

Amendment to Purchase Order No. 6031221 to Unit A Architecture Inc. for Professional Services during Construction of the Process Control Building at Highland Creek Treatment Plant and Update Regarding Related Litigation

Date: March 9, 2021

To: Infrastructure and Environment Committee

From: General Manager, Toronto Water, Chief Procurement Officer, Purchasing and Materials Management and City Solicitor

Wards: Scarborough - Rouge Park (Ward 25)

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 the value and extend the term of Purchase Order No. 6031221 issued to Unit A Architecture Inc. for professional services during construction of the Process Control building project at Highland Creek Treatment Plant, awarded under Request for Proposal (RFP) 9117-09-7264.

There have been significant delays in the completion of this project and remediation of deficiencies due to difficulties experienced with the general contractor together with mitigation measures that were required to be taken by the City as a result. An amendment to the purchase order is required to extend the professional services, contract administration and site inspection services provided by Unit A Architecture Inc. to December 31, 2024 and to revise the value by \$647,455 from \$1,983,789 to \$2,631,244 net of all taxes and charges.

The general contractor for this project, Aplus General Contractors Corp. ("Aplus") commenced a legal action against the City for amounts invoiced by it and not paid by the City. The City has defended the action and commenced a counterclaim for damages

it alleges are attributable to Aplus. Confidential Attachment 1 contains legal advice from the City Solicitor regarding the litigation that has arisen from this Project.

RECOMMENDATIONS

The General Manager, Toronto Water, the Chief Procurement Officer and the City Solicitor recommend that:

1. Infrastructure and Environment Committee in accordance with Section 71-11.1.C of the City of Toronto Municipal Code Chapter 71 (Financial Control By-Law), grant authority to amend Purchase Order No. 6031221 with Unit A Architecture Inc. for professional services, contract administration and site inspection services during construction of the Process Control Building at Highland Creek Treatment Plant, RFP No. 9117-09-7264 and additional amount of \$647,455 net of all taxes and charges (\$658,850 net of HST recovery), revising the current total value from \$1,983,789 net of all taxes and charges (\$2,018,704 net of HST recovery) to \$2,631,244 net of all taxes and charges (\$2,677,554 net of HST recovery) and to extend the delivery date to December 31, 2024.
2. City Council adopt the confidential instructions to staff in Confidential Attachment 1.
3. 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 amendment to Purchase Order No. 6031221 for an additional amount of \$647,455 net of all taxes and charges (\$658,850 net of HST recovery), increases the current value of Purchase Order No. 6031221 from \$1,983,789 net of all taxes and charges (\$2,018,704 net of HST recovery) to \$2,631,244 net of all taxes and charges (\$2,677,554 net of HST recovery).

Funding is included in the Toronto Water 2021 Approved Capital Budget and 2022-2030 Approved Capital Plan as follows:

Table 1 - Financial Impact Summary

WBS Element	Description	2021	2022	2023	2024	Total (net of HST recovery)
CWW036-01	Building Rehab & Site Improvements	\$289,000	\$196,000	\$90,000	\$83,850	\$658,850

Aplus's claim against the City is for payment of \$588,260 and the City's counterclaim is \$1,514,250. Additional discussion regarding Financial Impact is set out in Confidential Attachment 1.

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

DECISION HISTORY

At its meeting on June 9, 2010, the Bid Committee adopted BD173.1 "Contract Awards - June 9, 2010 - Composite Report" including item 10, granting authority to award Request for Proposal 9117-09-7264 to Unit A Architecture Inc. for professional architectural and engineering services for the preliminary design, detailed design, preparation of tender documents, contract administration, commissioning services and project management of alterations and additions of various buildings at Highland Creek Treatment Plant in the amount of \$1,091,160.00 net of all taxes. The Bid Committee decision document can be viewed at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.BD173.1>

At its meeting on May 6, 2015, Bid Committee adopted report BD25.12 granting authority to award Tender Call 82-2014, Contract MCP13-19WP for Provision of New Construction and Rehabilitation of the Process Control Building at the Highland Creek Treatment Plant to Aplus General Contractors Corporation, in the amount of \$13,504,400.00 net of net of all applicable taxes and charges. The Bid Committee decision document can be viewed at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2015.BD25.12>

At its meeting on June 12, 2018, The Public Works and Infrastructure Committee adopted report PW30.1 granting authority to amend Purchase Order No. 6031221 with Unit A Architecture Inc. for professional services for contract administration and site inspection services during construction of the Process Control Building at Highland Creek Treatment Plant, RFP No. 9117-09-7264 by an additional amount of \$392,644.10 net of all taxes and charges, revising the total value from \$1,591,145.00 to \$1,983,789.10 net HST and to extend the professional services delivery date on the Purchase Order to December 31, 2019. The Public Works Committee decision can be found at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2018.PW30.1>

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

COMMENTS

1. New Construction and Rehabilitation of the Process Control Building Project

The Highland Creek Treatment Plant (HCTP) is one of four wastewater treatment plants operated by the City of Toronto. The facility is located at the mouth of Highland Creek at 51 Beechgrove Drive and services an area bounded by Steeles Avenue on the north,

Victoria Park Avenue on the west, the Rouge River on the east and Lake Ontario on the south. This area contains an estimated connected population of 533,000 and its current rated capacity is 219,000 m³ per day.

As part of Toronto Water's 2021 to 2030 Capital Plan, the Division has budgeted \$707 million of critical construction work at the HCTP over the next ten-year period. The purpose of these projects is to ensure regulatory requirements are continually met, maintain infrastructure in a state of good repair and improve service (i.e. Odour Control and Compliance).

The New Construction and Rehabilitation of the Process Control Building Project is required to maintain the plant in a state of good repair and is one of several projects included in the Capital Plan. The scope of work under this project includes the construction of a new Operations Control Centre from which plant operations staff will monitor and control all critical plant systems and processes, the renovation of the existing plant administration building and the construction of an adjacent parking lot.

The City retained Unit A Architecture Inc. to provide engineering services in support of the project including design, contract administration, construction and post-construction services.

2. Award of Contract with Aplus General Contractors and Notice of Default

In 2015, the construction Contract MCP-13-19WP (the "Contract") was awarded to Aplus General Contractors Corp (Aplus). Work on the contract started in July of 2015 and substantial performance was achieved in November 2019. However, since that time, Aplus has failed to complete the remaining contract work and correct contract deficiencies.

In January 2020, the City received a Statement of Claim from a subcontractor asserting a claim for damages and lien. In response, the City complied with its obligation to holdback funds and also asserted its right of set off as provided for under the Contract against the outstanding amount invoiced by Aplus for the work. The subcontractor claims and City mitigation costs and damages exceed the outstanding amount invoiced and claimed by Aplus.

In June 2020, the City of Toronto issued a Notice of Default (NOD) to Aplus for failure to complete the contract work in a timely manner, failure to remedy defective work, failure to provide an acceptable project manager/site supervisor or seek approval for replacement of supervisory personnel and for failure to withdraw outstanding construction liens. As at that point, Aplus had not performed any work at the site since December of 2019.

In July 2020, Aplus briefly returned to the site and resumed construction activities on a portion of the outstanding work under the Contract. However, in August 2020, Aplus again stopped all work and abandoned the site.

In October 2020, the City issued a second NOD to Aplus due to work stoppage, failure to remove idle equipment and fencing, and failure to provide erosion and sedimentation

control as required by the TRCA. To date, Aplus has not remedied these defaults and has continued to refuse to return to the work site to complete the outstanding work.

The City has made a claim on the Performance Bond provided by Aplus in respect of the Project which is currently being investigated by the Bonding Company.

3. Litigation Arising from Aplus' Default

In September 2020, Aplus issued a Statement of Claim for amounts invoiced but not paid by the City. The City has defended the Aplus claim on the basis that these amounts have been held and/or set off as a result of subcontractor claims and City damages and costs incurred or to be incurred. The City has also delivered a counterclaim in the amount \$1,514,250.00 for additional costs reasonably expected to be incurred as a result of Aplus' default and in completing the remaining work. This litigation is discussed further in Confidential Attachment 1.

4. Remaining Work

The remaining work under this Contract includes: (i) Completion of the parking lot including grading, paving, landscaping, lighting and security gate; and (ii) Correction of Contract deficiencies within the building including the epoxy flooring, HVAC system, rental radiators, rainwater harvesting system and other deficiencies.

It appears unlikely, given past communications, that Aplus will resume efforts to complete the remaining work. The outcome of the City's claim on the Performance Bond is not yet known. If neither Aplus nor the bonding company will complete the remaining work, the City intends to retain other contractors to address the outstanding work.

As a result, Unit A Architecture Inc. is required to perform additional professional services, contract administration and site inspection services related to the remaining work. The outcome of the City's claim against Aplus' Performance Bond could affect the scope of services to be provided; however, significant additional professional services have been and will continue to be required to complete the Project regardless of the outcome of the bond claim.

Additional costs to the City are being tracked for the purposes of the counterclaim against Aplus and any other available avenues to recover these funds.

5. Amendment of Purchase Order No. 6031221 with Unit A Architecture Inc.

In order to complete the remaining work under this Contract, Unit A Architecture Inc. has been asked to provide professional services not anticipated under their original assignment totalling \$647,455 net of all taxes and charges as follows:

- (i) Additional professional services to prepare the new drawings and specifications in the amount of \$151,560 net of all taxes and charges;

- (ii) Additional full-time resident site supervision services to support the new construction completion by December 31, 2023 in the amount not to exceed \$330,295 net of all taxes and charges; and
- (iii) A Contingency Allowance of \$165,600 net of all taxes and charges to accommodate any additional professional services in respect of any as yet undiscovered deficiencies in Aplus' work and to provide informational support to the City in respect of the litigation arising from this Project. It is anticipated that this effort could extend to December 31, 2024.

City staff recommend the existing Purchase Order No. 6032332 issued to Unit A Architecture Inc. for professional services be amended by increasing the value by an additional amount of \$647,455 net of all taxes and charges from \$1,983,789 to \$2,631,244 net of all taxes and charges and to extend the delivery date to December 31, 2024.

CONTACT

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SIGNATURE

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ATTACHMENTS

Confidential Attachment 1 - Amendment to Purchase Order No. 6031221 to Unit A Architecture Inc. for Professional Services during Construction of the Process Control Building at Highland Creek Treatment Plant and Related Litigation