

## Delivering Value in Municipal Construction

Micah Zerbe

When municipalities undertake public construction projects, one of the key considerations will always be how to deliver the best value for ratepayers. One way that municipalities do this is by using public procurement processes to appropriately balance quality with cost. However, it is equally important to build value by negotiating a fair and clear contract with the successful bidder.

In order to reduce the costs of municipal construction projects, municipalities must reduce any ambiguity in the contract language and allocate risk fairly to the party that can best manage it. This will reduce the incidence of legal disputes later, which creates long-term value for ratepayers.

To achieve these objectives, municipalities should avoid using contracts developed in house by contractors. These contracts may not have allocated risk between the parties appropriately, and a municipality could incur substantial legal fees trying to negotiate the appropriate modifications. Beyond taking the time to get to a base level of fairness, a municipality will also have to negotiate for terms that are unique to municipalities.

Instead, municipalities should consider using standard form contracts that have been designed for use in the construction industry, such as those produced by the Canadian Construction Documents Committee (CCDC), the Master Municipal Construction Document Association, and the Canadian Construction Association. The purpose of these standardized construction documents is to produce a comprehensive and clear contract which fairly allocates risk and streamlines dispute resolution. This allows the

parties to spend less time negotiating a general agreement, and more time focusing on any unique aspects of a given project.

One example of a standard form construction contract is the CCDC 14 – 2013 Design-Build Stipulated Price Contract. A municipality may wish to use a form contract like this where a project is designed and built by a single contractor. Under the CCDC 14, risk associated with price, schedule, performance of the construction work, and warranties are all allocated to the contractor. The owner of the project is responsible for providing information and its requirements for the project. The owner is liable for errors in the information it provides to the contractor, unless the error was known or ought to have been known by the contractor on review of the information.

Under the CCDC 14, risk for delays to the project are balanced between the parties. If delays are caused by the owner, the contractor is entitled to reimbursement for costs it suffers as a result. If the delay is caused by factors outside of either party's control, such as weather, labour disputes, or fire, the contractor is not entitled to reimbursement for its costs. If the contractor fails to perform the work in compliance with the contract, the owner can correct the default and deduct the cost of doing so from the contract price. The owner is allowed to make changes to the project after the contract is executed without invalidating the contract, but the contract price and schedule may be adjusted based on the change.

This form contract also includes balanced clauses for dispute resolution, intellectual property, warranties, and termination.

The CCDC 14 may not address every issue that will apply to a given project. This is especially the case for municipalities, where there may be unique considerations to the project. The contracts themselves developed by the CCDC and others generally cannot be modified. However, the effect of the contract can be modified through a separate document of “supplementary conditions”, which can add new clauses or modify existing clauses.

Municipalities will typically need to add supplementary conditions if they receive funding from provincial or federal governments. In these circumstances, the need for supplementary conditions can arise either from obligations under an inter-governmental funding agreement that the municipality wants to pass off to the contractor, or the funding agreement might provide certain clauses that the municipality must include in any third-party agreements. For example, if a provincial funding agreement requires the municipality to obtain specific insurance coverages for a construction project, the municipality might wish to pass off that insurance obligation to the contractor who performs the work. The province might also require the municipality to include a provision in any third-party contract that specifically indemnifies the province from any liability.

For certain projects, a municipality will also need to consider whether there are specific governmental design standards that apply to the project. For example, schools and day care centres have provincial design guidelines with which the municipality will need to comply. To clarify the need for the contractor to conform with these guidelines, the municipality should include these in its design requirements as well as the supplementary conditions.

In the municipal context, there can also be an added layer of complexity where a community development corporation undertakes to coordinate a project that will ultimately be owned by the municipality. In this case, a municipality would be well served to add supplementary conditions to a form contract which make clear the structure of the project and the relationship between the parties.

Municipal construction projects can be complex and expensive, but municipalities can reduce their costs in the long term by taking the time to manage risk at the outset. A comprehensive and balanced contract will lead to certainty between the parties on what their obligations and liabilities are. In turn, this will reduce the likelihood of claims arising from the project. Taking the time to do things right at the start will create long term value for ratepayers.