



cutting through complexity

**Office of the Executive Council
Province of Newfoundland
and Labrador**

Assignment of Contract

Report Date: June 6, 2014

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1 Introduction

The Province of Newfoundland and Labrador (PNL) engaged KPMG LLP (KPMG) to assist with an evaluation of whether the assignment of an existing highway rehabilitation contract from one party to another would put the PNL in a position where it is assuming greater risk as a result of the assignment of the contract.

We are pleased to provide our report pursuant to the engagement including background, the scope of our assessment, analysis and our conclusion.

2 Background

The PNL Department of Transportation and Works (DTW) awarded a highway rehabilitation contract to Humber Valley Paving Ltd. (HVP) on September 4th, 2013 pursuant to a call for tenders reflected in Tender Book Project No. 55-13THP. The contract involves the rehabilitation of the Trans Canada Highway (TCH) from 0.9 kms west of South Brook Bridge to the Interchange at R490 (approximately 11.5 km), realignment of the TCH at St Georges Intersection, R461, and paving various locations on the Port aux Port Peninsula. The contract price was \$8,819,535.35 including HST. HVP has sought the consent of DTW to an assignment of the contract to a third party, Marine Contractors Inc. (MCI).

PNL has requested that KPMG undertake an assessment of whether the assignment of the contract to MCI will result in additional risk to be borne by PNL.

3 Scope of KPMG's Assessment

There are two possible elements to the assessment of risk to PNL. The first relates to the allocation of risk amongst the parties as articulated in the terms of the contract. Assuming that the existing contract with HVP is being assigned to MCI without change to its terms, there is no change to the risk allocation regime inherent in the terms of the contract.

The second element relates to the financial capacity and capability of the contracted party to undertake the work. In relation to this element, DTW applies evaluation criteria which serve as the basis for DTW to assess whether a potential contractor has the requisite financial capacity, and capability, to undertake a particular project.

Our evaluation of whether the assignment of the contract to MCI will result in additional risk to be borne by PNL has been based on whether PNL has imposed the same financial capacity and capability requirements on the proposed assignee.

In undertaking our evaluation we reviewed the following which were provided to us by PNL:

- Tender Book for Project No. 55-13THP
- Tender Book submission by HVP for Project No. 55-13THP
- Agreement Between Owner and Contractor for Project No. 55-13THP
- HVP Labour and Materials Bond
- HVP Performance Bond

- Memo (Opinion) from PNL's Legal Counsel in re: Assignment and Novation of the contract for Project No. 55-13THP
- Draft Assignment Agreement between HVP and MCL and PNL
- Correspondence between HVP and PNL in respect to the potential assignment of the contract for Project No. 55-13THP to MCI
- DTW's Contractor Evaluation Reports and related correspondence in relation to MCI
- DTW Decision Note dated June 1, 2014 regarding Assignment of Project 55-13THP.

4 Financial Capacity and Capability Requirements Imposed on HVP

Based on our review of the Tender Book for Project No. 55-13THP (TB), DTW imposed the following financial capacity and capability requirements on HVP in the award of contract to HVP:

- a. Bona Fide status as required by Section 8 of the Supplemental General Conditions of the TB
- b. A 50% Performance Bond as required by Section 3.(b) of the Supplemental General Conditions of the TB
- c. A 50% Labour and Materials Bond as required by Section 3.(c) of the Supplemental General Conditions of the TB
- d. Liability insurance coverage as required by Section 2 of the Supplemental General Conditions of the TB
- e. A 'Declaration of Equipment' required by Part 6 of the TB and an assessment by DTW that sufficient equipment is available to undertake the project
- f. A 'Construction Schedule' required by Part 8 of the TB and an assessment by DTW of the reasonableness of the proposed project schedule
- g. Worker's Compensation compliance clearance as required by Section 25.1 of the General Conditions of the TB (from the Workplace, Health, Safety & Compensation Commission)
- h. A Certificate of Recognition (Letter of Good Standing) as required by Section 128 of the DTW Specifications Book (available online), incorporated by reference in the TB, Part 3, Section 5.(b).

5 Application of Requirements to MCI

In relation to 3.a. above, based on our review, DTW has undertaken an assessment of MCI and determined it to be Bona Fide based on MCI performance ratings as documented in DTW Contractor Performance Evaluation Reports on projects undertaken by MCI between 2011 and 2014.

In relation to items 3.b. through 3.h. above it is our understanding that each would be a condition precedent to the assignment of the contract.

6 Conclusion

As noted in Section 2 (above), our evaluation of whether the assignment of the contract to Marine Contractors Inc. will result in additional risk to be borne by PNL will be based on whether PNL has imposed the same financial capacity and capability requirements on the proposed assignee.

Assuming that the following are provided as conditions precedent to the assignment of the contract to MCI, PNL will not be assuming any additional risks as a result of consenting to the assignment of the contract to MCI:

1. A 50% Performance Bond as required by Section 3.(b) of the Supplemental General Conditions of the TB
2. A 50% Labour and Materials Bond as required by Section 3.(c) of the Supplemental General Conditions of the TB
3. Liability insurance coverage as required by Section 2 of the Supplemental General Conditions of the TB
4. A 'Declaration of Equipment' required by Part 6 of the TB and an assessment by DTW that sufficient equipment is available to undertake the project
5. A 'Construction Schedule' required by Part 8 of the TB and an assessment by DTW of the reasonableness of the proposed project schedule with a completion date acceptable to (available online), incorporated by reference in the TB, Part 3, Section 5.(b).
6. Worker's Compensation compliance clearance as required by Section 25.1 of the General Conditions of the TB (from the Workplace, Health, Safety & Compensation Commission)
7. A Certificate of Recognition (Letter of Good Standing) as required by Section 128 of the DTW Specifications Book (available online), incorporated by reference in the TB, Part 3, Section 5.(b).

7 Limitations Regarding Report

Comments in KPMG's report are not intended as, nor should they be interpreted to be, advice or opinion of a legal nature.

Should any information, which was not available to KPMG as at the date of this document, become available subsequently, KPMG reserves the right to review such information and adjust this report accordingly.

KPMG LLP



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