



REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

Restoring Ontario's Competitiveness Act, 2019 - Schedule 9, Changes to the Labour Relations Act, 1995

Date: June 17, 2019
To: The Board of Governors of Exhibition Place
From: Dianne Young, Chief Executive Officer
Wards: All

REASON FOR CONFIDENTIAL INFORMATION

This report is about labour relations. It is also about potential litigation that affects Exhibition Place.

SUMMARY

On April 2, 2019, Restoring Ontario's Competitiveness Act, 2019 (the Act), passed 3rd reading and received Royal Assent on April 3, 2019.

This report provides an overview of the changes made to the Labour Relations Act, 1995 (the LRA) by Schedule 9 of the Act and provides an analysis of the anticipated effects on Exhibition Place.

Schedule 9 amends Section 127(1) of the LRA to explicitly deem public bodies, including municipalities, school boards, hospitals, colleges, universities and local boards, within the meaning of the Municipal Act, 2001 and the City of Toronto Act, 2006, as non-construction employers. Exhibition Place is a Local Board under the City of Toronto Act, 2006.

The Act includes a provision to allow municipalities to opt out of being a non-construction employer within three (3) months from April 3, 2019.

Exhibition Place is bound to five (5) province-wide collective agreements in the Industrial, Commercial and Institutional (ICI) sector of the construction industry.

Exhibition Place has publicly indicated that it is bound by the City's Fair Wage Policy in all sectors through the purchasing process.

As a result, Exhibition Place has until July 3, 2019 to decide if it will choose to opt-out and remain a construction employer. This authority to opt-out requires a Board decision. If Exhibition Place does nothing, it will by default become a non-construction employer.

Once the Board's decision is filed with the Provincial Minister of Labour in writing, the election is irrevocable and should Exhibition Place wish, at a later date, to be a non-construction employer, it must make application to the Ontario Labour Relations Board (OLRB) under the currently existing definition of non-construction employer in the LRA, which is a high threshold.

The City is considering this same decision with respect to the City unions, however, the Board is required to make its own determination about the status of Exhibition Place as a construction employer.

It is important to note that should Exhibition Place become a non-construction employer the local collective agreements with the same 5 trade unions will remain in force.

RECOMMENDATIONS

The Chief Executive Officer recommends that:

1. The Board adopt one of the following options to determine its status as a non-construction employer under subsections 127 (1) to (4) of the Labour Relations Act, 1995:
 - a. The Board take no action, thereby confirming Exhibition Place is a non-construction employer effective the day subsections 127 (1) to (4) of the Labour Relations Act, 1995 comes into force; or
 - b. The Board confirm Exhibition Place as a construction employer, thereby maintaining the status quo, and direct the Chief Executive Officer to file an election with the Minister of Labour in writing by July 3, 2019 to opt out of the application of subsections 127 (1) to (4) of the Labour Relations Act, 1995.
2. The Board direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it pertains to labour relations and potential litigation that affects Exhibition Place.

FINANCIAL IMPACT

There are various studies that indicate increasing competition in procurement has the potential to lower costs. The studies vary substantially in their estimate of resulting savings that range from 2% to as high as 30 to 40%.¹

The links to two such studies are provided below, one Canadian and one European. ²

It is reasonable to expect that more competition will lead to lower prices. However, what is difficult to predict is how much competition will increase if the Board becomes a non-construction employer and precisely what cost savings the Board would achieve since, in accordance with the past practice of the Board, bidders will still have to comply with the City's Fair Wage policy. Exhibition Place is typically not a significant purchaser of construction services however, ICI unionization does play a significant role in commercial dealings that Exhibition Place has with tenants, shows and commercial partners.

Capital Works Projects through Third Party Constructors

In 2018, Exhibition Place awarded approximately \$2,684,144.00 in construction contracts, of which \$1,930,019.00 was work within the ICI sector. If Exhibition Place were able to achieve savings even at the low end of the predicted ranges (i.e., 2% to 8%), it would translate to approximately \$39,000.00 to \$154,000.00 per year in savings (or funds available for additional construction projects) based on the \$1,930,019.00 spend in 2018.

If Exhibition Place is not bound to the ICI agreements, outside contractors used by Exhibition Place would still have to pay the fair wage rate per the City's Fair Wage Policy. Exhibition Place, has publicly indicated it that it has adopted the City's Fair Wage Policy.

Accordingly, this would reduce estimated savings unless the Board directs that Exhibition Place not continue its practice to issue bids with reference to the requirement to comply with the City's Fair Wage Policy. The City's Fair Wage Policy sets a 'wage floor' for various types of work. The Fair Wage rates are comparable to union rates and set by taking the hourly rate plus benefits and vacation set out in the ICI agreements or applicable industry collective agreements.

Another consideration for the Board is the effect that unionization has with respect to other aspects of construction work on the grounds, particularly with respect to sewer and watermain work and roads work. There are additional savings to be realized in these sectors that are difficult to quantify.

¹ See for example Brian Dijkema, Dr. Morley Gunderson, *Restrictive Tendering: Protection for Whom?* Cardus (2017) <https://www.cardus.ca/research/work-economics/reports/restrictive-tendering-protection-for-whom/>

² Lukas Vogel, *Macroeconomic effects of cost savings in public procurement*, European Union Economic Papers 398 (November 2009) http://ec.europa.eu/economy_finance/publications/pages/publication16259_en.pdf

ICI Wages Paid to Exhibition Place Unionized Workers

There are also some savings to be realized for work that is currently performed by direct employees of Exhibition Place and paid at rates set under the 5 ICI agreements. In 2018, Exhibition Place paid \$779,000.00 in ICI wages to Exhibition Place seniority unionized staff working on various small projects that would typically fall within ICI work. If these same tasks were performed under the terms of the local collective agreements, Exhibition Place would have saved \$129,866.00 in 2018 and would achieve administrative efficiencies resulting from operating under one collective agreement.

If there are significant savings to be achieved by becoming a non-construction employer, those savings may be realized by an increase in the number of contractors being permitted to bid on smaller projects required to be done at Exhibition Place. Such savings may occur both in the ICI sector, where Exhibition Place is bound to 5 different unions and in the sewer and watermain and roads sectors. The savings may result from:

- union firms that are currently permitted to perform Board work competing more aggressively for Board work,
- firms bound to other unions now being permitted to perform Board work; and
- non-union firms being able to compete for such work.

DECISION HISTORY

At its meeting of June 6, 2019, the Executive Committee of the City of Toronto considered Report # EX6.3 on Restoring Ontario's Competitiveness Act, 2019. The City Manager recommended that City Council take no action, thereby confirming the City of Toronto as a non-construction employer. However, the Executive Committee adopted a motion to forward the item to City Council without recommendation. This report will be considered by Council at its meeting of June 18 & 19, 2019 and Exhibition Place staff will present the Council decision to the Board at its meeting of June 20, 2019.

COMMENTS

Restoring Ontario's Competitiveness Act, 2019, Schedule 9

Restoring Ontario's Competitiveness Act, 2019 (the Act) received Royal Assent on April 3, 2019. Subsection 14(1) & (2) of Schedule 9 of the Act (the Schedule is appended as Attachment 1) will come into force on a day to be proclaimed by the Lieutenant Governor. The subsections amend section 127 of the LRA in a few ways that are of significance for the City:

- Municipalities are listed among the entities deemed to be non-construction employers under subsection 127 (1) of the LRA;
- On the day the provisions come into force, any trade union that represented employees of one of the listed entities no longer represents those employees who are in the construction industry; and

- Any collective agreements binding the entity in respect of the construction industry ceases to apply.

If Exhibition Place takes no action, Subsection 127(2) will apply, once proclaimed in force, and Exhibition Place will no longer be deemed to be a construction employer and will no longer be bound to the existing ICI Labour Trade agreements or any agreements to which it is bound in other sectors of the construction industry. However, the local collective agreements with the trade unions will remain in force.

Opt-Out Election

The Act contains a provision which allows affected entities to opt-out of the application of Subsections 127(1) to (4). This allows Exhibition Place to make an application to opt-out of the provisions which would result in Exhibition Place remaining a construction employer, i.e., maintaining the status quo. This would mean that Exhibition Place would remain bound to the existing collective agreements that it is bound to in the construction industry and could be certified by additional unions in the future.

The opt-out provisions came into force on April 3, 2019. As such, Exhibition Place has three (3) months from April 3, 2019 (i.e., July 3, 2019) to file an election, in writing, with the Minister of Labour.

Opt-Out Election is Irrevocable

Once filed, the opt-out election is irrevocable. Should Exhibition Place wish, at a later date, to be declared a non-construction employer, it must make application to the Ontario Labour Relations Board (OLRB) under the currently existing definition of 'non-construction employer' found in subsection 126(1) of the LRA, which is defined as follows:

"non- construction employer means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person"

It should be noted that the current definition of non-construction employer in the LRA (above) presents employers with a high threshold to meet. Although there are notable exceptions, a number of employers who have applied to the OLRB to be declared non-construction employers under this definition have failed. If Exhibition Place were to decide to opt-out of the "deemed non-construction employer" definitions provided in the Act, Exhibition Place will find it difficult to reverse course and make application to be a "non-construction employer" at a later date before the OLRB. In addition to the high legal threshold set out in the LRA, such litigation would be protracted, expensive and highly contentious.

In essence, Schedule 9 provides Exhibition Place with a singular and time limited opportunity to choose to become a non-construction employer.

Exhibition Place has been considered a construction employer and has been bound by 5 Province-wide collective agreements applicable to trades in the Industrial, Commercial and Institutional (ICI) sector as detailed below. It is important to note that Exhibition Place is also bound to local collective agreements with each of the same five trade unions and these local collective agreements would remain in force regardless of whether Exhibition Place becomes a non-construction employer or remains a construction employer.

Under the LRA, the construction industry is divided into different sectors, including the:

- Industrial, Commercial and Institutional ("ICI"),
- sewer and watermain,
- heavy engineering,
- roads

Exhibition Place is bound to the following 5 ICI collective agreements.

- Carpenters & Allied Workers, Local 27
- International Brotherhood of Electrical Workers, Local 353
- Labourers' International Union of North America, Local 506 (LiUNA)
- International Union of Painters & Allied Trades, District Council 46
- United Association of Journeymen & Apprentices of Plumbing & Pipefitting, Local 46

In addition, it is important to note that LiUNA has 'accredited' collective agreements in a number of sectors, including the roads and sewer and watermain sector and takes the position that Exhibition Place must comply with these collective agreements. As with the ICI sector, there can be no direct negotiations or bargaining with LiUNA in those sectors.

Where Exhibition Place tenders municipal infrastructure and/or building projects, or otherwise has construction work performed for Exhibition Place in the ICI sector or where an applicable accreditation order applies to Exhibition Place in another sector, the use of union workers is required, subject to the jurisdiction of the collective agreements. On a typical ICI sector project, the amount of work that must be performed by unionized workers can vary significantly, as there are a number of trades to which Exhibition Place is not bound and this will vary in accordance with the work to be performed.

Only 'unionized' contractors and/or sub-contractors are permitted to perform construction for Exhibition Place with respect to many aspects of ICI-sector work (and certain other types of construction work in other sectors) with all other contractors and their employees being precluded from performing such work.

Where work does not fall within the jurisdiction of these unions, it must be performed in compliance with the Fair Wage schedules, but does not have to be assigned to unionized firms or workers.

As required by the LRA, collective bargaining in the ICI sector is done on a province-wide basis, with the accredited Employer Bargaining Agency ("EBA") and various union

locals bargaining as a group. When an employer is certified by the OLRB for the ICI sector with respect to a particular construction union, that employer becomes bound to the province-wide ICI agreement for that union. One of the most important features typically found in the ICI agreements are exceptionally strong “subcontracting” clauses that require the employer to use unionized workers to perform the work that falls within the jurisdiction of that construction union, whether it performs the work directly or engages sub-contractors to do the work.

In other sectors of the construction industry, employers are able to bargain directly with the union in some situations, but not in others. Where a majority of the employers have received accreditation by the OLRB, a single collective agreement is negotiated for all unionized employers in that sector.

Exhibition Place's Current Labour Trades Requirements for Event Show Work

Being unionized in the construction industry has financial implications for shows taking place on the Exhibition Place grounds. This has the consequence of passing along increased costs to shows and potential shows and the challenge of determining what kinds of work constitutes construction work, which is often a source of disagreement and lack of clarity. The other competitive venue in Toronto, the Metro Toronto Convention Centre, is not bound by ICI agreements.

Exhibition Place's Current Labour Trades Requirements for Tenants

All tenant leases on the grounds have terms requiring tenants to comply with the collective agreements between Exhibition Place and its unions, including ICI agreements and any other agreements to which Exhibition Place is bound with these unions.

As with the shows, this is a source of uncertainty and potential tension between Exhibition Place and its various tenants. For example, during the construction of Hotel X, grievances were filed with respect to work jurisdiction issues that created legal tensions between Exhibition Place, Hotel X and the General Contractor engaged by Hotel X to build the hotel.

City of Toronto's Fair Wage Policy

Exhibition Place includes in all procurement documents a requirement for the bids to comply with the City's Fair Wage Policy. The objectives of the City Fair Wage Policy are to:

- (1) Produce stable labour relations with minimal disruption.
- (2) Compromise between wage differentials of organized and unorganized labour.
- (3) Create a level playing field in competition for City work
- (4) Set standards in the workplace that contractors must meet.
- (5) Protect the public and guard workers from exploitation

(6) Enhance the reputation of the City for fair and ethical business dealing

The Fair Wage Policy seeks to provide wage protection for workers while they work on Exhibition Place contracts. The Fair Wage Policy addresses this concern by requiring contractors to pay workers in accordance with the Fair Wage schedules. The Policy seeks not only to protect workers, but to level the playing field for contractors; i.e., aggressive contractors are not able to win City contracts by paying workers less than the value of the work assigned and as prescribed by the Fair Wage schedules. The Fair Wage rates in many cases align with collective agreement wage rates in the construction industry.

Fair Wage schedules are established every three years, taking into account the prevailing wage rates in particular industries. The Fair Wage Office consults with employee and employer groups, associations, construction unions, organizations, and City operating divisions in developing the schedules. The City's current fair wage schedules contain rates for the years 2016 to 2019. Those rates will remain in effect, subject to future amendments.

Exhibition Place Procurement of Construction

Exhibition Place follows the City's construction procurement process. The competitive bidding process for public procurement allows any contractor who has the experience and qualifications, the financial capacity for providing performance bonds for the construction contracts and who can meet various legislative requirements, to submit a bid and be given an equal consideration in the award of the contract.

Competitive bidding on construction projects involves inherent uncertainty for each bidder. There are numerous interrelated factors that go into any particular bid, especially in respect of large scale work (such as materials cost, labour, value and pricing of work to be performed by sub-contractors, equipment, supervision, mark-up on return, overhead and return on investment). Projects differ in size, specialization and location. Projects of the same size may differ substantially in specifications. Similar projects built at different times or in different locations may face shortages or surplus of labour or materials arising from the overall state of the economy and/or industry conditions.

As a result it is difficult to assess the potential savings of becoming a non-construction employer. It is clear that Exhibition Place is not a major purchaser of construction services like the City, this would suggest that there may not be a high level of absolute savings to be reached. However, this could change as the intent is for the capital works program to double over the next 10 years to meet the state-of-good repair backlog on the grounds.

Regardless of the dollar value of the capital works program, it is also the case that Exhibition Place has disproportionate compliance costs, labour relations and legal costs associated with being a construction employer as contrasted with its relatively minor needs to procure construction services. In addition, Exhibition Place does not have a need or a practice of utilizing the construction collective agreements as would a

construction employer: ie. hiring construction employees through the hiring hall to work on projects for intensive periods of work availability and then laying off these workers.

Decision Options

The Board has two (2) options available:

1. Take no action and become a non-construction employer.

If Exhibition Place does nothing, any ICI collective agreement binding Exhibition Place and the five (5) trade unions would cease to apply immediately on the date Sections 12 and 13 and subsection 14 (1) of the Act come into force, in so far as the collective agreement applies to the construction industry. In addition, any other collective agreements to which Exhibition Place is bound in other sectors of the construction industry would also cease to bind Exhibition Place. The only agreements that would continue in effect would be the local agreements between Exhibition Place and the five (5) trade unions.

2. Opt-out of the deemed non-construction employer provisions and remain a construction employer, maintaining status quo. The election to opt-out must be submitted to the Minister of Labour, in writing, by July 3, 2019.

Potential Implications to Becoming a Non-Construction Employer

Procurement of Construction Services

Becoming a non-construction employer has the potential for cost savings in construction contracts for work that is currently subject to the labour trade obligations and more generally. Cost savings could result through both the potential for more competitive bids being submitted to City purchasing on behalf of Exhibition Place on a particular project, and/or the bidders having a broader subcontracting pool to draw from in order to complete the work. The financial impact section above describes the potential range of savings Exhibition Place may achieve from increased competition.

Qualified Contractors

Should Exhibition Place become a non-construction employer, bidders would still need to comply with all of the other requirements Exhibition Place may set out in a particular procurement such as the ability to obtain bonding, experience to demonstrate the bidder's qualifications, capability to perform the work, and the ability to meet health and safety requirements. Staff will review whether any changes to how we pre-qualify bidders would be required as a result of becoming a non-construction employer.

Contract Administration

By becoming a non-construction employer, Exhibition Place may need to increase contract administration. In the current environment in the ICI sector, the unions play a

role in precluding both collective agreement violations and fair wage violations by visiting job sites and ensuring union compliance. In some circumstances, this may also help to ensure that workers on the site hold the appropriate licensing and qualifications to perform the work. In the absence of this additional layer of oversight, Exhibition Place may need to take other measures to ensure that contractors use appropriately skilled employees.

Other types of Agreements

Exhibition Place stands to gain significant commercial manoeuvrability by becoming a non-construction employer. As a non-construction employer, Exhibition Place will have more flexibility in entering leases, joint ventures, commercial agreements with private entities and agreements with other levels of government that result in construction work being performed for the benefit of Exhibition Place. This consideration is of major significance to Exhibition Place given the high number of leases and commercial partners on the grounds. It is important to note that the continued application of the City's Fair Wage Policy will ensure that greater commercial maneuverability does not affect workers' wages.

Grievance and Litigation Activity

As a non-construction employer, Exhibition Place would no longer be at risk of being required or ordered to pay damages to the trade unions for construction work that is performed on behalf of Exhibition Place in contravention of the construction collective agreements. In addition, Exhibition Place will no longer incur the staffing and legal expenses associated with construction grievances and would no longer be required to engage in, or be at risk of engaging in, protracted litigation over construction industry jurisdictional disputes between unions. In recent years, Exhibition Place has experienced a disproportionately high number of construction industry grievances and jurisdictional disputes, with significant implications for staff time, labour relations expenses, legal costs and costs associated with the determination of these legal proceedings.

Fair Wage Office

Where no collective agreement applies to the work, there may be an increase in fair wage complaints and a more expansive investigatory process will be required in order to ensure that work is performed in a manner that is compliant with the City's Fair Wage Policy.

Transition

The non-construction employer provisions of the Act are currently not accompanied by any transitional provisions or periods. As a result, there is no legislative guidance on transitioning from the current construction environment to a new environment as a non-construction employer.

As an example, should Council decide that Exhibition Place should become a non-construction employer, staff will have to consider the impact on contracts out in the market and not yet awarded; or those procurement processes that have closed but are not yet awarded. In addition, Exhibition Place should expect that the Act will face litigation being launched by the affected Unions, including possibly a Charter challenge. This adds an additional layer of uncertainty to City contracts should Exhibition Place become a non-construction employer.

Conclusion

The amendments to the Labour Relations Act provide Exhibition Place with two options. Exhibition Place may choose to take no action and become a non-construction employer effective on the date proclaimed by the Lieutenant Governor. Alternatively, Exhibition Place may choose to opt out by July 3, 2019, which will maintain the Exhibition Place's status quo as a construction employer.

CONTACT

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SIGNATURE

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Chief Executive Officer

Confidential Attachment 1