

From: [Barry Steinberg](#)
To: [Clerk](#)
Subject: My comments for 2016.GM13.13 on July 12, 2016 City Council
Date: Monday, July 11, 2016 11:04:28 AM
Attachments: [CEO Follow up Letter City of Toronto Litigation Exclusions July 11 2016.pdf](#)
Importance: High

To the City Clerk:

The attached letter is a follow-up to CEO's original (July 6, 2016) letter and the City's subsequent response (July 7, 2016). Please add my 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 11, 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

Dear Mr. Pacholok,

Thank you for your prompt reply to my letter of July 6th detailing the concern members that Consulting Engineers of Ontario (CEO) have with the amendment to the City of Toronto's Purchasing By-law and procurement processes policy being proposed by purchasing department staff.

I am pleased to read that going forward, City of Toronto staff will recognize, and make reference to, our members as consultants, recognizing the professional services they provide. The distinction between engineering services and construction services is an important and meaningful distinction. I was also pleased to note your reassurance that the City of Toronto will not regard our members' use of administrative or judicial review procedures related to the procurement process as antagonistic acts, but rather as legitimate means of seeking corrective measures where appropriate. This too is an important and meaningful distinction.

Where we remain concerned is with the belief held by City staff that they have the unilateral authority to exclude potential proponents for publicly funded projects. We recognize the proposed amendment to the By-law is not to expressly prevent firms from exercising their legal rights under the Constitution, to enter into legitimate litigation against their clients where conditions deem it necessary. However, it is a well-known fact that, across this province, such exclusions currently are a common by-product of firms exercising this right. The issue is that the proposed amendment will codify a process permitting the City of Toronto to hold as evidence a potential proponent's litigation history as the primary or sole predictor of any future legal action it may take. Such a system will create a substantial risk of producing a decision making apparatus empowered to arbitrarily exclude perfectly viable firms from participating in public projects simply because they have reasonably sought to legally defend their rights.

Municipalities, as public owners, have responsibilities in addition to those held by private owners. Being publicly funded they cannot unjustly and unduly prevent potential proponents from seeking to participate in public projects through either direct or indirect action. The current proposed amendment creates this risk.

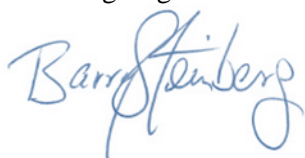
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CEO is not asserting that the City is proceeding with this proposed amendment in bad faith; that it is intentionally seeking to establish a unilateral and punitive system empowering the City Treasurer, on the advice of the City Solicitor, to subjectively “pick and choose” with whom it procures its services. However, we are adamant that any system of proponent selection, as required by the Ontario legal system, must be fair in its process and application. We are gravely concerned that the current process to enact this amendment puts at risk the ability for Council and staff to create a system that can ensure such fairness.

To seek an amendment to the Purchasing By-law that will empower staff with the proposed authority before developing the process through which this prerogative is exercised is at best premature. By tabling this amendment as currently written, without supporting details and definitions, City staff are asking Council to make an uninformed decision. They are seeking to gain the authority to act on a material element of City business before any justifiable limits on such authority have been defined and established. Such a decision will have the very real potential to generate unintended consequences including, but not limited to, the creation of an economically and legally indefensible and unconstitutional system of procurement. It is difficult for stakeholders to determine and accept the intent of such actions under these circumstances; especially when the potential risks are so high.

We want to work with the City of Toronto on this very important issue. Serious effort will be required to develop fair, equitable and legally balanced terms and conditions to govern any proponent selection system this amendment may produce.

Sincerely,
Consulting Engineers of Ontario

A handwritten signature in blue ink that reads 'Barry Steinberg'.

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