

Amendment to Purchase Order Number 6043932 with Drainstar Contracting Ltd. for Construction Services for the Basement Flooding Protection Program Storm and Sanitary Sewer Improvements and Watermain Replacement on Bestview Drive, Goldenwood Road, Harrington Crescent and Kentland Crescent

Date: November 18, 2021

To: Infrastructure and Environment Committee

From: Chief Engineer and Executive Director, Engineering and Construction Services and Chief Procurement Officer, Purchasing and Materials Management

Wards: Ward 17 - Don Valley North

REASON FOR CONFIDENTIAL INFORMATION

This report is about litigation or potential litigation that affects the City of Toronto.

The attachment to this report contains advice or communications that are subject to solicitor-client privilege and litigation privilege.

SUMMARY

The purpose of this report is to request authority to amend Purchase Order Number 6043932 issued to Drainstar Contracting Ltd., as a result of Request for Tender Number 49-2016 for Contract Number 16ECS LU 05FP, for the provision of construction services for storm and sanitary sewer improvements and watermain replacement on Bestview Drive, Goldenwood Road, Harrington Crescent, and Kentland Crescent as part of the Basement Flooding Protection Program.

A Purchase Order Amendment of \$400,000 net of all taxes and charges (\$407,040 net of HST recoveries) is being requested, revising the current Purchase Order value from \$7,650,388 net of all taxes and charges (\$7,785,034 net of HST recoveries) to \$8,050,388 net of all taxes and charges (\$8,192,074 net of HST recoveries).

This Purchase Order Amendment is necessary to address an overrun on the tendered quantity for the "Disposal of Asbestos-Containing Asphalt in accordance with MOE Asbestos Waste Disposal Requirements", as a result of asbestos-containing asphalt being found on additional streets paved within the contract area.

RECOMMENDATIONS

The Chief Engineer and Executive Director, Engineering and Construction Services and the Chief Procurement Officer recommend that:

1. City Council adopts the confidential instructions to staff, in Confidential Attachment 1.
2. City Council direct that the confidential information contained in Confidential Attachment 1, remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege and pertains to litigation or potential litigation.
3. City Council grant authority to amend Purchase Order Number 6043932 issued to Drainstar Contracting Ltd., for the provision of construction services for storm and sanitary sewer improvements and watermain replacement on Bestview Drive, Goldenwood Road, Harrington Crescent, and Kentland Crescent as part of the Basement Flooding Protection Program by the amount of \$400,000 net of all taxes and charges (\$407,040 net of HST recoveries), revising the current Purchase Order value from \$7,650,388 net of all taxes and charges (\$7,785,034 net of HST recoveries) to \$8,050,388 net of all taxes and charges (\$8,192,074 net of HST recoveries).

FINANCIAL IMPACT

Funding for the contract amendment is available in the 2020-2029 Approved Capital Budget and Plan for Transportation Services as summarized in Table 1 below (net of HST recoveries).

Table 1: Financial Impact Summary for Purchase Order Number 6043932

Year	CTP315-07-170 Local Road Rehabilitation
2021	\$407,040
Total	\$407,040

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

DECISION HISTORY

On March 25, 2020, by authority of the Chief Engineer and Executive Director, Engineering and Construction Services, the City amended Purchase Order Number 6043932 with Drainstar Contracting Ltd. for construction services for Basement Flooding Protection Program Storm and Sanitary Sewer Improvements and Watermain Replacement on Bestview Drive, Goldenwood Road, Harrington Crescent, and Kentland Crescent, in the amount of \$216,056, net of all taxes and charges, revising the original purchase order value from \$7,434,332 net of all taxes and charges, to \$7,650,388 net of all taxes and charges.

On August 10, 2016, by authority of the Bid Committee, Contract Number 16ECS-LU-05FP (Tender Call Number 49 2016) for Basement Flooding Protection Program Storm and Sanitary Sewer Improvements and Watermain Replacement on Bestview Drive, Goldenwood Road, Harrington Crescent, and Kentland Crescent, was awarded to Drainstar Contracting Ltd. in the amount of \$7,434,332 net of all taxes and charges. Purchase Order Number 6043932 for construction services in the amount of \$7,434,332 net of all taxes and charges was subsequently issued to Drainstar Contracting Ltd. A copy of the Bid Committee Decision Document can be found at: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2016.BD98.7>

On May 7, 2014, by authority of the Bid Committee, the City retained Stantec Consulting Ltd. to provide Professional Engineering Services associated with Request for Proposal Number 9117-13-7262 for Basement Flooding Protection Program Phase 3 program management, design and contract administration, and post construction services. The total fee for this assignment was \$11,420,492 net of all taxes and charges. Three purchase orders were subsequently issued to Stantec Consulting Ltd. under this assignment: Purchase Order Number 6039567 for program management services in the amount of \$1,942,489 net of all taxes and charges; Purchase Order Number 6039568 for design and contract administration services in the amount of \$9,405,253 net of all taxes; and Purchase Order Number 6039566 for post construction services in the amount of \$72,750 net of all taxes and charges. A copy of the Bid Committee Decision Document can be found at: <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2014.BD179.7>

COMMENTS

In 2016, in support of the City's Basement Flooding Protection Program, Contract Number 16ECS-LU-05FP included storm and sanitary improvements on Bestview Drive, Goldenwood Road, Harrington Crescent and Kentland Crescent, located in the vicinity of Bayview Avenue and Steeles Avenue East in Ward 17 - Don Valley North was awarded to Drainstar Contracting Ltd. In 2014, Stantec Consulting Ltd. was awarded a contract for the provision of professional engineering services supporting this work, including engineering design, the preparation of the construction tender, and contract administration services.

At the tender stage, the unit quantity for the Form of Tender item "Disposal of Asbestos-Containing Asphalt in accordance with MOE Asbestos Waste Disposal Requirements" was estimated based on asphalt core testing undertaken within the contract area. Asbestos was used as an additive to the asphalt mix from the 1960's to mid-1980's to provide greater strength and performance. It is no longer used in asphalt, but in many municipalities, roads that were built between the 1960's and mid-1980 may contain asbestos. In preparing the detailed engineering design for the work associated with this contract, six (6) out of nine (9) core samples taken were found to contain asbestos fibers (three on Bestview Drive, one on Goldenwood Road, and two on Harrington Crescent). Asbestos fibers were not found in the one (1) core sample taken on Kentland Crescent. Based on extrapolation of these results, it was estimated that 425 tonnes of asbestos-containing asphalt would need to be disposed of as a result of the sewer installation work. This quantity was included in the Form of Tender, and Drainstar Contracting Ltd. provided a unit price of \$95/tonne for this item in their bid submission.

During construction, the quantity of asbestos-containing asphalt that required disposal increased for the following reasons:

- Post-contract award, additional material testing completed found that asbestos-containing asphalt was present on all streets in the contract area, and not just on Bestview Drive, Goldenwood Road, and Harrington Crescent as was first confirmed through asphalt core testing completed prior to tender. It is possible that the one (1) core sample taken on Kentland Crescent in the first round of testing was from a location where the original asbestos-containing asphalt had been replaced as a result of road/utility cut repairs, and that core samples taken in the second round of testing were from locations where the original asbestos-containing asphalt remained.
- At the tender stage, it was assumed that the full depth (i.e. 100 to 150 millimetres) of asbestos-containing asphalt would only be removed in areas of sewer trench excavation. Given the deteriorated condition of the roads where this work was undertaken, Transportation Services requested full depth asphalt replacement curb-to-curb for all streets in the contract limits to better align with their State of Good Repair Program requirements and to minimize disruption to the public disruption in the future. This request was not made until after the contract had been awarded.

Change Order Number CO-039 was circulated to the Director, Design and Construction-Linear Underground Infrastructure, Engineering and Construction Services for approval on February 4, 2019. However, its approval was put on hold when questions arose as to whether the City's Project Manager should have attempted to negotiate a better price based on the fact that the overrun was approximately ten (10) times the quantity contained in the Form of Tender.

Between 2019 and March 2021, City staff negotiated with Drainstar. On March 9, 2021, Drainstar terminated negotiations and requested that the City proceed to arbitration. Upon Drainstar terminating negotiations with City staff, Engineering and Construction Services engaged Legal Services to review the circumstances leading up to the request for arbitration and to advise on next steps. Confidential Attachment Number 1

summarizes the communications between Engineering and Construction Services and Legal Services.

CONTACT

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SIGNATURE

Michael D'Andrea, M.E.Sc., P.Eng.
Chief Engineer and Executive Director, Engineering and Construction Services

Michael Pacholok, JD.
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ATTACHMENTS

Confidential Attachment 1 - Drainstar Contracting Ltd. Purchase Order Amendment Number 6043932