

Manitoba mbudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2014-0510

MANITOBA HOUSING AND RENEWAL CORPORATION

REPORT ISSUED ON DECEMBER 23, 2016

CASE SUMMARY

A complainant contacted Manitoba Ombudsman because he was concerned that the Manitoba Housing and Renewal Corporation (MHRC) had retained architectural services from a company without a competitive bidding process.

MHRC states that rather than using a competitive bidding process, it expanded the scope of existing contracts it had awarded the company after a public tendering process.

Manitoba Ombudsman found that while MHRC's decision deviated from the existing applicable procedure, given that the architectural services related to MHRC's first for-profit residential development, MHRC's rationale for its approach was reasonable. We are concerned, however, that MHRC did not clearly communicate its approach to potential bidders. As a result, we recommend the following:

- That MHRC review its procurement process for multi-phase projects to ensure it respects its procedures and receives the best value for money. More specifically, when tendering contracts that may be extended, MHRC should look at opportunities to clearly communicate this intent to potential bidders at the outset of the process.

Manitoba Ombudsman is also concerned that MHRC agreed to expand the scope of existing contracts worth significant funds without initially putting any details in writing about the services being exchanged. As a result, we recommend the following:

- That in the future, MHRC formally document its commitments of public funds in exchange for goods or services, especially when a significant amount of money is committed.

Given that Manitoba Families is responsible for MHRC services and programs, we provided the department a copy of this report. The department advised that MHRC will be implementing both recommendations.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, and municipalities, and their officers and employees.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation. On other occasions it is written policy or established procedures implemented to give effect to legislative purpose. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision.

The goal of administrative investigations is to review complaints and to identify areas requiring improvement.

KEY ISSUE

- **Did MHRC follow legislation and policy when it awarded contracts for the Bridgwater Trails development without a competitive bidding process?**

MANITOBA HOUSING AND RENEWAL CORPORATION

MHRC is a Crown corporation created by the Housing and Renewal Corporation Act. Section 2 of the act states that the purpose of MHRC is as follows:

- (a) to ensure that there is an adequate supply of housing stock in Manitoba;*
- (b) to enhance the affordability of, and accessibility to, adequate housing for Manitobans, particularly those of low and moderate income or those with specialized needs;*
- (c) to maintain and improve the condition of existing housing stock; and*
- (d) to stimulate and influence the activities of the housing market to the benefit of Manitobans as a whole.*

MHRC receives policy direction from the provincial government and is governed by a board of directors appointed by the Lieutenant Governor in Council.

According to the MHRC website, MHRC provides subsidies to approximately 35,000 housing units, of which approximately 18,000 are owned by MHRC. MHRC also develops suburban neighbourhoods in Manitoba and reinvests the profit from land development into province-wide housing initiatives.

While MHRC policies refer to the corporation as “Manitoba Housing,” this report refers only to the name MHRC, as it is the legal name of the corporation.

BACKGROUND INFORMATION

On May 1, 2002, the provincial government approved the development of approximately 1,257 acres of land in southwest Winnipeg that was owned by MHRC. The following year, MHRC was authorized to enter into all agreements deemed necessary to proceed with the development of this land, including the hiring of consultants and professionals. This project was MHRC's first for-profit residential development and is comprised of four neighbourhoods:

- Bridgwater Lakes (area 1)
- Bridgwater Centre (area 2)
- Bridgwater Trails (area 3)
- Bridgwater Forest (area 4)

On December 21, 2010 MHRC issued three requests for proposals (RFPs) related to areas 1 and 2. The same company (Company X) won all three competitions. This resulted in MHRC and Company X signing the following three contracts on September 1, 2011:

- An architectural services agreement for area 1 worth approximately \$891,700
- An architectural services agreement for area 2 worth approximately \$311,400
- An architectural services agreement for landscaping and fencing for areas 1 and 2 worth approximately \$7,665,000 (including construction costs)

In 2012, the provincial government approved the development and sale of serviced building lots in area 3. MHRC did not issue any RFPs for architectural services for phases 1 and 2 of this neighbourhood. Instead, MHRC decided to expand the scope of its existing contracts with Company X to include work on these phases for area 3. MHRC states this was communicated verbally to Company X in late 2012 or early 2013. The agreement for architectural services for phase 1 of area 3 was worth approximately \$7,117,500 (including construction costs).

The complainant is of the view that MHRC awarded Company X the work for area 3 in an unfair manner in that other companies were not allowed to bid for the work as no RFP was issued.

MHRC'S POSITION

MHRC advised our office that it expanded the scope of its existing architectural services contracts with Company X for the following main reasons:

- MHRC had been satisfied with the design services provided by Company X and did not see a need to release an RFP for architectural services and architectural landscape design and fencing for area 3.
- There is significant overlap in the scope of services between area 1 and area 3, resulting in a seamless transition in design services from one area to the next.
- The pricing Company X provided for areas 1 and 2 was carried over at the same rate into area 3, resulting in good value to MHRC for the services being provided.

- MHRC viewed the development as one large project rather than a group of discrete projects and therefore wanted design continuity throughout the areas. Retaining the same company ensured adherence to the same design goals for the entire development.

SCOPE OF THE INVESTIGATION

Our investigation of this complaint included the following:

- Interview with the complainant
- Review of the records submitted by the complainant
- Review of the records submitted by MHRC, including MHRC policy documents and contracts with Company X
- Interview with the MHRC deputy minister, acting chief financial officer, and executive director of housing delivery and land development
- Review of relevant legislation, agreements, and provincial government policy including the Housing and Renewal Corporation Act, the Agreement on Internal Trade, and the General Manual of Administration.

ANALYSIS

Did MHRC follow legislation and policy when it awarded contracts for the Bridgewater Trails development without a competitive bidding process?

MHRC tendering procedures

At the time of awarding the architectural services contracts for phases 1 and 2 of area 3 to Company X, MHRC's procedure for tendering requirements stated that any MHRC purchase of services and works of \$50,000 and over required a public tender on MERX, which is an electronic tendering service. The procedure also required that notification of the bid opportunity be faxed to known vendors or contractors. The tendering procedure stated that the above process did not need to be followed if special circumstances, such as emergencies or health and safety issues, dictated otherwise, or if a purchase was scheduled on a service standing agreement or standing offer. A service standing agreement is an agreement used over a period of time that MHRC enters into based on the outcome of a competitive process (typically on MERX). A standing offer is an offer from a supplier to provide goods or services at a pre-arranged price, if required.

In our view, this procedure required tendering the contracts for area 3 because the work was worth over \$50,000, was not scheduled on a service standing agreement or offer, and there were no special circumstances such as emergencies or health and safety issues. For instance, there is no evidence that a public tender would have been impossible in the circumstances due to time constraints.

Moreover MHRC also had a tendering procedure at this time (PR-1002) stating that it is MHRC policy "to procure goods and services in a sustainable and cost effective manner, within budget

and specified authorization levels, demonstrating fairness to suppliers.” The procedure set out further notification requirements for contracts that are publicly tendered.

MHRC, however, states that these procedures were initially developed for activities related to the construction and maintenance of social housing and were not practical for its for-profit development in southwest Winnipeg.

It advises that because this project falls outside the scope of MHRC’s usual work, its procedures did not fit well with the procurement of services for the development. MHRC is of the view that participating successfully in free market activity requires adhering to industry practices rather than government practices.

MHRC believes it had legitimate reasons for expanding the scope of its existing architectural services contracts with Company X for area 3. We note, however, that when MHRC issued its requests for proposals for architectural services for areas 1 and 2, it did not clearly communicate to potential bidders that the winning bidder(s) may also be awarded work for area 3. This may have given the impression that MHRC would tender the work for area 3 at some point in the future. When MHRC chose to expand the scope of existing contracts rather than tender the work, it may have appeared that the work for area 3 was awarded in an unfair manner.

While MHRC’s decision deviated from the existing applicable procedure, we are of the view that given this project was MHRC’s first for-profit residential development, MHRC’s rationale for its approach is reasonable. We are concerned, however, that MHRC did not clearly communicate to potential bidders that the winning bidder(s) of the work for areas 1 and 2 might also be awarded work for area 3. Going forward, MHRC should review its procurement process for multi-phase for-profit projects to ensure that its approach respects its procedures, receives the best value for money, and is clearly communicated to potential bidders. MHRC should look at opportunities to clearly communicate its intent for a potentially multi-stage project in any applicable tendering documents. This would ensure that a formal competitive procurement process has occurred for all aspects of the work, rather than a portion of it.

Current MHRC tendering policy

We note that MHRC updated its procurement policies in May 2014, subsequent to its decision to expand the scope of its existing contracts with Company X. The new tendering policy (POL-1) states that tendering requirements may be waived for the purchase of services that can be provided only by authorized professionals, such as architects. This is also an exception recognized in the Agreement on Internal Trade, which is a Canadian intergovernmental trade agreement that applies to MHRC. MHRC advises that its most common situation for waiving tendering for the purchase of professional services is one of design continuance, where a consultant has already been contracted on a project through the bidding process and additional services are required of a similar or identical nature.

In our view, professional services should be retained through a competitive procurement process whenever possible. MHRC advises that in general, it is also of this view. Going forward, we encourage MHRC to obtain professional services, including architectural services, through a competitive procurement process whenever possible.

Lack of written agreement

When MHRC awarded Company X the work for area 3, this was communicated verbally and not put in writing. MHRC has advised that it does not have any documentation regarding its evaluation of the performance of Company X, such as a Consultant/Contractor Performance Evaluation Report Form, prior to awarding the company the work for area 3. MHRC routinely completes this form in order to gauge the safety, quality, delivery, cost and customer service provided by a contractor. MHRC advises that an evaluation using this form is performed on all major capital projects after total completion and used to gather performance data for future reference on new work opportunities. MHRC officials state that they did their due diligence and evaluated Company X's performance, but no records of this evaluation exist. MHRC advises that it will complete the Consultant/Contractor Performance Evaluation Report Form for Company X after the company completes its responsibilities for phases 1 and 2 of area 3, which is expected around the end of 2017.

MHRC indicates that the informal verbal agreement to extend contracts with the company, without written evaluation, was consistent with the arrangements it had with other contractors on this development. MHRC advised our office that this agreement was communicated verbally in order to save time and be more efficient. After MHRC learned that a complaint had been filed with Manitoba Ombudsman regarding the awarding of the architectural services work for area 3, MHRC proceeded to formalize its arrangement with Company X. MHRC advised our office that on September 29, 2015, its board approved extending MHRC's architectural services agreements for area 2 to include phases 1 and 2 of area 3. MHRC advises that in October 2015 it signed contracts with Company X to reflect this decision.

While it is positive that MHRC now has written contracts with Company X regarding the extension of the work, it is very concerning that MHRC agreed to this multi-million dollar commitment without initially putting any details in writing about the services being exchanged for this significant amount of funds. Our office believes that when public bodies commit funds, these commitments should be put in writing at the outset and not years after the commitment has been made. In this case, a written agreement would have clarified when MHRC awarded Company X the architectural services contract for area 3.

RECOMMENDATIONS

In light of the above, we recommend the following:

Recommendation 1

- **That MHRC review its procurement process for multi-phase projects to ensure it respects its procedures and receives the best value for money. More specifically, when tendering contracts that may be extended, MHRC should look at opportunities to clearly communicate this intent to potential bidders at the outset of the process.**

Recommendation 2

- **That in the future, MHRC formally document its commitments of public funds in exchange for goods or services, especially when a significant amount of money is committed.**

THE DEPARTMENT'S RESPONSE TO THE RECOMMENDATIONS

Given that Manitoba Families is responsible for MHRC services and programs, we provided the department a copy of this report. The department provided us the following response:

In response to the two recommendations contained in the report, MHRC will commit to clearly communicating to proponents at the start of the tendering process when procuring multi-phase projects that the contracts may be extended into additional phases. Regarding the second recommendation, MHRC acknowledges that it did not formally document its Bridgwater Trails architectural services arrangement in a timely manner, and will ensure that all future commitments involving significant public funds are formally documented at the outset.

We are pleased that the department has accepted our recommendations. The release of this report now concludes our involvement regarding this complaint.

MANITOBA OMBUDSMAN