

CITY ATTORNEY'S OFFICE

MEMO

TO: Mayor Roy D. Buol and
Members of the City Council

FROM: Barry A. Lindahl, Senior Counsel
Crenna M. Brumwell, City Attorney
James R. Wainwright, Esq.

DATE: December 11, 2018

RE: Canadian Pacific Construction Contract Update/Upper Bee Branch Creek
Restoration Project

On the City Council agenda for the December 17, 2018 City Council meeting is a Construction Agreement and an Environmental Right of Entry Agreement Between the City of Dubuque, Iowa and Dakota, Minnesota, & Eastern Railroad Corporation d/b/a Canadian Pacific (CP) and accompanying temporary and permanent Easement Agreements for Construction and Maintenance of Culvert System and Hike/Bike Trail. CP requires an Environmental Right of Entry Agreement in order to grant the City a license to enter in and upon CP's property to perform Phase II environmental testing.

This is not a typical public improvement project. On most public improvement projects, which are on City property, the City has the final say over the technical design and contractual terms. Here, because much of the construction will occur in CP's right-of-way and because railroads enjoy extensive rights under federal law, CP enjoys significant control over all facets of the Project.

This is a complex project. If the City executes the Construction Agreement, it will be difficult to predict and contain the City's potential costs beyond the initial amount of the contract the City awards to the lowest responsive, responsible bidder.

However, we have carefully considered the alternatives to a voluntary agreement between the parties, and in our opinion, approving the Construction Agreement and the Environmental Right of Entry Agreement will avoid the significant delay, expense and uncertainty of any alternative. We recommend that the City Council approve the Construction Agreement and the Environmental Right of Entry Agreement.

The Construction Agreement includes the following significant terms:

- 1) The City agrees to pay CP \$131,000 as consideration for entering into the Construction Agreement, including compensation for the temporary and permanent easements CP will grant the City.
- 2) The City agrees to accept the obligation “to pay the cost for the construction of the Culvert System without cost or assessment to the Railroad and to be solely responsible for the ongoing maintenance and functioning of the Culvert System.” Throughout the Agreement, CP has made certain that it will not bear any of the costs associated with the Project.
- 3) The City agrees to pay for / reimburse the costs of correcting track movement caused by the construction of the Culvert System (which includes tunneling underneath the railroad tracks. If track movement / subsidence happens, the City will not be allowed to determine what must be done to correct it. CP will decide whether to utilize the City’s contractors or its own staff / contractors to correct any track problems caused by the City’s construction of the Culvert System.
- 4) The City agrees to pay or reimburse “all costs associated with scheduling and lost profits associated with track down times caused by construction of the Culvert System.” This represents a cost exposure that is essentially unknown.
- 5) The Construction Agreement includes “Assumption of the Risk” language which also includes the broadest form of indemnity possible – requiring the City to agree not to pursue any claims against CP even if the Culvert System is damaged by CP’s operations, including negligent conduct.
- 6) The Construction Agreement includes a broad one-way indemnity provision whereby the City must indemnify, defend, and hold harmless CP and its affiliated entities (including “any railway company or contractor operating trains or rail equipment upon railway tracks in close proximity to CP property) to an extremely broad array of potential damages, including lost profits, punitive and exemplary damages, and “any upstream or downstream flooding caused by the Culvert System.” CP is shifting the responsibility for locating all underground utilities to the City, even though the City must provide notice to “CP One Call” prior to commencing any excavation or boring.
- 7) The City agrees to take all action required pursuant to environmental laws to include all actions necessary for CP to continue using its property for railroad purposes.

Many of the City’s contractual obligations under the Construction Agreement are incorporated by reference in the Environmental Right of Entry Agreement. CP’s indemnity demands here are consistent with what we understand to be their position regarding all construction in their right-of-way. Even the Iowa Department of Transportation (IDOT) has had to agree to CP’s indemnity demands when contracting with contractors who need access to CP’s right of way. The IDOT has shifted those obligations on to the contractors who actually construct the improvements in CP’s right of way. The City will attempt to do the same here through its construction contract with the General Contractor for this

Project and in its contract with the consultant that will perform the Phase II environmental testing.

Most, but not all of the risks associated with this Project can be transferred by the City to the General Contractor via indemnification clauses and insurance requirements.

CP requires certain insurance coverages that are excluded under the City's ICAP insurance coverages. The City will require the general contractor and subcontractors to have the liability insurance coverages CP requires. City staff have worked with the City's insurance advisers to make sure the public improvement contract between the City and the general contractor includes the requisite insurance provisions.

Subject to the general contractor and subcontractors providing the insurance we are requiring and subject to the limits of such coverage, claims arising out of the Project would be covered by insurance as follows:

- 1) The Railroad Protective Policy would protect Canadian Pacific, but no one else, for a loss that is caused by the City's contractors or the City.
- 2) ICAP would cover the City for claims against the City or Canadian Pacific related to the City's work outside of 50 feet from the railroad tracks, or within the 50 feet but not related to construction or demolition.
- 3) The contractors' commercial general liability policies would be modified to cover claims against the contractors and the City for acts within and outside the 50 feet boundary.

The coverage gap for the City is for claims against the City arising out of Canadian Pacific's acts, other than gross negligence or intentional misconduct, for which the City is assuming liability. And there is no coverage the City can obtain for that gap in coverage.

There is no way to foresee exactly how this Project will play out once construction begins. There are risks associated with all construction projects, but as the complexity increases, so too does the likelihood of challenges and unforeseen circumstances arising. On this Project, CP's primary concern is that track subsidence resulting from the installation of the new culverts could cause a train derailment. The City will attempt to shift through contractual indemnity provisions and insurance requirements much, if not all of that liability exposure, to the general contractor who performs the work.

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cc: Michael C. Van Milligen, City Manager
Gus Psihoyos, City Engineer
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