



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Litigation Arising from Contract MCP-13-18WS for the Ellesmere Pumping Station Power Generators Upgrade

Date: February 28, 2019

To: Infrastructure and Environment Committee

From: City Solicitor

Wards: All

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 City contracted with Aplus General Contractors Corp. ("Aplus") to upgrade the Ellesmere Pumping Station (the "Project") pursuant to contract MCP-1318WS and Tender 2-2015 (the "Contract"). The Contract was awarded April 25, 2016.

Aplus did not perform the Contract in accordance with its obligations. The City delivered multiple notices of default under the Contract, which Aplus did not address to the City's satisfaction or at all.

Aplus ceased active work on the Project in March, 2018. On November 1, 2018, the City terminated Aplus' right to continue with the Work remaining under the Contract.

In April, 2018, Aplus commenced a legal action against the City. The City defended and counterclaimed.

In November, 2018, the City issued a claim against Zurich Insurance Company Ltd. ("Zurich") under the performance bond Aplus provided at the time that the Contract was

executed (the "Bond"). The City's claim is that Zurich failed to fulfil its obligations under the Bond. Zurich denies it was obligated to act under the Bond.

Other actions have been commenced in the Superior Court by subcontractors to Aplus; the City and Aplus are both named as defendants. Callaway Construction Inc. ("Callaway") has claimed for \$1.8 million and Plan Group Inc. ("Plan Group") has claimed for \$5.8 million. In October, 2018, Callaway also commenced a claim against Zurich under the labour and material bond provided by Aplus in connection with the Project. The City defended the actions and delivered a crossclaim against Aplus.

Confidential Attachment 1 contains legal advice from the City Solicitor regarding the litigation that has arisen from this Project.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the confidential instructions to staff in Confidential Attachment 1.
2. City Council direct that Confidential Attachment 1 remain confidential in its entirety, as it contains advice that is subject to solicitor-client privilege and pertains to litigation or potential litigation.

FINANCIAL IMPACT

The financial implications are discussed in Confidential Attachment 1.

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

DECISION HISTORY

The City Solicitor has not previously reported on the matters discussed in this report.

At its meeting of March 18, 2019, the Infrastructure and Environment Committee will receive two other reports that reference this Project:

1. a report from the General Manager, Toronto Water, and the Chief Purchasing Officer recommending the suspension of Aplus for 3 years on the basis of its poor performance on the Project; and

2. a report recommending that the General Manager, Toronto Water, be authorized to negotiate and execute an agreement with Plan Group to perform work required to complete the Project.

ISSUE BACKGROUND

Overview: Project Commenced in 2016, Work Ceased in 2018

The Contract awarded to Aplus was issued in support of Toronto Water's System Sustainability Initiative and the Toronto Water Strategic Plan capital program to upgrade the Ellesmere Pumping Station, including its East reservoir and power generators.

Ellesmere reservoir and pumping station is a key water storage and distribution hub serving 500,000 residents and annually supplying 30 billion litres of water to York Region. It plays a significant role in the City's water security needs.

Aplus commenced work under the Contract in June, 2016.

The Project was to be completed by August, 2018.

Aplus ceased to carry on active work on the Project in March, 2018. It is Aplus' position that it was entitled to suspend work on the Project because the City refused to pay it all the monies to which it claimed entitlement.

The City's position is that it paid Aplus all the monies to which it was entitled under the Contract and, in any event, Aplus was not entitled to suspend work.

In 2017 and 2018, the City notified Zurich of Aplus' default and requested that Zurich satisfy its obligations under the Bond issued by it in respect of the Contract. The terms of the Bond require that, if Aplus is in default and the City has complied with its obligations under the Contract, Zurich may remedy the default, complete the Contract, retain another party to complete the necessary work, or pay the City for the proposed cost of completion of the Project (to the limit of the value of the Bond). Zurich denied that it was obligated to act under the Bond in the circumstances.

At present, the Project is not complete. Unsuccessful efforts were made to negotiate an appropriate resolution with Aplus and Zurich.

On November 1, 2018, the City terminated Aplus' right to continue with the balance of the Work remaining under the Contract.

Litigation Arising From the Contract

Aplus Sued the City and the City Counterclaimed

On April 17, 2018, Aplus commenced an action claiming \$3.079 million in damages from the City in relation to the Project (the "Aplus Action"). The City defended the Aplus Action and counterclaimed against Aplus for \$6 million.

Aplus alleges the City caused delays in the Project because there were errors in the Contract Documents and the City delayed addressing issues such as changes in the scope of work, among other things. In addition, Aplus alleges the City failed to pay amounts owed to it under the Contract. Aplus claims it is owed \$2.5 million for materials and services provided, plus an additional \$500,000 in other damages.

The City's position is that it is not liable to Aplus and that, in fact, Aplus is liable to the City for damages caused by Aplus' breach of the Contract. The City alleges that the delays in the Project were caused by errors made by Aplus and by its failure to act reasonably in responding to issues that arose. In addition, as delay accumulated on the Project, Aplus refused to deliver schedule recovery plans and instead purported to deliver construction schedules unilaterally extending the Contract completion dates. As an approved construction schedule is a precondition to payment under the Contract, the City was entitled to withhold payment under the Contract.

Through its counterclaim, the City claims damages caused by Aplus' delay and breach of contract. These damages include increased costs to complete the Project, increased Contract administration costs, and foregone revenues due to delays in the completion of the Project.

City's Claim Against Zurich Insurance

On November 30, 2018, the City also commenced an action against Zurich in respect of its failure to perform its obligations under the Bond (the "Zurich Action"). The City's claim is for \$13,466,775. In the Zurich Action, the City also claims punitive damages arising from what the City alleges is Zurich's failure to investigate the City's claim under the Bond in good faith.

Zurich has defended the claim on the basis that it was not obligated to act under the Bond because Aplus did not default on its obligations under the Contract. It further states that its investigation of the City's claim was conducted in good faith.

Other Litigation Related to the Project

In May, 2018, a claim against Aplus and the City was commenced by a subcontractor, Callaway. In October, 2018, Callaway also commenced a claim against Zurich under the labour and material bond.

In October, 2018, a claim against Aplus and the City was commenced by another subcontractor, Plan Group.

The City has defended both actions and delivered crossclaims against Aplus.

The essence of both Callaway's claim and the claim by Plan Group is that they performed work on the Project for which they have not been paid and Aplus is in breach of its contract with them. The City's position is that Aplus, not it, is liable for any monies owed to Callaway or Plan Group.

COMMENTS

Confidential legal advice is provided in Confidential Attachment 1.

CONTACT

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SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Litigation Arising from the Ellesmere Pumping Station Power Upgrades Project