

TORONTO STAFF REPORT

October 3, 2002

To: City Council
From: City Solicitor
Subject: Toronto Computer Leasing Inquiry – Expanding the Terms of Reference

Purpose:

To advise City Council on the implications of requesting a second investigation and inquiry concerning, a review of the IT consulting contracts, involving Remarkable Software, Inc. ("Remarkable") and Beacon Software Revenue Systems, LLC ("Beacon") involving additional terms of reference ("the Toronto External Contract Inquiry or TECI").

Financial Implications and Impact Statement:

If Council resolves to establish the TECI as set out in this report, this will involve an expansion of the hearing portion of the Inquiry, additional investigation time required by the Commission counsel to the Inquiry, and a significant increase in the overall costs of the Inquiry. It is difficult to accurately estimate the potential increase in costs at this time, but it could be in the range of \$3 Million - \$4 Million over the amount previously approved by Council. This amount includes funding for one contract junior lawyer and one contract law clerk to assist with the review of documents and issues relating to the Inquiry.

Recommendations:

It is recommended that:

1. (i) City Council defer any decision on creating a second inquiry concerning the Beacon and Remarkable contracts pending receipt of the Auditor's Reports dealing with the selection of the former City of North York tax system and the examination of the relevant documentation at the former City of North York dealing with Beacon and Remarkable;
- (ii) Council elect to approve an Inquiry with respect to external contracts being Ball HSU-Associates Inc. and the contracts for the purchase of the computer hardware and

software that subsequently formed the basis for the computer leasing RFQ that is the subject of the Toronto Computer Leasing Inquiry as requested by Commission counsel;

Or

2. Council elect to approve the Terms of Reference for a second inquiry concerning the Beacon and Remarkable contracts and the external contracts being Ball - HSU Associates Inc. and the contracts for the purchase of the computer hardware and software that subsequently formed the basis for the computer leasing RFQ that is the subject of the Toronto Computer Leasing Inquiry, and that Council direct that:
 - i) The City Solicitor request Madame Justice Denise Bellamy to conduct the further inquiry;
 - ii) City staff include the costs for the second inquiry in the 2003 budget process;
 - iii) Additional funds of \$100,000 be allocated to the current budget of the Legal Division for additional staff resources to assist with the inquiry;
 - iv) City staff take all appropriate steps to implement these recommendations.

Background:

Request for Report from the City Solicitor

On October 1, 2002 during the Council meeting, City Council had before it Clause No. 7 of Report No. 8 from the Audit Committee dealing with the status of the Inquiry. Council requested that a further report be presented by the City Solicitor to City Council on October 3, 2002 regarding a proposal to amend the Terms of Reference for the Inquiry to include the IT consulting contracts involving Beacon and Remarkable. It was further requested that discussions be commenced with Commission counsel regarding how to accomplish this goal and the extent to which the Commission would be prepared to act on this request, or if the Commission is prepared to entertain a second stage of the hearing at a later date and to explore this issue without delaying the present hearing. It was also requested that the report comment on the estimated cost implications of additional parties being added, and the cost, to date, of the Inquiry. In addition, Council requested the City Solicitor to make public to Council the list of witnesses for the Inquiry.

Existing Terms of Reference for the Inquiry and Status

City Council, at its meeting held on February 13, 14 and 15, 2002, established the terms of reference for the Toronto Computer Leasing Inquiry ("TCLI"), pursuant to section 100 of the *Municipal Act* to inquire into all aspects of leasing contracts for computers and related software between the City of Toronto and MFP Financial Services Ltd. and between the City of Toronto and Oracle Corporation Canada Inc. The specific terms of reference for the TCLI are attached hereto.

Madam Justice Bellamy was appointed as Commissioner of the TCLI. She appointed Commission counsel in April, 2002, who have been working on the Inquiry since that time. As set out in the status report, the TCLI has already dealt with issues of standing and funding, document production and the investigative part of the TCLI. The Commission counsel have collected thousands of documents, have consulted experts and have interviewed about 100 witnesses, many of them more than once. The hearing portion of the TCLI was scheduled to begin on September 30, 2002 and was anticipated to last approximately six to eight weeks.

All of the work done by Commission counsel to date has been on the basis of the existing terms of reference.

On September 30, 2002, at the opening session of the TCLI, the Commissioner adjourned the Inquiry for at least two weeks. Her reasons for doing so are set out in the speech given by the Commissioner, a copy of which is attached hereto. She indicated that the Ontario Provincial Police has begun a criminal investigation into certain alleged wrongdoings and that at the request of the Commissioner of the OPP, she has agreed to adjourn the TCLI for at least two weeks.

Forensic Audits on Various Consulting Contracts

At its special meeting of July 30, 31 and August 1, 2002, City Council had before it a report from the City Auditor to the Audit Committee – In Camera, dealing with the forensic audit on the consultant contracts involving Beacon and Remarkable. These companies are two U. S. based consulting firms which were engaged for the purpose of providing systems development and maintenance services with respect to the tax and water billing systems in the Finance Department of the City. The report sets out the scope of review of the Beacon and Remarkable consulting contracts and also includes the findings of the Auditor with respect to those contracts. As set out in that report, the City Auditor was unable to conduct any audit work in relation to the period prior to January 1998, other than a review of two agreements signed with Beacon in December, 1997. Further, the City Auditor did not review the appropriateness of the decision to proceed with the TMACS, a tax billing system in operation at the former City of North York, which was being developed and maintained by Beacon, in preference to the TXM 2000 system, which was being jointly developed by the City of Mississauga and the former City of Scarborough.

One of the recommendations from the Audit Committee, which was adopted by City Council, was that the City Auditor's report "be made available to Justice Bellamy in order that she may determine whether it should be reviewed in preparation for the Toronto Computer Leasing Inquiry". Consistent with this recommendation, the report was forwarded to Commission counsel. In addition, City Council also adopted the following recommendations in relation to the Auditor's report:

- "1) the Chief Administrative officer, in consultation with the Chief Financial Officer and Treasurer and the City Auditor, be requested to submit a report to the Audit Committee on the savings achieved, if any, by the actions that were taken by the former Chief Financial Officer and Treasurer in sending the tax bills out on time, and the appropriateness of proceeding with the TMACS system in preference to TXM 2000; and

- 2) the City Auditor be requested to submit a report to the Audit Committee for consideration with the foregoing report requested of the Chief Administrative Officer, on the following matters:
 - a) a review of all circumstances related to the selection of the former City of North York tax system as the system currently being used to process tax billings at the City of Toronto;
 - b) an examination of all relevant documentation at the former City of North York, and an evaluation of whether or not policies and procedures at the former City of North York were followed, including whether or not such matters were reported to the Council of the former City of North York, in order to determine the circumstances related to the original hiring of the consultants at the former City of North York; and
 - c) an outline of the role of Audit staff with respect to work carried out in connection with the City's tax and water billing systems, as well as the timelines when certain irregularities came to the attention of the City Auditor."

Comments:

Auditor's Review of Beacon and Remarkable Contracts

The Director of Litigation and outside counsel met with the City Auditor on October 2, 2002 to review the steps taken by his division in reviewing the Beacon and Remarkable consulting contracts. We understand that the Auditor spoke to several former and current employees of the City, primarily in the Finance Department. The City Auditor also had certain brief telephone conversations with the principals of Beacon and Remarkable. However, there are several former and current employees who were not interviewed by the City Auditor, including, for example, the former Chief Financial Officer and Treasurer. As set out above, this is a matter which City Council has asked the City Auditor to review and to report on to City Council. The Auditor has not yet completed that work and has not yet prepared that report. In addition, the Auditor is in the process of retaining an accounting firm to do a forensic review of the decision to choose the TMACS tax billing system. It is anticipated that the RFP for this work will be sent out soon to six accounting firms who have already been pre-qualified to conduct this work.

Based on our discussions with the City Auditor, it appears that of the twenty potential witnesses at the TECI Inquiry, six to eight would also testify at the TCLI.

Discussions with Commission Counsel

As requested, discussions were commenced with Commission counsel. Commission counsel is of the opinion that section 100 of the *Municipal Act* obliges the Commissioner to conduct an investigation and inquiry in accordance with any terms of reference adopted by Council.

Commission counsel is aware of Council's desire to have the TCLI proceed as expeditiously as possible. To this end, Commission counsel would consider recommending to the Commissioner that she address any additional terms of reference in a second phase following the hearing of the factual evidence at the TCLI. Commission counsel would likely need to retain other professionals to assist in conducting the investigation part of a second inquiry. This will necessarily involve additional costs and extend the overall time of the Inquiry.

Commission counsel advised our outside solicitors today that there are two areas that Commission counsel would like to investigate and explore further that may not be expressly included in the current Terms of Reference. Commission counsel is aware that we are reporting to City Council today and wanted this brought to Council's attention. The areas involve a consulting contract with Ball HSU Associates and the purchase of computers that then formed the basis of equipment which was the basis of the RFQ.

Establishing a Second Inquiry

It appears to us that there are three possible aspects dealing with the Beacon and Remarkable matters that could form part of the TECI. These three components are as follows:

- i) reviewing the involvement of Beacon and Remarkable in its dealings with the former City of North York prior to amalgamation;
- ii) reviewing the decision to choose the TMACS tax billing system in operation at the former City of North York over the TXM 2000 system which was being jointly developed by the City of Mississauga and the former City of Scarborough; and
- iii) reviewing the consulting contracts between Beacon and Remarkable and the new City of Toronto.

To date the Auditor has only reported to Council on item (iii).

Included in the materials distributed by the City Clerk is a report from the former Chief Financial Officer and Treasurer to the City Auditor dated September 14, 1999, which was previously submitted to City Council in connection with these matters. That report identifies that the principals of Beacon and Remarkable have a long history of doing work for the former City of North York, dating back to 1987. It is anticipated that the Toronto Consultants Inquiry may have difficulty obtaining all relevant documents and/or difficulty obtaining witnesses' recollection of events, due to the passage of time. We understand that the City Auditor has experienced such difficulties.

We also point out that the City Auditor has not completed his review and further reports on the issues regarding the former City of North York or his review of the circumstances related to the selection of the former City of North York tax system. Further, certain individuals who would have documentation and information relating to these matters reside in the United States. Commission counsel may have little or no success in compelling U. S. citizens to co-operate which may limit the effectiveness of the Inquiry and its findings.

Attached hereto are draft Terms of Reference for Council to consider.

Current Preliminary Budget of the Inquiry

In the report dated June 10, 2002, the City Solicitor and Chief Administrative Officer reported to the Audit Committee on the preliminary budget of the inquiry. That report identified the following budget estimates connected to the inquiry itself:

- a) Total Public Inquiry Preliminary Budget Estimate \$1,960,000
- b) Estimated Cost of additional KPMG retainer \$15,000
- c) Estimated Cost of City's Outside Counsel at Public Inquiry \$500,000 - \$750,000
- d) Estimated Costs for Intervenor Funding \$250,000

These amounts do not include the sum of approximately \$450,000 already paid to KPMG for its review of the lease transactions. In addition, there is a further report from the City Solicitor, which will be considered by the Policy and Finance Committee at its meeting on October 17, 2002, that deals with the adequacy of funding for the individuals who were granted standing. Depending on City Council's decision on the matter, the costs for intervenor funding could increase to \$400,000.

It is estimated that the costs incurred to date relating to the Inquiry are likely at or near \$1,000,000 (although not all invoices for work already performed have been received). This does not include the amounts already paid to KPMG.

Estimated Additional Costs of Toronto Consultants Inquiry

It is difficult to accurately estimate the potential increase in costs at this time. We observe that there will likely be a need for Commission counsel to retain certain experts to assist in its investigation stage if the inquiry is expanded. We estimate as well, that there could be in excess of twenty potential witnesses called at the hearing stage on these matters. If the inquiry is expanded to include the additional terms of reference, there will be additional costs for Commission counsel, outside counsel and intervenor funding. We estimate that the additional costs could be in the range of \$3,000,000 to \$4,000,000. In addition, the preparatory work to prepare for an Inquiry is time consuming and the legal division will require additional resources on a temporary basis to assist with this matter. The additional costs include a junior lawyer and a law clerk.

Alternatives to an Inquiry

Pursuing an inquiry under section 100 of the *Municipal Act* is a rarely used and costly mechanism for reviewing an issue involving the good government of a municipality. There are alternatives that City Council may wish to consider. As set out above, the City Auditor has not

completed his review, nor has he reported on certain additional requests relating to these issues. Council may prefer to defer any decision on establishing a second phase to the inquiry to deal with the Beacon and Remarkable issues, until those reports are received. Further, City Council may choose to refer this issue to an outside expert to review the matter, conduct an investigation and report back to City Council.

Witnesses:

In accordance with City Council's request, we advise that the following is a list of potential witnesses at the Toronto Computer Leasing Inquiry released by Commission Counsel on September 18, 2002. Commission Counsel advises that this list is neither final nor complete, and that additional witnesses may be called and some witnesses may be omitted.

1. Councillor Bas Balkissoon
2. Peter Wolfrain
3. Rob Ashbourne
4. Lou Pagano
5. Dave Beattie
6. Brendan Power
7. Mark Fecenko
8. Line Marks
9. Lee Ann Currie
10. Len Brittain
11. Don Altman
12. Nadir Rabadi
13. Jim Andrew
14. Lana Viinamae
15. Irene Payne
16. Dash Domi
17. Rob Wilkinson
18. Janis Cowrie
19. Wanda Liczyk
20. Kathryn Bulko
21. Paula Leggieri
22. Al Shultz
23. Ken Colley
24. Brian Loretto
25. Duncan Card
26. Larry Griffiths
27. Jeff Lyons
28. Shirley Hoy

Conclusion:

This report was prepared to assist City Council in determining what actions to take in respect of these matters.

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City Solicitor

Attachments: Existing Terms of Reference
Speech of Commissioner on September 30, 2002
Alternative Draft Terms of Reference for a Second Inquiry