



**Town of Aurora  
General Committee Report**

**No. FS19-037**

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**Subject:** Procurement Exemptions to Library Square Project  
**Prepared by:** Anna Ruberto, Procurement Manager  
**Department:** Finance  
**Date:** November 5, 2019

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### **Recommendation**

- 1. That Report No. FS19-037 be received;**
- 2. That an exemption to the Procurement By-law be approved to permit Colliers Project Leaders, the project Architect and Planning/Landscape Architect, including RAW Architects and the Planning Partnership, to participate on the Evaluation Committees for the Library Square Project; and**
- 3. That an exemption be approved to waive the requirement for liquidated damages for the Library Square Project.**

### **Executive Summary**

The Community Services department has requested that Colliers Project Leaders (“Colliers”), The Planning Partnership (TPP) and RAW Architects participate on the Evaluation Committees for the Library Square Project and that the requirement for a liquidated damages clause be waived on this project. Both these requests require approval from Council.

- Colliers TPP and RAW Architects possess extensive industry knowledge and experience
- Colliers TPP and RAW recommend not using a liquidated damages clause

### **Background**

The Town’s Procurement By-law 6076-18, defines as consisting of Town staff only. Within the Procurement By-law 6076-18, Section 3. Definitions 3.1 (aa) “Evaluation Committee” is a component of the Request for Proposal process, where a committee of

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three or more staff, is established to conduct proposal evaluations, interviews, and demonstrations, during proposal evaluations for goods, services, or construction. Consequently, in order to permit an external party to be part of an evaluation committee, the requirement to only have Town staff as part of the committee has to be waived by Council.

The review of the Procurement By-law 2020 will include the review of the definition for "Evaluation Committee".

With respect to liquidated damages, Council passed a motion on February 24, 2015 that mandated that liquidated damages clauses be included in all construction project contracts, unless approval is obtained from Council not to include one and that staff report to Council on the effectiveness of a liquidated damages clause. Later that year, staff brought forward Closed Session Report No. LLS15-047, Effectiveness of Liquidated Damages Clauses, which Council deferred to the August 25, 2015 open session meeting. At this meeting, Council received the report for information. No further direction was provided with respect to liquidated damages. As such, and in accordance with the February 24, 2015 resolution, staff have been inserting such clauses on every construction contract.

## **Analysis**

### **Colliers Project Leaders, The Planning Partnership and RAW Architects possess extensive industry knowledge and experience**

The Library Square Project will be the Town's largest procurement and project undertaken by the Town. The Town has engaged Colliers to assist in the process and provide their expertise in managing the project. As part of their service team, Colliers brings a team of industry experts that have taken part in leading and managing projects with a similar scope to Library Square. As the design consultant team, TPP and RAW will be working closely with the General Contractor and need to have input into the selection.

Following a review of the Town's procurement process, it has been recommended that Colliers Project Leaders, TPP and RAW Architects be permitted to be part of the evaluation committees to evaluate any contractors to be hired by the Town to conduct work on the Library Square Project. The Town's Community Services department is in support of this approach in order to ensure that the evaluation team involved on this project is equipped with an appropriate level of relevant knowledge and experience.

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As per the Town's process, any members of the evaluation committee will be required to avoid any conflicts of interest and will be required to sign a statement attesting to their impartiality in the evaluation prior to their involvement.

**Colliers Project Leaders, TPP and RAW recommend not using a liquidated damages clauses**

As part of developing the terms of reference that will be applicable to the Library Square project the matter of liquidated damages was discussed. Colliers and TPP/RAW has suggested that a liquidated damages clause not be employed as part of the Library Square project. Colliers recommends the utilization of contract documents through the Canadian Construction Documents Committee (CCDC). The CCDC contract documents are commonly used and accepted throughout the construction industry. The CCDC contains clauses pertaining to all aspects of the construction process. It has been developed and vetted by professionals in the construction industry.

As per recommendation from Colliers, the contract document that would be part of the Library Square project would consist of CCDC terms and Supplementary Conditions. With respect to recovery of damages caused by delay, the contract documents would contain a clause that provides an ability for the Town to recover reasonable costs from the contractor, incurred as a result of delays, provided such damages can be demonstrated and are shown to have been caused by the contractor. Colliers has expressed the following with respect to liquidated damages clauses:

- A liquidated damages clause creates an adversarial relationship with the general contractor from the initiation of the project. Colliers has found this not to be a productive approach on such projects, as from the start of the project the contractor is preparing back-up documentation to justify contractually why this schedule milestone could not be met.
- If liquidated damages are to be assessed for delays, contractors also expect to be rewarded, by way of financial incentives, if milestones can be achieved ahead of schedule. If such bonuses are not introduced, it eliminates the motivation for the contractor to do anything more than is expressly required by the contract documents.
- It would be difficult to accurately ascertain the actual value of liquidated damages to apply to this contract, especially with respect to the Square and Library work. Such estimates involve an amount of speculation and assumptions which begin to qualify the estimates as a penalty rather than an actual cost. The estimates must not be overstated in order to be valid. However if not directly addressed in

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the contract, the Supplementary Condition clause permits the Town an ability to recover the actual costs incurred by the Town, due to the contractor's delay in achieving the schedule

### **Advisory Committee Review**

None

### **Legal Considerations**

Council has mandated by resolution in 2015 that all Town construction projects include a liquidated damages clause, which requirement can only be waived by Council. A detailed report from Legal Services with respect to liquidated damages clause was previously presented to Council in an open session on August 25, 2015 and is attached to this report.

If the clause is not included as part of the Library Square contract documents, it cannot be added later in the project. A liquidated damages clause is used to define the scope of damage that the Town is estimated to suffer as a result of delays on a project. In case of delays that are caused by a contractor and not approved by the Town, the Town could demand payment of the predetermined amount for every day of delay. The Town would generally be limited in recovery to the estimated amount set out in the contract.

If a liquidated damages clause is not part of the contract, the Town may still recover for delay. The contract document that would be part of the Library Square project would contain a standard clause that would allow for recovery of damages suffered by the Town as a result of a delay. The difference in not having a liquidated damages clause is that the amount of losses would not be a predetermined daily amount, but rather it would be based on a reasonable amount of losses or damages that is demonstrated by the Town, and shown to have been caused by the contractor. Consequently, without having a predetermined estimate, when making a claim to recover delay damages, the Town would have to show the actual losses suffered attributable to the contractor.

### **Financial Implications**

None

## **Communications Considerations**

None

## **Link to Strategic Plan**

The development of Library Square supports the following strategic Plan goals and key objectives:

***Supporting an exceptional quality of life for all*** in its accomplishment in satisfying requirements in the following key objectives within these goal statements:

- **Invest in sustainable infrastructure**
- **Celebrating and promoting our culture**
- **Encourage an active and healthy lifestyle**
- **Strengthening the fabric of our community**

## **Alternative(s) to the Recommendation**

1. To not approve the request for an exemption to allow Colliers Project Leaders, RAW Architects and The Planning Partnership to participate on Evaluation Committee for the Library Square Project.
2. To not approve the request to waive the requirement for Liquidated Damages to be included in the tender documents.

## **Conclusions**

Town staff is recommending that Colliers Project Leaders, The Planning Partnership and RAW Architects be permitted to be part of the evaluation committees that will be involved in evaluating submissions from contractors for the work on the Library Square Project. The members of the Colliers Project Leaders team working on this project possess extensive industry experience including large construction projects and their participation would be valuable in the evaluation process. Further, based on recommendation from Colliers, TPP and RAW, staff are also asking that Council waive the requirement for a liquidated damages clause on this project.

## **Attachments**

Attachment #1: Extract from Council Meeting of Tuesday, February 24, 2015

Attachment #2: Report No. LLS15-047, Effectiveness of Liquidated Damages Clauses dated July 14, 2015

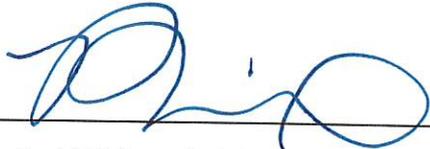
## **Previous Reports**

N/A

## **Pre-submission Review**

Agenda Management Team review on October 16, 2019

## **Departmental Approval**



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**Rachel Wainwright-van Kessel, CPA,  
CMA  
Director, Finance  
-Treasurer**

## **Approved for Agenda**



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**Doug Nadorozny**

**Chief Administrative Officer**