

# Manitoba Ombudsman

## REPORT UNDER

### *THE OMBUDSMAN ACT*

#### CASE FILE NUMBER 2013-0391

#### RURAL MUNICIPALITY OF WEST ST. PAUL

#### REPORT ISSUED NOVEMBER 26, 2015

### CASE SUMMARY

Manitoba Ombudsman received several complaints, some of which were anonymous, alleging that a councillor with the Rural Municipality of West St. Paul (the RM) failed to comply with legislation and RM policy regarding conflicts of interest in the performance of his duties. These complaints related to the tendering and construction of a new Fire Hall for the community and other council matters.

We investigated the following issues in response to these complaints:

1. Did the RM fulfill its obligations and responsibilities to follow an appropriate and fair tendering process for the Fire Hall project?
2. Did the councillor abide by *The Municipal Council Conflict of Interest Act* (MCCIA), RM policy regarding conflicts of interest, and procedural fairness obligations?
3. Did the RM council have an obligation to ensure that council members followed the MCCIA and RM policies?

Manitoba Ombudsman concluded that the RM did not provide a fair tendering process for the Fire Hall project. Secondly, we determined that the councillor in question failed to follow the statutory requirements and RM policy regarding conflicts of interest, and did not adhere to procedural fairness principles. Finally the RM council, in our view, did not meet its obligation to ensure council members followed legislative provisions and RM policy regarding conflicts of interest.

As a result, the ombudsman made four recommendations to improve administrative accountability in the RM:

**Recommendation 1:** That the RM council members and administrative staff undergo training to acquire a better understanding of legislative and policy requirements regarding conflicts of interest, procurement and tendering, and the principles of procedural fairness.

**Recommendation 2:** That the RM develop a policy for how it will address instances of conflict of interest and the perception of bias to ensure compliance with all legislative and policy requirements.

**Recommendation 3:** That the RM ensure that the minutes of every committee of council meeting are prepared and retained using the same standards that apply to council meeting minutes as set out in *The Municipal Act*.

**Recommendation 4:** That the RM take steps to ensure full compliance with its tendering and procurement policy in the future. Any variation from the tendering and procurement policy should be documented and approved by council, and the reasons for the variation recorded in council minutes. In order to promote transparency and administrative accountability, the RM should post its tendering and procurement policy on its website in a manner consistent with the instruction found in section 6.8.10 of the *Municipal Act Procedures Manual*.

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## 1.0 MANITOBA OMBUDSMAN – JURISDICTION AND ROLE

As set out in section 15 of *The Ombudsman Act*, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees:

### Investigations

15 The Ombudsman may, on a written complaint or on her own initiative, investigate

- (a) any decision or recommendation made, including any recommendation made to a minister, or any act done or omitted, relating to a matter of administration in or by any department or agency of the government, or by any officer, employee or member thereof, whereby any person is or may be aggrieved; or
- (b) any decision or recommendation made, including any recommendation made to a council, or any act done or omitted, relating to a matter of administration in or by any municipality or by any officer or employee of a municipality, whereby any person is or may be aggrieved.

The investigative process we follow is non-adversarial. We carefully and independently consider the information provided by the complainant, the decision maker(s), and any witnesses we determine to be relevant to the case. Administrative investigations can involve an analysis of statute or by-law provisions, document reviews, interviews and site visits.

The ombudsman will either support a complaint and identify the appropriate corrective or restorative action, or provide a reasonable explanation for the conclusion that a complaint cannot be supported. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of *The Ombudsman Act*.

Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. Such suggestions are made to support and help government bodies achieve better administration, often through the adoption of best practices. Improved administrative practices can improve the relationship between government and the public, and reduce administrative complaints.

## 2.0 THE COMPLAINT

Manitoba Ombudsman received an anonymous complaint by way of letter on September 24, 2013. The complainant alleged that a councillor from the RM of West St. Paul had been in an ongoing conflict of interest situation. The councillor was employed as a project/estimator for a local company (“The Firm”) which was owned by his brother (“The Owner”). The complainant claimed the RM awarded many contracts to “The Firm” and its affiliated companies. In particular, the complainant indicated the councillor in question and his brother were members of an RM committee responsible for managing the construction of a new Fire Hall while “The Firm” was actively involved in the building of the facility.

Manitoba Ombudsman also received five additional anonymous complaints between September 2013 and April 2014 making similar conflict of interest allegations. According to the various complainants, the councillor in question participated in discussions and decisions related to “The Firm” and its business with the RM.

In addition, Manitoba Ombudsman received a letter on September 10, 2014 from a lawyer alleging that the councillor in question breached conflict of interest rules when he voted on a variance application for the lawyer’s client, a competitor of “The Firm”. He further stated that he observed the councillor in question breach the RM’s Code of Conduct during a council vote related to his client’s application.

### 3.0 OUR INVESTIGATION

Complainants who choose to remain anonymous present a unique challenge to our investigative process as it is difficult to clarify their concerns or obtain further information from such parties. Nevertheless, anonymous complainants can raise issues of a serious nature. In this instance, significant allegations of inappropriate administration warranted investigation by our office. This investigation proceeded under the ombudsman’s own initiative as set out in section 15 of *The Ombudsman Act*. Our office contacted the RM on December 16, 2013, advising it that an investigation into this matter would be undertaken. A formal notification letter was sent December 23, 2013.

When conducting an investigation into a municipal complaint, we would normally ask the RM’s chief administrative officer (CAO) to advise us of the position of council on the matter under review. In this instance, council members had significantly divergent views regarding the Fire Hall project and how decisions about it were made. As a result, the RM could not provide a unified position on the issues under investigation. Accordingly, we relied on documentary evidence from RM files and information obtained through interviews with RM staff and council members.

Our investigation of this complaint included the following:

- A review of all RM council meeting minutes between September 2010 and September 2014.
- A review of all available minutes of the Ad Hoc Fire Hall Building Committee.
- A review of all internal communications, emails, memoranda, tendering and procurement documents related to the construction of the Fire Hall.
- A review of policies adopted by the RM of West St. Paul, including *By-Law No. 7/2008 (Committees)*, *By-Law No. 5/2000 (Procedures)*, *The RM of West St. Paul Municipal Tendering and Procurement Policy (ADM 2012-03)*, *The RM of West St. Paul Code of Conduct*, and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee* (RM of West St. Paul).

- A review of *The Municipal Council Conflict of Interest Act (MCCIA)*, *The Municipal Act*, the *Municipal Act Procedures Manual* (Manitoba Municipal Government) and the *Council Members Guide* (Association of Manitoba Municipalities and Manitoba Municipal Government).
- Interviews with witnesses, including:
  - The councillor in question
  - The brother of the councillor in question
  - The RM's chief administrative officer
  - The RM's manager of public works
  - Two other councillors, and
  - A Fire Department member of the Ad Hoc Fire Hall Building Committee.

Manitoba Ombudsman conducts its investigations in a confidential, non-adversarial manner. It is our standard practice to omit personal names of individuals and names of private companies in our reports. In place of personal and business names, we have used “identifiers” when discussing evidence in this report. A full list of identifiers can be found in Table 1 in the appendix.

## 4.0 FINDINGS AND ANALYSIS

### 4.1 Fire Hall planning and tendering process

Planning for the new Fire Hall began in 2009. The new building was to replace the existing Fire Hall which was built in 1984. A structural review of the old Fire Hall conducted by an architectural firm retained by the RM stated the following:

*The building does not appear to be in very good condition...One washroom fixture and non-operational shower is not adequate for fire fighter use where up to 28 people will be in the building. Fire hose storage is also deficient and without sufficient drying area on west wall of building. Fire Department also requires two additional bays for their vehicles.*

An informal committee consisting of the mayor<sup>1</sup>, the acting CAO and two senior firefighters spent seven months developing a plan to address the current and future needs of the West St. Paul Fire Department, including visits from some committee members to several newer fire halls. In December 2009, a site plan feasibility study for a new Fire Hall was prepared by an architectural firm for the RM.

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<sup>1</sup> The Mayor who started this project is a predecessor of the current Mayor of West St. Paul.

According to a member of the Fire Department, there was interest in having a design similar to the concrete building recently constructed by “The Firm” to house its operations in West St. Paul Industrial Park. The Fire Department discussed building designs with the councillor in question and his brother at a very early stage in the process. Subsequently, the brother developed a \$3 million budget for the construction of the Fire Hall based on those early discussions. By June 2011, the RM completed all the procedural steps to borrow \$3 million to construct the new Fire Hall.

### **The Ad Hoc Fire Hall Building Committee**

In November 2011, the councillor in question moved Resolution 2011-362 establishing the Ad Hoc Fire Hall Building Committee<sup>2</sup> which included three firefighters, the RM’s Protection Committee members (the councillor in question and a council colleague), the CAO and a “volunteer consultant” who would be recruited through advertisements in the local newspaper and on the RM’s website.<sup>3</sup>

In early January 2012, a tendering package for the Fire Hall and a proposed process for evaluating and receiving bids was prepared by the CAO. However the other ad hoc committee members, including the councillor in question, disagreed with the CAO’s proposed approach, questioning the need for a tendering process entirely. The CAO subsequently withdrew the tender package and process.

In January 2012 the mayor was added to the membership of the ad hoc committee in the RM’s annual resolution regarding appointments to various council committees and other public bodies.

At a January 26, 2012 meeting of the ad hoc committee, it was noted that only one person responded to the advertisement for a volunteer consultant. This person was “The Owner”, who was also the brother and employer of the councillor in question. A resolution to appoint “The Owner” as the volunteer consultant to the committee was passed and forwarded to council for ratification.

This meeting of the ad hoc committee also considered the terms of reference for the committee that had been recommended by RM administration. These terms included a strict conflict of interest provision to prevent committee members from bidding on the Fire Hall project as that would conflict with their roles and responsibilities as committee members. These terms also amended the membership of the ad hoc committee, appointing the mayor as chair and adding the RM’s manager of public works to the committee. A resolution to endorse the terms of reference was passed by the committee and forwarded to council.

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<sup>2</sup> It should be noted that this committee is referred to in council minutes and other documents by a variety of similar names. This report uses “Ad Hoc Fire Hall Building Committee” or ad hoc committee to include these other names.

<sup>3</sup> Ad hoc committees are often formed to investigate and report on particular matters, for example the feasibility of a new arena or the planning of a centennial celebration. Councils have flexibility as to who they appoint to committees and often include members of the public. Committee meetings are open to the public. In most circumstances, such committees can only make recommendations to council. Once the committee has fulfilled its purpose it is dissolved.

At its regular meeting on February 9, 2012, the RM council ratified the terms of reference and passed a resolution appointing “The Owner” to the ad hoc committee as the volunteer consultant. The evolution of the ad hoc committee membership can be found in Table 2 in the appendix. The ad hoc committee minutes from April 2012 state that, while the role of the volunteer consultant needed to be clarified and defined, “*The consultant needs to be part of all aspects of the project including tendering and procurement.*” These ad hoc committee minutes were adopted by council on April 12, 2012 (Resolution #2012-538, seconded by the councillor in question).

In September 2012, the mayor sent an email to the members of the ad hoc committee expressing his concerns regarding the fairness of the tendering and procurement process developed by the ad hoc committee for the Fire Hall project. This email was read into the record at a November 2012 council meeting and discussed in a closed session of the council meeting. Following the resumption of the meeting, Resolution # 2012-881, which reduced the membership of the ad hoc committee to three members – the CAO, the public works manager and the volunteer consultant (“The Owner”), was passed without a recorded vote.

In December 2012, “The Firm” was successful in its tender for a contract from the RM for \$55,900.00 to build accessible entrances for the RM office and the new Fire Hall (Resolution #2013 010). This was preparatory work for the Fire Hall and was not within the scope of that project.

### **RM Tendering and Procurement Policy**

On December 13, 2012, the council of the RM of West St. Paul adopted Resolution 2012-994, which set out the tendering and procurement policy for the municipality. The policy identifies the following principles that are to guide the tendering and procurement activities of the RM.

- *An open, fair and consistent process for the procurement of all goods, services and construction projects that will ensure the best value for dollars spent.*
- *Procurement processes that encourage competitive bidding for the supply of all goods and services.*
- *An open fair and consistent process for the sale of surplus capital assets that will ensure the best value for capital assets sold.*
- *Accountability of the Municipality for the procurement of goods and services and the disposal of surplus capital assets.*

In addition to providing an “open, fair and consistent process,” this policy sets out the principle that the “best value,” rather than the lowest price, be a key criterion in the awarding of contracts, purchases or the sale of capital assets. Further, the tendering and procurement policy expresses



the belief that competitive bidding is the most beneficial process for the supply of all goods and services to the RM.

Procedural fairness is an important part of an open, fair and competitive bidding process. In order to have integrity, all of the bidders must compete fairly. That is, they all have the same opportunity to receive bid information, there is a common closing date for the submission of tenders and, more often than not, they are required to present their information in a similar format. Moreover, each bid is to be evaluated on pre-set and known criteria that are part of the tender documents.

There are many different approaches to the evaluation of bids. We believe, however, that a fair tendering process should ensure that:

- the evaluation process is clearly stated in the tender documents,
- the evaluation process is applied consistently to all bid submissions, and
- the evaluators do not hold a preference or bias toward particular bidders in the evaluation process.

Although individual bidders may have advantages based on prior experience, expertise, qualifications, proprietary technique or other assets, this does not constitute an “unfairness” in terms of the competitive process. Each bidder is expected to present their best case, including price, as part of their submission for evaluation.

A consistent and fair tendering process encourages the broadest possible pool of qualified bidders. In turn, a competitive process that engages the participation of a broad pool of bidders is more likely to deliver the best value for money.

The reverse – a tendering process that lacks integrity – will not be attractive to potential bidders who believe the outcome of the process is predetermined. Without competitive bids, there is no assurance that the RM will receive the best value for money.

Information in municipal minutes, correspondence and from interviews conducted by our office present two strongly held points of view among the members of the Ad Hoc Fire Hall Building Committee, the RM council and RM administration with regard to the tendering process.

One view, expressed most often by the administration, was that a fair and competitive tendering process was the only way to acquire goods and services for this project. The other view, which was held by some members of the ad hoc committee, including “The Owner” and the councillor in question, was that a tendering process was unnecessary and that the best value would be achieved by using the expertise and familiarity with local suppliers provided by “The Owner”. There was also a belief that hiring a general contractor would add unnecessarily to the overall cost and that the RM had the ability to “self-manage” this project.

It is noted that the *Expression of Interest*, a document drafted to recruit the volunteer consultant to the ad hoc committee, stated that the project would be managed by the RM. However, the ad hoc committee meeting minutes for March 26, 2012 state that “The Firm” *will be engaged by the*

*RM of West St. Paul to be Construction Manager to manage project and review all construction costs.* This was later changed in the April 2012 minutes of the ad hoc committee which indicated that “The Firm” had not been retained by the RM as Project Manager.

When it was eventually decided the project was ready to go to tender, it was determined that it would be divided into three separate streams:

- Phase 1 – The Fire Hall Building Civil and Structural Project
- Phase 2 – The Fire Hall Mechanical, Electrical and HVAC
- Phase 3 – The New Fire Hall Exterior, Interior Finishing’s [sic], Millwork & Miscellaneous Metals

It was decided that a single contract would be awarded for the work for Phase 1 and likewise for Phase 2. Phase 3, however, would be divided among various bidders so there would be multiple contracts for this portion of the Fire Hall project. Individuals interviewed during our investigation were asked about this approach. None of the interviewees could recall how the decision to divide this project into three phases took place (the CAO had proposed a tendering approach that would bundle the entire project in one process). We reviewed the minutes of council meetings for this time period and could find no resolution or related documentation regarding the adoption of the three stream approach to tendering.

This procurement process appeared to reflect the principles identified in the RM’s tendering and procurement policy in that potential bidders were notified of the tendering opportunity and closing date, and tender packages were made available. Evidence suggests, however, that the processes to award the Phase 1 contract and many of the contracts under Phase 3 were not conducted entirely according to the RM’s tendering and procurement policy.

## **Tender Documents**

The tender documents for Phase 1 and Phase 2 set out criteria by which the bids could be compared. These criteria included the previous experience of the firm, including references regarding projects of a similar size and scope, the expertise of the project managers, the equipment that would be used, an affirmation of insurance and certificate of good standing from the Workers Compensation Board, and a price menu. There was no information, however, provided to bidders regarding the relative weight of the various criteria in the evaluation process.

The RM of West St. Paul employed an evaluation process based on a comparison of the bids rather than an evaluation of the various elements within each bid. In this approach, a comparison of the different bids is used to determine the adequacy and equivalence of the various items rather than trying to assess the relative quality of items, such as previous experience, the expertise of the project staff or other factors. This process has been used on a consistent basis by the RM and potential local bidders likely would have had a comfort level with this approach.

Under this approach, the bidders needed to satisfy the evaluators that they met the criteria specified in the tender package and those who did not meet this bar were eliminated from the evaluation process. With these criteria satisfied, it appeared that price was the main factor in

determining the award of the contracts. Although the tender documents specified that the lowest bid would not automatically be accepted, the lowest-price bidder would have had an advantage in this process.

### **Awarding of Phase 1 Contract**

The tender process for the Phase 1 contract began in January 2013. Although “The Owner” and “The Firm” are listed as having picked up a tender package, the name of “The Firm” was struck out in the tracking sheet and replaced with that of “The Limited Company.” The relationship between the “The Firm” and “The Limited Company” will be discussed later in this report.

Tenders for this contract closed on February 6, 2013. Six firms picked up tender packages but only two of them, one being “The Limited Company,” submitted bids.

Two days before the close of bids for this contract, the Ad Hoc Fire Hall Building Committee met and discussed details concerning the scope of work. There was a general consensus that a change in a design element, namely deleting the brick on the building elevations, could be made to save money without diminishing the aesthetic appearance of the Fire Hall connection to the municipal office. No official minutes were kept of this meeting. The architectural firm, however, did prepare and distributed a document titled Addendum No. 1, which noted that there was a change in the scope of work *at the direction* of “The Owner.”

Later that day, the RM public works manager posed a question via email to the architectural firm concerning the authorization for this change. He wanted to know who ordered this change and what authority they had to act on behalf of the RM. The following day, the architectural firm stated that this change was a misunderstanding and that they wanted to retract Addendum No. 1 and that this document should be eliminated from the project record.

When asked why he sent the email, given his participation in the meeting where this decision was made, the public works manager stated that he wanted to remind committee members that it was the RM, and not the ad hoc committee, that should be making decisions about the project.

Despite the retraction of Addendum No. 1 and the questioning of the ability of the ad hoc committee to make decisions on the RM’s behalf, no brick appeared on the elevations when the building was constructed. This change, which could have had an impact on the project price, was not communicated to those who had picked up bid documents for the tender that was set to close two days after the change was discussed. The only people who would have been aware of this change would have been the people attending the meeting, which would have included “The Owner.”

In the bid submitted by “The Limited Company” on February 6, 2013, the role of “The Firm” as a major subcontractor for “The Limited Company” was not mentioned. Two other subcontractors were identified, along with their specific responsibilities for this project. According to “The Limited Company,” they would be using their “own forces” to complete the remaining parts of this project.

As the lowest-price bidder, the RM invited “The Limited Company” to attend a pre-award meeting on February 14, 2013. On the morning of this meeting, the president of “The Limited Company” notified the RM by email that “The Owner” was authorized to represent “The Limited Company” at this meeting. Our office was provided a copy of a letter sent by the president of “The Limited Company” to the RM designating “The Owner” as its representative. As such, “The Owner” was in a position to speak on behalf of the company with regard to any and all questions that would be posed by the RM regarding the details of the bid.

We asked “The Owner” about his role in the pre-award meeting. “The Owner” denied any knowledge of being appointed by “The Limited Company” to be their agent or any recollection of attending the pre-award meeting with the representatives of the RM. The minutes of this meeting taken by the RM do not record who was in attendance. However, an individual who was at the meeting confirmed that “The Owner” did attend and answered questions on behalf of “The Limited Company” with regard to the bid.

At a February 21, 2013 council meeting, the contract for Phase 1 was awarded to “The Limited Company” in the amount of \$1.239 million (plus GST). The councillor in question voted in favour of the motion.

After being awarded the contract, the president of “The Limited Company” sent a letter to the RM’s manager of public works on March 6, 2013 stating the following:

*We wish to advise that our concrete subcontractor is [“The Firm”] and were [sic] not listed as a trade on the tender form. This occurred in error prior to the submission of the tender.*

With “The Firm” as one of the major subcontractors in the “Limited Company” bid and “The Owner” acting as the agent of the company in the pre-award meeting, the weight of evidence points to a substantive role for “The Owner” in the preparation of “The Limited Company” bid. “The Owner” would also have been in the position to inform “The Limited Company” of the deletion of the higher-cost brick from the scope of work.

Even if the bid from “The Limited Company” met the evaluation criteria and was the lowest-price bid, given the advantages that “Limited Company” had with regard to the bidding process for the Phase 1 contract, it is our view that the award of this contract was not handled on the basis of a fair and competitive process.

### **Awarding of Phase 2 Contract**

The tenders for the Phase 2 contract closed on March 13, 2013. Of the six bid packages picked up by potential suppliers, the RM received only two valid bids. The RM rejected one potential bid because it did not cover the entire scope of the work. Another potential bidder was disqualified because their bid arrived three minutes past the time of the bid closure.

On March 18, 2013, council awarded the contract to “Mechanical Corporation” for the total tendered price of \$588,677 (plus GST). This company has no affiliation or business relationship with “The Owner”.

In his monthly report to council on May 9, 2013, the manager of public works reported that “The Firm” was hired to remove the concrete slabs and other materials from where the old buildings were situated on the construction site. As a sole-sourced contract<sup>4</sup>, “The Firm” was paid \$7,835 in accordance with the hourly rates as established in the RM’s 2012 Equipment Rental Rates.

### **Awarding of Phase 3 Contracts**

The deadline for bids for Phase 3 was May 10, 2013. Bidding on this phase of the Fire Hall project used a “menu format” that allowed bidders to bid on the entire phase of the project or portions of it. Bid submissions were to be provided directly to the RM in a sealed envelope, however, the councillor in question and “The Owner”, were involved in receiving quotes at their place of work (The Firm) from suppliers. These suppliers included companies owned by “The Holding Company,” which was owned by the brother of the councillor in question. According to the documentation, all these quotes resulted in purchase orders from the RM.<sup>5</sup>

Numerous emails demonstrate the involvement of the councillor in question and “The Owner” in the bid process for Phase 3. For example, on April 14, 2013, the councillor in question received a quote at his office at “The Firm” from “Door Company” to supply and install overhead doors and to supply and install other materials for the Fire Hall for the total amount of \$34,495.00 (GST extra).

On May 9, 2013, the day before the tenders for Phase 3 were closed, “The Owner” forwarded an email to the councillor in question at his email address at “The Firm” regarding the West St. Paul Fire Hall. The email included a quote from the president of “Supplier Company” to “The Owner” with regard to stairs, rails, and landings for the Fire Hall project in the amount of \$132,798.00 (GST extra).

Another example of the role played by “The Owner” can be found in an email exchange between “The Owner” and the RM Public Works Manager two weeks prior to the close of bids for Phase 3. On April 22, 2013, “The Owner” sent the Public Works Manager and the CAO an email in which he updated the two on the construction of the fire hall with respect to walls and windows. He also indicated that he now had all the quotes for the balance of the building. The next day, the Public Works Manager responded to this email with the following:

*We have been putting together a formal request for proposals for the balance of the work for the fire hall. This will be advertised later this week. Meanwhile, would you be able to*

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<sup>4</sup> The RM used an existing standing offer for the use of rented equipment with “the Firm” to issue the contract. The payment was determined using the hourly rate schedule set in this standing offer.

<sup>5</sup> Of the nine unaffiliated companies who submitted their quotes directly to the RM, only one received a purchase order under Phase 3 of this project.

*share the quotes you have for the balance of the works? Are they based on the construction drawings? If so, please forward them to me. I thank you in advance.*

“The Owner” responded to this message, indicating that he had three new quotes with the latest drawings.

It is clear that the process for confidential sealed bid tenders was not followed. In addition, many of these quotes did not conform to the process set out in the bid package. Potential suppliers were to use a standardized form for their bid response. As stated in the bid package:

*The Proposer must use the FORM OF PROPOSAL included in this Request for Proposal and shall provide all information or data requested in the FORM OF PROPOSAL, together with any other information or data that may be requested in this Request for Proposal.*

Along with the information required for the FORM OF PROPOSAL, bidders were asked to supply the RM with the following information in their response:

- Related experience in construction and construction methods related to the scope of work.
- Ability to manage complex projects with minimal supervision.
- Dependability, with mature judgement and the ability to communicate effectively.
- Be prepared to travel in the performance of the work.
- A statement that the bidder understands the work requirements of the RM and has the expertise to fulfil the scope of work.

In reviewing the information on file, none of the successful bidders for Phase 3 complied with the format of the response as stipulated in the bid package. Each supplier responded in their own manner, often by way of a brief quote on company letterhead, without addressing the information requirements set out in the bullet points noted above. In order to properly evaluate and compare bids, it is imperative that bidders be required to follow the format prescribed in the tendering process.

Even had these bidders complied with the requirements of the bid package and were successful in a fair and open process, the involvement of the councillor in question and “The Owner” in this process invalidates any notion that the award of these purchase orders was based on a fair and equitable process.

It is impossible to reconcile the obligations of the councillor in question or the actions of “The Owner” as ad hoc committee members, who were to work on behalf of the RM, with their actions as bidders for contracts or as apparent intermediaries in the tendering process.

#### 4.1.1 Did the RM fulfill its obligations and responsibilities to follow an appropriate and fair tendering process with regard to the Fire Hall project?

No. The RM had an obligation to ensure a tendering process that was fair, open, transparent and competitive. The evidence shows that did not occur with respect to the awarding of contracts for Phase 1 and Phase 3 of the project.

Council was aware of the CAO's recommended approach to tendering that adhered to *The Tendering and Procurement Policy* adopted by the RM but instead approved one proposed by the Ad Hoc Fire Hall Building Committee. Issues related to this tendering process subsequently formed part of the complaint that we investigated.

The RM Council should have considered the appropriateness of using "The Owner" to serve as the volunteer consultant for the project and should have assessed his subsequent level of involvement in providing advice to the ad hoc committee.

Even though it was clear in the terms of reference that a committee member could not be bid on the project or use information available through their participation in the committee for their own gain, the RM Council did not take any action when it became aware that the volunteer consultant was acting as an agent for a bidder for the Phase 1 contract or acting as an intermediary at other times in the process. It is also clear that most members of the ad hoc committee were not familiar with the terms of reference or the need to abide by those terms.

With respect to the councillor in question, the RM also took no action to prevent this member, who was employed by a bidder, from participating in the decision-making process. Council members should have considered whether the councillor in question was in a conflict of interest on matters related to the Fire Hall project. Instead, it would appear that they chose not to act while apparent conflicts of interest were permitted to occur.

The RM also failed to ensure that suppliers who bid on Phase 3 of the project followed the format set out in the tendering package in order to ensure all bids could be evaluated fairly. Additionally, the RM took no action when it learned that companies were sending bids directly to "The Firm" as opposed to the RM office.

Finally we note that there were many instances where the minutes were incomplete or non-existent. For example:

- No explanation was recorded as to why the membership of the ad hoc committee was reduced to three members – the CAO, the public works manager and the volunteer consultant ("The Owner").
- There is no resolution or related documentation in the minutes of council meetings explaining council's decision to divide the tender for the Fire Hall project into three streams.

- No official minutes were kept at a meeting where there were discussions that ultimately resulted in a change in a key design element (deleting the brick on the building elevations).
- Minutes taken at a pre-award meeting concerning the Phase 1 contract for the Fire Hall did not record who was in attendance.

It is important that comprehensive minutes are maintained in order to provide a record of what was discussed and allow citizens to better understand the decisions made by council and its committees.

## 4.2 Conflicts of interest and perception of bias

It is important that council business is conducted in an open and transparent manner and that council members act in the best interests of the citizens they represent. When that is not the case, or if there is a perception of bias, the credibility of council as a whole is diminished.

### **The Municipal Council Conflict of Interest Act**

*The Municipal Council Conflict of Interest Act (MCCIA), the Municipal Act Procedures Manual published by Manitoba Municipal Government, the Council Members Guide published by the Association of Manitoba Municipalities, the RM of West St. Paul Code of Conduct, as well as our guide, Understanding Fairness: a Handbook on Fairness for Manitoba Municipal Leaders, all provide guidance on the benchmarks and standards related to conflicts of interest.*

The MCCIA sets out standards related to conflicts of interest on the part of municipal officeholders. In addition to defining direct and indirect conflicts of interest, the act requires the declaration of any conflicts of interest and the recusal of officeholders from participating in debates, discussions or votes. Further, the act states that a municipal officeholder cannot use information gained from their position to benefit themselves or others and forbids the exercise of influence with other officeholders that might result in a financial benefit to themselves or their dependents as defined in the act.

The MCCIA deals with conflicts arising from pecuniary (financial) interests. Further, it is concerned with the pecuniary benefits that may accrue to the officeholder, their spouse and any dependent children.

Under clause 4(1)(b) of the MCCIA, an indirect pecuniary interest exists for an officeholder who is employed by “*a person, corporation, partnership, or organization who or which, or (in the case of a corporation) a subsidiary of which, has a direct pecuniary interest in the matter.*” This clause makes it clear that officeholders who are employed by a company are deemed to have an indirect conflict of interest in any matter where that company has a financial interest. Not only must a conflict of interest be declared and the officeholder withdraw from the discussion, a declaration and recusal must be recorded in the minutes each time a “conflicted” item is raised.



The absence from a meeting does not exempt an officeholder from the requirement to declare a direct or indirect conflict of interest.

The provisions regarding conflicts of interest apply to all official meetings, including committee meetings and meetings of boards and commissions where the officeholder is a member by virtue of their office. In this case, it would include committees established by council, such as the Ad Hoc Fire Hall Building Committee.

Under certain circumstances, complaints of conflict of interest may be raised through an application to the Court of Queen's Bench pursuant to subsection 20(1) the MCCIA. However, in order to pursue a matter under the MCCIA, one must be an "elector" within the community, meaning he or she is entitled to vote at an election of members to a council. Given the anonymity of the complainants in this case, there was no way to determine whether or not the complainant was an elector within the scope of this act. We note that no application was made to the Court of Queen's Bench.

It is important that the MCCIA is not viewed as a complete code of ethical behaviour for council members. This fact is recognized in section 84.1 of *The Municipal Act*, which requires each council to establish a code of conduct "*to set guidelines that define the standards and values that the council expects members to meet in their dealings with each other, employees of the municipality and the public.*" Manitoba court decisions have also spoken to the reality that ethical behavior cannot be completely defined or limited by statute.<sup>6</sup>

A significant difference between the ombudsman investigation process and the court process is the remedy available to a complainant/applicant in these processes. If a court determines that a council member has violated the MCCIA, the council member may be disqualified from council and may be required to make restitution to any person or the municipality affected by the financial gain. The goal of a complaint investigation under *The Ombudsman Act* is to determine whether there are administrative issues and, if so, to make recommendations for administrative improvement that could benefit both government and the public.

Provincial ombudsman offices take a broad approach to conflict of interest matters. While we will consider various provisions of the MCCIA in our investigation process, we will also consider whether or not a decision has been made in a procedurally fair manner. All decision-making bodies, including municipal councils, have an obligation to make fair decisions. When

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<sup>6</sup> In *Chan v. Katz*, [2013] M.J. No. 323, 2013 MBCA 90 the Court of Appeal, after finding that the MCCIA was not engaged on the facts of the case went on to say that

*"This should not be taken as an indication of approval of the conduct, nor do we express any comment on whether it meets appropriate ethical standards for elected officials."*

In *Dunn v. Struthers*; [2013] M.J. No. 402, 2013 MBQB 281, a case under *The Legislative Assembly and Executive Council Conflict of Interest Act*, a judge of the Court of Queen's Bench said:

*"The Act does not purport to establish a general provision to provide ministers with "the normative standard of conduct by which they should conduct themselves."*

making a procedurally fair decision, a decision maker must be impartial or unbiased, without a personal interest in the outcome and be open to persuasion on the merits of an issue. Participation in discussions and votes by a council member who is sufficiently self-interested or tainted by bias could invalidate the decision or the process by which it was made.

As we point out in our *Understanding Fairness* publication, “*The appearance or perception of conflict can be as harmful to public confidence as actual conflict.*” Once a conflict between a public official's personal interests and a public decision is identified, it can be difficult to demonstrate that the decision was not influenced by personal interest.

## **The Courts and Conflict of Interest**

There are numerous court decisions addressing the issues of bias and conflict of interest. It is evident that bias or favour is clear when a councillor is the applicant on a matter, but bias or favour is also an issue when the councillor stands to benefit (or suffer) from a decision where they are not an immediate party.

The case of *Arbez v. Johnson*, [1998] M.J. No. 257 provides a good example. In this case, a municipal council was considering if they should sell property to a local retailer and, if so, when to conclude this sale. One councillor took part in the discussions on the sale and voted on the resolutions even though she ran a competing business. This matter came to court under the MCCIA and, ultimately, the application was allowed and the councillor's seat was declared vacant.

The Supreme Court of Canada set out a conflict of interest test in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 31 (SCC), [1990] 3 S.C.R. 1170. This test, as stated by Justice Sopinka, is as follows:

*It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. **Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. (Emphasis added)***

In that decision, Justice Sopinka explained that the specific statutory provision he referred to was the MCCIA.

The discussion in the *Arbez* case also includes a case that was decided in the Alberta Court of Appeal [Guimond and Sornberger (1980), 115 D.L.R (3d) 321 (Alta. C.A.)]. In that case, three members of a municipal council were employed by the major employer in the municipality. They voted to reject a general plan and re-zoning amendment. This measure was also opposed by their

employer and the record shows that the employer did not apply any pressure on these council members to direct their votes. However, as the discussion in the Arbez case states:

*The court determined that when a municipal councillor votes on a matter which his employer opposes, the councillor has an indirect pecuniary interest in the matter. Once it is found that the councillor does have such an interest, an irrefutable presumption of bias is raised. The prohibition against voting on the issue is absolute.*

Participating in council matters while in a conflict of interest is a breach of both the MCCIA and of the common law duty of procedural fairness. A breach of the MCCIA can result in consequences for the councillor. Further, a breach of the duty of procedural fairness goes to the jurisdiction of the council and may result in its decision being quashed on judicial review.

## **RM Policies**

In addition to provincial law, we reviewed the RM of West St. Paul's policies relevant to this matter. In order to comply with RM policy as outlined in both the tendering and procurement policy and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee*, there needed to be a clear separation between those who would be managing the process and those who would be bidding on the tenders. As stated in the committee's terms of reference:

*Members of the Committee agree to comply with the applicable provisions of The Municipal Act, The Municipal Council Conflict of Interest Act, resolutions and by-laws of Council, RM's Municipal codes of conflict and applicable policies, and the following code of conduct...If there is a conflict of interest, the member shall remove himself [from] any discussion and the decision.*

The terms of reference applied to all members of the committee; not just the elected officeholders.

With regard to the Phase 1 contract, it appears that "The Owner", when not acting on his own behalf or that of "The Firm", was acting for "The Limited Company." As noted earlier, the "The Owner" is recorded as picking up the bid documents used to prepare the bid for "The Limited Company", agreed to have "The Firm" included as a subcontractor in the bid it submitted by the "The Limited Company,"<sup>7</sup> and acted as the representative of the "The Limited Company" at the pre-award meeting.

With regard to the contracts awarded under Phase 3, documentation shows that both the councillor in question and "The Owner" were receiving quotes from third party suppliers before and after the May 10, 2013 closing date, including suppliers that were part of the same "Holding Company" that owned "The Firm." It is clear that "The Owner" was not acting as someone detached from the review of bid documents or the decision making process. When asked about

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<sup>7</sup> This fact that "The Firm" was a subcontractor was not included in the original bid submission and was the subject of an amendment submitted by "The Limited Company" after the award of the contract.

the role played by “The Owner” and the councillor in question in the bid process for Phase 3, the Public Works Manager stated that the two were acting on their own initiative.

*I think they kind of took it upon themselves. I don't recall anyone...I don't recall myself anyways didn't ask them to go out and find somebody. But I do recall telling certain contractors that, you know, when you send correspondence in or you submit bids, you submit them to the RM not to [“The Firm”]. I did tell people that.*

Both the “Paint Firm” and the “Construction Firm”, which provided quotes directly to the RM, are owned by the “Holding Company”, which is controlled by “The Owner.” He advised our office that he saw nothing wrong with having companies that he owned submit bids on the Fire Hall given all the work he had done as a volunteer consultant on the project.

The involvement of the councillor in question and “The Owner” in the Phase 3 contracting process is shown in Table 3 in the Appendix. All of these activities occurred while “The Owner” was a volunteer consultant and member of the ad hoc committee. The minutes do not indicate that “The Owner” declared a conflict of interest or recused himself from these deliberations of the ad hoc committee.

Likewise, the councillor in question did not declare a conflict in the committee or in council, or recuse himself from all relevant discussions when matters affecting his employer, “The Firm,” appeared on the agenda.

Both the councillor in question and “The Owner” denied that they had any role as intermediaries in this bidding process. They state that quotes may have been sent to them regarding Phase 3 in error when they should have been directed to the RM. They insist that the RM was the final decision maker with regard to accepting bids. Further, they state that, since submissions would be in the form of sealed bids, they had no knowledge of the contents of the bids and would not be in a position to confer an advantage or influence a decision-making process driven by the lowest price.

As Table 4 in the Appendix indicates, there were many interconnected relationships between the suppliers on this project and the councillor in question, “The Owner”, and the companies owned through the “Holding Company.”

Concerns regarding conflicts of interest were in fact raised at the RM council meeting on September 12, 2013 during which there was an *in camera* discussion of a conflict of interest complaint concerning the construction of the new Fire Hall.<sup>8</sup>

There was a further *in camera* discussion concerning this matter at a September 30, 2013 RM council meeting. Once regular business resumed, a councillor moved Resolution #2013-440 to authorize the CAO to solicit a value-added audit regarding the Fire Hall through the RM's legal representatives and a third party to determine if the project was properly managed. The resolution was carried without a recorded vote.

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<sup>8</sup> As noted earlier, Manitoba Ombudsman became involved in this matter in December 2013.

At the same meeting, a councillor moved Resolution #2013-441 to disband the Ad Hoc Fire Hall Building Committee as of October 31, 2013. The motion was carried with the councillor in question and a council colleague voting in opposition. According to the councillor in question, the decision to shut down this committee was premature. He believed that committee members still had much to offer in terms of finalizing details and managing this project.

Meanwhile, through a unanimous recorded vote, council commissioned an engineering firm to conduct the audit and review of this project. The engineering firm was asked to render a professional opinion as to the project management approach employed, the construction contracts issued, and whether or not the RM received good value for the money spent on this project.

The engineering firm reviewed project documentation provided by the RM and conducted a site visit of the nearly completed Fire Hall. In its report of February 28, 2014, the engineering firm stated that the project was managed in accordance with industry standards and provided the same value for the money as similar projects undertaken elsewhere. It also stated that:

*From our perspective, the procurement process for all aspects of the work was undertaken in a transparent manner and subsequent contracts were managed effectively and along industry standards.*

It should be noted that this audit served a different purpose than our investigation. For instance, the audit was not tasked with reviewing the RM's actions against benchmarks such as *The Municipal Council Conflict of Interest Act (MCCIA)*, *The Municipal Act*, relevant by-laws or policies, or the principles of administrative fairness.

At a December 12, 2013 meeting of council, the councillor in question moved a motion to provide an additional \$150,000 to cover additional costs associated with the construction of the new Fire Hall. The motion was carried without a recorded vote.

### **Other Allegations of Conflict of Interest**

While the Fire Hall project constituted a majority of the items relating to a conflict of interest, there are other instances where the councillor in question should have acted to declare a conflict and withdraw from the discussion.

In 2007, "Group Company," acting on behalf of its subsidiary company, "Paving Company," applied to the RM for a zoning variance in the West St. Paul Industrial Park. The purpose of this variance was to allow for the construction of concrete operations for "Paving Company."

There was, and continues to be, a concrete ready-mix operation in the West St. Paul Industrial Park. Although this plant is owned and operated by "Canada-wide Company," the plant is located on land owned by "The Firm" and leased to "Canada-wide Company."

“Construction Company” and “The Firm” are occasional competitors in the construction business.

The RM held a public hearing for the zoning variance application on December 13, 2012, approximately five years after the application was received. The meeting agenda was lengthy and included a number of applications for conditional use, including the application by “Group Company.”

A review of council minutes and statements from observers at this meeting indicated that application by “Group Company” was contentious and drew a long list of supporters and opponents. Prior to the public hearing, “The Owner” registered his opposition to the application by letter.

The councillor in question, despite his connection with “The Firm” and relationship to “The Owner”, participated in the discussion and voted on items related to the application by “Group Company.” One supporter of the application challenged the councillor in question and told him that he should recuse himself from the discussion because he had predetermined his position on the application.

Meeting minutes state that council members voted on the application with additional conditions after the public hearing concluded. The mayor and one councillor voted in favour of the application and two councillors, including the councillor in question, voted against it. One councillor, while present, did not have a vote recorded nor was their abstention recorded (the unusual nature of this missing vote, and the issues it presents, will be discussed in the following section).

The minutes also state that, immediately after this vote, a councillor moved a motion to table this item *“until later this evening upon further discussion”* and it carried. A recess was taken and, when the meeting resumed, council voted on the application again and approved it, despite opposition of the councillor in question and another councillor.

Given that the applicant in this matter was a competitor of “The Firm” and that the councillor in question’s brother had registered his opposition to the application, the councillor should have declared a conflict of interest at the meeting and withdrawn from the discussion concerning this item.

#### **4.2.1 The December 13, 2012 council meeting minutes**

As noted in the previous section of this report, the meeting procedure on three items related to “Group Company’s” zoning variance/conditional use application (9.5.3, 9.5.4 and 9.5.5) as recorded in the minutes, raises procedural questions.

When there is a recorded vote, as in this case, every councillor present is asked for their position on the item. A councillor has only three options at this point – to support the motion, to oppose the motion, or to abstain from the motion and give the reason for their abstention. The fact that a councillor is present and is recorded as neither voting nor abstaining raises a concern.

Further, the vote on Item 9.5.3 (the first vote) records the outcome of the Resolution Conditional Use CU 25/12 “Group Company” as a tie. Under section 138 of *The Municipal Act*, a tied vote means that a resolution, bill or by-law does not pass.<sup>9</sup>

With this item defeated, it would seem illogical to then vote on a motion to table the defeated resolution “*until later this evening*” as occurred in this meeting in Item 9.5.4. However, council decided to carry the motion to have a discussion on this resolution later in the meeting.

Although the motion indicated that further debate would be later in the evening, the minutes record that the next order of business, Item 9.5.5, was to have another vote on the previously defeated resolution.

Our investigation revealed that the circumstances at this meeting were unusual. Several observers indicated that this part of the council meeting was quite raucous and debate was heated. These observers stated that, during the first vote, the councillor in question put his hand on another councillor’s arm to prevent him from voting in favour of the application. Immediately thereafter, this councillor requested a five minute recess from the chair.

The councillor in question insists that while parts of the council meeting of December 13, 2012 might have been heated and contentious, he did not touch his council colleague in any fashion or interfere with his colleague’s ability to vote. He stated that witnesses will attest to his version of events. Our office notes that any attempt to interfere with the vote of a council member is a serious matter and could constitute a breach of the *Council Member’s Code of Conduct*.

We also note that the recording of minutes can be a challenging process, especially when council meetings are contentious and procedure is not clear. As the official record of events, however, every effort must be made to ensure the accuracy of these minutes.

Our review of the minutes presents a confusing and incomplete picture of what actually transpired at the December 13, 2013 council meeting. This would, in our view, suggest deficiencies on the part of council and administration regarding their understanding of the rules and procedures governing meetings.

The minutes, for example, do not explain why a second vote was taken after it appeared the first vote was defeated, or if the second vote was a “reconsideration” as allowed by *The Municipal Act* in certain circumstances.<sup>10</sup> The minutes simply indicate that two votes occurred. However,

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<sup>9</sup> Parliamentary practice states that a tied vote also results in a defeat on the item in question.

<sup>10</sup> There are some exceptions to this rule which, in terms of section 139(1)(a), were met by this meeting. The relevant text of *The Municipal Act* is:

**Council reconsidering decision**

139(1) A council may not reconsider or reverse a decision within one year after it is made unless

- (a) at the same meeting at which the decision is made, all the members who voted are present; or
- (b) a member gives written notice to the council, from at least one regular meeting to the next regular meeting, of a proposal to review and reverse the decision.

**Record of reconsideration in minutes**

139(2) A council that reconsiders and reverses a decision under clause (1)(a) may direct that the minutes show

given the incomplete recording of the first vote (i.e. failing to explain why a councillor who was present neither voted nor abstained) raises questions about the legitimacy of the vote and whether it should be included in the official record.

If the initial vote was considered a legitimate vote, then it would follow that there should be a “record of reconsideration” in the minutes as set out under section 139(2) of the act to account for the second vote. Without this record of reconsideration, someone could raise a challenge to the legitimacy of these votes due to the provisions set out in *The Municipal Act* regarding “reconsideration and reversal” within the one-year period.

#### **4.2.2 Did the councillor in question abide by *The Municipal Council Conflict of Interest Act*, RM policy regarding conflicts of interest and procedural fairness obligations?**

No. The MCCIA, the *Council Member’s Code of Conduct*, and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee* are clear about the obligation placed on office-holders with regard to conflicts of interest.

In order to comply with the RM policy as outlined in the *Tendering and Procurement Policy* and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee*, there needed to be a clear separation between those who would be managing the process and those who would be bidding on the tenders. As it states in the *Terms of Reference*:

*Members of the Committee agree to comply with the applicable provisions of The Municipal Act, The Municipal Council Conflict of Interest Act, resolutions and by-laws of Council, RM’s Municipal codes of conflict and applicable policies, and the following code of conduct...If there is a conflict of interest, the member shall remove himself [from] any discussion and the decision.*

The actions of both “The Owner” and the councillor in question suggest they did not put their minds to the conflict of interest provisions of the RM’s tendering process and procurement policy, *The Terms of Reference for the Ad Hoc Fire Hall Building Committee*,<sup>11</sup> or provincial law.

“The Owner”, through his legal counsel, explained that he was involved in the Fire Hall project because of his construction expertise and that he is not familiar with processes involving public bodies. He indicated that he left procedural tasks to be addressed by the RM representatives.

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- (a) the original decision and the decision made on reconsideration; or
  - (b) only the decision made on reconsideration.

<sup>11</sup> It is clear from the interviews undertaken for this investigation that most of the members of the Ad Hoc Committee were unfamiliar with the *Terms of Reference* for the Committee. “The Owner”, for example, cannot recall ever receiving the document. With the exception of administration members of the Ad Hoc Committee, none of the other committee members interviewed for this investigation could recall this document or any specific details about its content (including conflicts of interest). It should be noted that the *Terms of Reference* were ratified at a meeting of the Ad Hoc Committee and, subsequently, by the RM Council.



The councillor in question, who had been a member of council for 12 years, did not appear to have fully understood his obligations under the MCCIA, other provincial acts governing municipal governments, and the policies of the RM where, in terms of the tendering and procurement policy, the code of conduct policy, and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee*, he voted for their adoption.

While the Fire Hall project accounted for the majority of items where a declaration and recusal should have occurred, there are other items where the councillor in question should have acted to declare a conflict and withdraw from the discussion. These would have included any of the discussions or votes involving the variance order requested by “Group Company” on behalf of a competitor of “The Firm.”

On this point, the councillor indicated that he had no specific recall of any conflict of interest issues related to the variance order application by “Group Company.” He insisted that he viewed this issue on its merits and that his opposition to granting this order was independent of the opposition to this variance order expressed by “The Owner.”

From our overall review of meeting minutes from the 2010-2014 council term, we determined that the councillor in question had an apparent conflict of interest with respect to over 20 agenda items where he participated in discussions or voted on issues. He declared a direct or indirect conflict of interest and withdrew from discussion or votes eight times.

We discussed the MCCIA with the councillor in question. He explained that it was his understanding that the MCCIA only applies to immediate family and must consist of a personal financial benefit for himself and/or dependent family members, further explaining that *“outside of that, I think it’s pretty grey.”* He exempted the company where he was employed as well as other family members, including his brother, who was also his employer, from any personal application of conflict of interest provisions or perception of bias considerations.

We also raised the obligation of councils to make decisions that are procedurally fair. To illustrate our point, we discussed with the councillor in question his participation in discussions and voting related to a subdivision proposed by his nephew, the son of “The Owner.”

While the councillor’s actions, as they related to the nephew’s proposed subdivision, did not appear to be a conflict of interest as defined in the MCCIA as there was no direct pecuniary interest, in our view it raises concerns regarding an apprehension of bias in favour of the nephew. When a council member is believed to be too close to an issue – in this case because the matter before council related to a nephew – the council member should recuse himself from discussing and voting on the matter. A very narrow interpretation of the MCCIA may limit the perceived scope of the ethical responsibility of municipal officeholders

As the MCCIA states, a municipal officeholder must declare a direct or indirect conflict of interest whenever and wherever it occurs and immediately withdraw from the discussion. The councillor in question failed in this responsibility numerous times, both with regard to the Fire Hall project and the matter related to the “Group Company.”

### 4.3 Obligations of the RM council

Whether it is set out in provincial legislation, the *Municipal Act Procedures Manual*, or adopted as policy through the ad hoc committee's terms of reference, the tendering and procurement policy, or its code of conduct, the RM has clear direction with regard to operating in a fair, open and equitable manner. However, it is not sufficient to merely have these policies; they need to be implemented on a day-to-day basis. This investigation raised the issue of the responsibility of council as a collective or corporate body to ensure that its policies and processes are respected and implemented.

Policies such as those cited above ensure that individual councillors, as well as council as a whole, are acting ethically as they carry out the business of the RM. The requirement for ethical behaviour often faces its most difficult tests when dealing with family members, close friends or business partners, and when considering issues where significant financial gain is at stake, such as the awarding of contracts, considering the acquisition or disposal of capital assets, or development agreements.

The MCCIA, as well as in the guidance supplied by Manitoba Municipal Government and the Association of Manitoba Municipalities, the emphasis is on the individual officeholder to determine whether or not they are in a conflict of interest. While the emphasis on the individual officeholder is appropriate, it can mislead an individual officeholder to assume that they, and only they, can make the determination of a conflict of interest.

Municipal councils operate in a collegial fashion where all council members – whether the mayor/reeve or an individual council member – have an equal voice at the council table. The focus on the responsibility of the individual in the MCCIA and elsewhere may infer that there is no role for the council to police itself or comment on the actions of a member. However, *The Municipal Act* and the RM's own code of conduct indicate that individual members are responsible to council as a whole and that council has a right, if not the obligation, to provide oversight, guidance and even censure to individual council members who are not in compliance with these policies.

In this case, for example, the councillor in question stated in an interview with us that he had read the MCCIA and that it was clear that, as a councillor, he was to avoid making decisions that might result in a pecuniary benefit accruing to himself, his spouse or dependent children. Using this provision as the test by which his actions were taken, he judged that he was not in a conflict of interest when participating in debates or making decisions on matters where other family members or his employer were involved.

There is no question that other members of the RM council were aware of the actions of the councillor in question with regard to the construction of the Fire Hall while employed at "The Firm." Council held discussions and conducted votes with the councillor in question present after they were aware of this councillor's conflict of interest.

Both the councillor in question and the RM council did not appear to consider how their actions (or lack thereof) could foster a perception that conflicts of interest were occurring or that they were not concerned with the necessity for procedural fairness.

With regard to the Fire Hall project, it was clear that a fair, open and transparent tendering process was required by the tendering and procurement policy, provincial legislation and the common law duty to provide procedural fairness.

As the governing body of the RM, council must be concerned about maintaining integrity and its corporate reputation. The RM council has a responsibility to prevent an individual member from operating according to his or her own interpretation of the rules.

#### **4.3.1 Did the RM council have an obligation to ensure that council members followed the provisions of the MCCIA and RM policies?**

Yes. The responsibility to maintain standards and principles of good governance in a municipal council does not rest on individual councillors or the mayor alone. Instead, this responsibility rests on the municipal council as a whole.

By adopting the *Tendering and Procurement Policy*, the *Code of Conduct*, and the *Terms of Reference for the Ad Hoc Fire Hall Building Committee*, as well as accepting the rules set out in provincial legislation, the RM council of West St. Paul stated its intention to follow these standards. However, the RM council must put these standards into practice. This is a task for the RM council as a whole, not just for an individual council member or the head of council.

## **5.0 RECOMMENDATIONS**

The issues raised in this investigation are serious and the RM council needs to review its actions in light of our findings and conclusions. The municipality is expected to undergo a significant period of growth and public and private investment will be a large part of that expansion. The RM needs to ensure that conflicts of interest and unfair tendering procedures do not take place.

Subsection 36(2) of *The Ombudsman Act* sets out the ombudsman's authority to make recommendations as a result of an investigation. In light of the findings from this investigation, we make the following recommendations to the RM of West St. Paul:

**Recommendation 1: That council members and administrative staff for the RM undergo training to acquire a better understanding of legislative and policy requirements regarding conflicts of interest, procurement and tendering, and the principles of procedural fairness.**

**Recommendation 2: That the RM develop policy for how it will address instances of conflict of interest and the perception of bias to ensure compliance with all legislative and policy requirements.**

**Recommendation 3:** That the RM ensure that minutes of every committee of council meeting are prepared and retained using the same standards that apply to council meeting minutes as set out in *The Municipal Act*.

**Recommendation 4:** That the RM undertake the necessary steps to ensure full compliance with its tendering and procurement policy in the future. Any variation from the tendering and procurement policy should be documented and approved by council, and the reasons for the variation recorded in council minutes. In order to promote transparency and administrative accountability, the RM should post its tendering and procurement policy on the RM website in a manner consistent with the instruction found in section 6.8.10 of the *Municipal Act Procedures Manual*.

All members of the RM council need to understand that provisions regarding conflict of interest and the requirement to provide procedural fairness are ongoing obligations of their office.

### **5.1 The Response of the RM of West St. Paul**

In accordance with *The Ombudsman Act*, the RM council met in closed session during the council meeting of October 27, 2015 to consider the report findings and recommendations. The following response from the RM was received on November 10, 2015.

Four recommendations were given to the RM to promote good governance and achieve administrative improvement. The following is a summary of the steps taken to give effect to these recommendations:

**Recommendation 1:** Council and administrative staff to undergo training to acquire a better understanding of legislative and policy requirements regarding conflict of interest, procurement and tendering, and the principles of procedural fairness.

#### **Steps Taken:**

- The RM requires Council to sign an Oath of Office when elected.
- Administration provides a Council Orientation session following each election.
- The RM hosted a 2 day education session by George Cuff (biography enclosed) for surrounding municipalities.
- The RM hosted an education session by Legacy Bowes on Conflict of Interest. (agenda enclosed)
- Attend educational sessions hosted by the Federation of Canadian Municipalities (FCM), Association of Manitoba Municipalities (AMM) and Manitoba Municipal Administrators Association (MMAA)
- The CAO registered for Advanced Procurement Law & Practice: Major Tendering Projects at York University

**Recommendation 2:** That the RM develop a policy as to how it will address instances of conflict of interest and the perception of bias to ensure compliance with all legislative and policy requirements.

**Steps Taken:** The municipality is committed to and has instructed Administration to work with our legal representatives and other sources to adopt a policy to address conflict of interest and the perception of bias. The RM will request AMM to lobby to revise the Council Conflict of Interest Act with a stronger set of guidelines to deal with perceived conflict.

**Recommendation 3:** That the RM ensure that minutes of every committee of council meeting are prepared and retained using the same standards that apply to council meeting minutes as set out in the Municipal Act.

**Steps Taken:**

- The CAO is advised of all meetings and administration staff are available to take minutes.
- Agenda and minutes of every committee of council meeting are prepared and retained using the same standards that apply to council meetings.
- Memo sent to Department heads to act accordingly.

**Recommendation 4:** That the RM take steps to ensure full compliance with its tendering and procurement policy in the future. Any variation from the tendering and procurement policy should be documented and approved by council, and the reasons for the variation recorded in the council minutes. In order to promote transparency and administrative accountability, the RM should post its tendering and procurement policy on its website in a manner consistent with the instruction found in Section 6.8.10 of the Municipal Act Procedures Manual.

**Steps Taken:**

- The tendering and procurement policy is posted on the RM website ([http://www.weststpaul.com/docs/ADM2012-03\\_Tendering&Procurement-FINAL.pdf](http://www.weststpaul.com/docs/ADM2012-03_Tendering&Procurement-FINAL.pdf))
- All purchases comply with the tendering and procurement policy. Should a variation from the policy occur it must be documented and approved by council and the reason for the variation recorded in the minutes.

The report and construction of the WSP Fire Hall covers a period of three separately elected Councils. The current Council and Administration is committed to governing in a transparent and responsible manner and is working diligently with the public to do so. A further step to achieve this was the hiring of a Communications Officer whose responsibilities will be to report to the public the business of the municipality.

Manitoba Ombudsman is satisfied that the RM has taken immediate and appropriate action with regard to the recommendations and the report findings. These are positive steps towards ensuring that council members are seized with their responsibilities regarding conflicts of interest, the collective responsibility of council members, and the integrity of the RM's tendering and procurement process.

**MANITOBA OMBUDSMAN**  
November 2015

## 6.0 Appendix

Manitoba Ombudsman conducts its investigations in a confidential, non-adversarial manner. It is our standard practice to omit personal names of individuals and names of private companies in our reports. In place of personal and business names, we have used “identifiers” when discussing evidence in this report.

<b>Table 1: Identifiers used in this report</b>	
<i>Identifier</i>	<i>Description</i>
“The Firm”	A construction firm that employs the councillor and is owned by the councillor’s brother, “The Owner,” through the “Holding Company”
“The Owner”	Brother to the councillor in question and owner of “Holding Company” and its subsidiary companies.
“Canada-wide Company”	This large nation-wide construction supply firm has a long-term lease on property owned by “The Firm.”
“Company S”	A local firm that submitted its Phase 3 quote to the RM and received a purchase order from the RM.
“Construction Firm”	A local construction and tiling company that submitted its Phase 3 quote directly to the RM and received a purchase order. This company is owned by “Holding Company.”
“Door Company”	A door supply and installation company that supplied a quote for work under Phase 3 to the councillor in question and received a purchase order from the RM.
“Group Company”	A local holding company that owns “Paving Company.”
“Holding Company”	“The Owner” owns this company, which owns a number of subsidiary companies, including “The Firm”, “Paint Company”, and “Construction Firm”.
“Limited Company”	A construction firm represented by “The Owner” in the bid process for Contract #1 and who used “The Firm” as a subcontractor.
“Masonry Company”	A local masonry company that submitted its Phase 3 quote directly to “The Owner” and received a purchase order from the RM.
“Mechanical Company”	A mechanical, electrical and HVAC company that was the successful bidder on Contract #2.
“Paint Firm”	A local paint and interior decoration company that submitted its Phase 3 quote directly to the RM and received a purchase order. This company is owned by “Holding Company.”
“Construction Company”	A construction and paving company owned by “Group Company” and an occasional competitor of “The Firm”
“Supplier Company”	A local company that submitted a Phase 3 quote directly to “the Owner” and received a purchase order from the RM.
“The Millwork Company”	A local millwork company that submitted its Phase 3 quote directly to “The Owner” and received a purchase order from the RM.
“Window Company”	A local window supply and installation firm that submitted its Phase 3 quote to “The Firm” and received a purchase order from the RM.

**Table 2: West St. Paul Ad Hoc Fire Hall Committee Membership**

<i>Date</i>	<i>Item</i>
May 13, 2010	The councillor in question moves Resolution # 2010-091 to establish a Building Committee comprised of fire chief, the director of operations, the CAO and two members of the Fire Department.
November 10, 2011	A councillor moves Resolution # 2011-362 establishing the Ad Hoc Fire Hall Building Committee and authorizing advertising for a volunteer consultant. Membership of this committee includes three firefighters, Protection Committee members (including the councillor in question), one volunteer consultant from the community, an administration delegate, and municipal consultant.
January 12, 2012	Resolution # 2012-456 titled Council Appointments to Committees adds the mayor to the Ad Hoc Committee.
February 9, 2012	Resolution # 2012-464 Membership of the Ad Hoc Fire Hall Building Committee is amended as follows: <ul style="list-style-type: none"><li>• Mayor (who also acts as chair)</li><li>• Two members of council (including the councillor in question)</li><li>• CAO</li><li>• Fire chief</li><li>• Two members of the WSP Fire Department</li><li>• Manager of public works</li><li>• Volunteer member of the public as appointed by council (the brother of the councillor in question)</li></ul>
November 15, 2012	At a meeting of the RM council, a councillor moves Resolution # 2012-881 that the membership of the ad hoc committee be reduced as follows: <ul style="list-style-type: none"><li>• CAO</li><li>• Manager of public works</li><li>• Volunteer consultant</li></ul>
September 30, 2013	A councillor moves Resolution #2013-441 to disband the ad hoc committee as of October 31, 2013. The councillor in question votes against this resolution.

<b>Table 3: Phase 3 Contracts - Chronology of Quotes and Purchase Orders</b>						
<i>Quote Date</i>	<i>Quote From</i>	<i>Received By</i>	<i>Quote Amount</i>	<i>Purchase Order #</i>	<i>Purchase Order Date</i>	<i>Purchase Order Amount</i>
April 14, 2013	"Door Company"	Councillor in question at "The Firm"	\$34,495.00	#3526	June 21, 2013	\$34,495.00
May 9, 2013	"Supplier Company"	"The Owner" & Councillor in question at "The Firm"	\$132,798.00	#3490	June 3, 2013	\$132,798.00
May 10, 2013	"The Millwork Company"	"The Owner"	\$39,980.00	#3824	August 26, 2013	\$17,109.40
May 10, 2013	"Company S"	RM	\$78,550.00	#3588	July 26, 2013	\$51,345.00
May 10, 2013	"Paint Firm"*	RM	\$49,900.00	#3823	August 26, 2013	\$49,900.00
May 10, 2013	"Construction Firm"*	RM	\$9,800.00	#3842	September 4, 2013	\$9,800.00
June 6, 2013	"Window Company"	"The Firm"	\$81,753.00	#3553	July 5, 2013	\$82,289.00
June 27, 2013	"The Firm"*	RM	\$12,980.00	#3557	July 15, 2013	\$12,980.00
August 26, 2013	"Masonry Company"	"The Owner"	\$24,000.00	#3837	September 3, 2013	\$24,000.00
<b>Note:</b> Tenders for this project closed on May 10, 2013.						
* Companies owned by "The Owner" through "Holding Company."						



**Table 4: West St. Paul Fire Hall Project Suppliers**

Item	Company	Quote Amount	Contract Amount	Relationship to "Holding Company"
New Access and Entrance to RM Office	"The Firm"	\$55,900	\$55,900	Subsidiary
Building Demolition	"Construction Company"	\$7,450	\$7,450	Competitor
Concrete Slab Removal	"The Firm"	Sole sourced	\$7,835	Subsidiary
Asphalt Paving	Other paving firm	\$125,800	\$125,800	None
Fire Hall Building Civil and Structural Project Contract #1	"Limited Company"	\$1,239,000	\$1,239,000	"The Owner" was appointed company representative at Pre-Award Meeting. After bid was awarded, it became known that "The Firm" was subcontractor.
New Fire Hall Mechanical, Electrical, HVAC Contract #2	"Mechanical Company"	\$588,677	\$588,677	None
Phase 3 Miscellaneous Metals	"Supply Company"	\$132,798	\$132,798	Quote submitted to "The Owner," who shared info with the councillor in question
Phase 3 Overhead Doors	"Door Company"	\$34,495	\$34,495	Quote submitted to the councillor in question
Phase 3 Windows and Glazing	"Window Company"	\$81,753	\$82,289.00	Quote submitted to "The Firm", "The Firm" identified as "Customer" in quote
Phase 3 Interior Framing, Cladding & Related Works	Other Contracting Company	\$104,936	\$104,936	None
Phase 3 Metal Doors, Finishing Hardware & Miscellaneous Finishings	"Company S"	\$78,550	\$51,345	None
Floor Trench Drains	"The Firm"	\$12,980	\$12,980	Subsidiary
Phase 3 Paint	"Paint Company"	\$49,900	\$49,900	Subsidiary
Phase 3 Millwork	"The Millwork Company"*	\$16,940	\$17,109.40	Quote submitted to "The Owner"
Phase 3 Block Walls & Masonry	"Masonry Company"	\$24,000	\$24,000	Quote submitted to "The Owner"
Phase 3 Thin-set Tiling	"Construction Firm"	\$9,800	\$9,800	Subsidiary
* Overall price increased due to change in PST				