

From: [Barry Steinberg](#)
To: [Clerk](#)
Subject: My comments for 2016.GM13.13 on July 12, 2016 City Council
Date: Friday, July 8, 2016 1:59:09 PM
Attachments: [Consulting Engineers of Ontario Letter City of Toronto Litigation Exclusions July 6 2016.pdf](#)
Importance: High

To the City Clerk:

This information is an important resource for councillors prior to consideration of 2016.GM13.13, Amendments to the Purchasing By-law and Procurement Processes Policy. The attached represents the opinion of Consulting Engineers of Ontario (CEO). CEO represent 200 engineering firms collectively employing 20,000 people.

Please add CEO comments to the agenda for the July 12, 2016 City Council meeting on item 2016.GM13.13, Amendments to the Purchasing By-law and Procurement Processes Policy

I understand that my comments and the personal information in this email will form part of the public record and that my name will be listed as a correspondent on agendas and minutes of City Council or its committees. Also, I understand that agendas and minutes are posted online and my name may be indexed by search engines like Google.

Comments:



July 6, 2016

Sent via email: mpachol@toronto.ca

Mr. Michael Pacholok
Director
Purchasing & Materials Management
City of Toronto
City Hall, 18th Floor, West Tower
100 Queen Street West
Toronto, ON M5H 2N2

RE: Proposed Litigation Exclusion amendment to the City of Toronto Purchasing By-law and procurement processes policy, to take effect January 1, 2017

Dear Mr. Pacholok,

On behalf of the members of Consulting Engineers of Ontario (CEO), I am writing in regard to the presentation purchasing department staff made to members of the Broader Construction Association Consultation Group (BCACG). A number of our member firms have expressed concern about the proposal to amend the city's purchasing by-law and procurement processes policy to incorporate litigation exclusions, taking effect January 1, 2017.

Consulting Engineers of Ontario represents approximately 200 consulting engineering companies across Ontario, collectively employing over 20,000 individuals. We work with many public and private sector clients to promote consultant selection processes that allow our member firms to provide value and quality professional services for reasonable and appropriate remuneration.

The proposed new clause as presented by purchasing department staff states:

The “[City] Treasurer, at its sole discretion, can disqualify a [contractor/supplier] in litigation with the City related to a contract awarded by the City on a case by case basis.”

Additionally, we were informed that such exclusions are to be applied based on the City Treasurer's consultations with the City Solicitor and would consider the following non-exclusive factors:

- The contractor/supplier's history of making frivolous or vexatious claims, exaggerated damages;
- Outcome of prior litigation including whether legal costs have been awarded against the contractor/supplier or City;
- Is the contractor/supplier the only qualified entity or in case of an emergency;

- Overall risk in relation to the total cost of the contract; and,
- Claims less than \$100,000.

Our first concern is city staff's failure to reference consultants or design professionals in their proposal. Rather, all parties are to be captured under the classification of either contractor or supplier. Consulting engineering services are neither a commodity nor contracting services and should not be treated as such. Our members provide value-added professional services. Acting as agents and advocates for their clients, our members address the unique and myriad complexities and risks inherent to the projects they undertake while keeping public safety at the forefront. Consequently, we respectfully recommend that if consulting engineers are intended to be subject to this amendment to the city purchasing by-law that staff make reference to contractors/consultants/suppliers.

Furthermore, it is difficult to understand why city staff are seeking to develop such extreme measures to deal with its infrastructure partners. We can only assume that the city is seeking to work with businesses that operate in an open, transparent and professional manner. CEO appreciates the substantial additional costs and complications that can arise from spurious legal cases. However, we are concerned with the process the city intends to entrench in law to make and enforce decisions pertaining to litigation exclusions. We feel the proposal to place such decision making authority at the discretion of the City Treasurer, supported by the City Solicitor, is not reasonable and would not stand the test of due process and jurisprudence.

In Ontario the rule of law requires that all official power, including that of municipal governments, be exercised within a specific framework. Such authority must be applied fairly, reasonably and in accordance with the powers duly conferred on the body exercising it. The City of Toronto is not entitled to the authority that the current staff proposal seeks to establish; such powers are reserved exclusively for the courts.

CEO recognizes that clients, just as consultants, have the right to defend themselves. However, they may only do so against actual threats of harm and not against perceived risks, such as those presented by city officials, and not at the expense or exclusion of the rights of others. It is our grave concern that the proposed amendments will create the unintended consequence of a system preventing consultants from procurement opportunities with the city due to perceived rather than real threats and unproven claims. CEO believes that diligent and thoughtful work on this issue must be undertaken by city officials and its consultant partners to address the underlying concerns giving rise these proposed amendments.

As the basis for such work, CEO subscribes to the position adopted by the Association of Consulting Engineering Companies | Canada. We believe that:

Every Canadian has the right to go to court, this being one of the fundamental freedoms enjoyed by Canadians by way of our Charter of Rights and Freedoms. Consequently, [Consulting Engineers of Ontario] believes that its member firms have the legal and contractual right to engage in litigation and/or alternative dispute resolution (ADR) with

their public clients and have the right to defend themselves without threat.

[CEO] therefore opposes the practices by public owners of excluding firms from participating in procurement opportunities or otherwise penalizing them for past or current claims and disputes with that owner or other owners.

[CEO] believes such sanctions by public clients effectively coerce member firms into not exercising their legal rights (both in law and contractually) by threat of barring them from participating in projects if they are or have been legitimately involved in litigation, arbitration or alternative dispute resolution. [CEO] member firms are entitled to due process. Further, such sanctions penalize firms even when litigation or ADR shows that the firms have been proven to be in the right, or even when client-launched actions are proven to be frivolous and vexatious.

We would like to work with the City of Toronto to develop a solution to this issue. It is important to our members that we maintain positive and mutually respectful working relationships with our clients that produce effective public policy serving all parties. Our office will contact you shortly to set up a meeting to begin work.

Sincerely,
Consulting Engineers of Ontario



Barry Steinberg, M.A.Sc., C.E.T., P.Eng.
Chief Executive Officer

c.c. via email:

His Worship John Tory, Mayor of the City of Toronto
Michael D'Andrea, M.E.Sc., P.Eng., Executive Director, Engineering &
Construction Services, City of Toronto
Bill De Angelis, P.Eng., Director, Design & Construction, Major Infrastructure,
City of Toronto
Ulli Watkiss, Clerk of the City of Toronto
City Councillors
Peter Mallory, Chair, Consulting Engineers of Ontario
Bill Allison, Chair, Business Risk Committee, Consulting Engineers of Ontario
Rex Meadley, Chair, Government Relations Committee, Consulting Engineers of
Ontario
John Gamble, President, Association of Consulting Engineering Companies |
Canada