



STAFF REPORT ACTION REQUIRED

Review of General Contract Conditions for Capital Projects

Date:	May 30, 2012
To:	Government Management Committee
From:	Executive Director, Technical Services Treasurer
Wards:	All
Reference Number:	P:\2012\Cluster B\TEC\GM12025 (AFS# 13988)

SUMMARY

This report summarizes the results of a recent review of the City's general contract terms and conditions related to construction contracts. The new terms and conditions being recommended in this report are expected to attract more competitive bids in an effort to lower the overall cost of capital construction projects.

RECOMMENDATIONS

The Executive Director, Technical Services and the Treasurer recommend that:

1. City Council adopt the use of the *City of Toronto General Conditions of Contract*, an amended version of the Ontario Provincial Standards *General Conditions of Contract*, as set out in Appendix B of this report, as the City's general terms and conditions for use with linear capital work contracts, effective from October 9, 2012;
2. City Council adopt the use of the Canadian Construction Documents Committee's CCDC-2 *General Conditions of Stipulated Price Contract* along with the City-specific Supplementary Conditions of contract documents pertaining to the CCDC 2 General Conditions of Contract, as set out in Appendix C of this report, as the City's General Conditions for use with vertical capital work projects, effective from October 9, 2012; and,
3. City Council authorize the Executive Director of Technical Services, from time to time, to make those technical, procedural and substantive amendments, that he determines are appropriate, except for changes that materially impact the potential liability of the City, to both sets of the City's General Conditions, as referred to in

Recommendations 1 and 2, in consultation with the City Solicitor and the Director of Purchasing and Materials Management; and that Division Heads be authorized, in consultation with Legal, to amend the Supplementary Conditions to change the order of priority of documents contained in CCDC-2 clause 1.1.7.

Financial Impact

The City expends a significant amount of funds on construction projects each year. Table 1, below, summarizes the amount spent on construction services over the past three years. The amount varies from year to year depending on a number of factors including the level and scope of capital projects for the year.

Table 1: Summary of Purchases, 2009 to 2011

	2011		2010		2009	
	POs / Contracts Issued		POs / Contracts Issued		POs / Contracts Issued	
	#	\$ Value	#	\$ Value	#	\$ Value
Construction Services	569	555,301,576	549	860,586,408	513	985,688,934

While it is not possible to accurately estimate the financial impact, the terms and conditions recommended and outlined in this report are aimed at maximizing competition which should result in lower quotations and pricing for the City's construction requirements.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

ISSUE BACKGROUND

Based on feedback received from the construction industry and trade associations, there appears to be a perception or concern that the current terms and conditions associated with the City's capital construction projects may inadvertently drive up the cost of our projects due to language ambiguity and attempting to utilize contractual terms and conditions better suited for linear type work for vertical/building type work. As part of the City's continuous improvement efforts related to capital delivery, a team of City staff from various divisions responsible for capital construction projects across the City and the City Solicitor's Office have reviewed the City's terms and conditions with the goal of improving the clarity of the City's contracts and encourage more competition for City tenders, thereby providing better value to the City.

COMMENTS

The General Conditions of Construction Contract document currently used by the City were adopted by City Council in April 2000. The document is based on the Ontario Provincial Standards (OPS) form of document for the construction of municipal

infrastructure. The OPS is owned jointly by the Ministry of Transportation and the Municipal Engineers Association. It should be noted that two major industry associations, the Ontario Road Builders' Association and the Ontario Sewer and Watermain Construction Association, are members of a subcommittee responsible for reviewing and revising the document.

A survey of major Ontario municipalities in Ontario conducted by staff in 2005 and 2007 revealed that most Ontario municipalities were using:

- the OPS based general conditions for municipal construction of roads, sewers and water mains. This type of work is typically called "linear" work, and the contracts are mostly based on unit prices;
- *CCDC-2 General Conditions of Stipulated Price Contract* published by the Canadian Construction Documents Committee (CCDC), with their own supplementary terms, for "vertical" work such as building construction and renovation. The contracts are generally fixed price or based on a lump sum amount.

The Canadian Construction Documents Committee (CCDC) is a national joint committee responsible for the development, production and review of standard Canadian construction contracts, forms and guides. The membership of CCDC is made up of the owner representatives from the Royal Bank of Canada, Design & Project Delivery Services BLJC, Defence Construction Canada and Ontario Realty Corporation, and appointed volunteer members from the Association of Consulting Engineering Companies Canada (ACEC), Canadian Construction Association (CCA), Construction Specifications Canada (CSC) and Royal Architectural Institute of Canada (RAIC).

The City's capital work projects include both linear (sewer, water main, road) and vertical (buildings, plants) work. While the contractors involved in linear work contracts are supportive of the OPS based general conditions due to their familiarity with the OPS document, the contractors involved in vertical work appear to prefer the CCDC document. In fact, their trade association, the Ontario General Contractors Association, has encouraged the City to use CCDC standard forms of contract.

In a review of the CCDC-2 general conditions document in 2007 by a team of City staff from Legal Services, Technical Services, Facilities & Real Estate and Parks, Forestry & Recreation, it was concluded that while the CCDC-2 document was not acceptable to the City in its existing form, it could be amended by means of a set of supplementary conditions to meet the City's needs for fixed price vertical work contracts. This is the format used by many municipalities and other public entities that use the CCDC-2 document. Staff did not pursue using the CCDC documents in 2007 because CCDC was conducting a major review of CCDC-2 at that time. The revised CCDC-2 was not available until 2008. City staff commenced another review of the City's general conditions of contract in November 2009. Representatives from Technical Services, Purchasing, Toronto Water, Transportation Services, Parks, Forestry and Recreation and Real Estate Services (Design, Construction and Asset Preservation) reviewed the

construction contracting practices of Peel Region, the City of Mississauga, York Region, the Ontario Realty Corporation, and the Ontario Legislative Assembly. Staff also considered the 2007 staff review and reports and input from the Residential and Civil Construction Alliance of Ontario ("RCCAO"), a construction industry association. Following this review, a decision was made to recommend the use of two sets of general conditions:

- a) an OPS-based set of general conditions for linear work (similar to the City's present GCs); and,
- b) the CCDC-2 General Conditions of Contract with a City-specific set of Supplementary General Conditions for vertical work.

This approach is supported by the survey set out in Appendix A of this report.

Following this decision, staff representatives broke into two teams:

- **Linear Work:** a team of staff from Legal Services, Technical Services, Transportation Services, Toronto Water, Purchasing and Parks, Forestry & Recreation who reviewed and revised the current City general conditions for linear work. Insurance and Risk Management was consulted on the insurance provisions; and,
- **Vertical Work:** a team consisting of staff from Legal Services, Technical Services, Facilities & Real Estate, Parks, Forestry & Recreation, Toronto Water and Purchasing reviewed the current version of the *CCDC-2 General Conditions of Stipulated Price Contract* and the Supplementary Conditions of other municipalities and public entities and developed Supplementary Conditions to meet the City's specific needs. Insurance & Risk Management staff was consulted on the insurance provisions.

Revision of General Conditions of Contract – Linear Infrastructures

Since the adoption of the current General Conditions of contract in 2000 (the "current GC's"), minor changes have been made in 2005 and 2007. The changes in 2005 were to enhance the dispute resolution process, particularly the negotiation and arbitration conditions and processes. The 2007 revisions were made in conjunction with the introduction of the standard construction tender template for language consistency.

The objectives of the current review and revision process were:

- where possible, to consolidate relevant terms and conditions that presently exist in other parts of the tender document into the general conditions document;
- to ensure the City's general conditions accurately reflect the balance of risk and responsibilities between the City and its general contractors; and,

- to maintain consistency as close as possible with the OPS based document while satisfying the City's needs/requirements.

The staff review of the City's current document did not result in substantial changes to the document. As it is, the City's document is closely aligned with the OPS document. The review has resulted in the following improvements:

- update to the insurance provisions in the City's document as recommended by the City's Insurance & Risk Management division;
- deletion of unnecessary or redundant wording; and,
- clarifications of definitions and other wording.

Attached as Appendix B is the amended version of the City's general terms and conditions for linear capital work contracts.

Review of CCDC-2 General Conditions of Stipulated Price Contract for Vertical Works

The objectives of the review were to:

- adopt the use of the current version of the *CCDC-2 General Conditions of Stipulated Price Contracts* from the Canadian Construction Documents Committee CCDC for City vertical projects, and supplement the document with provisions that are applicable to the City of Toronto capital works construction environment;
- review the CCDC-2 supplementary clauses from other municipalities and public entities and consider best practices in their documents that meet the City's needs;
- create a standardized document for the entire corporation for all City contracts for vertical projects; and,
- replace the current general conditions with a document that reflects a realistic apportionment of risk between the City and contractors with the goal of attracting more bids and increasing competition, thus hopefully lowering procurement costs, while ensuring the protection of the interests of the City and its residents and recognizing the City's position as a public authority with specific legal and policy obligations.

The review team had assembled the CCDC-2 supplementary clauses from ten major Ontario municipalities and public agencies. The supplementary clauses from the following municipalities were reviewed in detail and compared to the existing City of Toronto General and Specific Conditions of Contract:

- The Regional Municipality of Peel;
- Legislative Assembly of Ontario (OLA); and,
- The City of Mississauga

Among other minor changes, selected clauses in the CCDC-2 are supplemented with the City's own provisions that are in line with the supplementary clauses of other major

municipalities in Ontario and the OPS-based General Conditions of Contract for linear projects.

Over 80% of the 251 clauses in the CCDC-2 documents were either adopted by the review team without amendments, or adopted with minor modifications that do not alter the original intentions of the CCDC-2 document. The rest of the CCDC-2 document was supplemented with City-specific Supplementary Conditions. The Supplementary Conditions are attached as Appendix C to this report. .

It should be noted that the CCDC-2 document is subject to copyright and there is a charge associated with the sealing of the documents. At present, that charge is approximately \$14 per seal per copy used. Based on the number of vertical type construction contracts issued in 2010, the cost of the seals is estimated at \$10,000.00 per year City wide.

The following are highlights of some of the more significant changes to the CCDC-2 documents. One should refer to the Supplementary Conditions for the exact language of the changes.

Definitions

- The use of the term 'Consultant' in the CCDC document appears to presuppose that there will be an external consultant on most contracts. Additionally, the CCDC document provides the 'Consultant' with substantial decision-making power. Given the City's responsibilities as a municipality and the project management expertise of City staff, the term 'Consultant' has been redefined in the Supplementary Conditions to mean the entity designated by the Owner as the "Consultant" from time to time, to reflect the fact that on some projects the person carrying out that role will be a member of City staff.

Progress Payments

- The 20 calendar day progress payment timeline in the CCDC document was revised to 30-calendar days which aligns with the time lines in the current GCs. The current time line more realistically reflect the City's administrative protocols for issuing payment as well as the volume of payments issued by the City. The 30-day period will not commence until such time as the Consultant (i.e. contract administrator) has determined that it has received from the Contractor all required documents supporting the invoice and evidencing that the Work being invoiced has been completed, all to his reasonable satisfaction. This condition is introduced to the City's new General Conditions to protect the City from paying unsupported or inappropriate invoices. As required under the City's current GCs, the Contractor will continue to be responsible for providing the City with all supporting materials and documents to support their application for final payment. It is desirable to have the same time line for processing payments in all City projects to provide standardization and consistency.
- The Contractor is required to submit Operation and Maintenance Manuals and to provide training, mark up drawings and record drawings at substantial performance,

as record drawings are a regulatory requirement. This is also a requirement in Peel, OLA, Mississauga, and in the current GCs.

Changes in the Work

- While most of the provisions in CCDC-2 were kept intact, the process of issuing and approving Change Directives and Change Orders will follow the City's current contract change management procedure to improve accountability and tracking.
- A new Liquidated Damages clause was added to supplement CCDC-2. Liquidated Damages is a standard condition in the current GCs and is a means of reimbursing the Owner (i.e. the City) for reasonable costs incurred by the Owner as a result of a delay by the Contractor.

Dispute Resolution

- The CCDC-2 dispute resolution process was replaced with the dispute resolution process from the current GCs. The City's current process better reflects the City's position as a public authority with specific legal and policy obligations which can sometimes be complex. Items that reflect this position include more flexible timelines, optional mediation, and gradual levels of negotiation. As well, the current dispute resolution process will also be the basis for the dispute resolution process for linear type projects. Accordingly, it is desirable to have one dispute resolution process for all City projects to provide uniformity and consistency.

Protection of Persons and Property

- The new document:
 - provides that the Contractor shall be liable for all the costs associated with the replacement of trees that are damaged by the Contractor or its suppliers;
 - that the Contractor shall first consult with and obtain written instructions from the Consultant and Owner before they undertake to repair and/or replace any damages to the Work caused by the Contractor, or of other Contractors, or to adjoining property unless there is a danger to life or public safety, in which case repairs must be carried out immediately. This allows for proper tracking and accountability;
 - was enhanced to include the City's current occupational health and safety provisions.

Governing Regulations

- Under the new document, Contractors are required to assist the City in the application for, or recovery of, funds when taxes or duties are changed. This modification applies to both the vertical and linear contracts.

Insurance and Contract Security and Indemnification, Waiver of Claims and Warranty

- The insurance requirements of the CCDC-2 were replaced with the City's new insurance requirements, following consultation with City Legal and Insurance and Risk Management (IRM). IRM reviewed the previous insurance wording included in

the General Conditions of the City's construction contract and the CCDC insurance wording and developed insurance requirements that:

- i) considered the insurance provision requirement of both documents; and
 - ii) included insurance policy requirements to reflect the vast and diverse City construction contracts, such as Pollution coverages, which were not part of the CCDC requirements.
- The indemnities in the CCDC-2 were deleted and replaced with the City's own indemnity language, which is similar to that of the linear GC document. The unsupplemented CCDC limits indemnification to \$2 million for contracts with a value under \$2 million and to the actual contract price up to no more than \$20 million for contracts over \$20 million. This limit could leave the City exposed to substantial liability considering the value and importance to the City's key infrastructure of many of the projects undertaken by the City. The current General Conditions do not limit the amount of the Contractor's indemnity to the City, and this has been continued in the new Supplementary Conditions. This was done in light of the City's status as a municipality and a public authority and recognizing its particular role in safeguarding its assets and the financial interests of the public.

Revision of General Conditions of Contract – Linear and Vertical

In some areas identical or similar changes were incorporated into the new or revised conditions. Some are set out above.

- In particular, the contract provisions with respect to insurance, indemnification and warranty are mostly harmonized between the two sets of conditions. The new standard insurance provisions were developed by the City's Insurance and Risk Management and are being adopted for use in the City's construction contracts to enhance the protection of the City against potential claims and liability. The insurance requirements can be amended, as required, on a project by project basis, to ensure that the appropriate coverage, in appropriate amounts is in place on all jobs.
- The CCDC and OPS standard warranty period is 12 months; however, the City's current 24-month warranty period has been retained as the default warranty period in all of the City's vertical and linear projects. The City's standard 24-month warranty period has been successful in safeguarding the City against premature failures, defects and deficiencies in machinery, materials and workmanship, and it is recommended that this practice be maintained and continued. The warranty period and when it commences to run can also be adjusted on a case by case basis, if appropriate, in light of the particular circumstances of a contract.

Amendments to General Conditions Documents

It is being recommended that the Executive Director of Technical Services be authorized, from time to time, and in conjunction with the City Solicitor and PMMD, to make amendments to the General Conditions documents. This is a delegated power the Executive Director currently has been granted by Council with respect to the current GCs for contracts under his purview. The Executive Director and his staff were the leads on the new General Conditions project and have the expertise and the understanding of the issues that are required to make the necessary changes, as may be required. It would be impractical for every change to be brought before Council and having one central knowledgeable senior staff member being able to make the changes, as may be needed, is the best way to ensure the integrity and consistency of the City's General Conditions. In the event any changes were proposed that would materially impact the potential liability of the City, the Executive Director would report back to seek authority to make any such change to the documents.

As well, it is being recommended that Division Heads in consultation with City Legal be permitted to alter the order of priority of documents in CCDC-2 clause 1.1.7 where appropriate for their projects. This is because some divisions have expressed a concern that the standard CCDC order of priority of documents may be more appropriate for their type of projects.

Implementation and Effective Date

It is proposed that the new City of Toronto General Conditions of Contract for linear projects be effective from October 9, 2012. This date was chosen because the document is very similar to the City's existing GCs and is familiar to both staff and the construction industry, so no training or information sessions are required prior to implementation. Before the new CCDC-2 and Supplementary Conditions documents are implemented for vertical construction projects, City staff will have to be trained with respect to the processes and content of the new documents and staff will want to provide the opportunity for the industry to be educated about the documents. For these reasons, it is recommended that implementation of the CCDC-2 and Supplementary Conditions be effective for vertical projects as of October 9, 2012.

As the general contractors involved in vertical/facility type work prefer the CCDC document for General Conditions (GCs) of contract, the industry's various associations such as the Ontario General Contractors Association (OGCA), the Residential and Civil Construction Alliance of Ontario (RCCAO), and the Ontario Association of Architects (OAA) have been consulted to gain their advise and input in the adaption of the CCDC-2 as the General Conditions of Contract for the City's construction contracts related to facility type work. With respect to the linear GCs, consultations were undertaken with the Greater Toronto Sewer and Watermain Contractors Association (GTSWCA) and the Toronto Area Road Builders Association (TARBA).

Based on several meetings with the above associations, a new set of GCs which significantly incorporate the CCDC-2 general conditions have been developed which

accurately reflect the nature of the construction work to be undertaken and result in a fair and reasonable apportionment of risk between the parties. The City's new GC's should attract more bids thereby achieving increased competition, which potentially should result in lower costs, while appropriately protecting the City's interest as a municipal entity and public funds.

The City intends to measure the effectiveness of these new General Conditions through an analysis of future contracts with past contracts performed and report back after a three-year period.

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SIGNATURES

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ATTACHMENTS

Appendix A: CCDC Survey, 2005 & 2007

Appendix B: Amended General Terms and Conditions for Linear Capital Work Contracts

Appendix C: Supplementary Conditions to the CCDC-2 Document