

18.3 **Late Contract Claim** (Report No: 276/20)**Motion – Exclusion of the Public – Section 90(3)(b)&(h)****C220920/2062**

1. That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 276/20 - Late Contract Claim in confidence.
2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 276/20 - Late Contract Claim on the following grounds:
 - b. pursuant to Section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is:
conducting business; and
could prejudice the commercial position of the Council.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.
 - h. pursuant to Section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item includes legal advice.
3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.

Moved Councillor Bouchee, Seconded Councillor Lindop

Carried Unanimously

Mossop Group Construction + Interior (Mossop) undertook the construction of the hockey pitch and the Kauri Parade Sports and Community Centre building in May 2016 and October 2017 respectively for the City of Holdfast Bay.

In May 2018, Mossop raised two draft invoices (totalling \$108,158.33) and submitted these to the Mr Mal Wilkinson, an employee of Tonkin Consulting who had been engaged by Council to act as Project Manager and Contract Superintendent for the

project. At that time, Mr Wilkinson advised Council that he did not support the payment of the invoices as he suggested that these invoiced amounts would be offset by potential claims to be issued by Council against Mossop and that he had an agreement with them that this quid pro quo would prevail.

In early 2020, Mossop restated their position that the unpaid invoices were valid, that they remained entitled to payment and that settlement was overdue. Council's lawyers wrote to Mossop setting out the position as advised by Mr Wilkinson that the invoiced amounts were to be offset against damages incurred by Council (ie removal of a significant tree and liquidated damages) and there was an (undocumented) agreement that the invoices would not be lodged by Mossop. A settlement where both parties "walked away" from their claims was proposed. Mossop did not respond to the letter and it appeared that they were content with the resolution and no further action ensued.

On 1 June 2020, Mossop, subsequently wrote to Council disputing this position and restating their claim that they were entitled to payment for works performed, that the late invoices remained live and that they were entitled to payment.

Council's lawyers have now re-interviewed Mr Wilkinson and undertaken a further detailed review of project documentation. On this basis, they have modified their original advice to be that Council should now seek a negotiated settlement as it would be:

- difficult to defend the non-payment of the claim as it relates to work undertaken under the contract, although the timeframe for issue of the invoices is outside the timelines envisaged by the contract;
- hard to substantiate a claim for liquidated damages against Mossop as it would be difficult for Council to define the extent of damages or losses due to the delayed completion of the project; and
- hard to substantiate a claim for damages against the loss of a significant tree as there is confusion about the instructions issued by the Mr Wilkinson on this matter.

Further complications that weaken Council's position are that:

- Mr Wilkinson is no longer engaged by the project or the Council; and
- No Certificate of Practical Completion was issued for the project and no formal request for final invoices was made to the contractor.

As indicated, current legal advice (Attachment 1) is that Council should seek to negotiate a settlement with Mossop, which in a worst case could result in Council having to pay the outstanding balance of the two (2) invoices, totalling \$108,158.33. This report therefore seeks council approval to enter into commercial negotiations with Mossop in an attempt to resolve the matter in a favourable manner.

Legal advice does not support taking any legal action against Tonkin at this stage as we need their support to negotiate with Mossop.

Motion**C220920/2063****That Council:**

1. authorise Administration to undertake commercial negotiations with Mossop on a without prejudice basis in an attempt to defray costs for outstanding claims lodged by Mossop in relation to construction of the Kauri Sports and Community Centre;
2. request Administration consider any claims that Council may have by way of offset (significant tree and liquidated damages);
3. authorise the Mayor and Chief Executive Officer to approve any negotiated settlement on the basis of best value for Council;
4. approve new capital budget of up to \$108,158.33 (worst case scenario) in the 2020/21 Capital Works Program to allow payment of the negotiated settlement, such actual amount being set by the authorised settlement figure approved by the Mayor and CEO; and

RETAIN IN CONFIDENCE - Section 91(7) Order

5. That having considered Agenda Item 18.3 Report No: 276/20 Late Contract Claim in confidence under section 90(2) and (3)(b)&(h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the report, attachments be retained in confidence for a period of 24 months following resolution of the contractual dispute and the Chief Executive Officer is authorised to release the documents (excluding the Attachments) after that time and that this order be reviewed every 12 months.

Councillor Lindop left the meeting at 8.54pm.

Councillor Lindop re-joined the meeting at 8.56pm.

Moved Councillor Bouchee, Seconded Councillor Snewin

Carried Unanimously