



CITY OF RAPID CITY

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MEMORANDUM

TO: Legal and Finance Committee

CC: Public Works Committee
Mayor Hanks
Kevin Thom
Jim Preston

FROM: Jason E. Green, City Attorney

JEG
4-16-2008

DATE: April 16, 2008

RE: MG Trust Agreement

It is my recommendation that the Council not approve the proposed agreement with MG Trust Company. This is item No. 25 on the April 16, 2008, Legal and Finance Committee agenda.

The Council has approved the concept of adding an additional 457(b) Deferred Compensation Plan through Edward Jones to the City's two existing plans. This would provide an additional option for City employees to choose when selecting a deferred compensation plan. The Council has also previously approved an agreement with Digital Retirement Solutions to act as the administrator of the Edward Jones plan. The final step is approving an agreement with a trust company. The trust company will ultimately hold all of the assets of the individual employees' retirement accounts. Therefore, it is an absolutely integral part of implementing the Edward Jones plan. However, it is my opinion that the agreement as presented poses a significant and substantial liability risk to the City of Rapid City and to its taxpayers. Therefore, I can not recommend its approval.



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OPPORTUNITY

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First, the agreement requires that the City defend, indemnify, and hold the trustee harmless from any and all losses. It is my opinion that this potentially puts the City in the position of being responsible for any claims brought by city employees against the trustee. I believe this is an unacceptable risk for the City Council to undertake, and it is a risk that we do not currently have in either of the other two plans.

Second, the agreement and the obligations of the trustee are governed by the laws of the State of Colorado. I believe it is bad practice for the City to agree to be bound by the laws of a foreign state. At a minimum, the Council should hire a lawyer who is licensed in the State of Colorado to obtain an opinion regarding what obligations Colorado law would impose on the trustee.

Third, any litigation that arises out of this agreement must be brought in Denver, Colorado. Therefore, if there is a breach of this agreement, the City would have to hire an attorney licensed to practice in Colorado and litigate in Colorado. Obviously, this would be very expensive. In addition, the contract requires binding arbitration of any disputes and that the arbitration take place in Colorado. I routinely strike arbitration provisions from form contracts that are reviewed by my office. Arbitration is often described as an inexpensive alternative to litigation. However, in practice it often results in additional litigation regarding the arbitration proceeding. Further, since the arbitration is binding, there would be no avenue to seek appeal of the decision of the arbitrators. It is my opinion that the City should not waive its right to seek full protection of its rights and the rights of its employees in a court of competent jurisdiction.

Finally, there is a provision in the contract that states that the trustee is not responsible for the adequacy of the trust fund to discharge any payment obligations and liabilities under the plan. It is my opinion that this provision is completely intolerable. The trustee is being hired for the specific purpose of safeguarding and maintaining the employee's funds. This provision essentially provides a blanket exemption from any responsibility in carrying out the fiduciary obligations of a trustee.

Many of the problems I have identified with this agreement arise because of the nature of this particular trust company selected by Edward Jones. It is my understanding that MG Trust Company was created by the State of Colorado. Therefore, it does not have the ability to negotiate about which state's laws will apply nor does it have the ability to negotiate with regard to the indemnification provision as these requirements are mandated by its charter. However, MG Trust is not the only trust company that performs these types of services. There are other options, so I do not believe it is fair to say that rejection of this contract eliminates the possibility that Edward Jones could provide a 457 Plan to the city employees. Rather, it would require identification of a different trust company.

Please feel free to call with any questions.

JEG/map