lukes, Mayes, Orlikow, Rollins	6
Nay:		0

Carried

His Worship Mayor Gillingham resumed the Chair.

ADMINISTRATIVE REPORT

Title: Winnipeg Police Service Headquarters Litigation

Critical Path: Executive Policy Committee – Council

AUTHORIZATION

Author	Department Head	CFO	CAO
H. Dick	H. Dick (Acting Director of Legal Services)	C. Kloepfer	M. Jack

Note: This Report presents the recommendations of the Public Service for consideration by Council. This report does not include legal advice which is subject to solicitor-client privilege. Any communication of that nature will be provided to Council confidentially to preserve solicitor-client privilege.

EXECUTIVE SUMMARY

This report requests approval from Council to settle all claims (including any associated crossclaims and counterclaims) within two legal actions (referred to as the "Deficiencies Action" and the "Fraud Action" - together "the Actions" - both of which are detailed below) filed by the City in the Court of King's Bench arising from the redevelopment of the former Canada Post building for use as the Winnipeg Police Headquarters ("the Project"), excepting the City's severed claim against the Sheegl defendants, as defined below. This report proposes settlement upon payment to the City of $21.5 million if payment is made within 12 months and higher amounts if payment is delayed beyond that time.

Alternatively, if Council does not approve settlement on the terms proposed, this report requests Council approval for an additional expenditure of $6,407,750 in order to continue to pursue these Actions. The additional expenditure will allow the continued engagement of external legal counsel as well as document management and forensic accounting services and other expert services required to complete the trials of both the Deficiencies Action and the Fraud Action.

RECOMMENDATIONS

1. That the City agree to a full settlement of both the Deficiencies Action (CI 18-01-14533) and the Fraud Action (CI 20-01-25295) and all associated claims currently filed in Court of King's Bench in respect of all parties in those Actions (excepting the City's severed claim against the Sheegl defendants, as defined below) on the following basis:

    A. Payment to the City of the following:

        i. $21.5 million if payment in full is made within 12 months of Council's approval of the settlement proposed herein;

ii. $22.5 million if payment in full is made within 24 months of Council's approval of the settlement proposed herein; and

iii. $23.5 million if payment in full is made within 36 months of Council's approval of the settlement proposed herein;

B. If full payment is not made within 36 months of Council's approval of the settlement proposed herein, consent judgment in favour of the City to be filed with the Court of King's Bench in the amount of $28 million ; and

C. Security to be registered on real property and/or other security arrangements in place sufficient in the opinion of the Chief Administrative Officer to secure full payment of the above amounts to the City.

2. That the City enter into, execute and deliver such agreements with some or all of the parties to the Actions referred to in Recommendation 1 as are determined to be reasonable by the City Solicitor / Director of Legal Services to implement the intent of the foregoing.

3. That authority be delegated to the Chief Administrative Officer to negotiate and approve the terms and conditions of the agreements referred to in Recommendation 2 in accordance with this report and such other terms and conditions deemed necessary by the City Solicitor / Director of Legal Services to protect the interests of the City.

4. That, in the event Recommendations 1 - 3 are not approved, an over-expenditure be approved to the Legal Services Department 2023 operating budget of a total of $6,407,750 in order to continue the engagement of external legal counsel as well as document management and forensic accounting services and other experts required to complete the trials of the Deficiencies Action and the Fraud Action as further detailed in this report.

5. That subject to the approval of Recommendation 4, that contractual over-expenditures be approved as follows:

A. $4,035,000 on the contract to Marr Finlayson Pollock LLP for a total contract value of $6,435,000 in connection with the Fraud Action (as defined below);

B. $750,000 on the contract to Marr Finlayson Pollock LLP for a total contract value of $1,100,000 in connection with the Deficiencies Action (as defined below);

C. $1,622,750 on the contract to Deloitte LLP for a total contract value of $3,270,750.

6. That the proper officers of the City be authorized to do all things necessary to implement the intent of the foregoing.

REASON FOR THE REPORT

Only Council can approve a settlement of a claim brought by or against the City in excess of $250,000. Council approval is also required where a department requires additional budget funds and where contract over-expenditures are required without identified funds.

IMPLICATIONS OF THE RECOMMENDATIONS

The amounts payable as part of the settlement increase with each year that payment is delayed; if payment is made in full within 12 months after Council's approval of the settlement, the amount would be $21.5 million; if payment is made in full within 24 months, the amount would be $22.5 million; if payment is made in full within the third year, the amount would be $23.5 million. If payment is not complete within 36 months of Council's approval of the settlement proposed herein, the City would be entitled to file a consent judgment in the Court of King's Bench in the amount of $28 million. As part of the settlement agreement, the City would be entitled to security sufficient to ensure payment of the full amount agreed to.

If the recommended settlement is not approved, funding for the necessary legal, forensic accounting, document management and other costs will be necessary if the Actions are to be pursued to trial. A court finding of fraud by one or more of the defendants named in the Fraud Action will allow the City to seek a court order for recovery of some or all of the costs incurred by the City in proceeding with the Fraud Action, including legal and expert fees.

In the absence of an approved settlement, declining to provide the requested funding would prevent the City from proceeding with the Actions and pursuing them to trial, which would effectively end the last remaining opportunity to provide accountability to the citizens of the City with respect to the actions of the parties involved in the Project. It also would prevent the City from recovering losses it may have incurred due to fraud, conversion, fraudulent and/or negligent misrepresentation, deceit, conspiracy, unjust enrichment, negligence and breach of contract. A failure to fund the Actions would also expose the City to demands to pay the costs to the other parties involved in the action.

HISTORY/DISCUSSION

The Court Actions

The Project was undertaken with the objective of providing the Winnipeg Police Service (WPS) with the facilities required for it to carry out its operations well into the future.

The final costs of the Project were significantly more than original estimates. In particular, the originally agreed cost of construction for the Project in the Guaranteed Maximum Price contract entered into between the City and Caspian Projects Inc. (CPI) in November 2011 was $137.1 million. The amount subsequently agreed to in late 2013, after CPI sought an increase in funding which, it represented, arose from the increased scope of the work flowing from design changes, was $156,375,000. (References in media reports to project costs exceeding $200 million include the costs of acquiring the former Canada Post building and the Tower and miscellaneous soft costs entirely unconnected to the City's claims against the defendants named in the Fraud Action.)

There are two Actions that the City has filed in the Court of King's Bench naming a variety of defendants involved in the Project:

- CI 18-01-14533 – Court action filed on May 16, 2018 alleging deficiencies in various aspects of the construction of the Project (the "Deficiencies Action").The allegations against the defendants in the Deficiencies Action, as set out in the Statement of Claim,

relate to a number of construction and/or design deficiencies associated with the Project and involve allegations of negligent construction work by CPI. and negligent design and supervision work by AAR, the City's consultant on the Project. CPI filed a Counterclaim against the City in connection with the Deficiencies Action, and both CPI and AAR have filed Crossclaims against one another.

- CI 20-01-25295 – Court action filed on January 6, 2020, alleging improper and fraudulent conduct from multiple parties involved in the Project (the "Fraud Action"). The allegations against the defendants in the Fraud Action, as set out in the Re-Amended Statement of Claim, consist of allegations of fraud, conversion, fraudulent and/or negligent misrepresentation, deceit, conspiracy, unjust enrichment, negligence and breach of contract that led to a significant increase in the costs of the Project, resulting in loss and damage to the City. A number of the defendants named in the Fraud Action have filed Crossclaims against one another.

Among the defendants named in the Fraud Action are the former CAO Phil Sheegl, FSS Financial Support Services Inc. and 2686814 Manitoba Ltd. (the "Sheegl defendants"). The City's claim against the Sheegl defendants was severed from the claims against the remaining defendants in June 2020. This led to motions by both the City and the Sheegl defendants requesting judgment without the need for a full trial. Summary Judgement in favour of the City was granted by the Court of King's Bench. That decision is currently under appeal to the Court of Appeal. The action involving the Sheegl defendants is not addressed in this Report.

In July 2022, the court granted the City's motion to add additional parties and to obtain disclosure of additional documents from the parties to the Fraud Action and from third parties (including banking institutions, and a contractor who performed work on the Project. The City's re-amended statement of claim was filed in January 2023. The addition of these new parties will require additional discoveries, which are scheduled to take place in the spring of 2023.

Current Status

Trial dates have been scheduled as follows:

The Fraud Action - March 4 to June 7, 2024 (estimated 70 days trial)
The Deficiencies Action - November 4 through 29, 2024

The Deficiencies Action has been subject to pre-trial management. Deadlines have been set for the exchange of affidavits of documents by the parties, with a further pre-trial conference to be scheduled in the fall of 2023. Examinations for discovery have not yet been scheduled for the Deficiencies Action.

The Fraud Action has been subject to case management by the Chief Justice of the Court of King's Bench. The case management process and the pre-trial management process allow for decisions to be made and timelines imposed on the parties which are targeted to ensure the actions proceed expeditiously. While this has resulted in promoting the efficient movement of the Actions through the court process, it has also resulted in the City incurring costs to meet deadlines set by the court.

In the Fraud Action, most of the examinations for discovery of the defendants and much of the forensic accounting work has been completed. Deadlines have been imposed by the Chief

Justice for the completion of the City's expert report (May 1, 2023) and those of the defendants (September 1, 2023), and the completion of any examinations for discovery of the new parties (March 31, 2023).

The examinations for discovery of the City have been scheduled for the month of April 2023. Following the City's examinations for discovery, there will be a significant number of undertakings to be completed.

Budget – Current

Council approved an over-expenditure for the Legal Services Department in respect of these Actions on September 29, 2021, as outlined below. As stated in the Administrative Report from the Public Service at that time, the additional budget was to provide funds required for external counsel (Marr Finlayson Pollock LLP) as well as forensic accounting services (Deloitte LLP) and other experts required for the Actions.

The budget approved by Council on September 29, 2021, was estimated in an amount expected to pay only the costs of the Actions through the discovery process; it was not intended that this approval would suffice to see the Actions through trial. It was understood that Council would be asked to approve additional funding if the Actions proceed to trial.

Although discoveries and forensic accounting work is not yet fully complete, overall the expenses incurred to this point are tracking close to the previously approved budgeted amounts:

	Total Approved	To February 28, 2023
Marr Finlayson Pollock LLP (Fraud Action)	$2,400,000.00	$2,149,035.88
Deloitte LLP	$1,648,000.00	$1,639,600.00
Marr Finlayson Pollock LLP (Deficiencies Action)	$350,000.00	$317,654.98

In addition, Deloitte has $266,255 in additional unbilled amounts for recent work that requires payment.

Recommended Settlement

The settlement recommended by this report has been worked out with the various defendants in the Fraud Action and the Deficiencies Action. Given the number of parties involved and the complexity of these Actions, this has been a time-consuming and difficult undertaking.

In the end, the Public Service is recommending that Council approve a settlement which would be all-inclusive in respect of all of the parties named in the Fraud Action and the Deficiencies Action (with the exception of the severed claim against the Sheegl defendants). It would result in payment to the City of the following:

i. $21.5 million if payment is made within 12 months of Council's approval of the settlement;

ii. $22.5 million if payment is made within 24 months of Council's approval of the settlement;
iii. $23.5 million if payment is made within 36 months of Council's approval of the settlement.

The proposed settlement also involves an agreement that, if full payment is not made within 36 months of Council's approval of the settlement proposed herein, consent judgment in favour of the City would be filed with the Court of King's Bench in the amount of $28 million

The settlement agreement would also include security provisions to ensure payment to the City of the amounts noted above. This report is seeking authorization for the Chief Administrative Officer to agree to security arrangements which he considers sufficient to ensure full payment to the City.

It is likely that, in order to give effect to this settlement, it will be necessary to enter into a number of agreements with individual defendants or groups of defendants rather than a single agreement with all of the defendants. The details of these settlements may be complex; accordingly, this report requests delegated authority to the Chief Administrative Officer and the City Solicitor/Director of Legal Services to work out these details.

Budget Proposed if Settlement is Not Approved

As set out in the previous report, estimating the cost to proceed is in part dependent on steps taken by other parties to the Actions. As an example, a party may choose to bring a motion which adds to the cost. A review of the extensive evidence can also identify new facts which leads to the need for further analysis before trial.

With those factors in mind, the following are current estimates of the additional budgets required to move the Actions through trial:

Marr Finlayson Pollock LLP (Fraud Action)	$4,035,000
Deloitte LLP	$1,622,750
Marr Finlayson Pollock LLP (Deficiencies Action)	$750,000

These amounts form the basis for Recommendations 4 and 5 of this report.

FINANCIAL IMPACT

Financial Impact Statement Date: March 10, 2023

Project Name:

Winnipeg Police Service Headquarters litigation

COMMENTS:

If **recommendations #1 through #3** are approved there are no financial implications at this time as it is impossible to predict which option parties noted in this administrative report will chose. When/if settlement is received the funds will be included into Insurance Reserve in the year they are received.

If recommendations 1 through 3 are not approved and **recommendation #4 &5** are approved instead, a budget adjustment (increase in budget) in the amount of $6,407,750 will be required to cover additional costs of litigation.

Lioubov Gavrilova-Crozier March 10, 2023

Lioubov Gavrilova-Crozier, CPA, CA
Manager of Finance & Administration (Campus)

CONSULTATION

This Report has been prepared in consultation with:

- Corporate Finance

OURWINNIPEG POLICY ALIGNMENT

N/A

WINNIPEG CLIMATE ACTION PLAN ALIGNMENT

N/A

WINNIPEG POVERTY REDUCTION STRATEGY ALIGNMENT

N/A

SUBMITTED BY

Department: Legal Services
Prepared by: Harold Dick, Acting Director and City Solicitor
Date: March 10, 2023