

## **Pan Am Aquatic Centre / CSIO Site Remediation Financial Risk Assessment**

<b>Date:</b>	February 4, 2011
<b>To:</b>	City Council
<b>From:</b>	City Manager
<b>Wards:</b>	All
<b>Reference Number:</b>	

### **SUMMARY**

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This report identifies the City of Toronto's exposure to financial and other risks associated with two elements of the development of the Pan Am Aquatic Centre / Canadian Sport Institute Ontario (PAAC/CSIO) facility in Scarborough, namely:

- i. the remediation of University of Toronto and City of Toronto owned land to be used for the project, and
- ii. construction cost overruns

The report outlines measures which are being taken, or could be taken, to mitigate the City's exposure to these risks and consequential financial liabilities, including a recommendation to authorize staff to mitigate the City's risk through a Memorandum of Understanding with PAAC/CSIO project partners.

### **RECOMMENDATIONS**

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The City Manager recommends that City Council:

1. Authorize the City Manager and the General Manager, Parks, Forestry and Recreation to negotiate and enter into a Memorandum of Understanding and related agreements containing contractual obligations in connection with the Pan Am Aquatic Centre/CSIO project with the Ontario Infrastructure Projects Corporation, the Toronto Organizing Committee for the 2015 Pan/Parapan

American Games and the University of Toronto, on terms and conditions satisfactory to the City Manager and the General Manager, Parks, Forestry and Recreation, and in a form satisfactory to the City Solicitor.

2. Authorize the Public Works and Infrastructure Committee to exercise its delegated authority to approve the award of the remediation tender in accordance with the Municipal Code, Chapter 195, Purchasing, irrespective of whether or not the MOU has been finalized at the time the recommendation to award is before the Public Works and Infrastructure Committee.

## **Financial Impact**

The planned remediation of a portion of the Morningside landfill site in Scarborough represents a unique opportunity to enable development with significant economic and social benefits which could not otherwise take place, including the construction of the PAAC/CSIO facility and other potential projects that are part of the long-term Master Plan for the University of Toronto Scarborough campus.

As Council is aware, the City's capital plan is constrained by the City's debt repayment threshold. Given this limitation, when the need for remediation at the PAAC/CSIO site became apparent, staff pursued alternatives to debt financing.

The City's share of remediation costs (up to \$23M) is recommended to be funded from available funds within the Perpetual Care of Landfill Reserve Fund, and will have no debt impact on the 2011 Recommended City Capital Budget.

While landfill containment and monitoring activities are more common than remediation/waste removal activities, both measures are consistent with the purpose of the Perpetual Care of Landfill Reserve Fund and drawing up to \$23M from the Fund is an appropriate use.

As of December 31, 2009 the estimated future liability for post-closure care of Toronto's inactive landfill sites was \$121M. As of this date, \$38M was available in reserves (including \$31.3M in the Perpetual Care of Landfill Reserve Fund and \$7.4M in the Keele Valley Site Post Closure Trust Fund), resulting in an unfunded liability of \$83M.

Drawing on the Perpetual Care of Landfill Reserve to fund remediation work will increase the unfunded liability which Toronto faces for the long-term care requirements of its inactive landfill sites. However, the Recommended 10-Year Capital Plan for landfill perpetual care costs has been updated and will continue to be financed by Solid Waste Management Services (SWMS) user fees through operating budget contributions on a go forward basis, with the result that perpetual care requirements are funded without debt financing.

Specifically, as indicated in Appendix 6 of the 2011 Capital Budget Analyst Notes for SWMS, the projected 2011 year-end balance of the Perpetual Care of Landfill Reserve

Fund is \$171,000. With the reserve essentially depleted by year end, SWMS plans to fund perpetual care projects, estimated at a cost of approximately \$6 million/year (anticipated to increase by the rate of inflation) entirely on a "pay-as-you-go" basis from 2012 onwards. In contrast, annual contributions to this reserve from the operating budget over the past several years have averaged approximately \$3.8 million, representing a partial "pay-as-you-go" approach.

The City is not responsible for construction cost overruns associated with the PAAC/CSIO project, which is being managed by Infrastructure Ontario (IO) on behalf of the Toronto Organizing Committee for the 2015 Pan American and Parapan American Games (TO2015).

It is possible, however, that the City could be liable for incremental construction costs associated with a delay in transferring the PAAC/CSIO site to TO2015/IO by an agreed upon date or in a condition which does not meet environmental requirements. Various measures being taken, planned and recommended in this report can serve to substantially reduce such liability, but cannot, with certainty, eliminate all such risk.

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

## **DECISION HISTORY**

In December 2008, City Council endorsed Toronto's participation in the Bid to host the 2015 Pan/Parapan American Games.

At its meeting in February 2009, Council approved funding (\$49.5 million in 2008 dollars, subject to adjustments for construction cost inflation) for six capital projects to be used as training, competition or festival sites during Games, including \$37.5million for the development of the Pan Am Aquatic Centre / Canadian Sport Institute Ontario (PAAC/CSIO) to be developed and operated in partnership with the University of Toronto.

At its meeting on January 17, 2011 Executive Committee approved the recommendations included in the report (EX2.5) entitled "Toronto 2015 Pan/Parapan American Games Capital Facilities & Investments". Among other matters, this report advises that Council will be asked to consider as part of the 2011 Capital Budget process additional Pan Am Games related capital investments of up to \$47 million, including up to \$23 million for the remediation of City-owned and University of Toronto land located on top of a portion of the lands known as the Morningside landfill site that will be used for the PAAC/CSIO facility in Scarborough.

The Executive Committee also approved the following motion to which this report responds:

*That the City Manager report directly to Council outlining the financial and other risks associated with potential remediation and capital cost overruns, and providing options to mitigate these risks.*

Staff reports related to the Pan Am Games are available at:

<http://www.toronto.ca/legdocs/mmis/2008/ex/bgrd/backgroundfile-16632.pdf>

<http://www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-18591.pdf>

<http://www.toronto.ca/legdocs/mmis/2009/cc/bgrd/backgroundfile-19072.pdf>

<http://www.toronto.ca/legdocs/mmis/2010/sc/bgrd/backgroundfile-30951.pdf>

<http://www.toronto.ca/legdocs/mmis/2011/ex/bgrd/backgroundfile-34833.pdf>

## **ISSUE BACKGROUND**

The Pan Am Games Multi-Party Agreement (MPA) defines the rights and responsibilities of the Toronto Organizing Committee for the 2015 Pan American and Parapan American Games (TO2015), the Canadian Olympic and Paralympic Committees, and the City, Provincial and Federal governments with respect to the governance, financing and delivery of the Games. Among its key provisions, the MPA provides for:

- the incorporation, by Ontario, of a not-for-profit corporation with responsibility for planning, organizing, promoting, financing and staging the Games (i.e. TO2015);
- TO2015 to employ the services of Infrastructure Ontario (IO) as the project manager for various Pan Am capital projects, including the PAAC/CSIO project;
- the City of Toronto and the University of Toronto to each contribute 22% of the capital cost of the PAAC/CSIO; and
- Toronto to assume no responsibility for any deficit of TO2015, and Ontario to indemnify Toronto against any and all claims, liabilities, demands, damages, rights or causes of action, and expenses.

The PAAC/CSIO promises to be the most important sport and recreation legacy facility developed for the 2015 Pan Am Games. Its two 10-lane 50m pools, dive tank, field house, running track and various fitness and training areas are being designed to accommodate the sport, recreation and training needs of Toronto area residents, university students and high performance athletes. The facility will be co-owned by the City of Toronto and University of Toronto, and house the Canadian Sport Institute Ontario (CSIO), a unique training, research and competition centre for Canada's highest calibre athletes.

As the owners of the land on which the PAAC/CSIO facility will be built, the City and University of Toronto need to provide TO2015/IO with a site that is properly zoned and amenable to construction. The site selected for this project requires remediation. The City's share of funding for remediation (up to \$23M) is included in the recommended 2011 Capital Budget and 2012-2020 Capital Plan.

## **COMMENTS**

There are two notable financial risks and impacts associated with the remediation of the proposed site for the PAAC/CSIO facility, as follows:

1. A financial risk that actual remediation costs will exceed the budgeted funding for this project – up to \$52M gross and up to \$23M net – included in the Recommended 2011 Capital Budget and 2012 – 2020 Capital Plan
2. A financial risk that the City and University will be held liable for incremental construction costs if the PAAC/CSIO site is not remediated to the standard required by the Ministry of the Environment and made available to TO2015/IO by the agreed upon transfer date

The nature and magnitude of these risks, and corresponding measures and options to mitigate them, are outlined below, along with an explanation for why the City is not responsible for any construction cost overruns which are not directly attributable to a delay in the hand-over of the site by the agreed upon transfer date.

### **Sufficiency of the \$52M budget for remediation**

The recommended budget for remediation works at the site of the PAAC/CSIO is \$52M. University of Toronto and City of Toronto officials established this budget figure, and are confident that it adequately funds the planned works. It is noted that:

- The \$52M budget figure was based on the extent of work anticipated taking into consideration preliminary field investigations, initial estimated quantities and appropriate contingencies reflecting the extent of information available at the time.
- Since the development of the \$52M budget figure, detailed field investigations and detailed design work have been undertaken. The enhanced site knowledge has resulted in lower estimated quantities for disposal and other refinements to the extent of the works planned. Updated cost estimates, with appropriate contingencies still taken into account, confirm the adequacy of the budget figure.
- The remediation plan has been further informed by discussions with Ministry of Environment officials to ensure that appropriate regulatory requirements have been taken into account.

- The \$52M budget figure incorporates reasonable contingencies given the complexity and nature of the project.

As noted in the January 17, 2011 report to Executive Committee (EX 2.5), a competitive process has been initiated to solicit bids for the remediation contract. This process is being conducted in accordance with Municipal Code Chapter 195, Purchasing, and all applicable City purchasing policies and procedures. Based on the estimated value of this contract, the contract award will require approval of either the Public Works and Infrastructure Committee or Council.

Award approval has been delegated to the Public Works and Infrastructure Committee if the total value of all financial commitments for the works are within the project budget as approved by Council, and the other conditions of the delegated authority set out in Chapter 195, Purchasing, are met. Should the project require additional financing, or any conditions to the recommended award be necessary, Council must approve the additional financing and/or conditions and subsequently approve the contract award.

At the time of award, should additional budget approval be necessary, City staff would consider the specifics of the situation, assess all reasonable options, consult as appropriate with project partners and, having a very high regard for financial impacts, provide information to and seek direction from Council as required. Ultimately, Council could decide not to proceed.

Once the remediation tender award is approved, the contract executed and work is underway, the contingency amount included in the award functions specifically to mitigate the risks posed by the elements of an engineering project of this kind which cannot be known with absolute certainty ahead of time (e.g. despite extensive on-site testing, more waste than anticipated needs to be excavated; etc.)

In addition, on site contract management and engineering inspection services will be used to verify all material quantities and ensure all standards and specifications are met. Such activities will include, but will not be limited to, detailed engineering surveys to verify all excavation/ backfill volumes and linear measures of other unit price quantities, on site inspection, verification/determination and management of all excavated material for re-use and/or disposal, and on site scales to confirm waste disposal tonnages.

### **Potential liability for costs associated with delayed PAAC/CSIO site transfer**

To develop the PAAC/CSIO facility on time and on budget, TO2015 and Infrastructure Ontario (IO) have indicated that the University of Toronto and City of Toronto must provide a zoned and "ready-to-build" site by April 1, 2012.

City and University officials are confident that this timeline can be met if the remediation works begin, as planned, in early April 2011 and there are no major unforeseen delays which compromise the project's schedule and budgeted allowance for contingencies.

Accordingly, deferral of this report or the report EX2.5 now before Council will shorten the amount of time available to complete the remediation, driving up the risk of delays and hence potential liabilities and costs.

Other factors that could impede the schedule, and raise risk, include delays in securing required zoning approvals, and delays that could result from legal actions and unanticipated regulatory requirements. To mitigate these risks, City officials have undertaken public consultation, consulted with Ministry of Environment officials, and initiated required zoning approval processes.

The City has been asked to enter into an agreement with the University, IO and TO2015 that will place binding obligations on the City to deliver the site in accordance with specified conditions and requirements by a certain date and, potentially, certain responsibilities for post-remediation testing and monitoring. Failure to meet the obligations that are ultimately contained in this agreement could result in the City being held liable for breach of contract and responsible for associated damages and costs.

Specifically, on January 11, 2011 City and University officials received from TO2015 a first draft of a Memorandum of Understanding (MOU) for the PAAC/CSIO project. As drafted, the MOU proposes that the City assume liability for unknown, and presently indeterminable, costs for failure to turn-over the site by the date and on the conditions set out in the MOU, as well as for any follow-up remediation measures and changes deemed necessary to meet standards imposed by the Ministry of the Environment, including a requirement to provide by April 1, 2012 a "Record of Site Condition" for the site.

The City and University have advised TO2015 that the degree of risk assigned to the City and University in the draft MOU is not acceptable. We have likewise identified a series of opportunities and mechanisms for mitigating and more evenly apportioning such risks and liabilities between the parties, and requested that a meeting be scheduled as soon as possible to review our concerns.

Drawing on the extensive progress and good-will generated to date as well as the parties' shared interest in moving forward in a timely fashion, the City and University are working towards the finalization of an MOU which appropriately reflects all parties' interests prior to the award of the remediation tender.

However, given that any delay by the City in awarding and entering into the remediation contract increases the chance that the City will not be able to meet the transfer date deadline that is ultimately set and agreed upon, and increases the chance that the City will incur costs, liabilities or financial penalties for such delays, it may be necessary to proceed with the award of the remediation contract prior to the finalization of an MOU. If this occurs, there is a risk that if the parties fail to come to an agreement on the allocation of risks and liabilities, TO2015 may reconsider its commitment to the project after the remediation of the site is underway. It is staff's view that this scenario is unlikely, but Council is advised that it is a potential risk.

To further limit the City's exposure to financial risk associated with the timelines and environmental requirements of the site transfer, this report recommends that the City Manager and General Manager, PF&R, be authorized to negotiate and execute an MOU with the PAAC/CSIO project partners which allocates risks among the parties and provides for a dispute resolution process by which the potential cause of any delay and resulting incremental cost can be investigated and assessed.

This report also recommends that Council authorize the Public Works and Infrastructure Committee to exercise its delegated authority to approve the award of the remediation tender in accordance with Municipal Code, Chapter 195, Purchasing, irrespective of whether or not the MOU has been finalized at the time the recommendation to award is before the Committee.

While the City Manager and General Manager, PF&R will ensure that, to the extent possible, the MOU incorporates opportunities and mechanisms for mitigating and limiting the City's risks and liability, Council is advised that the MOU will place certain obligations on the City and failure to meet those obligations may result in liability for additional costs which cannot be predetermined.

### **Construction cost overruns**

Under the terms of the Pan Am Games Multi-Party Agreement and related agreements to which the City is a signatory, the Province of Ontario is the financial guarantor of construction cost overruns for Pan Am capital projects. As such, the City of Toronto will bear no responsibility for construction cost overruns associated with the PAAC/CSIO unless one of the following conditions prevails:

- as noted above, a cost overrun can be directly attributed to a delay in providing a zoned, ready-to-build site, and the City has entered into an MOU or other binding agreement which assigns it liability for such costs
- a cost overrun can be directly attributed to measures which must be taken during the construction phase in order to address environmental remediation requirements, and the City has entered into an MOU or other binding agreement which assigns it liability for such costs
- the City requests specific changes be made to the facility after the Request for Proposals is awarded to a successful proponent (e.g. the City wishes to add scope to the project at its own cost)



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## **SIGNATURE**

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