

Update to Winter Maintenance Program Follow-Up: Change in Contract Terms

Date: November 23, 2023

To: Audit Committee

From: Auditor General

Wards: All

SUMMARY

This report provides an update to information included in the Auditor General's report (June 28, 2023), "[Winter Maintenance Program Follow-Up: Status of Previous Auditor General's Recommendations & Processes to Hold Contractors Accountable to New Contract Terms](#)".

The Winter Maintenance Program Follow-Up report identified that Transportation Services was still working to implement 13 of the 22 recommendations from the original October 2020 report, [Audit of Winter Road Maintenance Program - Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes](#), and two of the four recommendations from the June 2021 report, [Winter Road Maintenance Program - Phase 2 Analysis: Deploying Resources](#).

In September 2023, the Auditor General was made aware of proposed changes to liquidated damages included in the winter maintenance contracts. The contract changes put forward by Transportation Services management impact information previously included in the Auditor General's report (June 28, 2023) on the Winter Maintenance Program Follow-up that describe the liquidated damages contract clauses and the amount of liquidated damages identified by Transportation Services staff and communicated to the contractors.

The Auditor General met with Transportation Services management and requested information about the change in contract terms.

Transportation Services management advised that the contractors were asserting that the contracted liquidated damages for "Failure to leave a Depot within the applicable Mobilization Period" (Item #6) was too high and out of line with other similar contracts. In response to the contractors' assertions, Transportation Services management advised that staff undertook a review of Liquidated Damages Item #6.

Transportation Services management also indicated that revisiting the liquidated damages addresses Recommendation #11 from the Auditor General's October 2020 audit, which was for the General Manager, Transportation Services Division, to

*"reassess and document the rationale for liquidated damages amounts in the next contract cycle taking into account past claims against the City and other potential losses, to ensure that the liquidated damages amounts are fair and supportable."*¹

This report provides City Council with information about changes to the liquidated damages specified in the current winter maintenance contracts. The proposals to amend the contracts were formally communicated to the contractors by Transportation Services management in September 2023 and agreed in principle shortly thereafter. Amending agreements were drafted and sent to the contractors on November 7, 2023.

RECOMMENDATIONS

The Auditor General recommends that:

1. City Council receive this report for information.

FINANCIAL IMPACT

The recommendation in this report has no financial impact.

The amounts recovered through the liquidated damages process do not increase the Council-approved contract award value or the annual budget for winter maintenance services. Liquidated damages are a means of reimbursing the City for reasonable costs incurred by the City when a contractor fails to meet certain contract requirements and deliverables. Management has advised us that the liquidated damages to be applied for Item #6 for the 2022/2023 winter season have not yet been finalized.

DECISION HISTORY

In June 2023, the Auditor General issued a report, "[Winter Maintenance Program Follow-Up: Status of Previous Auditor General's Recommendations & Processes to Hold Contractors Accountable to New Contract Terms](#)", which provided the status of 26 recommendations from two previous Auditor General's reports on the City's winter maintenance program:

¹ Transportation Services advised that the rationale for liquidated damages Item #6 in the current contracts was reassessed and a change was made due to an initial miscalculation when the liquidated damages were previously assessed.

- [Audit of Winter Road Maintenance Program - Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes](#) (October 2020)
- [Winter Road Maintenance Program - Phase 2 Analysis: Deploying Resources](#) (June 2021)

The 26 recommendations in the Auditor General's 2020 and 2021 reports were made in the context of the previous (2015-2022) winter maintenance contracts. In our current follow-up review, we assessed whether management's actions, in the context of the new (2022-2032) contracts, addressed the intent of the previous recommendations – to improve the efficiency and effectiveness of contract management and divisional processes designed to hold contractors accountable to the contract terms.

As highlighted in the June 2023 report, during our follow-up, we verified that 10 recommendations had been fully implemented and one recommendation was no longer applicable in the context of the new (2022-2032) contracts. Management was continuing work to implement 15 recommendations (in the context of the new winter maintenance contracts). The report provided the Audit Committee and members of City Council with the detailed results of our follow-up work and management's action plan for recommendations that were not yet fully implemented.

The report also detailed lessons learned from the first winter season (2022/23) of the new contracts (2022-2032) for Transportation Services to continue working on as they implement more robust processes, tools, and reporting, in advance of the second winter season. Our findings were summarized in the following three areas:

- A. Strengthening processes to consistently enforce payment criteria and apply liquidated damages
- B. Ensuring robust monitoring of contractor performance
- C. Continuing to implement systems and tools to improve efficiency and effectiveness of contract management

Our report included four new recommendations to highlight areas for continuous improvement when administering the current contracts going forward. Management agreed to all four recommendations and management's response to these additional four recommendations was included in the report.

The Audit Committee considered the item on July 7, 2023 and it was considered by City Council on July 19, 2023.

COMMENTS

This report provides City Council with information about amendments to the liquidated damages specified in the current (2022-2032) winter maintenance contracts.

Information Available at the Time of the Auditor General's June 2023 Winter Maintenance Program Follow-Up Report

Figure 5 in the Auditor General's June 2023 report, "[Winter Maintenance Program Follow-Up: Status of Previous Auditor General's Recommendations & Processes to Hold Contractors Accountable to New Contract Terms](#)", summarized the liquidated damages clauses included in the current winter maintenance contracts (as shown in Figure 1 below).

Figure 1: Liquidated Damages Clauses Excerpted from the New Winter Maintenance Contracts

<u>Item</u>	<u>Section number in Part 3</u>	<u>Event</u>	<u>Liquidated Damages Paid by Vendor</u>
<u>1</u>	<u>2.7.2</u>	<u>Failure to calibrate all Equipment seven (7) days prior to the Winter Season; or failure to calibrate all Equipment on a monthly basis</u>	<u>\$1,000.00 per day per piece of Equipment that is not calibrated in accordance with the Contract</u>
<u>2</u>	<u>2.6.10</u>	<u>Failure to provide verification to Contract Administrator that a GPS/AVL device is working</u>	<u>\$400.00 per day per piece of Equipment</u>
<u>3</u>	<u>2.10</u>	<u>Failure to submit CVOR abstract in accordance with the Contract</u>	<u>\$400.00 per day per piece of Equipment</u>
<u>4</u>	<u>3.1</u> <u>3.2</u>	<u>Failure to apply any required signage on a piece of Equipment</u>	<u>\$1,000.00 per day per piece of Equipment</u>
<u>5</u>	<u>4.3.3</u>	<u>Failure to provide shift schedule to Contract Administrator in accordance with the Contract prior to October 15 each Winter Season</u>	<u>\$100.00 per day</u>
<u>6</u>	<u>5.4.4</u>	<u>Failure to leave a Depot within the applicable Mobilization Period</u>	<u>\$200.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period</u>
<u>7</u>	<u>5.7</u>	<u>Failure to spread salt or pre-treated salt in accordance with the Contract</u>	<u>\$360.00 per failure</u>
<u>8</u>	<u>5.11</u>	<u>Failure to correct a deficiency within 2 hours of notification by the Contract Administrator</u>	<u>\$400.00 per hour starting two hours after notification</u>
<u>9</u>	<u>5.12</u>	<u>Failure to repair damages to property prior to May 31 annually</u>	<u>\$1,600.00 per day</u>
<u>10</u>	<u>7.2.7</u>	<u>Failure to submit a Depot plan in accordance with Contract</u>	<u>\$100.00 per day</u>

The report highlighted that liquidated damages for the first half of the winter season (from October 2022 to January 2023) were not applied and that management started applying liquidated damages from February 1, 2023, onwards, but chose to apply only two of the ten liquidated damages clauses (i.e., Item #6 - Failure to leave a Depot within the applicable Mobilization Period; and Item #8 - Failure to correct a deficiency within 2 hours of notification by the contract Administrator) as these two issues are performance related and can impact desired performance outcomes.

Table 7 in the Auditor General's June 2023 report, "[Winter Maintenance Program Follow-Up: Status of Previous Auditor General's Recommendations & Processes to Hold Contractors Accountable to New Contract Terms](#)" summarized the liquidated damages identified by Transportation Services staff versus amounts communicated to contractors as at June 1, 2023. Table 1 below shows an excerpt from the June 2023 report specific to liquidated damages Item #6.

Table 1: Liquidated Damages Identified by Staff vs. Communicated to Contractors as at June 1, 2023

Liquidated damage clauses	Staff estimate (Oct – Jan)	Staff estimate (Feb – Apr)	Total	Amount communicated to contractors
6. Failure to leave a Depot within the applicable Mobilization Period	\$8,387,000	\$29,242,600	\$37,629,600	\$17,300,960

Note: The liquidated damages to be applied for Item#6 under the current contract terms was reduced from over \$17 million (as at June 1, 2023) down to approximately \$6 million (as at September 2023).

As noted in the Auditor General's June 2023 report, management advised us that contractors for all 11 contract areas had disputed the liquidated damages notices issued to them and that management was continuing to work with the contractors to resolve the disputes in accordance with the contract dispute provisions.

We note that one of the recommendations that was not fully implemented at the time of the Auditor General's June 2023 report was Recommendation #11 from the Auditor General's October 2020 report, "[Audit of Winter Road Maintenance Program - Phase One: Leveraging Technology and Improving Design and Management of Contracts to Achieve Service Level Outcomes](#)". This recommendation requested the General Manager, Transportation Services Division, to reassess and document the rationale for liquidated damages amounts in the next contract cycle taking into account past claims against the City and other potential losses, to ensure that the liquidated damages amounts are fair and supportable.

Transportation Services advised that the rationale for liquidated damages Item #6 in the current contracts was reassessed and a change was made due to an initial miscalculation when the liquidated damages were previously assessed.

Transportation Services management has asserted to us that they are "confident in the fairness of the procurement process that took place in respect of liquidated damages", indicating "There is no basis on which we can assume that the contents of a liquidated damage table would materially impact a bidder's pricing, especially as these are only potential and not actual costs under the contract. And regardless, all bidders at the time of procurement would have had access to the same information and bid on that basis. Parties are able to agree to make changes to their contracts as a part of the contract management phase, especially being almost two years into the life of these contracts."

Auditor General's November 2023 Update to Winter Maintenance Program Follow-Up: Change in Contract Terms

In September 2023, Transportation Services management put forward a proposal to contractors as follows:

"The City of Toronto is proposing to amend the Agreement in respect of liquidated damage item #6. Following the City's thorough review of this item, we are of the view that this item should be revised.

Item #6 appears in 'Part 3 – Table 2' in Section 10.0 of Schedule E of the Agreement. Currently, in the event of "Failure to leave a Depot within the applicable Mobilization Period" by the Vendor, this liquidate [sic] damages item requires the Vendor pay the City as follows:

\$200.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period.

The City proposes amending item #6 by replacing the above language with the following:

\$10.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period, and the Daily Rate for each of those pieces of Equipment

...

The City is proposing the amendment be effective immediately once the parties sign an amending agreement to this effect. If approved by the parties, the amended item #6 would be applied to liquidated damages calculations going forward and also applied retroactively for the completed 2022-2023 winter season."

In reviewing the 2021 Negotiated Requests for Proposals (NRFP) for Winter Maintenance Services, we noted that the City indicated it would not be revising the liquidated damages. Through NRFP Doc3136860258 Addendum No. 4, the City provided the following responses to questions raised by potential suppliers:

Q121. Part 3 – Liquidated Damages Table 2, Item 6 – Failure to leave a Depot within the applicable Mobilization period LD = \$200.00 / minute.

The amount of damage set at \$200.00 / minute is far too high given that every operation differs, in particular for call in-drivers/operators. Live-in staff could meet the time frame as listed in Section 5.4.3.2, however the Call-in operators will never make it to the Depot in 1 hour in excellent conditions let alone during rush hour periods.

As the City is aware, the past 6 years has proven difficult to get all the Equipment out on time within a 2-hour notification period. Given the size of the contracts, a Supplier will be dispatching over 200 pieces of Equipment on any given snow event. What you are asking for is impossible. The penalties are ridiculous and must be revised. Will the City change the notification period to 2 hours for all call-in Operators?

A121. The City will not be considering this at this time.

Q122. Will the City Change the penalty to \$10.00/minute as it has been for the past six (6) years?

A122. No.

We noted that a similar response was also given for a similar question in NRFP Doc2970598171 Addendum No. 4, Q50/A50 and indicated the City would not consider revising the Liquidated Damages table.

In reviewing why changes were made to the liquidated damages clauses when the Division had previously indicated during the NRFP process that it would not consider revisions, the Auditor General met with and requested further information from the General Manager, Transportation Services Division.

In October 2023, Transportation Services management advised us that:

- Despite having agreed to this liquidated damage at the time of negotiations and contract execution, once the winter maintenance services commenced and liquidated damages were applied accordingly, the contractors began asserting that the amount was too high and out of line with other similar contracts. The contractors also indicated there were issues around the configuration for exiting the yard which was a contributing factor (i.e., impacting the ability for people to get to their beats).

- In response to this specific request from the contractors and in light of the general obligation to re-assess and document the rationale for liquidated damages, Transportation Services staff undertook a review of Liquidated Damages Item #6. This review included (i) a revisiting of the previous analysis used to develop the pre-estimate of \$200 per minute, (ii) a jurisdictional comparative review including other municipalities², and (iii) a review of previous winter maintenance contracts and other such contracts within Transportation Services. In reviewing the previous analysis conducted, Transportation Services staff found that there was an error in the calculations that resulted in the figure of \$200. As a result, Transportation Services staff utilized information from all the other review resources and conducted a new calculation to determine a new pre-estimate of costs it would incur in the event contractors failed to leave the depots within the required mobilization period.
- As the aforementioned proposal did not affect the City Council awarded budgets for each contract agreement, did not alter the fundamental service levels and operations, and would not generate revenue for the City, Transportation Services is not of the view that a report to any City Committee and Council is necessary.

We note that, on November 7, 2023, the City sent the amending agreements containing the new liquidated damages provisions to the contractors to be executed.

Management has advised us that the liquidated damages to be applied for Item #6 have not yet been finalized. Based on the City's letters communicating the proposed contract change to the contractors, the changes to the contracted liquidated damages provisions for Item#6 reduces Transportation Services' estimate of total liquidated damages (as at September 2023) for the months of February and March 2023, from \$6,044,200, based on the original contract terms of \$200.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period, to \$604,769, based on the revised liquidated damages provisions of \$10.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period, and the Daily Rate for each of those pieces of Equipment. This a difference of \$5,439,431 for the two-month period from February to March 2023. This contract change will also impact the value of liquidated damages for the remainder of the contract term, where applicable. The amounts put forward by Transportation Services are summarized in Table 2 below.

² Note: The Auditor General's Office has not audited the jurisdictional review completed by the Transportation Services Division

Table 2: Comparison of Liquidated Damages Under the Original Terms for Item #6 and the Revised Terms, as communicated by the City to the Contractors in September 2023

Contract Area	Total liquidated damages for Feb - Mar 2023, based on \$200.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period	Total liquidated damages for Feb - Mar 2023, based on:		Total liquidated damages for Feb - Mar 2023, based on proposed changes to terms	Difference
		\$10.00 per minute per piece of activated Equipment in the Depot after the expiry of the Mobilization Period	Daily Rate for each piece of activated Equipment in the Depot after the expiry of the Mobilization Period		
DVP-FGGE	\$ 80,000.00	\$ 4,000.00	\$ 5,475.09	\$ 9,475.09	\$ 70,524.91
Subtotal	\$ 80,000.00	\$ 4,000.00	\$ 5,475.09	\$ 9,475.09	\$ 70,524.91
TOA1-1	\$1,676,400.00	\$ 83,820.00	\$ 85,708.86	\$169,528.86	\$1,506,871.14
Subtotal	\$1,676,400.00	\$ 83,820.00	\$ 85,708.86	\$169,528.86	\$1,506,871.14
TOA1-4	\$ 190,400.00	\$ 9,520.00	\$ 7,595.13	\$ 17,115.13	\$ 173,284.87
TOA1-5	\$ 69,000.00	\$ 3,450.00	\$ 10,646.40	\$ 14,096.40	\$ 54,903.60
Subtotal	\$ 259,400.00	\$ 12,970.00	\$ 18,241.53	\$ 31,211.53	\$ 228,188.47
TOA1-2	\$1,579,400.00	\$ 78,340.00	\$ 79,152.00	\$157,492.00	\$1,421,908.00
TOA1-3	\$ 494,600.00	\$ 24,730.00	\$ 28,109.06	\$ 52,839.06	\$ 441,760.94
TOA2-1	\$ 28,000.00	\$ 1,180.00	\$ 9,532.60	\$ 10,712.60	\$ 17,287.40
TOA2-3	\$ 540,200.00	\$ 22,400.00	\$ 6,597.05	\$ 28,997.05	\$ 511,202.95
TOA2-4	\$ 409,600.00	\$ 13,570.00	\$ 9,262.10	\$ 22,832.10	\$ 386,767.90
TOA2-5	\$ 880,600.00	\$ 45,680.00	\$ 70,481.80	\$116,161.80	\$ 764,438.20
Subtotal	\$3,932,400.00	\$185,900.00	\$203,134.61	\$389,034.61	\$3,543,365.39
TOA2-2	\$ 96,000.00	\$ 2,620.00	\$ 2,898.56	\$ 5,518.56	\$ 90,481.44
Subtotal	\$ 96,000.00	\$ 2,620.00	\$ 2,898.56	\$ 5,518.56	\$ 90,481.44
TOTAL	\$6,044,200.00	\$289,310.00	\$315,458.65	\$604,768.65	\$5,439,431.35

Source: Information provided by Transportation Services Division

Note: The Auditor General's Office has not audited the accuracy or completeness of the underlying data and related calculations for the liquidated damages amounts provided by the Transportation Services Division

CONTACT

Ina Chan, Deputy Auditor General, Auditor General's Office
Tel: (416) 392-8472, E-mail: Ina.Chan@toronto.ca

SIGNATURE

Tara Anderson
Auditor General