



REPORT TO

## CORPORATE SERVICES, STRATEGIC PLANNING AND PROPERTY COMMITTEE

### CONSTRUCTION CONTRACT LEGAL CLAIMS SINCE 2009 (ALL WARDS)

*"I can do all this through Him who gives me strength."  
Philippians 4:13 (NIV)*

Created, Draft	First Tabling	Review
October 20, 2016	November 9, 2016	
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<b>INFORMATION REPORT</b>		

**Vision:**

*At Toronto Catholic we transform the world through witness, faith, innovation and action.*

**Mission:**

*The Toronto Catholic District School Board is an inclusive learning community uniting home, parish and school and rooted in the love of Christ.*

*We educate students to grow in grace and knowledge to lead lives of faith, hope and charity.*



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## **A. EXECUTIVE SUMMARY**

This report is for the information of the Board and provides a follow up to the previous report regarding *Enforceability of Construction Contract Clauses on Delay Claims*. Research by staff indicates that since adoption of Amendments to the Supplementary General Conditions for the CCDC-2 construction contract in 2009, there have been no formal legal claims initiated by either the Board or by any Contractor with respect to any Capital projects.

Updating of the Supplementary General Conditions is currently underway to possibly include a “time is of the essence” clause and any other revisions recommended by legal counsel to incorporate developments in the industry and lesson learned from projects since 2009.

<b>The cumulative staff time dedicated to developing this report was 12 hours.</b>
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## **B. PURPOSE**

1. On May 12, 2016, the Corporate Affairs, Strategic Planning and Property Committee received a report in Private concerning the *Enforceability of Construction Contracts Clauses on Delay Claims*.
2. A trustee motion arising from that report directed staff to provide a further report outlining the number of construction related legal claims the Board has been involved in since the adoption of the Supplementary General Condition Amendments in 2009.

## **C. BACKGROUND**

1. As outlined in the May 12, 2016 report to the Corporate Affairs, Strategic Planning and Property Committee, the current Supplementary General Conditions used by the TCDSB to amend the CCDC-2 – 2008 standard construction contract does not include “liquidated damages,” “penalty” or “time is of the essence” clauses.
2. The CCDC-2 contract is used by the Board for Capital projects and large Renewal projects. The majority of Renewal projects, which are typically under \$100,000.00 contract value, utilize a Board specific “Small Projects Contract” that is incorporated into the Small Projects standard bid documents.

3. Since the implementation of the Supplementary General Condition Amendments in April 2009, the Board has completed the following Capital programs:

• Phase 1 – 16 Additions	\$61.7M
• Phase 2 – 6 Replacement Schools	\$63.1M
• Retrofits and Additions to Accommodate FDK	<u>\$61.8M</u>
	\$186.6M

## **D. EVIDENCE/RESEARCH/ANALYSIS**

1. There have been no formal legal claims initiated by either the Board or by any Contractor with respect to any Capital project in any of the above-noted programs with a total of \$186.6M in expenditures.
2. Supplementary General Condition 3.27.2 provides for payment to the Board of additional consulting fees resulting from extension of the construction schedule due to delays deemed to be within the contractor's control. This clause has been used to recover additional consulting fees from the contractor on one FDK addition project, in the amount of approximately \$35K.
3. Poor performance, contract default and/or legal claims by contractors against the Board result in removal of that contractor for consideration for future prequalification on Capital projects. Contractors have been removed from consideration for these reasons – five (5) in Capital and five (5) in Renewal to date.
4. Delays in construction due to contractor performance have arisen in some small FDK retrofit projects with low dollar value utilizing smaller firms from the Board's list of prequalified Renewal contractors. These delays were addressed by warning letters to the contractors and subsequent meetings to advise that they would be removed from the prequalified list if performance did not improve. Four contractors have been removed from the list for this reason.
5. The conditions under which construction takes place are unpredictable, and conditions beyond the control of both the owner and the contractor that extend the construction schedule frequently arise. It is in the contractor's best interest to make every effort to complete projects as quickly as possible since any delays increase the contractor's costs and decrease profit.

6. For all projects (Renewal and Capital) contractors are required to obtain a performance bond valued at 50% of the contract amount. In the event of a contractor's default (bankruptcy or insolvency), the performance bond will cover costs to the owner as a result of the contractor's default, such as the cost to bring in another contractor to complete the work, up to the value of the bond. In addition, contractors must obtain a labour and material payment bond of 50% to guarantee payment of sub-contractors, sub-trades and suppliers.
7. The Ontario Association of School Business Official Operations, Maintenance and Construction Committee has recently issued a Supplementary General Conditions template. Staff have reviewed this document and found it to be substantially the same as the document used by the Board.

## **E. METRICS AND ACCOUNTABILITY**

1. The Board issues tenders for Capital project only to prequalified general contractors. Prequalification criteria include experience with school construction and **proven performance in managing the construction schedule**.
2. Since 2010, all Capital project supervisors employed by the Board have been trained architects with experience in construction contract administration. The supervisors understand the construction process and related construction contract legal implications.
3. Capital project supervisors complete a contractor evaluation form at the conclusion of every project to be used for future contractor prequalification.

## **F. IMPLEMENTATION, STRATEGIC COMMUNICATIONS AND STAKEHOLDER ENGAGEMENT PLAN**

1. Miller Thompson LLP have been requested by Board staff to review and update the Supplementary General Conditions to possibly include a "time is of the essence" clause and any other revision recommended to incorporate developments in the industry and lesson learned from projects since the last update.
2. Board staff in consultation with Miller Thompson LLP are also revising the Board standard "Small Projects" contract to include provisions to minimize

risk to the Board similar to provisions in the CCDC-2 and Supplementary General Conditions.

3. Once completed, the updated Supplementary General Conditions and Small Projects contract will be presented to the Board for approval.
4. Project schedules throughout the duration of construction are shared with the Principal and a monthly project status letter prepared by the Capital Supervisor leading the project is provide to the Principal to share with the school community as well as posted on the school web site.

## **G. CONCLUDING STATEMENT**

This report is for the information of the Board.