

Consent to Assignment of Municipal Access Agreement (MAA) with a2b Fiber Inc.

Date: November 14, 2017

To: Public Works and Infrastructure Committee

From: General Manager, Transportation Services

Wards: All Wards

SUMMARY

This report seeks authority for the General Manager, Transportation services to transfer the assignment of a2b Fiber Inc's Municipal Access Agreement ("MAA") for the construction, installation, maintenance and operation of a telecommunications network in the City of Toronto public highways to Distributel Communications Limited ("DCL"). This transferrance is necessary to allow DCL to assume the work of constructing fibre that previously it had relied on a2b Fibre Inc. to undertake as part of a business arrangement between these and other related companies.

The MAA provisions related to assignment of the Agreement during the term, permits assignments only with the City's consent, which consent shall not be unreasonably withheld or delayed. Subject to Committee approval, the assignment agreement would require DCL to observe, perform and be liable under and bound by every covenant, license, proviso, condition and agreement and stipulation under the MAA for the remainder of the term.

This report also seeks delegated authority to the General Manager, Transportation Services to consent to any future transfer of assignment under any MAA, where there is no financial impact of the proposed change to the City and all provisions of the MAA continue to be in force and effect.

RECOMMENDATIONS

The General Manager, Transportation Services recommends that:

1. City Council consent to the assignment of the Municipal Access Agreement (December 29, 2013) with a2b Fiber Inc. to Distributel Communications Limited (DCL) and authorize the General Manager, Transportation Services to negotiate and execute an assignment conditional on;
 - a. DCL being required to pay arrears of fees and any other amounts outstanding at the date of the assignment as well as any additional fees and other amounts which may be outstanding on, after or as of the date of the assignment agreement;
 - b. DCL providing the City with a certificate of insurance evidencing the insurance policies required under the MAA; and
 - c. DCL shall provide the City with letters of credit to replace letters of credit submitted to the General Manager by a2b,

and on such other terms and conditions satisfactory to the General Manager, Transportation Services and in a form satisfactory to the City Solicitor.

2. City Council delegate authority to the General Manager, Transportation Services to consent to any transfer of assignment under any Municipal Access Agreement (MAA) where, after consulting with the Chief Financial Officer, it is determined that there is no financial impact of the proposed change to the City, and all provisions of the MAA continue to be in force and effect, and such delegation includes authority to negotiate and execute an assignment agreement where deemed necessary by the City Solicitor on terms and conditions substantially similar to those described in this report and on such other terms and conditions satisfactory to the General Manager, Transportation Services and in a form satisfactory to the City Solicitor.

FINANCIAL IMPACT

The recommendations in this report will have no financial impact on the City.

The Acting Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

City Council, at its meeting of May 7, 8, 9, and 10, 2013, considered the matter "Municipal Access Agreement for Telecommunications Installations - Dotto One (8241104 Canada Inc.) and Standing Delegated Authority", (Item PW22.6). Council

adopted this Item and in doing so delegated standing authority to the General Manager, Transportation Services to negotiate, enter into and execute on behalf of the City any Municipal Access Agreement, based on the standard form agreement currently used by staff, to construct, install, maintain and operate fibre optic and other cables, conduits and ancillary plants in the City of Toronto public highways, including, without limitation, any renewals, extensions or subsequent amendments to a Municipal Access Agreement, on terms and conditions satisfactory to the General Manager, Transportation Services, and in a form satisfactory to the City Solicitor subject to the following condition:

(a) any variation from the City's standard form Municipal Access Agreement, or any subsequent amendment, shall not materially impact the potential liability of the City.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.PW22.6>

It was pursuant to this standing delegated authority that the City entered into its current Municipal Access Agreement with a2b.

City Council, at its meeting on February 7 and 8, 2011, delegated authority to consent to any future assignment under a Municipal Access Agreement as the result of change in control of a company, or acquisition of its assets, to the General Manager, Transportation Services, after consulting with the City Solicitor and the Deputy City Manager and Chief Financial Officer, where it is determined that there is no financial impact of the proposed change to the City, and all provisions of the agreement continue to be in force and effect, including entering into the City's form of assignment agreement where deemed necessary by the City Solicitor.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.PW1.6>

COMMENTS

The Municipal Access Agreement ("MAA") between the City and a2b Fiber Inc. became effective December 29, 2013. The terms and conditions set out in the Agreement establish the roles and responsibilities of the parties and protect the City's interests with respect to the work and installations of infrastructure in the public highways.

a2b Fiber Inc. and Distributel Communications Limited ("DCL") approached the City, seeking consent to transfer the assignment the existing a2b MAA to DCL. The need for this transfer is the result of a corporate reorganization where DCL has bought out a2b Fiber Inc.'s previous share of their partnership.

The MAA contains provisions respecting assignment of the Agreement, providing that a2b shall not assign its rights under the Agreement without the consent of the City, which shall not be unreasonably withheld or delayed. The MAA stipulates that no assignment shall take effect until the Assignee to which the City's consent is given shall have entered into the City's form of agreement directly with the City on terms and conditions satisfactory to the City Solicitor whereby, among other things, the Assignee covenants with the City to perform, observe and keep each and every covenant, proviso, condition and agreement in the MAA on the part of a2b to be performed, observed and kept.

Under the assignment agreement, the City's consent is conditional on:

(a) DCL being required to pay arrears of fees and any other amounts outstanding at the date of the assignment as well as any additional fees and other amounts which may be outstanding on, after or as of the date of the assignment agreement;

(b) DCL providing the City with a certificate of insurance evidencing the insurance policies required under the MAA; and

(c) DCL shall provide the City with letters of credit to replace letters of credit submitted to the General Manager by a2b.

While requests for such assignments have been rare in the past, delegating standing authority to consent to assignments and enter into the necessary assignment agreements will be in keeping with efforts to improve corporate efficiency and provide a higher degree of customer service. Although there is existing standing delegated authority for consenting to assignments of MAAs, that authority is narrow as it only applies in circumstances where the assignment is required as a result of a change in control of a company, or acquisition of its assets and where there is no financial impact of the proposed change to the City.

The authority being sought in Recommendation 2 of this report would continue to be limited to circumstances where there is no financial impact to the City as a result of the assignment but also would allow consent to an assignment that is requested for reasons other than a change of control or acquisition of assets. The terms of the assignment must include ones that are substantially similar to those set out above in this report and may include others that the General Manager, Transportation Services considers appropriate in the circumstances of the particular assignment.

Legal Services has been consulted in the preparation of this report.

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SIGNATURE

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