

Approval for Non-Competitive Purchase Order to Lerners LLP for Additional Proceedings arising from Rent Arbitration – 2 Bloor Street East

Date: June 27, 2017

To: City Council

From: City Solicitor and Director, Purchasing and Materials Management

Wards: Ward 27 Toronto Centre-Rosedale

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City or one of its agencies or corporations.

This report contains advice or communications that are subject to solicitor-client privilege.

SUMMARY

The purpose of this report is to request authority for a non-competitive purchase order related to external legal fees from Lerners LLP for additional legal proceedings related to the rent arbitration for 2 Bloor Street East and to report on the status of the legal proceedings. The new purchase order will be for \$155,000 net of HST, (\$157,728 net of HST recoveries). City Council had earlier approved Purchase Order No. 6034414, issued to Rochon Genova LLP in the amount of \$1,547,238 net of HST (\$1,574,470 net of HST recoveries). The original purchase order was used for external legal services with regards to the rent renewal arbitration for a long term ground lease on the City's property located at 2 Bloor Street East.

The hearing of the arbitration was completed in July 2015. The decision was released on September 8, 2015. Subsequent to the arbitration award, Brookfield commenced two proceedings: (i) an appeal of the arbitration under s.45 of the *Arbitration Act*, and (ii) a court application under s.46 of the *Arbitration Act*.

City Council approval is required in accordance with Toronto Municipal Code, Chapter 71 Financial Control 71-11A as the total estimated contractual commitment to-date

including this new request would be \$1,742,999, net of HST. This legal work can be viewed as an extension of the legal work related to the rent arbitration.

RECOMMENDATIONS

The City Solicitor and Director, Purchasing & Materials Management recommend that:

1. City Council grant authority for a non-competitive purchase order in the sum of \$155,000 net of HST, (\$157,728 net of HST recoveries) to Lerner's LLP for the additional legal proceedings arising from the rent arbitration for 2 Bloor Street East.
2. City Council direct that Confidential Attachment 1 remain confidential as it is the subject of litigation or potential litigation, including matters before administrative tribunals, affecting the City or a local board.

FINANCIAL IMPACT

Funding for the continuing retention of legal services in the amount of \$157,728 net of HST recoveries is included in the 2017 Approved Operating Budget for Facilities, Real Estate, Environment and Energy (FREEE) under cost centre group BU0131, cost element 4199. Funds should be charged to cost centre FA1511, cost element 4199.

The Deputy City Manager & Chief Financial Officer and the Chief Corporate Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

On August 25, 26, 27 and 28, 2014, City Council granted the authority under GM32.33 to amend and increase the value of Rochon Genova LLP Purchase Order No. 6034414 for an additional \$750,000, net of HST (\$763,200 net of HST recoveries). That increased the contract value from \$459,238, net of HST (\$467,321 net of HST recoveries) to \$1,209,238, net of HST (\$1,230,521 net of HST recoveries).

The following is the link to City Council Decision Document:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.GM32.33>

On May 5, 6 and 7, 2015, City Council granted the authority under GM3.25 to amend and increase the value of Rochon Genova LLP Purchase Order No. 6034414 for an additional \$200,000, net of HST (\$203,520 net of HST recoveries). That increased the contract value from \$1,209,238, net of HST (\$1,230,521 net of HST recoveries) to \$1,409,238, net of HST (\$1,434,041 net of HST recoveries).

The following is the link to City Council Decision Document:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.GM3.25>

On September 30, 2015, City Council granted the authority under GM6.12 to amend and increase the value of Rochon Genova LLP Purchase Order No. 6034414 for an additional \$138,000 net of HST (\$140,428 net of HST recoveries). That increased the contract value from \$1,409,238, net of HST (\$1,434,041 net of HST recoveries) to \$1,547,238 net of HST (\$1,574,470 net of HST recoveries).

The following is the link to City Council Decision Document:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.GM6.12>

COMMENTS

Background

The City was involved in a rent arbitration with Brookfield Properties Corporation (Brookfield) as a tenant regarding a long term ground lease on its property located at 2 Bloor Street East (Ground Lease). Due to the complexity and length of the arbitration, Legal Services retained Peter Jarvis from the firm Davis LLP on April 4, 2011 through a non-competitive process on behalf of the Real Estate Services Division. Peter Jarvis moved his law practice to Rochon Genova LLP later that year. A new non-competitive request was processed to Rochon Genova LLP on December 12, 2011 for the remaining amount unspent from the previous contract with Davis LLP. Rochon Genova in turn retained Cynthia Kuehl of Lerner's LLP to assist. The reason for this choice was that counsel from Lerner's worked with counsel from Rochon Genova on a previous City rent arbitration matter for 2 Bloor West and developed specialized expertise.

The Ground Lease commenced on December 1, 1971 with an initial term of 40 years and expired November 30, 2011, subject to the rights of termination as set out in the Ground Lease. The second term of the Ground Lease, for 26 years, commenced on December 1, 2011, without agreement on a new rental amount.

The City filed its Notice of Intention to Arbitrate to Brookfield on November 30, 2011. The arbitration proceeded over 68 days and was completed in July 2015. The arbitration award was released on September 8, 2015. The majority arbitration award determined the annual rent for the subject property to be \$4,210,000.

Legal Services is seeking Council authority to enter into a new purchase order with Lerner's LLP for legal services related to legal proceedings commenced by Brookfield subsequent to the arbitration award. One proceeding was an appeal of the arbitration award commenced by Brookfield by notice of appeal. The City brought a motion to quash the appeal primarily on the basis that there was no right of appeal except on a question of law, with leave of the court. The City was successful on the motion to quash the appeal. Brookfield then appealed that decision to the Court of Appeal. On June 13, 2017 the Court of Appeal issued its decision dismissing Brookfield's appeal. Both the Superior Court and Court of Appeal awarded the City a portion of its legal costs in the total sum of \$37,000.

Vendor	Value Issued (net of HST)
Davis LLP	\$40,761
Rochon Genova LLP	\$1,547,238
	Sub Total
	\$1,587,999
Requested on this report	
Lerners LLP	\$155,000
Total value of purchasing document for this arbitration and subsequent legal proceedings	\$1,742,999

Additional legal advice on these matters is provided in the confidential attachment.

The Fair Wage Office has reported that the recommended firm has indicated that it has reviewed and understands the Fair Wage Policy and Labour Trades requirements and has agreed to comply fully.

CONTACT

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SIGNATURE

Wendy Walberg
City Solicitor

Michael Pacholok
Purchasing and Materials Management Division

ATTACHMENTS

Confidential Attachment 1 - Approval for Non-Competitive Purchase Order to Lerner's -
2 Bloor Street East