

June 17, 2019

Mayor and Members of Council  
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CLAC is a member of the  
World Organization of Workers

Dear Mayor Tory and Members of Toronto Council,

It was our pleasure to address the Executive Committee meeting on June 6, 2019, and to answer questions. Since the meeting we have been working with city staff to respond to the different parts of the motion that was passed by the members of the committee. We have also been reflecting on the comments made during the meeting about what is important to the city, namely:

- Making prudent, fiscally responsible decisions that will ensure quality and the safety of the workforce.
- Ensuring the city and its citizens get the most benefit from the hundreds of millions of dollars invested in projects that are tendered. These benefits include investments in skills and training.

I am pleased to say that CLAC supports these objectives whole heartedly. Our members work for some of the best companies in the province and our union invests in training, apprenticeship, and in the community at comparable levels to other unions for our membership size.

Our union invests \$0.20 per hour worked by every construction member into skills and safety training, and into apprenticeship support. We understand that on a per-person basis, this is as much or more than is achieved by the nine craft unions that the city deals with exclusively.

We are also deeply engaged in work to attract and support new workers to the trades, particularly from groups that are underrepresented. We provide funding for training programs for youth, and youth at risk. We have also found that for a union our size, we can achieve the greatest impact through sponsorships, scholarships, and partnerships. Some of the organizations that we work with or support include: the Aboriginal Apprenticeship Board of Ontario, Canadian Apprenticeship Forum, Canadian Association of Women in Construction, Ontario Youth Apprenticeship, Pre-Apprenticeship Training Institute, Skills Ontario, Supporting Ontario Youth, and Women Building Futures. We estimate that CLAC spends nearly \$0.15 per hour worked by our construction members on such programs.

Currently, there appear to be three paths forward for city council. Whatever is decided on June 18 or 19 is permanent and this must be considered very carefully.



**CLAC's Commitments**

Positive Work-Life | Champions of You | Everyday Greatness

### **Path 1 – Allow all qualified, safe, and community invested companies to bid**

This option is, in our mind, the best and most inclusive one. It allows for the same open bidding on ICI construction projects that is currently available in civil construction, while still maintaining the same robust controls for safety, quality, and social benefit.

This option is expected to save 8-25 percent based on what we observed in reviewing the vast bidding spreads, the eliminated qualified bidders, and the low bidding numbers for Toronto over the past two months. For example, the city could have saved over \$230,000 if they could have taken a bid from a union contractor that was fully qualified, but was affiliated with a union not affiliated with the city ([see the bid for union contractor Maxim Roofing](#)). This option also allows the city to establish and manage its own procurement protocols to ensure that prospective bidders achieve the prescribed safety, training, and community investment standards established by the city.

### **Path 2 – Negotiate with the Carpenters and Building Trades to have other unions and their members voluntarily recognized to work on ICI projects**

We believe this option stands in violation of the City of Toronto bylaws, procurement policy, and Section 14 of the *City of Toronto Act, 2001* (see enclosed legal option). Further, if pursued, this option would see cost savings, but there is significant risk that it could be revoked by the Carpenters and Building Trades during the next bargaining cycle. This was what happened in Hamilton between the Carpenters and LIUNA on park work. The Carpenters had agreed to allow LIUNA to work on certain projects for the city and then negotiated that away in a subsequent round of bargaining. LIUNA was no longer recognized and the costs for parks and splash pads skyrocketed. **It is also not possible with this option to recognize other unions, such as CLAC, or qualified and safe non-union contractors.** We do not recommend that the city select this path.

### **Path 3 – Remain closed**

This option is not fiscally responsible or fair to workers, contractors, or citizens. The city will continue to see a low number of bidders per project and the same small group of contractors bidding and working on all projects. A small bidding pool on highly technical projects can be expected, but the city is seeing small bidding pools on most projects. If you look back over the past two months, you had one and two bid situations on [roofing projects for community centres](#) and [state of good repair improvements](#). These projects require experience and skill, but are not highly technical. The city is paying too much for construction because of the lack of contractors and the productivity efficiencies that can be gained by having different ways of organizing work and labour. This will continue if the city remains status quo.

Further, this option is unfair to the qualified union and non-union workers and contractors who want to build their city. Your procurement policy states that you will be inclusive. Maintaining the status quo tells workers and contractors who don't belong to a select set of unions that they are not good enough to work here, without giving them a chance. There were those who [said the same thing to women athletes](#) at one time as well. As we saw the diverse and inclusive city of Toronto celebrate **#WeTheNorthDay** together,

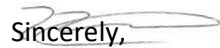
we do not believe this closed attitude is supported by the city and we look forward to witnessing you embrace inclusivity and fairness for all.

If given the opportunity to work for the city, our contractors and members would be pleased to meet all safety and quality requirements. In addition, we would support and advocate for a new policy that would require all unions (or companies in the case of non-union) to dedicate \$0.15 per construction person hour to fund skills training and community benefits in the city of Toronto. We believe this proposal gives clarity, transparency, and certainty to the city in the area of social procurement. It would also weed out bad actors when combined with your robust safety and experience qualification requirements.

We hope by submitting this information that you will have the facts needed to decide who gets to be included in building Toronto. CLAC is committed to becoming a true partner of the city. Our recommendation for open tendering is based on fairness for all and what is in the best interest of the city.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Ian DeWaard,  
CLAC Ontario Director

cc. Mr. Chris Murray, City Manager



DEVRY SMITH FRANK *LLP*  
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June 14, 2019

Our File No.: CHRLA850

Sent by email to: Idewaard@clac.ca

**Christian Labour Association of Canada**  
2555 Meadowpine Blvd  
Mississauga, Ontario  
L5N 6C3

Attention: Ian DeWaard, Provincial Director

Dear Mr. DeWaard:

**Re: Ability of the City of Toronto to Include LIUNA as an ICI Bidder**

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***Background***

The Ontario Government recently passed *Bill 66, An Act to restore Ontario's competitiveness* (the "**Bill**"). Schedule 9 of the Bill amends the *Labour Relations Act, 1995* (the "**LRA**") to deem municipalities like the City of Toronto (the "**City**") to be non-construction employers. This would free the City from being bound to the nine province-wide collective agreements (the "**Collective Agreements**") in the Industrial, Commercial and Institutional (**ICI**) sector of the construction industry. In turn this would allow for greater competition in bidding on City contracts related to the ICI sector.

The Bill allows the City to opt out of this new designation. If it does opt out, the City would, under the LRA, continue to limit bids on ICI work to the 9 trades covered by the Collective Agreements. Much of the work on the City's capital projects would thus remain the preserve of a limited and exclusive group of contractors and subcontractors.

The matter is to go before City Council ("**Council**") next week on Tuesday 18 June 18 a decision. The City Manager, in his report dated 29 May 2019 (the "**Report**"), has recommended that the City not opt out of the designation. It is his opinion that it is in the City's best interest to become a non-construction employer.

You understand that Council may determine at its meeting next week that the City opt out of the designation while voluntarily recognizing the Labourers' International Union of North America (**LIUNA**) as the only non-signatory to the Collective Agreements whose members would be eligible to bid on City ICI projects (the "**Council Action**") (the "**LIUNA Privilege**"). The members of

other unions, such as the Christian Labour Association of Canada (CLAC), would be prohibited from bidding on ICI projects. You have not been provided with any rationale as to why LIUNA would qualify for such a privilege.

You have requested that I provide you with an opinion on the legal status of the Council Action in the context of the provisions of the *City of Toronto Act, 2001* (the “Act”).

### ***LRA***

While this opinion does not specifically address the question of whether the LIUNA Privilege is permitted by the Bill, I note that there is no provision in Schedule 9 that would permit such action. As noted in page 18 of the Report there are only two options for Council to consider: opt out of the deemed non-construction provisions or take no action and become a non-construction employer.

This alone would make the Council Action *ultra vires* the powers of the City.

### ***The Act***

It is trite law that municipalities are creatures of statute and are constrained in their ability to act by statute. The authority of the City to act and regulate is governed by the provisions of the Act. For the purpose of this opinion the relevant sections of the Act are:

14 The City shall not confer on any person the exclusive right to carry on any business, trade or occupation unless the City is specifically authorized to do so under this or any other Act; and

212 (1) The City shall adopt and maintain policies with respect to the following matters:

3. Its procurement of goods and services.

### ***The City's Procurement By-law***

The City has adopted a Purchasing By-law, *Municipal Code Chapter 195, Purchasing* (the “By-law”). The purpose of the By-law (section 195-1) is to maintain “*the integrity of the procurement process by ensuring that, wherever possible, competitive methods of procurement will be used to obtain the best value for the City*” (B) and to clearly define the “*circumstances in which non-competitive procurements may be awarded*” (C).

Section 195-6.3, Competitive solicitations, states: “*A competitive solicitation method must be used for any procurement, unless one or more of the exceptions for using a non-competitive procurement described in this chapter exist*” (emphasis added).

Section 195-7.1, Non-competitive procurement exceptions, sets out those exceptions, provided that “*the proposed non-competitive procurement and the particular supplier can be justified in good faith*”. The exceptions are specific, such as procurement of a work of art, except for 195-7.1(P) which states that “*Such other non-competitive procurement exemptions authorized by Council*”.

In my view none of the exceptions listed is relevant for this particular circumstance. By including LIUNA on the list of eligible bidders the Council Action would not be authorizing a specific exemption from the requirement to engage in competitive solicitation but a blanket exemption for one specific union. There is no justification for the LIUNA Privilege or evidence of good faith in coming to such a decision.

### ***The City's Procurement Policy***

Pursuant to section 212 of the Act the City has adopted a number of Procurement Policies. The policy applicable to this issue is the *Labour Trades Contractual Obligations in the Construction Industry* (the "Policy"). The Policy reaffirms the City's obligation to use union labour for certain trades performing ICI work for the City. There is nothing in the Policy that would anticipate or allow the LIUNA Privilege.

### ***Case Law***

#### *Duty to Act Fairly*

The case law is clear that an act of Council can not be *partial and unequal in its operation*, which is what occurs which a particular class or person is privileged over another (*R. v. Levy*). Council cannot by resolution "*confer on itself a power to discriminate*" (*Neon Products Ltd. v. North York*).

The Council Action would confer on Council the power to discriminate in determining which union is the only one able to bid on ICI projects. This would be a basis for quashing the Council Action.

Section 10 of the Act does permit the City to pass *by-laws* that may differentiate between classes on a basis the City considers to be appropriate. This section is however not applicable to the case at hand as the Council Action:

1. does not involve the passage of a by-law;
2. would discrimination between members of the same (union) class; and
3. provides no rational or reasonable basis for the inclusion of only one union on the bidding list.

#### *The City Cannot Grant Exclusive Rights (No Monopolies)*

Section 14 of the Act prohibits the granting of exclusive rights within the City unless specifically sanctioned by the Act. Under the case law the courts have held that "*it is not necessary that the By-law grant an exclusive right to anyone in order to come within the prohibition. It is enough that it tends to create a monopoly*" (*Kovinic v Niagara Falls*).

It is my opinion that the LIUNA Privilege would grant LIUNA exclusive rights to bid on contracts otherwise reserved for unions who are parties to the Collective Agreements. The City is bound to the Collective Agreements but it is not required to grant such exclusive rights to LIUNA. If it is to expand the exclusive group of bidders it must do so in a way that allows competitive solicitations from more than one non-ICI union.

### ***Conclusion***

It is my opinion that the Council Action would not be rational, fair or legal. To grant LIUNA a bidding status not accorded to CLAC or any other non-ICI union:

1. is not an option provided to the City under the Bill. It would therefore contravene the provisions of the LRA;
2. would give rise to exclusive bidding rights in contravention of section 14 of the Act; and
3. is contrary to the purpose and the provisions of the By-law and the Policy. It would undermine the integrity and competitiveness of the procurement process and carve out an exemption that does not exist, without any rational justification.

For these reasons it is my opinion that the Council Action is outside of the jurisdiction of Council to approve. On the basis of the above I would anticipate that the Council Action would not survive a court challenge.

I trust that the above opinion has been helpful. Please do not hesitate to contact me with any questions you may have.

Yours truly,

DEVRY SMITH FRANK LLP

A handwritten signature in black ink, consisting of a vertical line on the left, a curved line that arches over and then levels off to the right, and a short horizontal line below the main signature.

Marc P. Kemmerer  
MPK/jrg