



Hamilton

Office of the City Auditor

J.L. Grightmire Arena

Lessons Learned Audit Report, Recommendations, and Management Response



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Office of the City Auditor

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Executive Summary

- 1 In 2016, a Hamilton based consulting firm, Invizij Architects Inc. (the Consultant) was single sourced for the design and architecture portion of the J.L. Grightmire Arena (Grightmire) addition and renovation project (the Project). Invizij was further retained to be the Prime Consultant and Contract Administrator. In August 2017, Century Group Inc (CGI) was contracted to take on the construction work through a competitive Request for Tenders (RFT) process.
- 2 With a fixed contract price of \$5.668 million, the Grightmire Arena project was scheduled to achieve Substantial Performance by September 7, 2018. However, CGI was not able to achieve Substantial Performance of even a reduced scope of work until May 16, 2019. The total cost of the Project eventually reached \$8.4 million, which exceeded the original budget of \$7 million by 20 percent.
- 3 During construction, CGI encountered delays, and the initial Substantial Performance date was missed. On December 21, 2018, three months after the missed date, the City issued CGI a Notice of Default. CGI defended itself and attributed some of the delays to design errors and extreme weather. In the meantime, in response to the Notice of Default, CGI proposed a revised schedule that reset the Substantial Performance date to April 9, 2019. The City accepted the revised schedules and continued working with CGI. However, by April 9, 2019, CGI once again failed to achieve Substantial Performance.
- 4 The delays forced all 2018-19 season hockey games to again be relocated, as they had been in 2017-18. To ensure Grightmire Arena would re-open for 2019-20 season, the City negotiated a transitional agreement with CGI and descoped six items from the Contract. CGI completed their descoped work on May 16, 2019. Grightmire Arena re-opened in September 2019.
- 5 Beginning in 2019, five of CGI's subcontractors filed lawsuits and registered liens against City property, because CGI had failed to pay these subcontractors. In August 2019, CGI also filed a lawsuit and registered a lien of \$3,929,461.91 against the City property. The matter was settled in late 2020 with a confidential settlement agreement. Per the settlement agreement, the terms of the settlement agreement are confidential and cannot be disclosed except as required by law. The Office of the City Auditor is therefore unable to disclose these details publicly.
- 6 Our lessons-learned audit included all stages of the Grightmire Arena project: from pre- RFT to the post settlement considerations. We engaged an external legal consultant, Cassels Brock & Blackwell LLP to provide legal advice on some of the decisions made during the course of the Project and received solicitor client privileged legal advice on these issues. The OCA has reached some of the conclusions of this report, where stated, based on the legal advice received from our independent legal consultant.

- 7 It is our opinion that there was a lack of a risk-based project management strategy and processes in place across the board to manage a high-risk capital project like Grightmire Arena. Grightmire Arena project was high risk due to a few factors, including:
 - highly anticipated among the community,
 - tight project timeline and non-negotiable completion date,
 - contracted to a vendor that had significantly underbid for the Project.
- 8 We also concluded that the Grightmire Arena project was not managed strictly in accordance with the terms and conditions of the Contract. The Contract had provided the City with several rights and remedies to handle deficiencies, schedules and delays aiming to mitigate the risk of contract default. The City did not avail itself of these remedies through the course of the Project, and there was poor contract management throughout its duration. The City's failure to exercise, or fully exercise, its rights under the Contract and its failure to manage the Contract strictly in accordance with its terms and conditions contributed to the delays and issues surrounding completion of the project, and later weakened the City's position in the negotiation of a settlement. In addition, lack of proper Project documentation and official communication on major events and issues with Contractor performance further contributed to the City's problems.
- 9 Use of its Performance Bond as assurance that the City would have the project completed in accordance with the Contract could have been an effective tool available to the City. However, the City's pattern of not exercising its rights nor following processes under the Contract and further failure to take timely action to declare the Contract in default when CGI missed the Substantial Performance date essentially made it unlikely that CGI's surety would step in to complete the Project.
- 10 OCA found that a vendor performance management process is sorely needed to mitigate the circumstances of poor contractor performance. The City, through its current approach, accepts the lowest bid, regardless of the level of risk involved or the previous performance of the contractor. The contractor in this case, was identified as having delivered poorly on a previous project. However, the current approach to procurement is unable to cope with situations where previously poor performers are bidding very low on new contracts. Further, the necessary contract management skills to closely performance monitor and manage a non-performing contractor are spread out amongst existing roles including those of project manager, contract administrator, legal experts and procurement specialists, and are generally insufficient to manage complex, high risk projects.

- 11 OCA found no evidence of any formal agreement for the consultant and contract administrator duties. Thus, the terms and conditions normally contained in such an agreement were absent. The form of contract which was through a Purchase Order for the single-sourced Prime Consultant and Contract Administrator Invizij limited the City's ability to hold the Consultant accountable for any design-related delays or fault in exercising professional due care in some areas of their work. Further, the Consultant being put in the position of wearing the hats of both design architect and contract administrator raises questions about objectivity.
- 12 Much public criticism and negative exposure of the Project was caused, in part, by lack of timely and upfront communication with Council and the public. Instead of open and timely updates on the progress of the Project and related issues that were emerging, the message that the project would be completed on time and on budget was repeated until long after it was in technical default and deficiencies were mounting, and even while the project management team might have had little confidence themselves that the Project would be completed on time.
- 13 In summary, OCA concluded that the level of oversight and timeliness of actions in overseeing the work of the Contractor were insufficient and not commensurate with the level of risk for the project. In our view, causal and contributing factors that resulted in these circumstances were resources that were spread over multiple projects, the lack of a risk management framework, weak processes for managing poorly performing contractors, 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.

Grightmire 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

Introduction and Background

Overview

- 14 The Office of City Auditor was requested by City Council to conduct a lessons-learned audit of problems associated with the Grightmire Arena Addition and Renovation project (the Project), with the goal of understanding the causes that led to the failure of the Grightmire project to achieve its intended outcomes and finding out what lessons could be learned to avoid similar pitfalls in future capital projects.
- 15 The renovations of Grightmire Arena had been on the City's capital plan since 2010. In 2013, Invizij Architects Inc. (the Consultant), a Hamilton based architectural consulting firm, was retained for environmental assessment and feasibility study. In 2016, Council approved a budget of \$7 million for the Project. Invizij was single sourced for the design and architect work, and later in the same year was retained to be the Prime Consultant and Contract Administrator for the Project. There was not an agreement signed between the City and Invizij, rather the responsibilities of Invizij as the Prime Consultant and Contract Administrator were defined in a Purchase Order issued in September 2016.
- 16 In July 2017, a Request for Tenders (RFT) for the Grightmire Arena project was released. Century Group Inc. (CGI) submitted the lowest compliant bid among the seven bidders. With a bid price of \$5.688 million, CGI was awarded with Contract C-13-44-17 (the Contract), signed on August 29, 2017.
- 17 CGI commenced the construction work at the end of September 2017. According to the Contract, the construction was scheduled to achieve Substantial Performance by September 7, 2018, in time for the next hockey season. However, CGI was not able to do so by September 7, 2018. According to Project meeting minutes, email communications, staff updates to Council, and comments in some payment certificates, the Substantial Performance date was extended a few times, however such extensions were not official as CGI did not request any of the extensions in accordance with the Contract terms. Emails and meeting minutes discussions did not constitute formal notice/request, nor did comments in the payment certifications.
- 18 By December 7, 2018, a full three months after the Substantial Performance date was missed, the Project was only approximately 80 percent complete. The Project Management team with oversight of the Project asked the Consultant to independently assess and determine whether the City had sufficient grounds to note CGI in default of the Contract.
- 19 On December 19, 2018 the Consultant responded to the Project Management team's request in writing, stating that sufficient grounds did exist to note default, mainly on the basis that CGI:
 - failed to achieve the Substantial Performance on September 7, 2018,
 - failed to rectify deficiencies, particularly items of life and safety that were brought to CGI's attention April 4, 2018,

- failed to provide a Project schedule when requested.
- 20 The City issued CGI Notice of Default and copied CGI's surety Travelers Canada on December 21, 2018.
- 21 On January 7, 2019 CGI responded to the City's Notice of Default. In its response, CGI failed to provide a rectification plan but provided a revised schedule as requested in the Notice of Default. CGI also delivered a rebuttal to many of the defaults enumerated by the Consultant, in most cases disclaiming responsibility, and asserting causes beyond its control including:
- design defects that caused delay
 - as-built drawings for the existing structure were not accurate
 - Change Directives No. 1 and 2 were delayed and impacted the schedule
 - the Consultant had failed to provide a deficiency list, while CGI had prepared its own deficiency list and addressed 75% of the deficiencies at the time of the letter; and
 - a variety of change orders that had impacted the schedule.
- 22 The City responded to CGI's rebuttal. Between January and February staff engaged CGI's subtrades in discussions about the project. The City decided to accept CGI's revised schedule and to continue working with CGI with renewed focus to complete the work. The revised schedule reset the Substantial Performance date to April 9, 2019.
- 23 CGI was not able to keep its commitment and once again failed to achieve the Substantial Performance by April 9, 2019. By May 2019, the City had decided to negotiate to terminate the Contract, which included descoping six items from the Contract that the City itself would complete.
- 24 CGI eventually managed to complete its descoped work and wrapped up the project on May 16, 2019. The project was certified as having achieved Substantial Performance on June 13, 2019. Grightmire Arena re-opened for business in September 2019.

The Cost of the Project

- 25 With an approved budget of \$7 million, and a later detailed cost estimate of \$6.9M, the total cost of the Grightmire Arena project was approximately \$8.4 million, of which \$6.7 million was paid to CGI, and \$1.7 million was provided as additional funding, which was approved in 2019 for completion of the outstanding work after CGI vacated the site. The cost of \$8.4 million does not include the loss of revenue

estimated at \$102,114 from waiving two seasons of user fees for the two hockey teams impacted by the construction delays. The cost was considerably in excess of the original \$7M budget (20%), and 22% over the detailed cost estimate - well beyond the presumed accuracy of the project estimate.

The Request for Tenders (RFT)

- 26 The scope of work for the Grightmire Arena project defined in the RFT included:
- Demolition of existing single-storey and basement level at west end of building with total floor area of approx. 2,907m² (31,292 sq.ft.),
 - Construction of new two-storey addition (with basement) of approx. 3,484m² (37,610 sq.ft.) in same proximity as demolished area including provision of a new elevator with access to all 3 levels,
 - New Basement Level includes: seven change rooms and service space,
 - New Ground Floor Level includes: Public Lobby, Administration space and Concession,
 - New Second-Storey includes: Multi-Purpose Space with view to existing ice surface,
 - Provision of new athletic floor surfacing inside existing arena proper (Provisional Price),
 - Exterior works include construction of new ramp, replacement of existing stairs, new concrete sidewalks, reconstruction of existing parking area (Provisional Price) including storm water management and demountable flood proofing measures,
 - New Mechanical HVAC, plumbing and sprinkler systems for new two-storey addition,
 - New Electrical systems for new two-storey addition.
- 27 The RFT specifically required the tenders to have:
- One price, all inclusive.
 - Bid security of \$500,000 for submission deposit.
 - 50% of base bid price Performance bond and 50% of base bid price Labour Material Payment bond.
 - Substantial Performance date of September 7, 2018.

The Contract

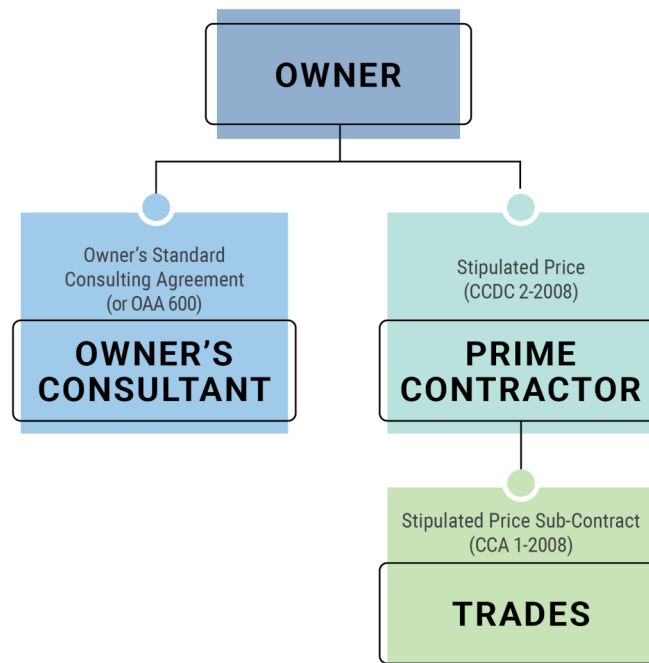
- 28 The contract used for Grightmire Arena project was a CCDC 2 Stipulated Price Contract. The CCDC 2 contract is a standard contract developed by the Canadian Construction Document Committee. The CCDC 2 Stipulated Price Contract form is typically used where an owner of the project has a defined scope of work, a completed issued-for-construction design, and is looking to engage a single contractor to construct and is prepared to pay the contractor a fixed price that includes an undisclosed amount for the contractor's mark-up for overhead, profit and risk. Such contract also requires that users of the contract be compliant with the high-level administrative requirements and procedures needed for construction projects, including the role and authority of the consultant, procedures for changes in the work, and work by other contractors, insurance requirements, etc.

Figure 1 below illustrates how a CCDC 2 contract works.

Figure 1

DESIGN ▪ BID ▪ BUILD

Build starts after design is finished



The Project Team

- 29 Under the CCDC-2 contract, the project team for the Grightmire Arena project consisted of:
- 1) Owner’s Representatives: The Project Management team from the City to provide oversight.
 - 2) Owner’s Consultant: Invizij (Consultant), responsible for design work and contract administration including evaluating contractor performance under the contract and keeping the Owner informed of progress, quality of work and deficiencies.
 - 3) Prime Contractor: CGI that was responsible for the construction work.

The Project Timeline

- 30 The initial timelines for Grightmire Arena project was set in 2016 as follows:
- Construction tender – March 2017
 - Contract award – April 2017
 - Construction completion – September 2018
- 31 However, the RFT for the Project was not released until July 6, 2017. According to the Project Management team, this was due to delays in some minor site plan approval and permit applications. As a result, all subsequent works were pushed back by 4 months, except for the Substantial Performance date. This delay made the project considerably riskier.

Table 1 below compares the initial timeline vs. actual project milestones of the project.

Table 1 Initial Timeline vs. Actual Project Milestones

Project Milestone	Initial Plan	Actual Milestone	Difference
Tender Document	March 2017	July 6, 2017	4 Months
Contract Signed	April 2017	August 29, 2017	4 Months
Substantial Performance	September 7, 2018	June 13, 2019 (Certified)	9 Months

The Lowest Bid

- 32 In accordance with City of Hamilton Procurement Bylaw Policy # 5.3 Request for Tenders, a contract is awarded to the lowest compliant bid. CGI's base bid of \$5,668,000 was the lowest compliant bid among the seven (one disqualified) bids received. CGI was awarded with Contract C13-44-17 on August 15, 2017. The second lowest bid was \$822,000 higher.
- 33 After receiving notification of being the successful bidder, CGI alleged that they had made an error in their Base Bid Price and that they had not included the price for the Provisional Items of \$425,708, and therefore requested to increase their bid price by the same amount.
- 34 Procurement staff found no error in CGI's submission. In accordance with *RFT 5.11 and 5.12*, CGI had an obligation to either enter the Contract with the price they bid; or withdraw the bid forfeiting the bid security of \$500,000.
- 35 Procurement staff had a meeting with CGI representatives on August 29, 2017. According to the meeting notes, CGI representatives confirmed at the meeting that they would enter into the Contract, and they would complete the Project on time as prescribed and at the price they bid.

Construction Delays

- 36 The 12-month construction work was delayed a few times. By the Contract prescribed Substantial Performance date of September 7, 2018, the project was less than 80% complete. Soon after the construction commenced in September 2017, some residents of Dundas community had observed on a few occasions that there were no workers on site at all for an extended time. Based on the documents we reviewed, one of these occasions was from February 15, 2018 to March 14, 2018 when the Ministry of Labour issued a stop work order due to safety concerns, and due to shoring and excavation not meeting standards. In its later rebuttal responding to the Notice of Default, CGI attributed most of the delays to factors out of its control such as design errors, inaccurate drawings, the number of changes required, found asbestos and extreme weather conditions.
- 37 Pursuant to General Condition GC 3.5.7, CGI was required to apply to the Consultant in writing through a Change Order process to request an extension of Contract Time if there were delays caused by factors out of its control. It was documented in April 2018 meeting minutes and a Consultant General Review Report that CGI had requested to extend the Project schedule by 20 days because of asbestos found on site and weather-related delays. The Consultant prepared a Change Order to request an extension of the Substantial Performance date to Sept. 27, 2018. The request was later refused by the Project Management team on the

basis that CGI did not provide sufficient supporting documents to justify the request. For other delays that CGI claimed was out of their control, there was no evidence that CGI had requested extensions of Contract Time in the manner required per the Contract.

- 38 After the Contract was declared in default, on February 8, 2019, CGI proposed a revised schedule that reset the Substantial Performance date to April 9, 2019, which was accepted by the City. But by April 9, 2019, CGI failed to keep its promise and missed the Substantial Performance date once again.
- 39 There was very little project documentation after January 7, 2019 provided to us for review. As a result, we could not determine what specifically caused the delays in 2019.

Support from Legal Services

- 40 Legal Services was involved in tailoring the Contract to the specific requirements of the Grightmire Arena project in 2017. In late July 2018, when it was obvious the project was falling behind schedule and there had been criticism from media and public, Legal Services was engaged to review the Contract.
- 41 Legal Services continued to provide support to the Project Management team throughout the rest of the Project.

The Contract in Default

- 42 CGI did not achieve Substantial Performance on September 7, 2018, the date prescribed in the Contract.
- 43 CGI also failed to request any extension of Contract Time in writing and follow the Change Order process within 10 days of the delay event pursuant to GC 3.5.7 and GC 6.5.4. From meeting minutes, staff updates to Council, and comments in payment certifications it appeared the Substantial Performance date had been informally agreed to be extended a few times, however we did not find any documentation that spoke to formal extension. In other words, while the extensions of the Substantial Performance Date might have been agreed upon verbally, none was official, which means the Contract was indeed in default as of September 8, 2018.
- 44 On December 7, 2018, three months after the prescribed Substantial Performance date was missed, the City's Consultant was requested to independently assess whether there were grounds for noting default. After the assessment, the Consultant

gave the opinion that the City had sufficient cause to declare the contract in default resulting from poor and/or non-performance of the contractor. On December 21, 2018, the City issued CGI a Notice of Default. CGI was given five business days to cure the default.

- 45 The grounds for noting the default were, but not limited to:
1. CGI's failure to achieve Substantial Performance by September 7, 2018,
 2. CGI's failure to rectify deficiencies, particularly deficiencies that were life-safety items, that were brought to CGI's attention as early as April 4, 2018, and
 3. CGI's failure to have provided schedules when requested.
- 46 In the Notice of Default, City staff requested from CGI a rectification/recovery plan, and to address some default items by way of "a thorough, reliable and verifiable schedule". CGI's surety, Travelers Canada, was put on notice, but no further action was taken to call upon the Performance Bond.
- 47 CGI responded to the Notice of Default on January 7, 2019 and delivered a rebuttal letter to the January 17, 2019 Council meeting, in most cases disclaiming responsibility and asserting causes beyond its control. From CGI's rebuttal and staff response to CGI's rebuttal, we noticed there were disagreements between City staff, the Consultant and CGI as to what staff believed to have been the causal factors – CGI's processes and lack of prompt communication, and what CGI believed to have been causal factors – circumstances beyond their control such as drawings and design issues, changes, weather and site conditions, etc.
- 48 In CGI's response to the Notice of Default, it did not provide a rectification / recovery plan as required by the Notice, and under GC 3.5.2. However, they proposed a revised schedule that reset the Substantial Performance date to April 9, 2019 and total completion by July 5, 2019.
- 49 With uncertainty as to whether CGI would be able to keep its promise, in February 2019 the City decided to accept CGI's proposed schedule and to continue to work with CGI with a renewed focus on the completion of works.

The Interim Ban

- 50 The City established an interim ban of CGI due to the impaired commercial relationship between the City and CGI, for the purpose of preventing CGI from competing and being awarded another City Contract until December 19, 2019. The interim ban was extended to December 31, 2020 and in 2020 it was extended further to become a 10-year long term ban.

Descoped Items and Deficiencies

- 51 By April 9, 2019, the date CGI had scheduled to deliver Substantial Performance on the contract, CGI was not able to meet its obligations. The construction work had only progressed about 8% from January 2019 to April 2019.
- 52 Staff were growing concerned the 2019-2020 hockey season might be impacted. In May 2019 to the City decided to terminate the Contract which included reaching a transitional agreement to descope some of items for the City to complete and to highlight the work CGI needed to focus on.
- 53 With six items descoped from the Contract, CGI eventually wrapped up its involvement in the project on May 16, 2019. The status of Substantial Performance was certified by the Consultant on June 13, 2019. CGI vacated the site on June 21, 2019 in accordance with the Transitional Agreement and the City took control of the premises.

The following table (Table 2) contains each of the descoped items and its value from the Contract with CGI according to the analysis we received:

Table 2

Descoped Items and Its Value

Descoped Items	Value
Concrete Floor Sealing	\$16,000
Exterior Ram, Stairs, and Retaining Walls	\$30,000
Flood Protection (Flood Barriers)	\$38,463
Glass balustrades, Interior and Exterior	\$300,568
Landscaping	\$18,800
Sandblasting	\$5,000
Total:	\$408,831

- 54 Maintaining a running deficiency list is integral to effective project management. The Contract did not specifically require or refer to any party to maintain a running deficiency list. In the absence of a formal contract with the Contract Administrator Invizij, no party in the project was formally accountable for identifying and keeping ongoing track of the status of the deficiencies. A deficiency list we reviewed from legal files indicated a total of 839 deficiencies that were identified throughout the Project with \$538,900 in items that were incomplete / not rectified. The number of deficiencies was expanded to 867 items in an independent third-party valuation. The deficiency list we received, even though grouped by category such as Architecture, Mechanical and Electrical, did not record the time each deficiency was identified, who identified the deficiency and when the deficiencies were rectified.

Construction Liens Against the City Premises

- 55 Entering 2019, CGI had failed to pay its subcontractors. As a result, five of CGI subcontractors took legal action and three of them registered liens against the City. In August 2019, CGI also served the City with its own Statement of Claim and further registered a lien of \$3,929,462 against the City's property.
- 56 In reviewing CGI's lien claims of \$3,929,462 OCA found that they were not supported by particulars, and more than \$2 million was not accounted for.

Table 3 below are CGI and subcontractors and the claims registered against the City:

Table 3 **Century Group Inc. (CGI) and Subcontractor Claims Registered Against the City**

Contractor/Subcontractor	Claim Amount
Cambridge Curbs and Sidewalks Ltd.	\$74,123
Century Group Inc.	\$3,929,462
Ekum-Sekum Incorporated	\$72,737
JML Enterprise	\$511,045
Val/Mar Construction Inc.	\$298,949
Skeates Contracting Inc.	\$88,313

The Financial Settlement

- 57 The Office of the City Auditor is unable to publicly share details relating to a financial settlement that was reached between the City of Hamilton and CGI as the terms of the settlement are confidential and cannot be disclosed save and except for any professional advisor or as may be required by law.
- 58 The total cost of the Contract with CGI was \$6,674,250 (exclusive of HST).

The Impact on the Hockey Community

- 59 In May 2019 the Project received additional funding of \$1.669 million from Reserves to complete the work outstanding after CGI vacated the site. Staff directly hired trades and contractors who completed the outstanding work. According to staff records, 20 items were worked on by City staff and their hired subcontractors to open the arena for the 2019-2020 hockey season.
- 60 The initial plan for the Grightmire Arena project was that the 16-month construction would close out in September 2018, so that only the 2017-18 season's hockey games would be relocated. When the substantial completion date was missed in September 2018, Facilities and Recreation staff had to coordinate with other arenas to relocate the games and accommodate hockey teams once again. Public Works senior staff also met with the local Councillor and hockey team leadership to update them on the project and apologized for the delay.
- 61 To mitigate the impact on the hockey teams for their losses such as ice time and expenses to relocate the games, user fees were waived for two seasons for two hockey teams. The estimated waived fee revenue was approximately \$102,114.

Audit Objective

- 62 The objectives of this lessons learned audit was to understand why and how the J.L. Grightmire Arena addition and renovation project experienced significant issues and did not achieve its desired outcomes; and what lessons can be learned for future City capital projects.

Audit Scope

- 63 The scope of the work included all work related to Grightmire Area project since 2016, key individuals that had involvement in managing the project, records, documents, communication, files and reports related to the project.
- 64 We interviewed key individuals that included:
- Staff from Legal Services,
 - Staff from Procurement,
 - Project managers who oversaw the project,
 - Invizij, the consultant who designed and contract administered the project,
 - Local Councillor,
 - Resident from Dundas community who made complaints about the delays.
- 65 We sought expert legal advice and opinion on some of the legal decisions made for the project. We retained Cassels Brock & Blackwell LLP to support us with the contract review to provide us their expert advice and opinions on how the CCDC contract could have been utilized to the best interests of the City; and further on opinions and opportunities that might have been available to the City throughout the project.
- 66 We reviewed the Procurement By-law and policies, tender documents, Council reports (some of them confidential), project documentation and communication records that included:
- Council reports and updates up to May 2021 (including private and confidential documents).
 - Procurement Bylaw No. 20-205 and Policies #1, #4, #5, #8 and #11.
 - Contract C13-44-17 and Tender Documents, as well as the Invizij Scope of Work.
 - Project management documentation that included bi-weekly meeting minutes, field reports, change orders and change directives, and payment certifications.
 - Email communication and documentation that were provided to us.
 - Documentation of the legal dispute and negotiation of the settlement.
- 67 We researched industry literature, best practices and advisories from professional associations such as Canadian Construction Association, and Surety Association of Canada.
- 68 We performed analysis on costs of the project and compared potential financial outcomes of various scenarios. We developed a project activity log and project timelines to understand the cause of issues at different phases of the project.

Detailed Findings

- 69 We categorized our findings in the following themes:
- A. Managing capital projects with a risk management strategy and tactful, forthright communication.
 - B. Managing project requirements in accordance with the terms and conditions of the contract.
 - C. Vendor management and procurement policies.
 - D. Legal support and decisions that could be optimized in the best interest of the City.
 - E. Effective deployment and oversight of external Consultants.

Theme A



This theme includes observations on the risk management strategy that is applied to capital projects, and in particular to managing any project with tight timelines and aggressive completion dates in a way that is strategic and effective, where timely evaluation of risk and upfront communication with Council and the public could make a difference to success.

A1.

Risk Management Strategy

- 70 OCA found there to be a lack of any systematic approach for identifying risks or for developing a risk management strategy to manage this project specifically, or capital projects in general. We did not find any formal assessment of Grightmire risks as part of the City's project management methodology and to subsequently manage the project in accordance with its risk level. That is not to say staff were not aware of any of the risks. Rather the lack of an assessment created a situation of a "perfect storm" that existed but was not recognized for what it was. Our interviews with the project management team indicated that each Project Manager in the Energy, Facilities and Fleet Management (EFFM) Division oversees about 15 projects at any given time, including multiple million-dollar projects. With the number of complex projects on hand, absent the discipline engendered by a risk-based approach, it is hard to imagine how any project manager could stay on top of everything. In our view the lack of formal risk assessment denied the project management team the opportunity to prioritize and deal with the very real risks that were emerging quite early in the process. As a consequence, Grightmire from the outset was destined to be managed in more of a reactive than proactive manner.
- 71 A few factors drove the Grightmire Arena project to high levels of risk. These risk factors include:
- a significant underbid by the contractor
 - unreasonably tight project timeline and non-negotiable completion date

- high public expectations
 - project resource issues
- 72 We noticed staff were aware of some of these risk factors. However, the likelihood the project might fail and potential impacts if it were to fail were not assessed or brought forward. Without a formal approach there was a bias toward inaction or soft action. In other words, there was no strategy in place to manage each risk factor. Staff assigned to the Project continued to oversee multiple projects, while at the same time managing the Grightmire Arena project as best they could. With the limited work hours divided among the projects, staff had to rely on the instincts and experience of other staff assigned to the project team to coordinate and work seamlessly to complete the Project.
- 73 Some of the early warning signals that should have been heeded include the delay in getting the RFT out which removed any room for unforeseen project delays without impacting the all-important deadline of September 2018, the successful proponent's very low bid (relative to other bidders and to the detailed cost estimate), and their acknowledged "mistake" in not including a key portion of the requirements in their costing. Less than a month into the project the contractor failed to furnish the required Project Schedule with its application for first payment, foretelling of the events that would unfold.

A2. Strategically Managing a Project with a Tight Project Timeline and Completion Date

- 74 The timeline of substantial completion of September 7, 2018 was set in the Contract as a requirement. As discussed in the Background section, the Grightmire Arena project did not actually commence at the time originally planned. When the RFT was finally released, it was four months after the planned date of issue. As a result, all project milestones were pushed back correspondingly, **except** for the Substantial Performance date. This squeezed the previously planned 16-month construction period into one of 12 months. Based on our interview with the Consultant, this timeline was described as "possible" if all aspects of the project worked out perfectly. Other commentary we received suggested the new timelines were unlikely to be achieved, however that was not communicated to stakeholders. At the very least, there was no room for unforeseen delays without having a dire impact on delivery to the community of the all-important completion date of September 2018.
- 75 The main consideration behind setting the Substantial Performance date for September 2018 was to meet the requirement of Council and minimize the impact on the hockey community. Missing one season of use from the construction was necessary and could be managed even with delays if the project were to start as soon possible after the hockey season ended. But that movement of the RFT date removed any ability to accommodate unknown factors and exposed the project to very high risk.

- 76 Taking into account the timing of hockey season, it would have been preferable to have either dealt with the site approval issues and permit delays earlier in the process or postponed the commencement of the Project to April 2018, which would have allowed for a longer period of construction time, and would have resulted in losing only the 2018-19 hockey season. It is generally reasonable, responsible and prudent to allow for some buffer time in a construction project, particularly a renovation project such as Grightmire Arena that may be impacted by site conditions not uncovered in the design phase.

A3. Timely and Upfront Communication with Council and Public Could Make a Difference

- 77 Based on our interviews with staff and the Consultant, it appears that their professional experience told them and the Consultant that there was a very high risk that the Project would not be completed in 12 months. However, such risk was not raised to Council. Instead, Council was assured that the Project would be completed as scheduled.
- 78 Dundas hockey community groups were prepared that one hockey season would be interrupted by the construction work. They were frustrated and disappointed that the games had to be relocated for a second season. The delays also cost the City financially, as the City in 2019 offered to waive user fees assessed at \$102,114 for two seasons for two hockey teams that were impacted by the delay.
- 79 Timely and upfront communication with users of Grightmire Arena on the issues and progress of the Project could have won the understanding of the community and helped the users set a reasonable expectation of the timeline of completion. Though difficult, it would also have been prudent to help Council understand the risks of compressing 16-month project into 12 months and kept Council updated in a timely and upfront manner on the issues and progress of the Project.
- 80 The need for more timely and proactive communication of challenges and emerging risks with the project was an issue that repeated itself through the course of the project. In our view the reluctance to bring forward the specific problems that were being experienced, or even recognize them from what was presented, combined with what in risk parlance is termed "overconfidence bias" - that element of human nature that leads one to think something extraordinary will happen in the face of adversity – these were factors in this project. For example, at the end of December the project was 80% complete, with a 5% progress rate from the end of November (75% complete). Yet, as late as August 2018 staff were contemplating but couldn't agree with CGI to an extension of only 3 weeks. It should have been readily apparent there was an almost certain risk of not meeting substantial completion.

Theme B



This theme includes observations on managing the project requirements in accordance with the terms and conditions of the contract taking into consideration the processes in place for project management and contract management including contract default, performance bond, project documentation and communication between the parties.

B1. Project Management and Contract Management

- 81 OCA found that the Contract of the Grightmire Arena project was not managed in accordance with the terms and conditions of the Contract. The contract management of this project was found by the OCA to be weak. In that regard, rights and remedies provided under the Contract were not exercised or fully exercised owing to many factors.
- 82 The Contract itself did contain the necessary provisions to protect the City against Contractor defaults and delays and was appropriate to the task. However, in many cases, issues that arose with the Contractor were not treated with any sense of urgency. This included:

B1.1. Deficiencies

- 83 Deficiencies were addressed in the following Terms and Conditions in the Contract:
- GC 2.4.1 – CGI was required to promptly rectify any deficiencies that were rejected by the Consultant and prioritize same based on the instructions of the City.
 - GC 2.4.3 – the City had the ability to deduct the value of any unrectified deficiencies from payments to CGI.
- 84 The City's Consultant assessment prior to the Notice of Default noted CGI's failure to rectify deficiencies, particularly deficiencies that were life-safety items, and were brought to CGI's attention as early as April 4, 2018.
- 85 However, the City failed to exercise its rights under GC 2.4.3 to deduct the value of these unrectified deficiencies. For deficient items such as fire alarms, exit signage, exit stairs, and fire access routes for emergency vehicles, if not dealt with in a timely fashion, the City might have been liable in case of accident.
- 86 In our review of the payment certificates, liquidated damages were not utilized as a remedy by the City to the fullest extent possible. This remedy was available to the City throughout the course of the Project and did not require CGI's agreement.

B1.2.

Schedule

- 87
- GC 3.5.1 – CGI was required to provide a schedule with its first application for payment.
 - GC 3.5.2 – the City had the ability to require a recovery plan from CGI in the event of a slippage in the schedule.
- 88
- The Consultant assessment prior to the Notice of Default noted CGI's failure to have provided schedules when required. CGI did not provide a Project Schedule with its first application for payment on September 30, 2017. In fact, CGI provided the Project Schedule with its 8th payment application on April 30, 2018. The City failed to take action to address the issue in a timely manner and allowed 7 payments to go through without the Project Schedule.
- 89
- Further, there was no evidence that CGI had provided a recovery plan for any of the slippage in the schedule; nor did we come across evidence that staff or the Consultant requested a recovery plan. There were milestones that were missed throughout the course of the project. For example, "Parking Area 1" on Drawing A1.1.3 "Construction Area Staging" indicated a required completion date by July 31, 2018. As of at least December 19, 2018 when the Consultant issued his assessment, the "Parking Area 1" had not been completed.

B1.3.

Delays

- 90
- GC 6.5.3 - CGI was barred from making a claim for an extension to the Contract Time unless it provided Notice in Writing **within 10 days** from the commencement of the delay event.
 - GC 13.5 – liquidated damages in the amount of \$1,000/day were payable by CGI to the City for every day that CGI did not achieve Substantial Performance by September 7, 2018
 - GC 13.5.3, the City may deduct liquidated damages from payments to CGI.
- 91
- As discussed in the Background section of this report, we did not locate any formal request from CGI for an extension of the Substantial Performance date. Both General Review Report 5 completed on April 4, 2018 by the Consultant after the site visit of April 3, 2018 and Meeting Minutes 13 for a project meeting held on April 4, 2018 discussed "the City had accepted the 20 days extension for weather and designated substance delay" for which the Consultant was directed to prepare a Change Order. However, the request was later refused by City staff on the basis that CGI had not provided sufficient supporting documents for the claim. Without a formal request and approval of time extension that followed the proper process as prescribed in the Contract, legally, the Contract was in default as of September 8, 2018. We were not able to determine why the Consultant would be directed to

prepare a change order if the Contractor had not filed the formal extension request.

- 92 Thus, we concluded the City failed to take prompt and appropriate action to declare the Contract in default on September 8, 2018 and further, it did not exercise its rights under GC 13.5. to apply the \$1,000/day liquidated damages.
- 93 Had the City undertaken a rigorous approach to contract management, including prompt actions to exercise its rights under the Contract, and using the financial penalties that were actionable and which would have encouraged CGI to stay on track, it may have enhanced the City's ability to control the work.

B2. Contract Default and Performance Bond

- 94 The RFT required CGI to carry a 50% of the bid price Performance Bond and a 50% of the bid price of Labour and Material Payment bond. The use of construction surety bonds was not only meant to comply with the requirements of the Construction Act, but also to provide assurance that the City would have a complete project in accordance with the terms and conditions of the original contract, despite a default by the contractor.
- 95 As discussed in B1.3, and pursuant to GC 6.5, any Contract Time extension due to delays caused by factors out of the control of CGI must be requested in writing and through a Change Order process within 10 days of the delay event. CGI failed to request, in writing, for any of the extensions we come across in our review. This essentially means the original Substantial Performance date of September 7, 2018 remained valid and the Contract was in default as of September 8, 2018.
- 96 Staff waited until December 7, 2018, exactly three months after the Contract was technically in default to seek an independent assessment from the Consultant and then declared the Contract in default on December 21, 2018.
- 97 As a result of the City's weak contract management, including the failure to follow, and demand adherence to Contract terms and conditions, using formal, prescribed processes, on a timely basis; and considering the fact that the Notice of Default was issued more than three months after the Contract was in technical default; and that (as CGI's rebuttal pointed out), some of the delays may have been related to design defects and changes, the likelihood CGI's surety Travellers Canada would step in to complete the Project was low.
- 98 Had the City provided timely notice of Default(s), the City's position would certainly have been strengthened and a claim on the Performance Bond may have been feasible and warranted. Overall, OCA concluded that the processes for contract management were not executed rigorously enough to exploit legal protections under the contract.

B3. Project Documentation and Communication

- 99 A contract is a legally binding agreement that defines and governs the rights and duties between or among its parties. When disputes arise, parties must present evidence to support that contract provisions were strictly followed.
- 100 The City failed to sufficiently document some of the Project milestones and important events and conditions in evidence of project status, risks, deficiencies and required remediations which contributed to the City's weakened position in the legal dispute with CGI.
- 101 For example, the substantial performance date was extended, however, there was no documentation or formal notice to CGI regarding this extension. Based on a review of the project files and documents provided to us, the extension of Substantial Performance was not sufficiently supported by staff.
- 102 Also, when the City accepted CGI's proposed revised schedules there was no documentation forthcoming to indicate that the decision was communicated to CGI in an official manner.
- 103 During April or May of 2019, staff negotiated a Transition Agreement with CGI to descope 6 items for the City to work on and also to highlight what CGI needed to focus on. This agreement was not signed by either party.
- 104 Further, we were provided with very few records and documents on the project dealing with events after February 13, 2019. There were no records to demonstrate staff was maintaining diligent and participatory oversight of CGI.
- 105 In our view, such lack of documentation and formal communications tends to weaken the City's position during any legal dispute or negotiation of settlement, and we believe it did so with this project.
- 106 The absence of Project documentation, coupled with the fact key staff who were involved in supporting the project or negotiating the settlement are not available, for various reasons, meant the OCA had very little to review in determining what happened to the Project after February 13, 2019, and how staff worked to arrive at the settlement amount. In particular, we could not understand how the previously unapproved changes became approved.

B4. Strengthen Contract Terms to Better Protect the City

- 107 The Contract itself **did** contain the necessary provisions to protect the City against Contractor defaults and delays, and it was appropriate to the task. There are improvements that could be written into the contract to better protect the City that include:

B4.1. Running Deficiency List

- 108 SC 16 GC 2.4 Defective Work did not specifically require any party of the Contract to maintain a running deficiency list, nor did it clarify that responsibility. It was left to the discretion of each party whether they would maintain a deficiency list. In its rebuttal January 7, 2019 in response to the Notice of Default, CGI alleged the Consultant had failed to provide a deficiency list, while CGI had prepared its own deficiency list and addressed 75% of the deficiencies at the time of the letter.
- 109 We were not able to determine who had maintained the deficiency list we received. We further were not able to determine when life-safety items such as exit stairs and fire separation on the deficiency list were identified, even though we can confirm that the issue of project signage not being erected was discussed at an April 17, 2018 meeting. We did not come across other life-safety items referred to by the Consultant. We also noted the signage not erected was documented in both General Review Reports from April 2018 after Consultant site visits, however, the Consultant did not list it as deficiency, rather, documented it as the site condition.
- 110 The OCA concludes there was not a rigorous process to identify and track deficiencies. In our view, at a minimum, the Prime Consultant should be required by the Contract to maintain one comprehensive running deficiency list that would document when each deficiency was identified and when it was rectified. In the case of life-safety items not rectified, they should be highlighted and pursued aggressively.

B4.2. Liquidated Damages

- 111 GC 13.5.1 expressly states that if the date of Substantial Performance is missed, CGI should pay to the City liquidated damages calculated as \$1,000.00 for each working day that Substantial Performance extends beyond the Substantial Performance Date.
- 112 OCA wanted to determine whether or not the liquidated damages were sufficient to their purpose – to compensate the City for damages caused by delay. We noted, based on the original contract cost and project schedule, that the City was paying

approximately \$22,500 per working day for CGI to perform the Contract work (12 months Contract at \$5.668 million). In comparison, the liquidated damages of \$1,000 a day did not appear to sufficiently compensate the City for the damages, nor would it incent the Contractor to have due regard for the damages caused to the City when confronted with schedule pressures. On further enquiry, OCA was unable to determine the basis for the setting \$1,000 per day as the appropriate amount.

After considering the legal advice received from our independent legal consultant and the terms of the contract, OCA understands that liquidated damages, to be enforceable, are to represent a genuine pre-estimate of damages. Having said that, it is OCA's further understanding that liquidated damages will only be unenforceable if they are so manifestly, grossly one-sided that their enforcement would bring the administration of justice into disrepute.

- 113 Based on the value of the Contract, the significance of the Project to the community, and the current situation with the amount set, OCA concluded the liquidated damages daily amount should be evaluated to justify its current level and/or assessed for the feasibility of raising it higher. In addition, OCA recommends that the City explore additional alternatives for incenting performance with options such as earn-back and penalty/bonus clauses in the contract.

B5. Summary of Issues with Contract Management

- 114 The observations of Sections B1 through B4 collectively indicate that more developed processes and practices are needed for contract management and administration, especially those protocols that are necessarily activated when projects run into difficulties with poor performance and default. The City also needs to develop and deploy greater technical skills in contract management and explore various options for doing so. That should include consideration of splitting off contract management as a separate and independent role from project manager and contract administrator. We are aware of two other municipalities in Southern Ontario that have split these roles to ensure that the contract management function is adequately resourced, focused on contract compliance, and carried out with technical proficiency. This could be achieved through the creation of permanent roles, or contracted resources and/or deployment based on risk considerations. It would be one way of addressing the current problems with lack of formality in the way contract management occurs, which harms the ability of the City to hold contractors to strict requirements and leads to unresolvable issues with them stemming from poor administration and compliance practices.

Theme C



C1.

This theme includes observations on vendor management and procurement, including the bid process and contract award decision making.

Lowest Bid and Contract Award Decision-Making

- 115 The contract for the Grightmire Arena project was awarded to CGI in accordance with Procurement By-law Policy #5.3, because CGI submitted the lowest compliant bid. Price is the one and only factor in making the award decision presuming the bid is judged to be compliant with requirements. Risks based on prior experience with a vendor, or other factors, are not considered; and with low price being the only consideration, the City is vulnerable to accepting bids where the Contractor will be incented to provide low quality or delayed delivery.
- 116 Suffice to say, there are certain risks related to accepting the lowest bid, and the City had exposure to many of them with the Grightmire project, some significant ones being:
- CGI lacked the incentive to get the work done in a timely fashion. By December 2018, the project was 80% complete. From January 2019 to April 2019 the project only progressed by 8%, regardless of the promises CGI made.
 - CGI failed to pay subcontractors, which resulted in five subcontractors taking legal action against CGI and the City, and registered liens against City property.
 - A total of 47 change orders was issued and approved prior to Contract default. Changes, unapproved changes, extras, etc. relating to the settlement are unable to be shared publicly by the Office of the City Auditor as the terms of the settlement are confidential.
 - A total of \$81,000 in overtime costs incurred in an attempt to assist CGI catching up with the schedules was authorized.
 - CGI had difficulty finding subcontractors to work as they in turn awarded lowest bid.
 - A total of 867 deficiencies were identified throughout the project.
 - Grightmire Arena project was 9 months late.
 - Legal dispute with CGI cost the City staff time and resources.
- 117 Further, ironically, the City ended up paying CGI approximately 18% more than what they bid, for less work, and City staff and Council faced increased public scrutiny.
- 118 In our view the City and staff need better tools and training to evaluate and deal with low bid risk.

- 119 One piece of information not considered but nevertheless important to informing the tender evaluation and risk is the pre-tender cost estimate. The “Class A” estimate prepared for the Grightmire Project, indicated that the cost would be approximately \$6.9 million. The lowest bid was \$1.3M below that estimate. Such cost information was not shared with Procurement staff as “it was not part of the processes”.
- 120 Another piece of information that can help to inform the evaluation and assessment of risk is to compare the difference between the lowest bid to other bids. In this case the lowest bid was \$822,000 below the next lowest bid, and \$1.2M below the average of the bids.

Table 5 below is a comparison of lowest bid and others:

Table 5 Comparison of Lowest Bid and Others

	Costs/Price	Difference from Lowest Bid	Difference from Lowest Bid in Percentage
Lowest Bid (CGI)	\$5,668,000	-	-
Second Lowest Bid	\$6,490,000	\$822,000	14.5%
Average of 7 Bids	\$6,982,984	\$1,314,984	23.2%
Budget	\$7,000,000	\$1,332,000	23.5%
Pre-tender Class “A” Cost Estimates	\$6,900,000	\$1,232,000	21.7%

- 121 Use of the above information should have raised red flags with the bid and should have prompted investigation of the award. The current approach to these situations, however, is dominated by the thinking that if the City has no specific reason or cause to reject a compliant bid it cannot presume that the bidder will not meet their obligations and reject the bid. The OCA acknowledges there is a conundrum here. However, what the City can do, should do, and should have done better is evaluate the risks the situation presents, and formulate specific actions to mitigate the potential for poor performance by prioritizing the project, shoring up resources, and bringing close monitoring and legal involvement earlier into the process.
- 122 Also to be considered, is that the current system of awarding contracts to the lowest bidder could be improved with the use of pre-qualification that evaluates vendors using various criteria such as vendor experiences, qualifications, capability, and performance, etc. This way a decision is made on a more informed basis than if price is the lone criterion in the evaluation of tenders. Another tool to be considered is the use of a vendor rating system.

- 123 By having a vendor rating system in place, it is possible to incorporate the vendor's ratings into the bid evaluation process. Ratings for each job that a Contractor completes, when averaged on a three-year rolling basis result in an "overall vendor score". For vendors bidding on future work the City takes account of these scores in the bid evaluations. For example, in some jurisdictions the bid evaluations consist of a score based 70% on price and 30% on the overall vendor score. Therefore, the use of overall vendor score or "rating" as a bid criterion can be effective in that the lowest bidder may be bypassed in favour of an historically better performing contractor. This reduces any tendency for the lowest bidders to cut corners on the quality delivered and addresses the issue of low bid risk.
- 124 Based on interviews with staff there is not a vendor rating system at the City currently, nor was pre-qualification of vendors performed for the Grightmire Arena project. Although CGI's previous performance on another project with the City was an issue, it was apparently not of any concern to staff as they believed it was not CGI's fault for the over budget and late delivery of the project. However, the comments of staff for the project seemed to tell a different story:

"Long delays and lack of communication/coordination from Century Group at the start of construction and all throughout construction. They could not control their sub contractors, no sense of urgency to try and catch up in their schedule. Close out documents have yet to be received, still working on that and closing out final deficiencies months after the project reached substantial performance. The delays experienced on the project were due to existing conditions/unforeseen issues that needed to be addressed. Understanding this added work extended the construction schedule, it really could have been cut down if proper communication and coordination from the GC were in place. **Overall, I wouldn't recommend this contractor to complete a large-scale project**"

- 125 Apparently, the performance review of CGI from the previous staff was not read, or not carefully considered, which makes us wonder if the vendor performance review as a control was merely a perfunctory exercise.

C2. Looking Retrospectively at Procurement

- 126 After receiving notification of being the successful bidder, CGI alleged that they had made an error in their Base Bid Price and that they had forgotten to include the price for the Provisional Items of \$425,708, and therefore requested to increase their bid price by the same amount.

- 127 However, Procurement staff found no error in CGI's submission. In accordance with *RFT 5.11 and 5.12 Instructions to Bidders* that formed part of the Contract, CGI had an obligation to either enter the Contract with the price they bid; or withdraw the bid forfeiting the bid security of \$500,000.
- 128 After review, the OCA concurred with Procurement's conclusion there were no errors in CGI's submission and that the Base Bid Price of \$5,668,000 had included the Provisional Items. We also agree that the decision to award the Contract to CGI was consistent with the City Procurement By-law Policy #5.3.
- 129 Section 16 of the RFT expresses the City's reserved right to reject any bid, pursuant to the "privilege clause".

16.1 The City may reject a Bid on the following basis:

- 16.1.1 the City may reject any Bid, the lowest Bid or all Bids, may cancel the Request for Tenders or may cancel the Request for Tenders and require the submission of new Bids.
- 16.1.2 any extraordinary or unjustified disparity between the lowest Bid and the other Bids received by the City.

130 At the time there were few options available:

- Rejection under 16.1.2 "extraordinary and unjustified disparity" is admittedly difficult to apply absent guidelines and precedent for its application, and the City has no guidelines.
- Cancelling the RFT as authorized under section 16.1 and re-initiating the RFT process would have likely postponed the commencement of the project to April 2018.
- Taking the second lowest bid would have meant paying \$822,000 more than CGI's bid price. In hindsight that may seem a better option since the City ended up paying CGI \$6,674,250, which was \$184,250 more than the second lowest bid.

131 The only financially feasible option at the time was to accept CGI's commitment to deliver the project at the bid price. However, it meant the risk of the project was very high and the level of contract monitoring and performance oversight needed to be increased significantly. It would have been prudent to have made Council aware that CGI's bid was substantially lower than other bids through an erroneous bid, that risk in the project was very high and keep Council updated on the mitigation strategies, progress and issues with project.

Theme D



This theme includes reliance on our independent legal consultant's view of some of the decisions made and legal opinions provided throughout the Project.

- 132 We engaged an external legal consultant to assist us with our review of the legal position of the City at various points in time and the appropriateness of actions taken in light of issues experienced throughout the Project, and received solicitor client privileged legal advice on these issues. We have separately tabled in a Confidential report, the letter outlining the opinion of the firm. This part of our report summarizes some of the detailed observations it contains, as well as OCA's own observations.
- 133 One finding the OCA made, from a project management perspective, is that City Legal Services was not involved early enough or extensively enough when risks began to appear with the project. Due to the issues we have reported with project documentation and communication, information was lacking that could have helped solidify a more aggressive legal and contract management approach to ensure the project would be successful and the Contractor held to account. Through our observations, OCA is of the view that a greater level of project management and contract management attention and expertise is needed for project matters that develop into serious non-performance.
- 134 OCA's independent legal consultant was engaged to address four general questions:
- 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?

After considering the legal advice received from our independent legal consultant:

- 135 With respect to the **first** question, OCA has concluded that the City used a form of contract that was appropriate and was "suitably modified" in the City's favour and, on balance, contained the necessary provisions to protect the City against Contractor defaults and delays, including the relevant terms and conditions that are in Confidential Appendix "B" to Report AUD22004.
- 136 With respect to the **second** question, OCA has concluded that the City took an appropriate course of action by entering into the Contract. Since the Contractor ultimately confirmed that it would honour its bid, rejecting their bid, although allowable pursuant to a "privilege clause" in the Request for Tender, would not have been without risk, and would have been a radical departure from typical City practice. The City would have had to pay \$822K more in choosing to go with the second lowest bidder, and would have likely prevented the City from recovering the price difference from the bid bond.

- 137 With respect to the **third** and **fourth** questions, OCA has concluded that the City had several available rights and remedies under the Contract, that, through the course of the project, it failed to exercise, or fully exercise, or delayed exercising. These failures appear to have weakened the City's negotiating position and may have also contributed to delays in project completion. With respect to the performance bond, we have concluded that the surety bonding company would not have stepped in to complete the work or make a voluntary payment to the City, had the City advanced a formal claim on the performance bond.
- 138 Based on advice from our special legal counsel OCA identified the following key issues:

D1.

Default

- 139 CGI's defaults under the contract were primarily its delays and failure to achieve Substantial Completion by the prescribed date. The contract required Substantial Completion by September 7, 2018 which was not accomplished. In addition, key milestones were missed, and a variety of deficiencies that were made known to CGI were not rectified, at least by December 2018.
- 140 With each default, the City did not avail itself of the rights and remedies available under the contract. The City did not provide timely, written notice of CGI's defaults, did not withhold payment from CGI and did not apply liquidated damages.
- 141 For example, the City did not issue written notice of default in the summer of 2018, when deficiencies were not rectified, including life-safety items, nor when Substantial Performance was not achieved by September 7, 2018. It did not issue notice when CGI failed to provide the required construction schedule along with its first application for payment September 30, 2017.
- 142 In fact, the City did not receive the required construction schedule until 8 months into the work. Not only did the lack of a construction schedule impinge on the City's ability to monitor and hold to account the contractor, but it was a requirement that time for the Contract Work was "of the essence" meaning it was a fundamental component of Contractor performance. OCA cannot understand why this was not dealt with earlier, and based on the legal advice from our independent legal consultant, OCA concludes that this qualified as a material default for the purposes of giving notice.
- 143 As it happened, the City waited three months after the Substantial Performance Date of September 7 was missed before providing any notice of default, even though most of the defaults then listed would have existed in September 2018.

- 144 In fact, after considering the legal advice received from our independent legal consultant OCA concludes that the City would have been better off had it initiated its default notice in September or earlier. It is crucially important for an owner to provide timely notices in writing, of the defaults and delays if they want to preserve the right to terminate. Proper and timely notice puts pressure on the contractor to either rectify or risk allowing the owner to take corrective measures. It allows the owner to unilaterally control the completion work rather than be forced to enter into an agreement with the contractor (which is what ultimately happened). It also exposes the contractor to the owner's completion costs and provides the owner the right of set-off against the contract price.
- 145 Most of the defaults listed would have existed prior to September 2018.
- While we understand and appreciate that City staff sought advice from Legal Services in August of 2018, based on the legal advice of our independent legal consultant OCA concludes that it would have been prudent for City staff to have sought further advice when the Substantial Performance date of September 7, 2018 was missed.
- 146 OCA believes from discussions with staff that, despite the issues faced with the Contractor, they were predisposed to "working with" the Contractor and resolving issues amicably, believing that would lead to better outcomes. In our view, that strategy was misguided and did not appreciate the high risk in the project. Nor should it have led the staff to ignore the proper administration of the contract in accordance with its laid-out processes. In our view, this approach resulted in the City continuing to "work with" the Contractor long past the point it was feasible and continued even when detrimental to the City's position.

D2. Adherence to Notification Requirements and Extension of Time Requirements

- 147 The Contract was clear that when the Contractor feels that the project has been delayed due to a cause beyond its control (e.g. a delay resulting from the conduct of the Owner or the Consultant, or due to a found site condition or weather), it has an obligation to provide **written notice** pursuant to the Contract provisions. Throughout the course of the Project, CGI did not appear to have sought extensions to the Contract Time through such formal process.
- 148 There did appear to be an informal agreement to extend the date for Substantial Completion to September 28, 2018 for weather reasons and because of asbestos found at the site, however the Consultant-drafted change order was withdrawn when the City was not satisfied by the Consultant's lack of backup.

- 149 According to the Contract, the Contractor was required to provide Notice in Writing within 10 days of discovering any delay event. OCA was not provided or made aware of any such notices. In addition, OCA understands that Ontario courts have found that a contractor's failure to provide appropriate written notice can operate as a bar to the contractor's later claim for a time extension and costs. Although there was evidence of delay discussions in meeting minutes that we were provided, there was very little discussion of what the causes were. After considering the legal advice received from our independent legal consultant OCA concludes that the Project meeting Minutes did not constitute the type of written notice required by the contract.
- 150 Conversely, contractual written notice provisions apply equally to owners. It is, therefore, crucially important for an owner to provide timely notices in writing of the defaults and delays of its contractor if the owner wants to preserve its right to terminate the contract or the contractor's right to continue with the work, in whole or in part.

D3.

Deficiencies

- 151 The Contract provided the City with considerable clout when it came to deficiencies.

Specifically, the Contract included the following terms:

- GC 2.4.1: requires the Contractor to promptly correct defective work that has been rejected by The Consultant.
- GC 2.4.3: permits the City to undertake to rectify the deficiencies itself and back charge the costs of doing so to the Contractor.
- GC 2.4.1.1: requires the City, the Consultant and the CGI to identify deficiencies and have them rectified in a timely matter.
- GC 2.4.1.2: requires the Contractor to prioritize the correction of deficiencies.
- GC 5.2.12: permits the City to withhold payment from the Contractor where there are unrectified deficiencies.

- 152 Review of documents indicated that the City:

1. did not require the Contractor, at least aggressively, to prioritize the correction of the deficiencies.
2. did not undertake to rectify the deficiencies itself and back charge the costs of doing so to the Contractor.
3. did not withhold payment from the Contractor where there were unrectified deficiencies.

153 Part of the problem was there was no evidence that any party was keeping a running deficiency list. In fact, in its January response to the City's default letter of December 2018, CGI cited the lack of a deficiency list.

154 OCA concluded the City should have been more aggressive in moving on the deficiencies and in notifying and keeping track of them.

D4.

Terminating the Contract

155 Following CGI's January 2019 letter responding to the City's notification of default, the City had the option of terminating the Contract. After considering the legal advice received from our independent legal consultant OCA concludes that the City's decision not to terminate the contract was made without a fulsome analysis of the City's contractual rights. Specifically, the City appears to have only considered common law grounds to terminate the Contract and not the City's termination rights under the Contract.

156 The Contract provided the City with two separate grounds to terminate the Contract.

- GC 7.1.6 – Termination for Convenience. This allows the City to terminate the Contract without cause or default. Had the City exercised this option, it would be liable to pay CGI for the work performed to date and reasonable profits for products and construction equipment already purchased but it would not be liable for lost profits on unperformed portions of the work.
- GC 7.1.4.2 – Termination for cause. This allows the City to terminate for cause where the Contractor is noted in default and fails to cure the default.

157 Based on the legal advice of our independent legal consultant:

OCA understands that termination for cause would have afforded the City certain advantages and specific rights and remedies, and if found to have been exercised appropriately, could have avoided liability to CGI for damages. It would have allowed the City to make a claim on CGI's performance bond, to terminate CGI's right to continue work, in whole or in part, to unilaterally remove work, to back-charge CGI the cost of completing said work using its own resources. This would have potentially avoided having to enter into an agreement with CGI over descoping and allowed better control of the timing and completion.

158 OCA also concludes that the City's decision not to terminate the Contract with CGI did not appear to have properly considered the City's available remedies to terminate in accordance with the Contract. The reliance solely on common law termination rights that was provided called for a much higher standard to terminate than the express rights within the Contract.

D5.

Settlement

- 159 We asked our legal consultant to review the settlement with CGI and provide insights as to the amounts and process. The Office of the City Auditor is unable to publicly share details relating to a financial settlement that was reached between the City of Hamilton and CGI as the terms of the settlement are confidential and cannot be disclosed.
- 160 However, we do note that we were unable to obtain sufficient, or indeed, any information on pivotal components of the financial settlement. We could find no evidence that the City performed the necessary due diligence for these pivotal components.

D6.

Section 40 of the *Construction Act*

- 161 Based on the legal advice of our independent legal consultant it appears to OCA that the City did not consider its right under Section 40 of the *Construction Act* to cross examine on the liens. Section 40 of the *Construction Act* would have allowed the City to scrutinize the timing and quantum of liens in support of motions to vacate, reduce or discharge the liens.
- 162 The lien CGI registered against the City premise was for \$3,929,461. Of that, \$1,693,653 was the amount stated to be owed in CGI's Reply and Defense to Counterclaim, leaving the amount of \$2,235,808 that appears not to have been accounted for. This substantial difference between CGI's lien amount and the position in CGI's Reply is perplexing.
- 163 It appears, at face value, that the lien of CGI was exaggerated and therefore, had the matter not settled, CGI could also have been potentially liable for damages for exaggerating its lien, pursuant to Section 35 of the *Construction Act*.

Theme E

This theme considers if there was effective deployment and oversight of external Consultants.

E1.**Consultant Objectivity**

- 164 The Consultant for the project was single sourced to be the contract administrator for the Grightmire Arena project. They were also the consultant firm that performed the design work and architectural services for the Project. Putting the architect who designed the project in the position of interpreting and administering the contract, overseeing the work of the Contractor, and potentially approving changes to work, may have its benefits in that the Consultant is intimately familiar with the details of the project. However, it also raises the question of whether the Consultant could be objective when their work was challenged in, for example, a dispute over alleged design flaws that cause delays or impose increased costs on the Contractor. This is particularly so where a project is very risky.
- 165 Through interviews and review of documents provided to us, we noted it was an on-going issue where CGI and the Consultant were having disagreements about some of the designs. In fact, such disagreement was highlighted in CGI's response to the Notice of Default on January 7, 2019. In rebuttal to the defaults enumerated by the Consultant, CGI took the position that there were design issues that resulted in increased costs and which caused and contributed to the delay of the Project.
- 166 While we cannot comment on the merits of CGI's alleged design flaw issues, and one might tend to be skeptical of a Contractor's assertions in these types of situations of dispute, it nevertheless is quite possible that it would be challenging for a consultant hired under such circumstances to maintain their objectivity. While it is not a common practice, some jurisdictions deliberately split the roles of design consultant and contract administrator to avoid these issues. In our opinion, high risk projects like Grightmire might be better served using this approach, and this might be considered a reasonable mitigation for certain projects that are deemed high risk.

E2.**Consultant's Due Professional Care**

- 167 The contractual responsibilities of Invizij with the Grightmire Arena project were defined in a Purchase Order (with standard City of Hamilton Purchase order terms) dated September 13, 2016; however, the Purchase Order did not contain the typical terms and conditions expected in an owner-architect agreement. The Consultant was wearing three hats in the Grightmire Arena project: design and architect consultant, Prime Consultant and Contract Administrator, which in our view, gave them responsibilities to exercise due professional care to ensure the Project was

constructed as designed and a shared responsibility to manage the contract in accordance with the terms and conditions.

168 In Observation B1, Project Management and Contract Management, we discussed the City's failure to manage the Contract in accordance with the terms and conditions of the Contract. The City's Consultant shared a role in this in:

- Certifying seven payment applications without the project schedule required by the Contract.
- Not keeping a running deficiency list and aggressively monitoring CGI to rectify deficiencies, particularly with life and safety items mentioned in December 19, 2018 letter that the City may be liable for.
- Not requesting a recovery plan for schedule slippage such as the parking lot which was due for completion before the Substantial Performance date.
- The delay of three months in issuing an independent assessment on grounds for noting default after the missed Substantial Performance date.
- The number of changes required. Changes, unapproved changes, extras, etc. relating to the settlement are unable to be shared publicly by the Office of the City Auditor as the terms of the settlement are confidential.

E3. Consultant's Contractual Responsibilities

169 There were no contract specifications governing the relationship between the City and the Consultant for their services to the Grightmire Arena project other than the use of standard City of Hamilton Purchase Order Terms and Conditions. The purchase order, assuming it represented the totality of the contract between the City and the Consultant, was insufficient to properly govern the relationship and hold the Consultant to account. For example, ordinary Purchase Order specifications do not contain the typical terms and conditions one would normally expect to see in an owner-architect agreement such as the OAA (Ontario Architects Association) Form 600, or the RAIC (Royal Architectural Institute of Canada) Document Six.

170 We further noted that the roles and responsibilities of the consultant not being clearly defined in a contract was not one single, standalone case. It is the OCA's understanding that one is generally not utilized when retaining architectural consultants in such a contract administration role.

171 We acknowledge that the Consultant cannot be held accountable for responsibilities not included in their contract with the City. However, the OCA concludes that the level of the Consultant oversight provided to Grightmire Arena project was not commensurate with the project risks.

- 172 As the Prime Consultant and the Contract Administrator, the Consultant had the responsibility to certify CGI’s payment applications. The most effective way to confirm the status of the project was to verify progress through site visits, with the Consultant completing a General Review Report after each visit to document site condition and what progress was observed.
- 173 The General Review Reports provided to us indicated that the Consultant visited the construction site 17 times from October 3, 2017 to March 28, 2019. More specifically, we observed that the Consultant visited the construction site on average about once every three weeks at the beginning of the Project. Then, starting in January 2018, the frequency of site visit was reduced. On one occasion the time gap between reports were as significant as 11 weeks, which indicated there were no site visits for nearly three months. These large time gaps were when the Project was running into problems.

Below is a timetable where there were no General Review Reports and the issues that arose during the time period.

Table 6 Timetable of No General Review Reports and Issues that Arose

Time Period	Report	Time Gaps	Issues During the Period
January 10, 2018 - April 3, 2018	Report 4 to Report 5	>11 weeks	Ministry stop work order February 15 - March 14.
July 10, 2018 - September 4, 2018	Report 8 to Report 9	>7 weeks	Legal was engaged in reviewing the Contract, increased public criticism, Councillor toured site.

- 174 We understand ultimately, it is the Project Management team’s responsibility to ensure the Consultant delivers to the needs of the Project, however the frequency of visits, in our opinion, did not accord with the need for close monitoring of such a risky project. In our view, the lack of oversight of the Consultant, without a contract, made it problematic to ensure there was consistent pressure being put upon the Contractor for making progress, and removed the means by which the Consultant could be held to account for their role in the non-performance of the Contractor.

Recommendations 175 As a result of the audit of the Grightmire Arena project, we identified opportunities for improvement and made the following 15 recommendations:

#1 Recommendation

176 We recommend that management develop a risk assessment framework and process, and that formal evaluation of risk be conducted as part of the project planning for each capital project. This would inform and identify the project management approach to be taken, resources that should be allocated, as well as the issues and mitigations that need to be tracked and reviewed on an ongoing basis.

Management Response (Energy, Fleet and Facilities Management Division)

177 Agree.

A risk assessment framework and process are planned for development as part of the continued implementation of the Quality Management System (QMS) in Public Works in 2022. The PW QMS team has developed and implemented project management documents (including a PM manual, project charter template, project transition checklist and closing report template) working with a cross-divisional team across the City.

Energy, Fleet and Facilities Management Division (EFFM) has further developed project initiation and close-out checklists, a project budget template and communications plan for capital projects to continually improve project management processes and mitigate risk. EFFM's 2022-2023 initiatives include further development of planning/ design and implementation/ construction phase checklists.

Expected Completion: Q2 2022

#2 Recommendation

178 We recommend that when using a CCDC 2 Stipulated Price contract for construction projects, that the current version be used and that the contract conforms with the changes introduced by recent changes to the *Construction Act*.

Management Response (Procurement Section and Legal and Risk Management Services Division)

179 Agree.

All construction contracts utilized through a procurement process are current with respect to the *Construction Act*. A working group of staff has been tasked with updating supplemental conditions to be used with the new CCDC 2-2020 Stipulated Price contract for implementation in June 2022.

Expected Completion: Q2 2022

#3 Recommendation

180 We recommend that contract management training be provided to project managers to ensure the City's rights under contract are protected and timely remedies can be implemented during the capital project process.

Management Response (Energy, Fleet and Facilities Management Division)

181 Agree.

Contract management training will be provided to Project Managers involved in the planning and delivery of construction projects to ensure the City's rights are protected and timely remedies are implemented. Training will be provided once Legal and Procurement have confirmed delegated authority and available support.

Estimated Completion: Q2 2022

#4 Recommendation

182 We recommend that management consider separating the roles of project management and contract management for capital projects in general, or alternatively with those that reach a pre-determined level of risk.

Management Response

183 Agree with alternative to be implemented.

Current practices will be reviewed with Legal and Procurement to determine the changes necessary related to the roles of project and contract management in general, or when a pre-determined level of risk is reached. As defined by the Office of the City Auditor (OCA), contract management for capital projects (in comparison to contract administration), is strictly concerned with contract delivery/ adherence to the contract terms (i.e., role of a contract compliance specialist). As such, EFFM will review the existing Service Level Agreement (SLA) with Legal Services with regards to the requirement to engage an experienced Legal representative knowledgeable in construction contract law to enforce contract management practices for applicable high-risk projects.

EFFM will undertake a municipal scan to explore models for construction contract management successfully implemented by other municipalities in Ontario for multi-disciplinary construction projects. Understanding that the City is bound by existing Legal and Procurement policies, and have limited ability/ flexibility to change processes, EFFM relies on the subject matter experts in these support divisions/department to provide guidance on contract management practices.

Expected Completion: Q4 2023

#5 Recommendation

184 We recommend that contractor performance for each contract be tracked and formally evaluated using a consistent and robust process, and that the use of contractor ratings from previous performance be considered for implementation as a procurement criterion in order to mitigate the risk of poor results.

Management Response (Procurement Section)

185 Agree.

It is within Procurement's workplan to research and develop a more robust Vendor Performance Program. The context of this program has yet to be determined however, Procurement will investigate the potential to use contractor ratings from previous contract performance as a procurement criterion in order to mitigate the risk of poor results. Procurement also recognizes that significant consultation is required with both internal and external stakeholders in order for this program to be successful.

Energy, Fleet and Facilities Management Division Supplemental Comment

186 In discussions with Procurement, EFFM will participate in this initiative to develop a more robust Vendor Performance Program.

Expected Completion: Q4 2022

#6 Recommendation

187 We recommend that the values used for liquidated damages be reviewed to ensure they adequately compensate the City for the damages of late delivery and daily costs incurred, and to motivate contractors to take prompt action to cure project delays/deficiencies. Where liquidated damages would likely fall short of what is necessary to motivate Contractors to meet schedule requirements, we also would recommend the use of bonus/penalty clauses and earn-backs in the Contract.

Management Response (Legal and Risk Management Services Division with Procurement Section)

188 Agree.

Staff will investigate and pursue best practices including discussion with other municipalities, on the approach to liquidated damages, bonus and penalty provisions pertaining to contractual dealings. Legal Services will aid Procurement in updating the approach to appropriately amending contracts arising from this investigation in order to best protect the City's interests as permitted by these measures.

Further, Procurement staff will engage and consult with client staff to assess consequences and controls in order to ensure appropriate application of the changes involved.

Estimated Completion: Q1 2023

#7 Recommendation (Energy, Fleet and Facilities Management Division)

189 We recommend that project management processes be improved to ensure adequate project documentation is maintained by the City, including delays and deficiencies, ensuring that contract management administrative requirements are strictly adhered to, and formal communications with the contractor are timely, effective and sufficient.

Management Response

190 Agree.

Project management processes will be improved with the planned introduction of a central filing system through the Enterprise Asset Management (EAM) project for all required project documentation, including delays and deficiencies. The EAM project is the medium-term solution to ensure adequate project documentation is always maintained. Implementation is expected by 2025.

The existing EFFM Contract Analyst position along with a new Quality Management Office within EFFM will be redefined to add duties related to quality management and project record retention. A standard operating procedure detailing project management processes will also be introduced related to ensuring contract management and contract administrative requirements are strictly followed for timely and effective contractor communications.

Estimated Completion: Q4 2022 for Quality Management Office and EAM implementation by 2025.

#8 Recommendation

191 We recommend that special contingency procedures and guidelines be developed for enhancing the oversight and contract management practices for projects in difficulty.

Management Response (Energy, Fleet and Facilities Management Division)

192 Agree.

A standard operating procedure will be developed for the management of contingency in order to enhance the oversight and contract management practices for projects in difficulty. This procedure will define roles and responsibilities, as well

as ensure updates for all projects on a routine basis through a project tracker or similar mechanism while incorporating an existing escalation protocol.

Since 2020, EFFM has implemented an escalation protocol through bi-monthly project status updates on significant/major capital projects, which allows senior management to be notified of any project issues.

Estimated Completion: Q4 2022

#9 Recommendation

193 We recommend that Public Works implement a process to share critical capital project information such as cost estimates with Procurement to ensure the procurement team has all relevant information for a capital project.

Management Response (Energy, Fleet and Facilities Management Division)

194 Agree.

A standard operating procedure will be developed to document the process to share critical capital project information with Procurement to ensure the Procurement team has all relevant information for a capital project e.g. cost estimates tracked in advance of tender issuance. This information could be attached as supporting documentation to the existing project budget template, RFCTA form and Project Charter submitted at the time of tender.

Estimated Completion: Q1 2022

#10 Recommendation

195 We recommend that the practice of single sourcing of professional consulting firms be reviewed and be utilized only during exceptional circumstances. Professional consulting services generally should only be retained through a competitive process as outlined in the City of Hamilton's Procurement By-law.

Management Response (Procurement Section)

196 Agree.

The City's Procurement Policy sets out the requirements for awarding contracts to

vendors. Staff agree that the most prudent mechanism to select a vendor is through a competitive process. However, where exceptional circumstances exist and a competitive process is not recommended, the appropriate approval to single source must be obtained either by the General Manager or Council.

Expected Completion: Not Applicable.

#11 Recommendation

- 197 We recommend that a standard form of contract be developed and used for the procurement of architectural consulting as well as for contract administration services including terms and conditions specific to each type of service. Furthermore, we recommend contract management techniques be utilized to manage the consultant's performance based on these agreements.

Management Response (Procurement Section)

- 198 Agree.

Procurement has developed and currently utilizes various templated competitive procurement documents for the engagement of contract administration and architectural consulting services.

For those circumstances where architectural or contract administration services are not procured through a competitive process, staff will ensure that a formal contract is to be executed with the vendor prior to any work being carried out. The next revision of the Procurement Policy will be amended to include this requirement.

Expected Completion: Q4 2022

#12 Recommendation

- 199 We recommend that communication with Council regarding projects in difficulty be timely and forthright, and that the risk assessment process (see Recommendation 1) be utilized to bring potentially unfavorable conditions and negative community impact to Council's attention in a proactive manner.

Management Response (Energy, Fleet and Facilities Management Division)

200 Agree.

A standard operating procedure will be developed to document the procedure for timely and forthright communication of projects in difficulty to Council. This procedure will incorporate the output of the risk assessment process to ensure that potentially unfavorable conditions and negative community impact are proactively brought to Council's attention.

Expected Completion: Q4 2022

#13 Recommendation

201 We recommend that the budget for the capital projects portfolio include sufficient funding for necessary corporate services, such as legal, financial, and contract management expertise, in order to ensure that they City's interests are protected during the completion of capital projects.

Management Response (Corporate Services Department)

202 Agree.

Corporate Services Financial Planning, Administration and Policy staff will work with the Corporate Asset Management team and the asset owners to assess the type of costs charged to Capital Projects and assess resources needed to support Capital Projects.

Under the Asset Management framework, staff will develop a definition of the cost of a Capital Asset including a review of operating costs recovered from Capital Projects. Staff will be looking to change our approach for costs that are recovered from Capital Projects, such that, capital projects may only include costs that are directly attributable to a capital project. Therefore, we will be reviewing costs for City project management, City contract management, other City overhead, City financial services, City and external legal services, etc. It is expected that the impact of any change will be assessed, and the pros and cons of alternatives will be provided. (Operating budget, capital financing costs, i.e. transfers to capital, may be needed to offset operating budget capital cost recoveries).

Expected Completion: Q3 2023

#14 Recommendation

- 203 We recommend that management implement and/or strengthen processes to ensure that when faced with contractor claims for cost increases or time extensions due to alleged design issues, that these alleged design flaws are rigorously and independently evaluated, commensurate with their seriousness. In particular, design flaws that potentially impact safety should be promptly addressed and accountability/liability for actual design flaws is assured.

Management Response (Energy, Fleet and Facilities Management Division)

- 204 Agree.

The EFFM Capital team through its new Quality Management Office, in collaboration with Legal Services and Procurement will explore means of strengthening current process that is currently governed by both (i) CCDC-2 design-bid-build contract, which defines the role of the Consultant as the contract administrator (i.e., The Consultant will provide administration of the Contract as described in the Contract Documents), and (ii) the Ontario Building Code (OBC), whereby, the capital construction projects delivered by EFFM require building permits in compliance with the OBC, which include a Commitment to General Review signed by the Prime Design Consultant and/or design Engineers to complete construction documentation, field inspections, review of shop drawings and testing reports, and contract administration services to ensure compliance with the design.

Additionally, CCDC-2 also includes mechanisms for conflict resolution. EFFM will review the existing Service Level Agreement (SLA) with Legal Services with regards to the requirement to engage an experienced Legal representative knowledgeable in construction contract law to enforce contract management practices for applicable high-risk projects. This will allow the City to act promptly to enforce our contractual rights going forward in situations where alleged design flaws are raised during the construction phase.

Expected Completion: Q2 2023

#15 Recommendation

- 205 We recommend that management review its process for approving settlements that exceed a predetermined threshold to ensure appropriate due diligence is being exercised over the proposed settlement amounts. Such process should be designed to provide Council with assurances that proposed settlements of significant cost were being subjected to the necessary scrutiny and validation, and were properly supported.

Management Response

206 Agree.

Management supports reviewing its process to approve settlements to ensure appropriate checks and balances are in place before recommendations are made to Council. Staff will target completion of this review Q3, 2022, in advance of 2023 budget deliberations.

Expected Completion: Q3 2022

Conclusion

- 207 The OCA has brought forward several observations and recommendations to strengthen various aspects of executing capital projects that will enhance the value for money achieved in capital delivery. The City has an opportunity to undertake transformative change in this area.
- 208 The OCA would like to thank Procurement, Legal Services, and Energy, Fleet and Facilities Management staff and other participants for their contributions throughout this project. We look forward to following up with management in the future to see the progress of their action plans and their impact on achieving value for money in service delivery.

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