

**IN THE MATTER OF  
THE TORONTO COMPUTER LEASING INQUIRY**

**REPLY SUBMISSIONS OF BRENDAN POWER**

Brendan Power - Generally

1. Mr. Power was an external contractor and not a City employee. That being said, he was largely treated as an employee and assigned employee type functions. The only real distinction between Mr. Power's situation and that of an employee is that, as a contractor, Mr. Power did not have personnel who had to report to him and, conversely, he did not have supervisory responsibilities.
  
2. In its submissions, the City of Toronto suggests its employees were duped by MFP and there was little the employees could have done in face of MFP's concerted efforts and given the improper conduct of certain City personnel. While Mr. Power does not comment on the City's submissions regarding MFP and certain City personnel, it is submitted that Mr. Power was in no different a position than all other City personnel.

Limit of \$43 million on leasing arrangement

3. In the closing submissions of the City of Toronto it is erroneously stated that Council approved putting \$43 million of computer hardware and software on lease. This was not Mr. Power's understanding. Rather, this dollar amount

was used by Finance to review the merits of lease financing relative to other methods of financing.

4. Recommendation No. 4 of the Report to P&F made it clear that the amount to be leased was anticipated to exceed \$43 million. That recommendation anticipated further reports would be submitted, if warranted.
5. Further, as it became widely known, including in Finance, that the amount put on lease had exceeded \$43 million, little or nothing was said or done about it. The City of Toronto correctly notes in its submissions that those in Finance that came to learn this included the Treasurer, Ms. Liczyk (Para.164, Chapter 1). This reaction, or lack thereof, accords more with the notion that all relevant parties shared the view that there was no dollar limit on the leasing arrangement.
6. In its submissions, the City of Toronto notes that the belief there was not a \$43 million limit on the leasing arrangement was widely held in I&T. The City of Toronto submits that greater effort should have been made to communicate I&T's understanding in this regard, particularly to Finance. Mr. Power does not necessarily accept that Finance was not aware of I&T's understanding. In any event, there can be little doubt that Mr. Power honestly shared I&T's view about the lack of dollar limit on the leasing arrangement. To the extent the City suggests that Mr. Power misled others, such as Mr.

Loreto, about the absence of a limit, it cannot be said that Mr. Power was being intentionally deceptive.

7. Mr. Power also notes MFP's submissions as regards the evidence that City officials outside I&T were well aware that more than \$43 million could be put on lease. He further notes MFP's unsuccessful efforts to obtain further evidence about such knowledge. It is Mr. Power's submission that it was widely understood at the City that the leasing arrangement was not limited to \$43 million.

#### Brendan Power's Qualifications to lead the computer leasing tender

8. The City of Toronto submits that Mr. Power was not qualified to lead the City's first major computer leasing tender. Mr. Power would not take great exception to this. It was Mr. Power's own evidence that while he had experience in IT leasing, he did not consider himself to be a leasing expert. The real issues are whether Mr. Power was the lead and whether someone in Finance should have been the lead. The 1999 RFQ was as much a financing initiative as anything associated with the Year 2000 Project or the acquisition of computer hardware and software. Indeed, much of the computer equipment had already been received by the City by the time the RFQ was issued. Consequently, the proper lead for the RFQ and the preparation of the Report to P&F was someone from Finance.

9. The possibility of the City using leasing as a form of financing its computer hardware and software had been considered for several months prior to the issuance of the RFQ. Officials from Finance attended those meetings and received 'educational' material from then prospective RFQ respondents. As early as April 1998, Mr. Ashbourne of MFP had sent leasing information to Mr. Rabadi of Finance. Several Finance officials were involved in efforts to learn more about leasing in early 1999. There is no suggestion that Mr. Power was involved in any of the efforts of Finance to consider leasing as a financing option or was aware that Finance did not have the requisite leasing expertise. It was not Mr. Power's responsibility to familiarize himself with any shortfall in Finance's leasing expertise.
  
10. In early 1999, and around the time of the preparation of the draft RFQ, the Treasurer, Ms. Liczyk, specifically assigned officials to investigate the merits of lease financing. This fact, together with the previous efforts of Finance to gain an understanding of the merits of lease financing is significant. It refutes any suggestion that Finance considered the subject RFQ as largely involving the acquisition of computer hardware and software and not a financing initiative. The RFQ was primarily a financing initiative. If Finance did not recognize this, it should have. If Finance felt it did not have the requisite leasing expertise to participate in drafting the RFQ and assessing the responses, it should have acquired it. Finance had no business to rely on Mr.

Power exclusively and without verifying Mr. Power's actual experience and expertise.

11. To the extent that Finance or Purchasing did not have the necessary leasing expertise, there was no reason for Mr. Power to know this.
12. The claims by those in Finance and Purchasing that they relied on Mr. Power's apparent leasing expertise was unwarranted and simply not the case. In terms of any future consideration of leasing as a form of financing acquisitions, of computers or otherwise, it is submitted that the lead in such cases be a Finance appointee.

#### Review and analysis of responses to RFQ

13. Mr. Power was involved in this process. However, the most important aspects of this review were financial considerations. Those functions were performed by officials in Finance and not by Mr. Power. His only involvement was to double-check for accuracy the input figures used in Finance's analysis. This double-checking was not undertaken on Mr. Power's initiative but on Finance's request, as should have been the case.
14. To the extent that Finance and Purchasing did not have the requisite expertise to analyze and review the RFQ responses, this was not Mr. Power's responsibility and was not known by Mr. Power in any event.

## Preparation of Report to P&F

15. Mr. Power played an active role in the preparation of this Report. He was not alone in this. However, officials in Finance were just as much involved and appeared to consider the Report to largely be theirs. This is reflected in the fact that Mr. Power was asked to simply provide IT's 'blurb' to be inserted in Finance's existing draft of the Report. A number of parties with standing have observed in their closing submissions that there was no drafting control over the Report but that there should have been. Mr. Power agrees with those submission and, in particular, that such control in future leasing RFQ's or RFP's reside with Finance. To the extent that this was not the case relative to the Report to P&F, it should have been.

## Sale-leaseback

16. It is Mr. Power's submission that this aspect of the leasing arrangement was or should have been known by all concerned. The City of Toronto submits that sale part of the sale-leaseback should have been conducted in accordance with the City's sale of assets by-laws. Mr. Power does not accept that this is the case. At the time the Report to P&F was being prepared, the thinking of those involved was that the hardware suppliers would simply reverse the invoices they had issued and re-issue the same invoices to the successful bidder. It is submitted that such thinking and such an approach was reasonable. Further,

that approach would have readily addressed the double payment of PST and GST issues.

#### Change from three year to five year leases

17. There is no suggestion that Mr. Power was involved in this change. Indeed, Mr. Power was not in attendance at the August 5, 1999 breakfast meeting where the possibility of five year leases was apparently raised for the first time. While Mr. Power did attend other meetings with MFP in August and September, there is no evidence that the possibility of five year leases was discussed at any of the meetings attended by Mr. Power. Further, it was Mr. Power's evidence that most hardware did not have a five year lifespan. He, was with others in I&T, would not have supported putting most hardware on five year leases. Mr. Power's evidence was that servers may have a five year lifespan and might, therefore, legitimately be put on five year leases.

#### Lease rates

18. It was clear from MFP's response to the RFQ and from the other responses that initial lease rates were guaranteed for only 90 days and, therefore, that the lease rates for hardware and software put on lease after that period were subject to change. The City of Toronto submits (para. 93, Chapter 8) that I&T should have considered the importance of future lease rates. It is Mr. Power's submission that Finance should have appreciated the importance of future lease rates.

19. Mr. Power was not involved in subsequent lease rates provided by MFP. He was involved in obtaining from MFP the lease rate for the first lease schedule. He was asked by Ms. Viinamae to obtain the rate, which he did. In accordance with the City's apparent decision to put equipment on lease for five years, the lease rate was for five years and not three years. To the extent that the lease rate was different than that contained in MFP's RFQ response is hardly surprising. It is not reasonable to assume that Mr. Power would conduct an analysis of the reasonableness of the five year lease rate provided by MFP. That is a matter for which Finance was or should have been responsible as Finance was, at least presumably, quite familiar with the cost of money.
20. In any event, the City was not bound to accept the lease rates quoted by MFP. The City could have attempted to negotiate better leases. It could have decided to use money from sources other than MFP, including the issuance of another RFQ.

#### PST rebate

21. While Mr. Power was involved in subsequent efforts to obtain a PST rebate on goods already acquired, there is no reason to suggest that Mr. Power is in any responsible for the City's inability to make a full recovery of PST paid. First, the fact is that the rebate is only available relative to goods where there was an



intention to sell and leaseback the assets at the time they were acquired. Quite simply, there was no such intention prior to issuance of the RFQ or even approval of the related report by City Council. Second, as far as Mr. Power knew at the relevant time, the intention was to have suppliers cancel existing invoices and re-issue them to MFP. This intention was reflected in the June 29 draft Report to P&F prepared by Mr. Rabadi. Third, MFP had specifically informed Mr. Andrew about the potential danger of double payment of PST prior to issuance of the RFQ. There is no evidence that Mr. Andrew drew this potential danger to Mr. Power's attention or the attention of anyone else involved in the RFQ process, not that much could have been done at that time. Fifth, once Purchasing was aware that certain goods that had not yet been acquired were to be put on lease it should have taken steps to ensure that PST was not billed by suppliers.

#### Legal review of leasing contract documentation

22. Mr. Power has already acknowledged his role and responsibility in this area, in his evidence and his closing submissions. However, he also notes the observations by the City of Toronto in its closing submissions about the extent of MFP's efforts to avoid the terms of the RFQ and its response thereto. Mr. Power also refers to the closing submissions of Mr. Doyle wherein he notes that Fasken Martineau and Mr. Fecenko had previously provided legal advice to the City. Based on the terms of the retainer and on that previous experience, Mr. Doyle expected that Fasken's would have been involved in

drafting the Master Lease Agreement and ensured that the final version reflected what Council had authorized. Further, it was expected that Mr. Fecenko/Faskens would have reviewed all relevant documents, including the RFQ, MFP's response, the Program Agreement and the Equipment Schedules. Had Fecenko done so, some of the difficulties associated with the terms of the Master Lease Agreement might have been avoided.

#### Vendor of record/sole supplier

23. Mr. Power refers to Mr. Andrew's closing submissions on this issue and largely adopts them. In Mr. Power's view, MFP had been accepted as a vendor of record. Further, it was open to the City (Finance) to select more than one successful respondent to the RFQ. Mr. Power also notes that there is nothing in the legal documentation suggesting that MFP was to be the sole supplier of lease financing for computer equipment and software. This was verified by a later legal review. It was never Mr. Power's view that MFP was the sole supplier of lease financing.

January 24, 2005