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The Regional Municipality of Durham Report

To: Committee of the Whole
From: Commissioner of Corporate Services, Commissioner of Works,
Commissioner of Finance
Report: #2020-COW-25
Date: September 16, 2020

Subject:

Report on the Organics Management Solution – Joint Venture/Co-ownership with
EPCOR Power Development Corporation

Recommendations:

That the Committee of the Whole recommends to Regional Council (“Council”):

- A) That Council ratify the August 11, 2020 Memorandum of Agreement between the Regional Municipality of Durham (“Region”) and EPCOR Power Development Corporation (“EPCOR”) in relation to the termination of the joint venture/co-owner relationship (“JV Termination”) between the parties on the Region’s long-term organics waste management solution (the “Project”).
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Report:

1. Purpose

- 1.1 The purpose of this report is to seek ratification of the August 11, 2020 Memorandum of Agreement between the Region and EPCOR and report on the JV Termination.

2. Memorandum of Agreement

- 2.1 Pursuant to Report #2020-COW-20, Council authorized Regional staff to continue negotiations with EPCOR to explore the possibility for a joint venture/co-owner relationship with the Region on the Project.

- 2.2 The parties exchanged written proposals on the joint venture/co-owner's agreement in the spring of 2020 and commenced negotiations thereafter. The parties made a good faith attempt to negotiate an agreement that was fair and reasonable for both parties. The Region's interests were to find an agreement that would result in a net present value benefit to the Region equal to or greater than what had been previously been presented to Council (as outlined in 2020-COW-20), share the change in law risk and ensure the Region retained control over substantial Project decisions. Unfortunately, the parties reached an impasse in negotiations on some of the key terms outlined in 2020-COW-20, such as governance and risk allocation related to change in law. As such, the parties mutually agreed that negotiations should be terminated, and the parties should part ways on amicable terms before either party incurred additional costs and time. Please note that the JV Termination date preceded the issuance of the RFPQ and therefore EPCOR was not referenced as a potential co-owner on the Project.
- 2.3 Prior to the termination of negotiations, the parties executed a Memorandum of Agreement on August 11, 2020, subject to ratification by Council. The substantive terms of the Agreement are as follows:
- a. The Region shall compensate EPCOR for its Project development costs associated with development activities for the Project from the date EPCOR commenced incurring such costs (September 25, 2019) to the date the JV Termination date. Such Project development costs shall not exceed \$250,000 CDN, which is inclusive of any applicable taxes or remittances ("Project Development Costs"). It is understood that the Project Development Costs do not include any costs associated with EPCOR's assessment of the joint venture/co-owner relationship, work on the joint venture/co-owner agreement and/or joint venture/co-owner negotiations.
 - b. Upon payment of the Project Development Costs, EPCOR and its past, present and future officers, directors, shareholders, employees, agents, successors, assigns, affiliates and subsidiaries shall release and forever discharge the Region and its past, present and future officers, directors, shareholders, employees, agents, successors, assigns, affiliates and subsidiaries of the Region from all claims, debts, demands, actions, complaints and liabilities of any kind or nature whatsoever in law, in equity or otherwise arising out of or in any way related to the JV Termination and/or EPCOR's involvement in the development activities on the Project prior to the JV Termination, excluding any claims, debts, demands, actions, complaints and liabilities arising out of or in any way related to the RFPQ for

the Project in which EPCOR is included with the Region in the definition of 'Owner'.

- c. EPCOR's ownership of all materials, work product and deliverables arising from the development activities on the Project shall be transferred to the Region and vest exclusively in the Region upon payment of the Internal Costs as required pursuant to this Agreement; however, EPCOR may use such work product, materials and/or deliverables as a precedent for other non-competing projects outside of the Durham Region provided confidential legal and financial information arising from the Project is not disclosed to a third party without written consent from the Region.

2.4 Regional staff recommend the Memorandum of Agreement for ratification by Council. The Region and Project have benefited from the labour and expertise EPCOR has dedicated to the development activities on the Project up to the JV Termination date. Starting in September of 2019, EPCOR dedicated eight staff members or 1,637.25 hours to the development activities on the Project. These activities included:

- a. **Project Risk Development:** EPCOR was a key participant, working with Deloitte and the Region, in developing the Project's risk matrix which included defining approximately 150 commercial and contract risks and allocating the assignment of those Project risks. They participated in meetings and workshops to develop and refine the risk matrix.
- b. **Procurement:** EPCOR participated in the development of the Project's procurement documents and strategy, including drafting, reviewing, and providing input into the bid and tender layout, technical scope, technical and financial evaluation scoring criteria, reference check questions and site visit parameters. EPCOR's expertise as a frequent respondent in the market assisted the Region to develop a financially, technically and legally sound document that is expected to generate significant market interest.
- c. **Business Case Development:** EPCOR was a key participant in developing and reviewing the Project's business case inputs and assumptions, working closely with Deloitte and the Region during various workshops as the Project developed. They also developed pro-forma financials for the Project and presented and discussed securing contract options for renewable natural gas ("RNG") sales based on their experience working in RNG markets across Canada.

- d. **Project Agreements:** Based on its prior experience and commercial precedents, EPCOR provided the Region with input into anticipated Project agreements that the Region can rely on in the future development of the Project.
- 2.5 The approved Project budget included anticipated consulting fees for developing and negotiating several agreements related to the JV. These agreements will no longer be required, therefore EPCOR's costs associated with the Project development activities can be funded from within the current Project budget. It is anticipated that consulting fees earmarked to the JV would have been at least \$250,000 over the life of the Project.

3. Conclusion

- 3.1 In light of the foregoing, Regional Staff recommend the ratification of the August 11, 2020 Memorandum of Agreement to compensate EPCOR for its Project Development Costs incurred on the Project's development activities, secure a release of future liability on the Project as it relates to EPCOR, and protect the Region's intellectual property on the Project to date.

Respectfully submitted,

Original signed by:

Don Beaton, B.Com., MPA
Commissioner of Corporate Services

Original signed by:

Susan Siopis, P.Eng.
Commissioner of Works

Original signed by:

Nancy Taylor, BBA, CPA, CA
Commissioner of Finance

Recommended for Presentation to Committee

Original signed by:

Elaine C. Baxter-Trahair
Chief Administrative Officer