Item 8.4

Section I – Items for Board of Directors Action

TO: Chair and Members of the Board of Directors
Meeting #8/18, Friday, October 26, 2018

FROM: Michael Tolensky, Chief Financial and Operating Officer

RE: **STANDBY SURETY FACILITY FOR TRCA CONSTRUCTION WORKS**
Agreement to Enter into a Surety Arrangement

KEY ISSUE
Approval to enter into a standby surety facility arrangement for TRCA construction services.

RECOMMENDATION

WHEREAS new provisions in the *Construction Act* (formerly the *Construction Lien Act*) came into force on July 1, 2018 requiring a contractor to furnish a public project owner with performance, labour and material bonds upon entering into contracts for improvements to land exceeding $500,000 in value;

AND WHERAS Toronto and Region Conservation Authority (TRCA) is likely to be considered a contractor when undertaking improvements to land under contract to public agencies such as municipalities and is therefore subject to the new public contract bonding requirements;

AND WHEREAS TRCA has held its previous surety facility in abeyance on the advice of its solicitors pending the resolution of an ongoing dispute;

AND WHEREAS TRCA has engaged Marsh Canada, Conservation Ontario's insurance broker of record to seek out proposals to provide a standby surety facility to underwrite TRCA's construction activities;

AND WHERAS based on preferable rates for both short term and long term contracts as well as acceptable conditions to TRCA and consistent underwriting ratings, Marsh Canada has recommended Trisura Guarantee Insurance Company as the preferred standby surety facility to TRCA;

THEREFORE LET IT BE RESOLVED THAT TRCA enter into a standby surety facility arrangement with Trisura Guarantee Insurance Company for TRCA works requiring bonding;

AND FURTHER THAT staff be authorized and directed to take all necessary actions to implement the foregoing, including the signing of documents.

BACKGROUND
Surety bonds are one of the most common types of guarantees used to underwrite contract and commercial obligations globally. The bond itself is a financial instrument involving three parties: the party to whom an obligation is made (the 'obligee'), a party making an obligation (the 'principal') and the bonding company (the 'surety').

The bond is issued by the surety at the request of the principal and is used to guarantee the performance of the obligation that they have made to an obligee. Under the typical terms, if the principal fails to meet the underlying obligation to the bond, the surety would fulfill those obligations on the principal's behalf as per the terms and conditions of the bond.

In exchange for these underwriting services and their associated risk, the principal agrees to pay the surety a premium but also enters into an indemnity agreement which promises to compensate the surety for any loss they may incur in carrying out the principal's duties under the bonding arrangement. This promise to pay a surety back for any of their potential losses makes a surety arrangement similar to that of a credit facility from the perspective of the principal, while the promise to undertake the principal's obligation to the benefit of the obligee if the principal fails to do so makes the bond similar to an insurance policy from the perspective of a obligee or project owner.

It is standard practice for TRCA to request bonds as well as other forms of guarantee of its hired contractors in the common course of contract administration to ensure bids, contract performance and payment of subcontractors and suppliers. While acting as a contractor TRCA has had to issue bonds in the past, however this has not been common practice to date.

On December 12, 2017, the *Construction Lien Amendment Act, 2017* received Royal Ascent. The Act brought in many changes to the former *Construction Lien Act* including among others, a name change to the *Construction Act* as well as new requirements for bonding of applicable public contracts.

As of July 1, 2018, the effective date of the bonding provisions, a contractor providing land improvement services under a public contract greater than $500,000 in value is now required to provide performance, labor and material bonds to the project owner. The Act is written in such a way that the onus is on the contractor to provide the required bonding rather than on the owner to request it. The provisions apply to new contracts that have not been signed, or where procurement processes (for example Requests for Proposals) for the underlying works have not been begun before July 1, 2018.

It is the opinion of TRCA's counsel, that despite TRCA's status as a broader public sector agency, when working as a general contractor to complete construction projects for another public agency, TRCA is likely to be considered a contractor under the *Construction Act* and as a result, the new bonding provisions do apply (Attachment 1 contains a summary bonding requirements of TRCA projects).

Projects that are likely to be affected by the new bonding regime would include TRCA's erosion management, landform construction, trail construction, parkland improvement and possibly other projects. TRCA's Restoration and Infrastructure division estimates that almost 20 projects ranging in construction budget of $500,000 to $100,000,000 may be affected by this change within the next year.

TRCA has a current bonding facility in place with a major North American surety provider, however due to an ongoing claim dispute, has held the facility in abeyance based on the advice of its litigation counsel. In order to ensure business continuity, TRCA has been working with Conservation Ontario's insurance broker of record, Marsh Canada, to find a suitable standby surety facility to service TRCA's applicable construction portfolio. The results of Marsh Canada's search returned Trisura Guarantee Insurance Company ('Trisura') as the preferred candidate to underwrite TRCA's construction practice.

RATIONALE

Marsh Canada's recommendation to enter into a surety arrangement with Trisura is based on a number of factors including preferred rates, financial strength, compatibility of Trisura's risk appetite in relation to TRCA's construction portfolio, a demonstrated willingness come to agreeable bonding terms and to provide claims support to TRCA.

FINANCIAL DETAILS

The new bonding requirements of the *Construction Act* will require TRCA to issue bonds for construction projects over $500,000 where TRCA is acting as a contractor to a public agency. At the proposed rates, the statutorily required bonds would represent an approximately 1-2% increase in the overall budget of affected projects, depending on the size and timing of the underlying work. Funding for the additional costs will be charged to the applicable project budget.

In addition to the individual bonding premiums, Trisura will require a $1,500 annual administration fee to keep the facility active. This fee is standard for the industry and represents the lowest rate offered by interested sureties in the market search. This fee will be charged to the Corporate Insurance Account (012-29).

DETAILS OF WORK TO BE DONE

Upon approval from the Board of Directors, staff will finalize the standby surety facility agreement with the support of its solicitors, Gardiner Roberts. Staff will subsequently work with their representatives at Marsh Canada to provide guidance to TRCA's construction teams on the process for budgeting, requesting and processing construction related surety bonds as needed.

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