



J. L. GRIGHTMIRE ARENA LESSONS LEARNED AUDIT

April 21, 2022

To understand:

- Why and how the Grighthouse Arena addition and renovation project experienced significant issues and did not achieve its desired outcomes.
- What lessons can be learned for future City capital projects.

Overview of Grightmire Arena Project

- Initial budget \$7 million + \$1.669 million additional funding provided later to finish the project.
- Lowest bid of \$5.668 million submitted by CGI in August 2017.
- Substantial performance was expected to be achieved by September 7, 2018. CGI failed to achieve timely completion.
- City negotiated a settlement with CGI and completed unfinished work
- The project was certified substantially complete June 13, 2019 (9 months late).
- Total cost of the project was \$8.4M (20% over original budget and 22% over detailed estimate).

Early Red Flags and Potential Risks

- Winning bid was significantly lower than the next highest bid (\$822K or 14.5%) and the budget (\$1.33M or 23.5%) and detailed cost estimate (\$1.23M or 21.7%).
- Contractor claimed to have erred in their bid price by not including \$425,708 in costs for provisional items.
- The original timeline for the project called for construction start in April however delay in tendering lost 4-5 months. The resulting squeeze into 12 months made for a very ambitious timeline which was described to us as “possible” if all aspects of the project worked out perfectly.
- Contractor had a poor evaluation of its performance on a previous project “Overall, I wouldn’t recommend this contractor to complete a large-scale project”.
- Contractor also failed to deliver the required project schedule upon first payment.

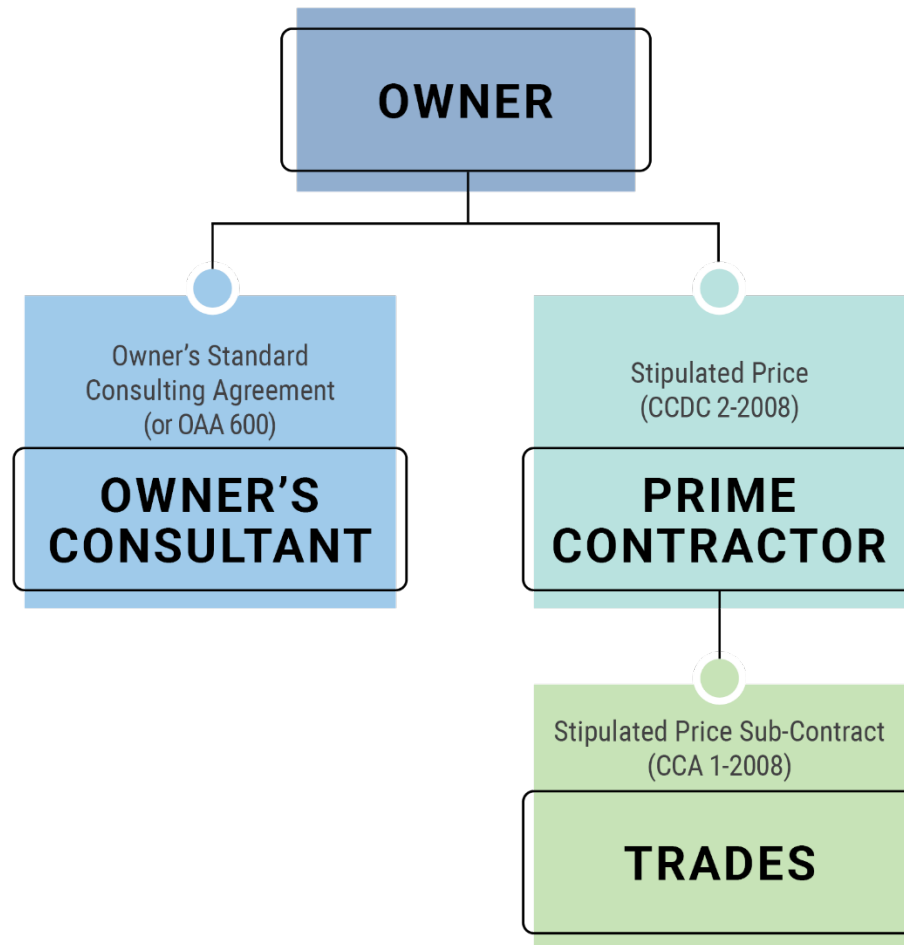
Timetable of the Project

Project Milestone	Initial Plan	Actual Milestone	Late by
Tender Document Release	March 2017	July 6, 2017	4 months
Contract Effective	April 2017	August 29, 2017	4 months
Substantial Performance	September 7, 2018	June 13, 2019 (certified)	9 months

The Participants in the Project

DESIGN ▪ BID ▪ BUILD

Build starts after design is finished



What We Found

General Observations

- The project was not managed strictly in accordance with the contract terms & conditions. Available remedies not used or delayed.
- A strong vendor performance process is lacking – especially with respect to projects in difficulty.
- The project would have benefited from more timely communication to Council of risks and challenges.
- Level of oversight and timeliness of actions was not commensurate with the riskiness of the project.

Causal and Contributing Factors

- Resources that were spread over multiple projects;
- Lack of a risk management framework;
- Weak processes for managing poorly performing contractors, including fulsome use of legal remedies;
- A shortfall of skills in contract management; and
- Lack of clarity in how the roles and responsibilities for this project (including project management, contract management, contract administration/consultant), and how legal and procurement expertise should be deployed and coordinated.

Grighthouse Arena - Lessons Learned Audit Findings



Managing capital projects with a risk management strategy and tactful, forthright communication



Managing project requirements in accordance with the terms and conditions of the contract



Vendor management and procurement policies



Legal support and decisions that could be optimized in the best interest of the City



Effective deployment and oversight of external Consultants



Managing Risk and Communication

- City capital project process needs a systematic approach for identifying risks and developing a risk management strategy.
- One major risk at the outset – loss of 4-5 months because of delay in getting the tender out.
- Squeezed the construction period to 12 months – doable if “things went perfectly”.
- The very high risks were not raised with Council early enough. A formal risk assessment approach prior to project launch could in future facilitate timely and upfront communication.



Project/Contract Management

- Contract management found to be weak – processes in the contract not followed and rights and remedies not exercised or delayed.
- City did not use available remedies to address deficiencies (deducting value of unfinished work and liquidated damages which it could unilaterally do).
- City took no action on Contractor failure to provide a project schedule with its first application for payment (first month). None was provided until April 30, 2018 (nearly 8 months late).
- No evidence of recovery plans.
- City did not insist on Contractor following formal notices of delay.
- City did not take prompt and appropriate action to declare project in default on September 8, 2018 when it clearly was nor did it exercise rights to liquidated damages.



Performance Bond

- Contract included the use of a performance bond.
- Found no evidence Contractor filed formal extension requests for delays or that the City demanded adherence to same.
- Project was technically in default when Substantial Performance not met September 8, 2018 yet the City took no action.
- City took another 3 months before seeking an assessment from the Consultant/Contract Administrator of default.
- Weak contract management, failure to follow and demand adherence to formal contract processes made it unlikely the surety would step in.



Project Documentation/Communication

- Found many instances where important documentation was lacking.
- OCA was provided with very little documentation that would demonstrate expected level of oversight.
- Not a rigorous process to identify and track deficiencies contemporaneously.
- Concluded that the City failed to sufficiently document project milestones, important events and conditions in evidence of project status, risks, deficiencies and required remediations.
- This weakened City's position during its dispute and negotiation with the Contractor.



Liquidated Damages

- Contract expressly states that if date of Substantial Performance is missed, liquidated damages are payable at \$1,000/day.
- City took no action with respect to liquidated damages until termination of the contract.
- OCA looked into the sufficiency of liquidated damages, however no apparent basis for this amount that is evidenced by analysis.
- Project costs were approx. \$22,500/day. Thus \$1,000/day did not appear to sufficiently compensate the City for damages of missed schedule, nor did it incent Contractor to adhere to schedule.
- Technically, liquidated damages are not to be construed as penalties.
- Concluded that the amount set for liquidated damages should be reviewed and that other contract mechanisms be explored that would better align as incentives (bonus/penalty, earnback clauses).



Contract Management Overall

City needs more developed processes and practices for contract management and administration:

- Protocols that can be activated when projects run into difficulty.
- Deployment of greater technical skills in contract management.
- Ensure formal contract mechanisms are adhered to and the way contract management occurs holds contractors to strict requirements.
- Consider splitting off contract management as a separate role from that of project management and contract administration.



Vendor Management

- The Grightmire contract award, as is the case with other capital projects was based on lowest compliant bid.
- Risks such as previously poor performance by a contractor are not considered.
- The successful proponent of Grightmire bid 14.5% under the next highest bidder and 23.5% under budget.
- They also had a poor evaluation from a previous project “Overall I wouldn’t recommend this contractor to complete a large scale project”.
- However, the current approach to procurement is unable to cope with previously poor performers bidding low on new contracts.
- Award practices could be improved by using pre-qualification or also a vendor rating system.
- Vendor rating system uses the accumulated vendor ratings from previous jobs as a scored factor in determining the winning bidder. Reduces the tendency for low bidders to cut corners or earn back profits from change orders.

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Looking Retrospectively at the Legal Approach

- OCA took the view that, in the absence of a contract management specialist, City's legal resources need to be experienced and engaged early and often when encountering projects in difficulty or likely to be risky.
- OCA engaged an outside legal firm to assist the City Auditor.
- We asked them to help us address 4 questions or lines of enquiry and then the OCA drew its final conclusions.



Questions for OCA External Legal Consultant

- 1) Was the construction contract “tight enough” and appropriate for the project?
- 2) What advice would they have given when the Contractor declared it had erred in its bid pricing and what options were available?
- 3) What advice would they have given once the Contractor defaulted, and did the City miss opportunities to claim on the performance bond?
- 4) What opinion do they have of the settlement and what strategies would they have used?



OCA Conclusions About the Contract

After considering the legal advice received from our independent legal consultant, OCA has concluded that:

- The City used a form of contract that was appropriate and suitably modified in the City's favour; and
- It contained the necessary provisions to protect the City against Contractor defaults and delays.



OCA Conclusions About the Bid Error

After considering the legal advice received from our independent legal consultant, the OCA has concluded that:

- The Contractor ultimately confirmed it would honour its bid despite the error.
- City could have rejected their bid. But that would not have been without risk and would be a radical departure from City practice.
- Also, if the City chose to go to the 2nd low bidder the cost would have been \$822K more none of which would likely be recoverable from the bid bond.
- OCA concluded the City took the appropriate course of action.



OCA Conclusions About Contract Administration, Default

After considering the legal advice received from our independent legal consultant, the OCA has concluded that:

- Substantial performance was not achieved by the prescribed date as well as key milestones that were missed.
- City did not provide timely, written notice of defaults (e.g., deficiencies, failure to provide construction schedule, SP not achieved).
- Contractor did not follow the prescribed process for notice of delay (some evidence this was informally done).
- City did not require Contractor to prioritize correction of deficiencies, nor did it rectify them itself and back charge or withhold payments.
- No evidence any party was keeping a running deficiency list.
- The City did not avail itself of available rights and remedies or insist that the Contractor follow contract protocols.
- Decision not to terminate under the contract was made without a fulsome analysis of contractual rights.



Settlement – No Evidence of Due Diligence

- OCA is unable to publicly share details of the financial settlement between the City and CGI as the terms of the settlement are confidential.
- We do note that we were unable to obtain sufficient, or indeed, any information of pivotal components of the financial settlement.
- We could find no evidence that the City performed the necessary due diligence for these pivotal components.



Role of External Consultant

- External Consultant/Contract Administrator who oversaw and evaluated the work of the Contractor was also the designer of the project.
- Contractor maintained that there were design issues that resulted in delay and increased costs.
- In such situations there is an inherent conflict of interest that could make it difficult to maintain one's objectivity in evaluating these claims.
- Some jurisdictions split the role of design consultant and contract administrator.
- OCA concluded that splitting these roles for projects anticipated to be high risk may warrant consideration.



Oversight of External Consultant

- OCA concluded the external consultant shares responsibility in not ensuring contract management due diligence.
- Some issues uncovered include certifying payments without project schedule, no running deficiency list, not aggressively monitoring the Contractor, and lack of a recovery plan.
- OCA found there was no formal agreement with the Consultant other than PO terms and conditions. (This appeared to be a systemic issue).
- Appeared to us the level of monitoring was not very aggressive (infrequent site visits, large time gaps in between) which did not accord with the need for close monitoring of such a risky project.
- Lack of oversight of the Consultant, without a contract, made it problematic to ensure pressure put on Contractor to make progress.

Recommendations

Fifteen recommendations were made to strengthen governance and processes in project management, contract management, vendor management, communications and procurement:

1. Development of a risk assessment framework and process.
2. Use the current version of a CCDC2 Stipulated Price contract.
3. Contract management training.
4. Consider separating the roles of project management, contract administration and contract management.
5. Contractor performance be tracked, formally evaluated and that contractor ratings be considered as a procurement criterion.

Recommendations

6. Review liquidated damages values /consider incentives (use of bonus penalty clauses and earnbacks).
7. Improvements in the project management processes including adequate project documentation, adherence to contract, timely deficiency information and communications.
8. Special contingency procedures and guidelines be developed for projects in difficulty.
9. Public Works implements a process to share critical project information such as cost estimates with Procurement.
10. The practice of single sourcing be reviewed and utilized only during exceptional circumstances.

Recommendations

11. A standard form of contract be developed and used for the procurement of architectural consulting and contract administration services.
12. Communication with Council re: projects in difficulty be timely and forthright and risks proactively brought forward.
13. Budget for capital projects to include sufficient funding for necessary corporate/support services.
14. Management implement or strengthen processes to ensure when faced with contractor claims due to alleged design issues, these are rigorously and independently evaluated.
15. Management review its process for approving settlements that exceed a predetermined threshold to ensure appropriate due diligence is exercised.



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QUESTIONS?