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TO: His Worship Mayor Harrison and Members of Council

FROM: Carl Bannister, CAO

PREPARED BY: Jenn Wilson, City Engineer

DATE: November 23, 2020

SUBJECT: **ROSS STREET UNDERPASS – CPR CONSTRUCTION AGREEMENT**

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**STAFF RECOMMENDATION**

**THAT: Council Authorize Staff to enter into the ‘Subway Construction Agreement’ with Canadian Pacific Railway to formalize the terms of construction for the Ross Street Underpass.**

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**BACKGROUND**

The 2020 approved capital budget included the construction of the Ross Street Underpass (RSU). Staff, the City’s project management consultant (Binnie and Associates), and the City’s legal counsel (Lidstone and Company) have been diligently working through all remaining approvals, agreements and documentation.

The majority of outstanding items are reliant on Canadian Pacific Railway (CPR) including detailed design approval, costing of third party works (eg. flagging) and several agreements (Construction, Operations and Maintenance, Utility Crossing and Right-of-way (construction and permanent)). These are all moving towards completion.

The Subway Construction Agreement, originally drafted by CPR has undergone thorough review by the City’s project team and has undergone several turns each from the City and CPR to get to the current draft form. Minor changes to the agreement are still required, but the major terms have been agreed upon by both parties.

The 2020 Capital budget currently includes a total of \$15,742,912.20 which includes a contribution of \$1,000,000 from CP as well as a grant of \$500,000 applied for by CP on our behalf. Additionally, CP is completing the hotbox detector relocation works at their cost and has removed the City’s responsibility for fiber relocation costs.

**STAFF COMMENTS**

Risk is a combination of the likelihood an event occurring and the consequence of the event.

The likelihood of a serious event occurring is being minimized through extensive engineering, bypass tracking and real time monitoring as well as full time supervision by City and CP agents. Staff can comfortably state that the likelihood of a serious event occurring will be minimized.

The consequence of a serious event occurring remains very high as interruptions to CPs service or at very worst a derailment could have catastrophic consequences. Many consequences (eg. environmental) can be minimized through mitigation and response plans and most of the financial consequences can be addressed through appropriate insurance; however, at this time there is a gap in the potential consequences and the insurance coverage available to the City. Specifically business interruption, loss of profit and consequential damages to CP are not covered by insurance available to the City. The City continues to work with CP to look at alternate options for reducing or eliminating this gap in coverage (CP has agreed to remove direct references to this liability in the agreement; however, this does not remove the liability if so assigned by the courts).

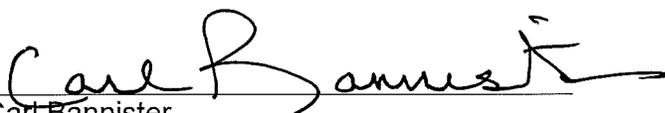
The project inherently has a large amount of risk to the City and CPR due to the active railway component. The agreement originally drafted by CPR was quite complex and onerous and originally included unacceptable risk to the City; through negotiations, the agreement has been modified significantly and has addressed the majority of the City's concerns. Staff are not confident however, that the remaining issue above will be able to be resolved through continued negotiations. The remaining risk is difficult to quantify, would be case specific and ultimately determined by the courts but could be anticipated to be financially significant if CPs operations are interrupted for any length of time.

Further to the above comments, the project team is requesting Council to authorize staff to enter into a final 'Subway Construction Agreement' with CPR per the negotiated terms of the draft agreement with minor modifications to finalize the agreement should Council be comfortable with the remaining project risk.

Should Council not be comfortable allowing the City to take on the remaining risk, the alternative options are to direct staff to continue negotiations with CP or to direct staff to break off negotiations with CP and either approach the Canadian Transport Authority to moderate the agreement or abandon the project.

Should the agreement be signed, the project can proceed to Tender over the winter with construction commencing in the Spring (assuming that bids come in within budget). Six contractors have been pre-qualified to bid on the Ross Street Underpass Tender.

Respectfully submitted,

  
Carl Bannister  
Chief Administrative Officer