



Date: November 10, 2022

To: PPS Board of Education

From: Marina Cresswell, Senior Director, Office of School Modernization

Subject: PPS/Fortis Settlement - Corporate Activity Tax (CAT)

Introduction and Timeline

Portland Public Schools has undertaken a significant school modernization program with generous support from property taxpayers and takes its responsibility to maximize and safeguard taxpayer funds very seriously. As part of the 2017 bond program, PPS modernized Leodis V. McDaniel High School in partnership with its general contractor, Fortis Construction, Inc., (the “Project”). The Project was successfully completed on time and under budget.

April 19, 2018: PPS and Fortis entered into a contract for Fortis to construct the Project.

May 16, 2019: About a year later, Governor Kate Brown signed House Bill 3427 into law.

The legislation does the following:

- Establishes a "Fund for Student Success" that is separate and distinct from the state's general fund; and
- Imposes a new Corporate Activity Tax (CAT) on all types of business entities for the privilege of doing business in Oregon.

This new CAT applied to Fortis’s total commercial activity in Oregon beginning January 1, 2020. Fortis seeks from PPS approximately \$1.3 million for reimbursement for estimated CAT amounts Fortis alleges that it and its subcontractors have incurred as a result of their work (commercial activity) on the Project.

Because the CAT was signed into law about a year after PPS and Fortis entered into contract, the contract did not mention the CAT.

July - August 2019: Six months before the CAT was to go into effect, PPS and Fortis negotiated a planned amendment to the contract setting the maximum price of the Project. This was after Fortis had already started preconstruction work on the project.

During the amendment negotiations, Fortis presented a draft that included an amount to account for Fortis’s estimated CAT liability that Fortis believed was related to the Project. PPS asked Fortis to remove the CAT from the proposed amendment because PPS needed time to analyze how and whether it would apply to the Project. The CAT was discussed during the amendment negotiations and removed during negotiations. The contract amendment indicated that the CAT issue would be resolved by October 15, 2019.



Fortis alleges that a PPS employee (who had only authority to approve expenditures under \$10,000), told Fortis that PPS would add the CAT to the price paid to Fortis by a “change order” after the amendment was executed. On that basis, Fortis alleges that it relied on the PPS employee’s representation in signing the amendment that did not include the CAT and proceeding with the Project. PPS disagrees that relying on these alleged statements was reasonable.

The parties did not resolve the CAT issue by October 15, 2019.

July 14, 2020: PPS denied Fortis’s request for additional compensation based on the conclusion that the CAT did not qualify as a reimbursable cost of the work under the language of the Contract. Fortis submitted a claim on July 20, 2020.

April 2021: PPS and Fortis attempted to mediate the dispute but did not reach a resolution.

After the April 2021 mediation, PPS filed an action, seeking a declaration from the court that the CAT is not a reimbursable cost of the work under the PPS-Fortis contract. Fortis responded by filing eight counterclaims against PPS: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) promissory estoppel / equitable estoppel; (4) reformation; (5) unjust enrichment; (6) quantum meruit; (7) implied in fact contract; and (8) fraud.

October 31, 2022: Following a second mediation, PPS and Fortis agreed to resolve the pending litigation between them related to the CAT dispute for \$750,000 in exchange for a release and dismissal of the lawsuit, subject to PPS Board approval.

Settlement

Both parties deny liability for the claims alleged against them, but each party faces the inevitable reality that taking a construction case to trial involves significant risk, expense and time.

PPS recognizes that the CAT is a new tax and that there was considerable uncertainty about how it applied to the Project under the language of the parties’ contract. PPS also recognizes that there was significant turnover in the Office of School Modernization during the summer of 2019, when the parties were negotiating the price amendments to the contract.

As a result, we:

1. Increased regular staff training on approval of contract changes;
2. Added regular PPS management representation at construction project team meetings; and
3. Increased approval requirements in the project management software used by PPS and its contractors.