



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Appeal Decision - Toronto District School Board v. Cogeco Data Services Inc.

Date: October 27, 2017

To: Government Management Committee

From: City Solicitor
Chief Information Officer

Wards: Ward(s) affected or All

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City or one of its agencies or corporations, and concerns the security of the property of the City or one of its agencies or corporations.

SUMMARY

At its meeting of July 15, 2008, City Council approved on a confidential basis the terms of a lit fibre data services agreement with Toronto Hydro Telecom Inc. ("THTI") in anticipation that the agreement would be assumed and performed by Cogeco Data Services Inc. ("CDSI") as the purchaser of THTI's assets.

As previously reported by the Chief Information Officer, delays to the completion of the build out of the Cogeco high speed WAN network have resulted in the City maintaining more of its data communications service requirements with Bell Canada than originally planned.

As a result of the delays, the Toronto District School Board, Toronto Catholic District School Board and the City of Toronto (the "Customers") requested an arbitration seeking a remedy for the failure by Cogeco to complete the network. On Friday, June 23, 2017 the City of Toronto received notice of a decision (June 23, 2017) of the Superior Court of Justice dismissing the application of the Customers for leave to appeal the arbitrator's previous awards in this matter.

The effect of the decision is that Cogeco is not required to construct the balance of the network, however it does not have the effect of terminating the WAN Agreement and the

City continues to receive services from Cogeco for those sites which have been completed.

Staff require instructions from Council on an urgent basis and have therefore prepared this report to Council.

RECOMMENDATIONS

The City Solicitor and Chief Information Officer recommend that:

1. City Council adopt the confidential instructions to staff in Confidential Attachment 1.
2. City Council direct that the confidential information contained in Confidential Attachment 1 shall remain confidential in its entirety, as it is about litigation or potential litigation that affects the City or one of its agencies or corporations, and concerns the security of the property of the City or one of its agencies or corporations.

FINANCIAL IMPACT

Financial Impact information is available in Confidential Attachment 1.

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

DECISION HISTORY

At its meeting of September 30, October 1 and 2, 2015, City Council adopted Item GM6.9 ("Update on Cogeco Contract Status").

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.GM6.9>

On December 13, 14 and 15, 2016, City Council GM16.6 ("Update on Cogeco Contract Status"), including the Confidential Recommendations contained in Confidential Attachment 1 to the report (October 27, 2016) from the City Solicitor, and directed that Confidential Attachment 1 to the report (October 27, 2016) from the City Solicitor remain confidential as it related to litigation or potential litigation affecting the City or one of its agencies or corporations.

<http://www.toronto.ca/legdocs/mmis/2016/gm/bgrd/backgroundfile-97813.pdf>

COMMENTS

Cogeco was originally contracted in 2009 to provide high speed WAN network services to 221 City sites, which would have migrated these services from Bell Canada by April 2012. (Bell would continue to be responsible for the approximately 500 low – medium speed network services to the balance of City sites that do not require high speed network services). Since the beginning of the contract with Cogeco, 105 of the sites formerly serviced by Bell have been migrated to Cogeco. The failure to complete the contract has resulted in a loss of value to the City as it has not been in a position to migrate the remaining high speed sites from Bell to Cogeco and realize the benefits expected under the Cogeco contract.

These sites include sites contracted for by the Toronto Police Services Board, Toronto Public Library and the Toronto Transit Commission, which are also affected by this decision.

The business case for the Cogeco network contemplated that it would enter into agreements with the Customers for the provision of services using a common network build. Cogeco's failure to complete the agreement therefore resulted in the breach of all three agreements (the "WAN Agreements").

As detailed in the Court's decision, the Customers had applied to the Court for leave to appeal two awards made by an arbitrator utilizing the required process under the agreements with the Customers. These awards determined that the Customers' ability to recover damages for non-completion of the network was limited by the contracts, which contain limitation of liability clauses, and that the remedy of "specific performance" which would have required Cogeco to complete the network (instead of paying damages) was not available in this instance.

The appeal was heard on March 15, 2017 and the decision of the Court was received on June 23, 2017.

The Customers argued that the Arbitrator had erred in his awards by (i) failing to apply fundamental principles of contract interpretation to the WAN Agreements, (ii) applying the limitations of liability in the WAN Agreements so as to allow Cogeco to benefit from its own breach of contract, (iii) misapprehending the test for the equitable remedy of specific performance; and (iv) placing an onus on the Customers to negate the availability of alternate performance of the WAN Agreements.

In its decision, the Court noted that the failure by Cogeco to complete the remainder of its network was due to Toronto Hydro's decision in 2010 to change its approach to the enforcement of regulations under the Electricity Act, 1998 respecting engineering and safety standards for poles. This resulted in additional "pole loading analysis" costs and delays with respect to obtaining permits for aerial fibre to be hung from Toronto Hydro poles. The alternative to the use of the poles was the construction of exclusive underground infrastructure, which was significantly more expensive for Cogeco.

The evidence before the Court was that Cogeco would suffer a \$43 - 67 million loss if forced to complete the network through an order of "specific performance". It should be noted that the City has not incurred any cost with respect to the construction of Cogeco's network, which is entirely at Cogeco's risk, and has not made any payments to Cogeco except with respect to the services received pursuant to the WAN Agreement.

The Court indicates in its decision that during the course of the hearing, the school boards both chose, during the 3-month period between the hearing of the appeal and the issuance of the decision, to terminate their agreements with Cogeco and transition their sites to services offered by Bell Canada. However, the City of Toronto still has an agreement with Cogeco for the current 105 sites which are being operated by Cogeco. The service to these completed sites has been very good and has been provided at excellent rates when compared to other providers for comparable high speed network services.

After consideration of the facts and application of the applicable law, the Court concluded that it was not prepared to grant the Customers' application for leave to appeal on the basis that the issues raised were issues of "mixed fact and law" or "fact alone" from which no appeal was permitted. Having refused leave to appeal, the Court nevertheless went on to consider the merits of the appeal and found, contrary to the submissions of the Customers, that "the Arbitrator did not err in his application of the law or misapprehend the evidence" and that his decision was "a reasonable decision considering the applicable law and evidence before him".

Confidential Attachment 1 contains further comments respecting the decision and its implications, and seeks instructions from Council on next steps.

CONTACT

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SIGNATURE

Wendy Walberg
City Solicitor

Rob Meikle
Chief Information Officer

ATTACHMENTS

Confidential Attachment 1 - Cogeco Appeal Decision - Confidential Comments