



STAFF REPORT ACTION REQUIRED

Standing Authority for City Solicitor to Submit Contractual Disputes of \$500,000.00 or Less to Arbitration

Date:	October 2, 2009
To:	Government Management Committee
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

This report seeks authority for the City Solicitor, in consultation with the responsible Division Head, Deputy City Manager or the City Manager, to submit contractual disputes to arbitration, where the amount in issue, exclusive of any interest, costs or arbitrator's fees is \$500,000.00 or less.

RECOMMENDATIONS

It is recommended that:

- (1) the City Solicitor, in consultation with the responsible operating Division Head, Deputy City Manager or the City Manager, be granted standing authority to refer contractual disputes to arbitration, where the amount in issue, exclusive of interest, costs and arbitrator's fees, is \$500,000.00 or less;
- (2) that such authority include the authority to negotiate the terms under which such arbitrations are to be conducted, including appeal rights or that the arbitration award be final and binding, and to enter arbitration agreements including those terms;
- (3) that such authority include the authority to discontinue or settle such arbitrations where it is concluded that it is reasonable to do so, to appeal arbitration awards where permitted and warranted, to take proceedings to enforce arbitration awards where necessary, to write off amounts that are uncollectible where it is

appropriate to do so, or otherwise to deal with the recovery of such claims, in consultation, where appropriate, with the responsible Division Head, Deputy City Manager or City Manager, and to execute any documents in furtherance thereof.

Financial Impact

The cost of arbitration, including any legal costs awarded, arbitration fees and expert's fees, will be paid by the responsible operating area from amounts approved in that budget for the relevant year. There is no financial impact beyond what has already been approved in those budgets.

ISSUE BACKGROUND

A dispute has arisen between the City and Four Seasons Site Development Ltd. ("Four Seasons") with respect to the construction contract for the Bloor Street Transformation Project. The dispute concerns the issue of whether tree grates are included within the contract price. The amount in dispute is approximately \$250,000.00. Four Seasons and staff wish to submit this dispute to arbitration. This raises issues concerning staff's authority to do so.

At its meeting of February 29, March 1 and March 2, 2000, Council adopted Works Committee Clause 2 of Report 4 entitled "Integration of Works Construction Contract Documents - Harmonized General Conditions of Contracts". This report approved the use of standard form General Conditions of contract for construction under the responsibility of the former Works and Emergency Services Department. The General Conditions included provisions allowing for the City and contractors to agree to arbitrate disputes <http://www.toronto.ca/legdocs/2000/agendas/council/cc/cc000229/cofa.htm>. At that time, Council also approved on a trial basis, mandatory unilateral arbitration of such disputes, provided the amount in dispute was \$150,000 or less. At its meeting of September 28, 29, 30 and October 1, 2004, Council adopted Works Committee Clause 17 of Report 8 entitled "Unilateral Access to Final and Binding Arbitration as an Option for Works and Emergency Services Construction Contracts". This report approved mandatory unilateral arbitration of such disputes in amounts of \$150,000.00 or less on a permanent basis <http://www.toronto.ca/legdocs/2004/agendas/council/cc040928/wks8rpt/cl017.pdf>.

The provisions of these General Conditions have generally been incorporated into the General Conditions of other City Divisions not previously under the mandate of the then Works and Emergency Services Department (e.g., Facilities and Real Estate Services).

COMMENTS

Although the General Conditions provide that either party may request arbitration and that disputes over \$150,000.00 can be heard by mutual agreement, they do not expressly set out who may enter into such an agreement on behalf of the City and agree to the terms of such agreements. Although arguably the current provisions may permit the operating

division responsible for this construction contract to agree to such an arbitration, the General Conditions are not altogether clear. Accordingly, out of an abundance of caution, authority is being sought to arbitrate this dispute.

At the same time, in light of this conclusion, I have further concluded that it would be advantageous that there be standing authority to arbitrate all contractual disputes up to \$500,000.00 as the matter of authority would otherwise be an ongoing issue under the City's General Conditions, and allowing the delegation of staff authority to arbitrate disputes within the above monetary amount would allow in appropriate situations for the expedient handling of disputes under other City contracts.

For example, the dispute between the City and Four Seasons is suitable for arbitration because the parties wish to obtain a speedy ruling on a narrow issue of contract interpretation. That sort of rationale in favour of arbitration could apply with respect to any type of contract dispute (e.g., a lease). Accordingly, this report seeks standing authority to arbitrate any contractual dispute of \$500,000.00 or less.

The City's General Conditions indicate that the rules and procedures of the *Arbitration Act* shall apply to any arbitration, except to the extent that they are modified by the provisions of the General Conditions. The *Arbitration Act*, among other things, provides that unless the parties agree otherwise, there are limited rights of appeal. One may only appeal on a question of law, with leave of the Court. That *Act* sets out rules for the Court in considering leave applications. The parties may wish to negotiate different rules, procedures and appeal rights, depending on the nature of a particular arbitration, including that it be final and binding. For example, if the issue involves a relatively small amount of money, and the parties wish to minimize legal expenses, they may wish to incorporate procedures to streamline the arbitration and limit appeal rights. Given that each case differs, this report also seeks authority to allow City staff to negotiate the terms of arbitration agreements.

At its meeting of June 23 and 24, 2008, Council gave standing authority to the City Solicitor to commence legal actions to recover monies owing to the City up to the sum of \$500,000.00, exclusive of interest or costs <http://www.toronto.ca/legdocs/mmis/2008/gm/bgrd/backgroundfile-13533.pdf>. That standing authority applies to lawsuits but does not reference arbitrations. The standing authority being sought in this report is consistent with that previously granted authority, in seeking authority up to \$500,000.00, authority to discontinue, settle, appeal, or enforce arbitration awards, and to write off uncollectible claims.

The arbitration of City disputes is rare, although given the costs and delays in our Courts, it may in future become more commonplace.

The granting of this authority will promote greater organizational efficiency by eliminating any need to report to Council each time staff wish to arbitrate a dispute up to \$500,000.00 in value. This will improve organizational efficiency by eliminating

unnecessary and duplicative reporting processes, and enable a more effective use of staff and Council resources.

The City's General Conditions provide that arbitrator's fees, and the fees of any independent experts appointed to assist the arbitrator, shall be shared equally by the City and contractor. They also provide that the arbitrator has discretion to award reasonable costs related to the arbitration. Those costs could include both legal fees, as well as experts and arbitrator's fees. Any such arbitration costs would be borne by the operating department from which the dispute in issue arose.

It is recommended that the requested authorization be granted.

CONTACT

Darrel Smith, Solicitor, Legal Services Division, Tel: (416) 392-8052,
Fax (416) 397-1765, e-mail: dsmith5@toronto.ca

SIGNATURE

Anna Kinastowski
City Solicitor