

Chapter 3

Section 3.03

Metrolinx—Public Transit Construction Contract Awarding and Oversight

Standing Committee on Public Accounts Follow-Up on Section 3.09, 2016 Annual Report

On February 21, 2018, the Standing Committee on Public Accounts (Committee) held a public hearing on our 2016 audit of Public Transit Construction Contract Awarding and Oversight administered by Metrolinx. The Committee tabled a report on this hearing in the Legislature in May 2018. The full report can be found at www.auditor.on.ca/en/content/standingcommittee/standingcommittee.html.

The Committee made 12 recommendations and asked Metrolinx to report back by September 2018. Metrolinx formally responded to the Committee on August 31, 2018. Several issues raised by the Committee were similar to the audit observations of our 2016 audit, which we followed up on in 2018. The status of each of the Committee's recommended actions is shown in **Figure 1**.

We conducted assurance work between April 1, 2019, and June 30, 2019, and obtained written representation from Metrolinx that effective October 1, 2019, it had provided us with a complete update of the status of the recommendations made by the Committee.

Overall Conclusion

As of June 30, 2019, all of the Committee's recommended actions had been fully implemented.

Detailed Status of Recommendations

Figure 2 shows the recommendations and status details that are based on responses from Metrolinx, and our review of the information provided.

Figure 1: Summary Status of Actions Recommended in May 2018 Committee Report

Prepared by the Office of the Auditor General of Ontario

	# of Actions Recommended	Status of Actions Recommended				
		Fully Implemented	In the Process of Being Implemented	Little or No Progress	Will Not Be Implemented	No Longer Applicable
Recommendation 1	1	1				
Recommendation 2	1	1				
Recommendation 3	1	1				
Recommendation 4	2	2				
Recommendation 5	2	2				
Recommendation 6	2	2				
Recommendation 7	1	1				
Recommendation 8	1	1				
Recommendation 9	1	1				
Recommendation 10	1	1				
Recommendation 11	1	1				
Recommendation 12	1	1				
Total	15	15	0	0	0	0
%	100	100	0	0	0	0

Figure 2: Committee Recommendations and Detailed Status of Actions Taken

Prepared by the Office of the Auditor General of Ontario

Committee Recommendation	Status Details
<p>Recommendation 1</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with its most recent results, including results from 2016-17 and 2017-18, of additional costs incurred by Metrolinx attributed to errors and omissions by design consultants. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with its most recent results, including results from 2016-17 and 2017-18, of additional costs incurred by Metrolinx attributed to errors and omissions by design consultants.</p> <p>Since the release of the Auditor General's <i>2016 Annual Report</i>, there have been two projects with evidence of poor performance by design consultants that Metrolinx has disputed, including:</p> <ul style="list-style-type: none"> a schedule overrun on a bus rapid transit station attributed to the performance of the design consultant. This dispute was settled by Metrolinx and invoiced monies were not paid to the design consultant; and a cost impact on a GO Station attributed to the default in the performance of the design consultant. Metrolinx was in the process of attempting to recover money from the design consultant.

Committee Recommendation	Status Details
<p>Recommendation 2</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with results of its evaluation and lessons learned exercise from the pilot tender using Vendor Performance Management (VPM), which was expected to be completed by March 2018. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with results of its evaluation and lessons learned exercise from the pilot tender using Vendor Performance Management.</p> <p>From December 2017 to April 2018, Metrolinx undertook two pilot projects where Vendor Performance Rating (VPR) data was used, as 5% of the total evaluation matrix, in evaluation of tender submissions and awarding of new contracts. In one project, the winning bidder had the highest technical capability that, along with a higher VPR, led to the awarding of the contract. In the second pilot project, the VPR did not significantly affect the evaluation process, and selection of the winning bidder was determined by the lowest bid price.</p> <p>Subsequently, Metrolinx conducted a lessons learned review of the pilot projects. The review found that processes and procedures put in place for the pilot tenders were generally effective and no major issues were encountered during the tender and award cycle for the pilot projects. Based on the lessons learned review, documentation and training updates have been prepared by Metrolinx and issued to its staff.</p>
<p>Recommendation 3</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with a summary of the number of safety breaches found in its audits of contractors at construction sites over the past year. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with a summary of the number of safety breaches found in its audits of contractors at construction sites between June 2017 and June 2018.</p> <p>Over this time period, Metrolinx completed a total of 629 audits of contractors at construction sites on 23 critical capital projects identifying a total of 1,250 safety breaches that contractors were ordered to address.</p>
<p>Recommendation 4</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide an update on its Contract Management training initiatives, <p>Status: Fully implemented.</p> <ul style="list-style-type: none"> including its development of a standard approach for the inclusion of liquidated damages (LDs) in its construction contracts. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx reported to the Committee that it conducted a two-day contract-management pilot training session in May 2018. Based on the success of this pilot, training started in July 2018, which included foundational training provided by a third-party vendor and procedure refresher training conducted by Metrolinx staff.</p> <p>On August 30, 2018, Metrolinx reported to the Committee that requirements for liquidated damages (LDs) for specific conditions have been included in Metrolinx's construction contracts. Metrolinx also reported that discussion of LDs is also required in the pre-posting Tender Review Committee meeting, which provides an opportunity to discuss the application of LDs before issuance of the tender.</p>

Committee Recommendation	Status Details
<p>Recommendation 5</p> <p>Metrolinx should provide the Committee with:</p> <ul style="list-style-type: none"> a list of projects completed over the past year and the corresponding length of time needed to fix outstanding deficiencies in each project; and <p>Status: Fully implemented.</p> <ul style="list-style-type: none"> where projects did not meet the industry standard of two months to fix all deficiencies, provide a reason why this was not done. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with a list of 12 projects completed between August 2017 and July 2018 and the corresponding length of time needed to fix outstanding deficiencies in each project.</p> <p>For six out of the 12 completed projects, where the industry standard of two months to fix all deficiencies was not met, Metrolinx provided the Committee with a reason and an explanation as to why it took longer to fix all the deficiencies. In most cases, the outstanding deficiencies related to asphalt and landscaping work, which could not be completed due to cold winter weather.</p>
<p>Recommendation 6</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with an update on its Contract Completion and Close-Out procedure and its Substantial Completion procedure, and <p>Status: Fully implemented.</p> <ul style="list-style-type: none"> explain how these procedures have assisted Metrolinx in closing out projects within the industry standard of two months. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with an update on its Contract Completion and Close-Out procedure and its Substantial Completion procedure.</p> <p>Metrolinx informed the Committee that it was in the process of implementing a new suite of procedures and processes in conjunction with associated IT systems to improve contract management across its capital program. Specifically, the Contract Completion and Close-out Procedure was approved in December 2016 and the Substantial Completion procedure was approved in April 2017.</p> <p>Subsequently, during this audit, on June 30, 2019, Metrolinx informed us that its Completion and Close-Out procedure and its Substantial Completion procedure were updated and implemented in February 2019.</p> <p>Metrolinx explained to the Committee that the Substantial Completion procedure prescribes a requirement to initiate a Deficiency List, which must be maintained until all deficiencies are addressed at which point the Contract Completion and Close-Out process can be initiated in accordance with the related procedure. These two procedures, along with a third related to Claims and Dispute Resolution, establish a standard and consistent approach in management of contracts at the final stages of the contracted work, including the period between Substantial Performance and Contract Completion, to ensure that relevant handover protocols are satisfied in accordance with contract requirements.</p>

Committee Recommendation	Status Details
<p>Recommendation 7</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with the results of its procurement team’s analysis of what type of mechanism or clause will be implemented in contracts to ensure that a substantial scope of work is not subcontracted. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with the results of its procurement team’s analysis of what type of mechanism or clause will be implemented in contracts to ensure that a substantial scope of work is not subcontracted.</p> <p>Metrolinx informed the Committee that its procurement team analysis resulted in a recommendation that General Contractors be allowed to outsource 90% of their work. This means that a minimum 10% of the work must be performed by the General Contractor.</p> <p>Metrolinx informed the Committee that it was discussing the 10% threshold with the Ontario Road Builders Association and the Ontario General Contractors Association in order to obtain industry-specific feedback on this recommendation. Metrolinx also told the Committee that the results of these discussions will lead to the introduction of new minimum requirements clauses in its construction tender templates in September 2018.</p> <p>Subsequently, as part of this audit, Metrolinx informed us that as of June 30, 2019, the 10% minimum requirement clause has not been implemented. Metrolinx told us that it has completed multiple rounds of engagement with two key vendor associations, the Ontario Road Builders’ Association and the Ontario General Contractors Association, seeking to understand potential supply chain impacts from implementing new restrictions on the use of subcontractors in keeping with its recommendation.</p> <p>Based on this feedback, Metrolinx continues to advance its policy development through dialogue with industry. Once a solution is found that is both acceptable to management and unlikely to negatively impact Metrolinx’s ability to secure services from the market affordably and effectively, it will be implemented in Construction Tender template documentation. Metrolinx set a target of August 2019 to have this matter resolved.</p>
<p>Recommendation 8</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with its evaluation of the benefits of implementing a pre-screening process for large subcontractors. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx informed the Committee that from June 2018 to July 2018 it conducted an evaluation of the benefits of implementing a pre-screening process for large subcontractors.</p> <p>From the evaluation, Metrolinx found that industry best practice and industry standard construction contract documents make the selection and performance of sub-trades the responsibility of General Contractors. The General Contractors are best able to manage the risk of selecting which sub-trades they want to work with to deliver a successful project. The General Contractor is the single point of contact for Metrolinx to work with to achieve project success. Pre-screening sub-trades would transfer risk to Metrolinx and this would negate any potential benefits. Only in very limited and highly specialized circumstances will Metrolinx require General Contractors to work with pre-qualified sub-trades selected by Metrolinx, for example track and signals maintenance contractors for railway corridors.</p>

Committee Recommendation	Status Details
<p>Recommendation 9</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide an update to the Committee on its efforts in negotiating with Canadian Pacific Railway (CP) to incorporate the allowance of audits of CP invoices. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with an update on its efforts in negotiating with Canadian Pacific Railway (CP) to incorporate the allowance of audits of CP invoices.</p> <p>Since 2016, Metrolinx has been incorporating an audit clause in its new agreements with CP. The audit clause allows Metrolinx to audit CP invoices during the term of the agreement, and for a period of five years thereafter. Metrolinx informed the Committee that it added the clause to two new construction agreements with CP. This includes the Mount Dennis agreement executed on August 1, 2017, and the Cooksville agreement executed on April 3, 2018.</p>
<p>Recommendation 10</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with an update on its review and renegotiation of the Master Construction Agreement with Canadian National Railway (CN). <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with an update on its review and renegotiation of the Master Construction Agreement (MCA) with Canadian National Railway (CN).</p> <p>On May 22, 2018, CN agreed with Metrolinx that there was a need to amend the existing MCA, and Metrolinx established a working group to review any necessary adjustments. The current approach is to amend the existing MCA, targeting critical items to better reflect the current state of the relationship, as well as current practices for the execution of agreed infrastructure work on CN owned territories.</p> <p>As of June 30, 2019, Metrolinx continues active negotiations with CN at the executive level, with an estimated completion date by the end of 2019. Further, at the project and program level, Metrolinx has restarted monthly commercial meetings with CN to provide a regular forum to resolve project and program level interactions.</p>
<p>Recommendation 11</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide the Committee with an update on the results of third-party reviews conducted on CN and CP projects. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx provided the Committee with an update on the results of third-party reviews carried out from January 2017 to August 2018 on CN and CP projects.</p> <p>The reviews confirmed that in general, work conducted by CN and CP was performed as per scope and quote. Where exceptions were found, Metrolinx informed the Committee that it received a credit from CN and CP for work that was not completed.</p>
<p>Recommendation 12</p> <p>Metrolinx should:</p> <ul style="list-style-type: none"> provide to the Committee, after negotiations with CN and CP have been completed, its yearly operating cost resulting from the 20% of the lines that it operates on CN and CP lines. <p>Status: Fully implemented.</p>	<p>On August 30, 2018, Metrolinx reported to the Committee that it was still in active negotiations with CN and CP and, because of that, it was not able to provide the Committee with its yearly operating cost resulting from the 20% of the lines that it operates on CN and CP lines.</p> <p>Metrolinx explained to the Committee that making this information public would reveal confidential information about its negotiating plans and strategies, which would jeopardize its negotiating position and economic interests.</p> <p>On June 19, 2019, Metrolinx sent a letter to the Committee. In this letter, Metrolinx provided its yearly operating costs resulting from the 20% of the lines that it operates on CN and CP lines for fiscal year 2017/18 and for fiscal year 2018/19.</p>