SUBJECT: Appeals of Technical Standards and Safety Act (TSSA) Orders (City Wide) - (PW09012/LS09003)

RECOMMENDATION:

(a) That the City Solicitor be authorized and directed to take all necessary steps to appeal the orders and fees invoices issued against the City of Hamilton under the Technical Standards and Safety Act, 2000 and as described in Report PW09012/LS09003.

(b) That the City Solicitor be authorized and directed to take all necessary steps to appeal any future orders and fees invoices issued against the City of Hamilton under the Technical Standards and Safety Act, 2000 which are of a type similar to those orders and fees invoices described in Report PW09012/LS09003, until the appropriateness of those orders and fees invoices being issued against the City of Hamilton has been resolved.
EXECUTIVE SUMMARY:

Pursuant to the Technical Standards and Safety Act, 2000, orders and fees invoices have been issued against the City of Hamilton with respect to two road construction projects which were performed by two different general contractors.

In both cases, it is the alleged action or inaction of the City’s contractor on the construction project that has resulted in the involvement of the Technical Standards and Safety Authority.

Therefore, City staff have appealed all of those orders and fees and invoices and written hearings are now scheduled to take place in January and February of 2009. This report is to request authorization to continue with those appeals.

Since the initial drafting of this report, another order has been received regarding an alleged underground gas line strike on October 24, 2008 by a City contractor (New Alliance Ltd.) on another construction project. Therefore this report is also to request authorization to appeal any future orders and fees invoices issued against the City of Hamilton by the TSSA until the appropriateness of such orders and fees invoices is resolved.

BACKGROUND:

There are two construction projects which have resulted in the orders and fees invoices being issued by the TSSA.

Kennedy Avenue

The City’s contractor on this project was New Alliance Ltd. The original incident leading to the issuance of the TSSA orders for this project involved alleged damage to a natural gas pipeline. A follow-up inspection by the TSSA resulted in a second order being issued as the contractor allegedly was not able to produce locates for underground gas lines, upon request of the TSSA Fuels Safety Inspector. In each case the TSSA Fuels Safety Inspector also issued orders against the City of Hamilton, as well as fees invoices for the TSSA’s costs in conducting its investigation.

Given that the alleged incidents resulting in the orders and fees invoices involved the action or inaction of the City’s contractor, and that the City of Hamilton was not the contractor nor the employer or supervisor of the contractor’s employees (as is required under the TSSA before an order can be issued against the person), City staff appealed such orders and fees invoices to the Director at the Technical Standards and Safety Authority.

After receiving the City’s appeals, legal counsel for the Technical Standards and Safety Authority advised that a further order would be issued against the City of Hamilton under a different section of the TSSA regarding this matter. That further order was issued against the City in its capacity of allegedly being a “person who has authority to correct the contravention” but did not clearly specify what outstanding contravention of the Act or regulations the City was required to correct. Therefore, City staff also appealed this order.
As a result, the Technical Standards and Safety Authority has issued a notice of written hearing which will involve the exchange of written submissions in January and February 2009, following which the Director will make a decision.

**Fennell Avenue East and East 12th Street**

The City’s contractor on this project was Wesroc Construction Ltd. The original incident leading to the issuance of the TSSA orders for this project involved alleged damage to a natural gas pipeline. An order and a fees invoice were issued against the City of Hamilton regarding this incident. To the best of City staff’s knowledge, at no time before issuing the TSSA Order did the TSSA Fuels Safety Inspector ask City staff for any information regarding any relevant City of Hamilton policies and procedures in place with respect to its contractors and/or its employees and agents, nor were any statements taken with respect to this particular incident.

Given that the alleged incidents resulting in the orders and fees invoices involved the action or inaction of the City’s contractor, and that the City of Hamilton was not the contractor nor the employer or supervisor of the contractor’s employees (as is required under the TSSA before an order can be issued against the person), City staff appealed such orders and fees invoices to the Director at the Technical Standards and Safety Authority.

As a result, the Technical Standards and Safety Authority has issued a notice of written hearing which will involve the exchange of written submissions in February 2009, following which the Director will make a decision.

It should be noted that with both construction contracts, City staff, in their capacity of representing the City as the owner of the property on which the work was being performed and as a party to the contracts, has met with each contractor to discuss the importance of working safely and following all contractual and legal requirements relating to their work on a City contract.

**ANALYSIS/RATIONALE:**

As set out in the background section of this report, City staff are of the position that in these particular fact situations, the City of Hamilton is not a “contractor”, “employer”, “supervisor” or “person who has authority to correct the contravention” within the meaning of the TSSA. Discussions with staff at the Technical Standards and Safety Authority were not successful in having these orders revoked and therefore the appeals described in this report were initiated.

**ALTERNATIVES FOR CONSIDERATION:**

The alternative available to the City of Hamilton is to withdraw the appeals and pay the fees invoices. This alternative is not being recommended as it would result in City of Hamilton staff having to continue to respond to orders and fees invoices of this type in the future, when it is not believed to be appropriate to have to do so.
FINANCIAL/STAFFING/LEGAL IMPLICATIONS:

Financial
There are sufficient legal resources in-house to handle the appeals of the orders and fees invoices. The fees invoices have been billed at a rate of $135.00 per hour and currently total $1,346.63.

Legal
While the issuance of orders and fees invoices is not the same as being found guilty of an offence under the TSSA, failure to comply with an order or requirement of an inspector is an offence under the TSSA. It does not appear that the City of Hamilton has received orders and fees invoices of this type in the past for City construction contracts performed by its contractors. By proceeding with these appeals, it is hoped that future similar orders and fees invoices against the City can be avoided.

After the TSSA Director has issued his decision on the City's appeals, the affected persons may appeal the decision to the Divisional Court. Should the TSSA Director issue a decision that is not favourable to the City, a further staff report will be provided to Committee and Council on that issue. It should be noted that a notice of appeal is required to be filed with the court within 30 days after receiving notice of the Director's decision.

POLICIES AFFECTING PROPOSAL:
The recommendation contained in this report does not alter or contravene an established City Policy.

RELEVANT CONSULTATION:
City Manager's Office - Human Resources
Technical Standards and Safety Authority

CITY STRATEGIC COMMITMENT:
By evaluating the "Triple Bottom Line", (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced. □ Yes  ✔ No
Environmental Well-Being is enhanced. □ Yes  ✔ No
Economic Well-Being is enhanced.  ✔ Yes  □ No
Allows for public resources to be utilized more efficiently on City construction contracts.

Does the option you are recommending create value across all three bottom lines?  □ Yes  ✔ No

Do the options you are recommending make Hamilton a City of choice for high performance public servants?  □ Yes  ✔ No