



OFFICE OF THE CITY AUDITOR COLORADO SPRINGS, COLORADO

Denny L. Nester, City Auditor
MBA CPA CIA CFE CGFM CGAP

15-30 Utilization of Outside Legal Counsel

November 2015

Purpose

The objective of this audit was to document the reasons that the City uses outside legal counsel (OLC) and evaluate whether the uses are benefiting the City. We worked closely with the City Attorney to obtain an understanding of why and when outside counsel was utilized.

The audit scope was January 1, 2014 through May 31, 2015; however, trend analysis considered 2010 through 2015. The City Attorney's Office (CAO) was responsible for legal services to the City, Colorado Springs Utilities, Memorial Health System and all City Enterprises. All enterprises were in our scope.

Highlights

Based on our testing, we concluded adequate criteria were in place to determine the need to use outside legal counsel (OLC) and processes to control selection of OLC firms were consistently followed. Appropriate oversight of OLC activities was provided by an in-house attorney assigned as a liaison to each OLC firm. In addition, a robust process for review of billing accuracy was in place. The cost of OLC had decreased since its peak in 2011.

While we noted no exceptions to the processes reviewed, we identified two observations for enhancement. These areas are discussed on page 3 of this report.

The City Attorney's Office is the legal advisor to the Mayor, City Council, Commissions, and heads of departments in relation to their duties as set forth in City Charter Art. XIII, §13-80. The City Attorney's Office:

- Represents the City in all court cases where the City has an interest and prosecutes all cases docketed into Municipal Court
- Provides legal representation to Colorado Springs Utilities and the Memorial Health System Enterprise
- Provides assistance in transaction matters and employment matters on behalf of the City and all its enterprises
- Reviews, updates, and maintains the City Code and provides legal services to special district, annexation, and finance issues

(Continued on page 2)

Recommendations

1. We recommend that the City Attorney's Office include a right to audit clause in the outside legal counsel retainer agreement template and future agreements.

2. We recommend that the City Attorney's Office maintain centralized documentation of the selection process followed to retain outside legal counsel to reduce reliance on recollection of attorneys involved and to make information available should similar needs arise in the future.

Management Response

The City Attorney's Office was in agreement with our recommendations.

15-30 UTILIZATION OF OUTSIDE LEGAL COUNSEL

Mrs. Patricia Kelly was the City Attorney through September 30, 2011. Mr. Chris Melcher was brought in from outside the organization by Mayor Steve Bach and held the position of City Attorney from October 1, 2011 through January 2, 2014 (officially through January 31, 2014). Ms. Wynetta Massey was promoted to Interim City Attorney and then City Attorney to succeed Mr. Melcher. The scope of the audit covered Ms. Massey's term in office, in order to consider current philosophy and processes regarding use of outside legal counsel.

The current City Attorney indicated that OLC was used only when one of several criteria was met. Usage criteria included 1) highly specialized expertise was needed; 2) a time limitation existed, where in-house staff resources were not available; 3) conflict of interest required outside staffing; and 4) other unusual circumstances approved by the City Attorney. We did not observe any exceptions to this philosophy. Over 90% of the OLC costs incurred during the period we reviewed were to obtain specialized legal expertise.

The amounts paid for OLC by entity by year was reported to City Council as part of the 2016 budget process. We projected 2015 total expenditure by extrapolating from the mid-October amounts reported to Council. The City Attorney's Office entered into and managed retention agreements with OLC firms. The retention agreements were not-to-exceed contracts. The costs shown below included these retention agreement expenses plus other non-retention related legal costs which were managed and approved directly by the receiving department. Examples of these non-retention costs included expert witnesses or other subject matter experts, as well as certain bond related issuance costs.

Cost of Outside Legal Counsel by Entity						
	2010	2011	2012	2013	2014	2015 *
City	\$368,755	\$787,723	\$1,165,143	\$933,167	\$861,629	\$620,130
Colorado Springs Utilities	\$2,965,282	\$2,673,404	\$1,810,734	\$1,650,416	\$2,416,223	\$2,143,578
Memorial Health System	\$4,759,432	\$5,605,772	\$3,679,145	\$2,141,253	\$1,280,406	\$245,389
Total OLC	\$8,093,469	\$9,066,899	\$6,655,022	\$4,724,836	\$4,558,258	\$3,009,097

* 2015 year end projected based on actuals as of 10/16/2015

We appreciate the cooperation of personnel in the City Attorney's Office during the course of this audit.

15-30 UTILIZATION OF OUTSIDE LEGAL COUNSEL

Observation 1

The retainer agreement templates that served as the standard outside legal counsel agreements for the City, Colorado Springs Utilities and Memorial Health System did not include a right to audit clause. A right to audit clause would provide the City or its enterprise with the contractual right to request additional or subsequent documentation. Without a mutually authorized right to audit clause, there could be a misunderstanding of the City's right to validate billing or timekeeping data. Retention agreement templates were reviewed annually and changes were incorporated as situations arise. A right to audit clause had not been included in the past.

Recommendation

We recommend that the City Attorney's Office include a right to audit clause in the outside legal counsel retainer agreement template and future agreements.

Management Response

The City Attorney's Office (CAO) employs a vigorous, multi-step process for review and approval of OLC invoices. This review includes a tracking process to confirm that invoices are approved only in conformance with the terms of the retention agreements. However, the CAO acknowledges that a right to audit could be included and might be useful in some circumstances. As a result, a right to audit clause has been incorporated into the 2016 Retention Agreements.

Observation 2

Procurement of professional legal services was one of the competition exceptions listed in the City Procurement Rules and Regulations (January 2011) in section 3-101.14 - Competition Exceptions. The section stated: "...The applicable exceptions must be cited in the comments section of the purchase order or in a formal memo signed by the proper approving authority when applicable and placed in the file for audit purposes." Exception L was "Obtaining professional legal services for trials, research, opinions, and testimony such as expert witnesses, trial consultants, case advisors and consultants, etc. No limit on cost as long as the City Attorney's Office has determined the need for such service is appropriate and the cost is fair and reasonable."

The proper process for determining that outside legal counsel was needed and selecting a firm was being conducted within the CAO. Typically several firms were interviewed by phone, a subset of those firms was asked to submit a proposal, and one firm was selected by CAO management. Documentation of the process used to select outside legal counsel was maintained in email and files of individual attorneys and was sometimes difficult to obtain for the audit. A centralized repository of previous evaluations of OLC could facilitate future decisions. A case management system could incorporate this function as well as handling billing, documents and tasks.

Recommendation

We recommend that the City Attorney's Office maintain centralized documentation of the selection process followed to retain outside legal counsel to reduce reliance on recollection of attorneys involved and to make information available should similar needs arise in the future.

Management Response

The City Attorney's Office agrees that it is a better practice to have OLC selection information maintained in one location. As a result, the current process has been altered such that all selection notes and materials will be forwarded to the Legal Administrator for maintenance and future reference.

This audit was conducted in conformance with the International Standards for the Professional Practice of Internal Auditing, a part of the Professional Practices Framework promulgated by the Institute of Internal Auditors.