



REGION OF WATERLOO
CORPORATE RESOURCES
Legal Services
FINANCE DEPARTMENT
Financial Services Division

TO: Chair Jim Wideman and Members of the Planning and Works Committee

DATE: August 14, 2012 **FILE CODE:** L04-20

SUBJECT: RAPID TRANSIT PROJECT - RFP 2012-023 - RETAINER OF EXTERNAL COUNSEL

RECOMMENDATION

That The Regional Municipality of Waterloo retain the law firm Norton Rose Canada LLP to provide legal services on an as-needed and as-requested basis in connection with implementation of the Rapid Transit Project as described in Report CR-RS-12-054/FIN-12-058 dated August 14, 2012.

SUMMARY: Nil

REPORT:

In February, 2012 Council approved the procurement delivery model of a Design-Build-Finance-Operate-Maintain (“DBFOM”) for Stage 1 of the rapid transit implementation plan. To select the DBFOM contractor, the Region will undertake a staged selection process involving a Request for Qualifications (“RFQ”) followed by a more detailed Request for Proposals (“RFP”) including contractual documentation that will secure, among other things, the short- and long-term private financing to fund the construction phase and portion of the construction costs that will be deferred to be repaid over the maintenance term. Developing the RFQ/RFP documents will require highly specialized legal expertise. In addition, other aspects of implementation of the rapid transit project, such as negotiation of the senior government funding agreements, acquisition of the light rail vehicles, and compliance with legal and regulatory provisions pertaining to municipal borrowing and private sector finance also require highly specialized legal expertise. In view of the foregoing, it was recognized that external legal counsel with experience in the subject areas of law should be retained in order to ensure the successful implementation of the rapid transit project in a manner that best protects the legal interests of the Region.

A comprehensive selection process was undertaken through a Request for Proposals (“RFP”) process to select a law firm to provide the required legal services to the Region. The RFP was advertised in the Ontario Reports as well as on the Ontario Public Buyers Association and Region of Waterloo websites. The evaluation team consisted of: Debra Arnold (Director of Legal Services and Regional Solicitor), Thomas Schmidt (Commissioner, Transportation and Environmental Services), Calvin Barrett (Director, Financial Services & Development Financing) and Lisa Buitenhuis (Manager, Procurement).

Eight (8) proposals were submitted in response to the Region’s RFP. These proposals were submitted by:

1. Aird & Berlis LLP/Fraser Milner Casgrain LLP
2. Borden Ladner Gervais LLP
3. Davis LLP
4. Heenan Blaikie LLP
5. McCarthy Tetrault LLP/Freshfields Bruckhaus Deringer US LLP

6. Norton Rose Canada LLP
7. Siskinds LLP
8. Torys LLP

One proponent was disqualified. After evaluation of the remaining 7 proposals, 4 proponents were shortlisted. The 4 short-listed proponents were interviewed by the evaluation team and their respective financial proposals evaluated.

The evaluation team used the following evaluation criteria:

A. Evaluation of written proposals (60%)

1. Experience of Proponent (35%)
 - Including three (3) examples of projects in respect of which the proponent has provided legal services, approach and methodology employed by proponent in delivery of legal services, three key challenges and how the proponent successfully addressed them
2. Experience and Qualifications of Lead Counsel and Legal Team Members (25%)
 - Individual capabilities in the subject areas of law required by the Region, egs. Drafting of RFQ/RFP documentation, vehicle procurement documentation, senior government funding agreements, legislative and regulatory provisions pertaining to municipal and private sector financing

B. Interviews/Oral presentation - Short-listed Proponents Only (25%)

- 20 minutes presentation by proponent followed by 30 minutes question and answer period

C. Financial Proposal - Short-listed Proponents Only (15%)

- Hourly rates of lead counsel and legal team members
- Task estimates

Norton Rose Canada LLP had the highest overall score and demonstrated substantial experience and qualifications in connection with transportation projects and the DBFOM or variations thereof procurement model. Norton Rose Canada LLP is part of an international law firm of which approximately 700 lawyers are based across Canada, including in Toronto and Ottawa offices. It was formed as a result of the Canadian law firms Macleod Dixon and Ogilvy Renault joining forces with London, England-based Norton Rose LLP. Norton Rose Canada LLP has provided a sworn statutory declaration that it has no conflicts of interest within the meaning of the Rules of Professional Conduct of the Law Society of Upper Canada in accepting a retainer by the Region.

Under the proposed retainer, legal services will be provided on a task assignment basis, as needed and requested by the Region, with invoicing for such task subject to a cost estimate and detailed hourly docketing provided to the Region. The hourly rates of the lawyers are subject to a maximum cumulative annual increase of 2.25% in each of the years of the retainer (similar to the General Engineering Consultant contract for the rapid transit project). Any travel disbursements must be pre-approved by the Region and will be reimbursed at actual cost. The job classification and hourly rates for the Norton Rose Canada LLP legal team are set out in Appendix "A" to this Report, as well as the description of tasks and estimated hours of work. It is noted that the estimated hours of work are subject to many variables depending upon issues and complexity which may arise during completion of a particular task. In order to ensure budget adherence and accountability, the retainer will require monthly invoicing and impose upset limits on individual tasks which may not be exceeded without prior Regional approval. Given the heavy reliance on the expertise and experience of the specific legal team members, the retainer stipulates that the law firm must provide the services of the legal team members named in the proposal unless it is unable to do so for reasons beyond its reasonable control, in which case any replacement(s) to the legal team are subject to the prior written approval of the Region and must provide the services at the same or lower hourly rate.

The proposed retainer will be for a term up to December 31 2017, with the Region's right to terminate earlier at any time in its discretion, subject to payment for legal fees incurred to the date of such termination. The retainer is non-exclusive and does not preclude the Region from retaining lawyers of other law firms in particular instances in the Region's sole discretion.

Next Steps in the Rapid Transit Project

Staff anticipates that the next steps in the rapid transit project will include:

- Fall 2012: report on the vehicle procurement negotiations;
- Fall 2012: issue request for qualifications from potential DBFOM teams;
- January 2013: shortlist qualified DBFOM teams;
- February 2013: complete performance specifications and a draft project agreement;
- February 2013: finalize funding agreements with federal and provincial governments;
- March 2013: issue request for proposals from shortlisted DBFOM teams;
- June 2013: begin aBRT construction;
- January 2014: evaluate and select preferred DBFOM team;
- May 2014: approve final agreement with the preferred DBFOM team;
- 2014: full implementation of aBRT;
- 2014: begin construction of LRT Stage 1;
- 2014: begin the environmental approval process for LRT Stage 2; and
- 2017: complete construction and begin operation of LRT Stage 1.

CORPORATE STRATEGIC PLAN:

The recommendation of this Report supports Focus Area 3.1 of Council's Strategic Plan, being to implement a light rail transit system in the central transit corridor, fully integrated with an expanded conventional transit system.

FINANCIAL IMPLICATIONS:

The capital cost of Stage 1 of the rapid transit project is estimated to be \$818 million, in 2014 dollars. The Region's portion of the capital cost is \$253 million. On June 15, 2011, Council approved the funding for the Region's portion of the Stage 1 capital costs, subject to annual budget deliberations.

The approved 2012 Regional capital program for rapid transit includes an allocation for soft costs that include engineering design, procurement and construction management, and design support. The scope of work for the external legal counsel is reflective of these tasks and will be funded from the soft cost estimate of over \$100 million.

OTHER DEPARTMENT CONSULTATIONS/CONCURRENCE:

This Report was prepared with input from Finance and Transportation and Environmental Services staff.

ATTACHMENTS: Appendix "A" – Hourly Rates and Estimated Hours for Tasks

PREPARED BY: *Charles Whitlock*, Director, Procurement and Supply Services
Debra Arnold, Director of Legal Services and Regional Solicitor

APPROVED BY: *Debra Arnold*, Director of Legal Services and Regional Solicitor
Craig Dyer, Commissioner of Finance and Chief Financial Officer

APPENDIX "A"

Description of Task and Estimated Timeframe	Partner	International Partner	Associate	Articling Student Hours	Law Clerk Hours	Total
Hourly Rate	\$510	\$650	\$350	\$185	\$225	
(1) Provincial/Federal Funding Agreements (2012)	30		30			
(2) Inter-municipal and public utilities Agreements (2012)	80		110	25		
(3) Request for Qualifications documentation (2012)	45	15	50			
(4) Request for Proposals documentation (2013)	452	55	455	60		
(5) Financial and Commercial Close documentation	168		330	28	60	
(6) Vehicle Procurement documentation (2012)	30	25	105	50		
(7) Contract Administration Issues (2014-2017)	40		110	50	10	
(8) Legal Advice regarding regulatory requirements for light rail transit operations (2012-2013)	7		45	50		
(9) Post Closing Items	1		2	20	3	
Total Hours	853	95	1237	283	73	
Total Fees *hourly rate multiplied by the total hours worked on Task(s) by corresponding lawyer	\$435,030	\$61,750	\$432,950	\$52,355	\$16,425	\$998,510

Note: All fee amounts exclusive of any sales, use or value-added taxes that may be applicable