

Clause 18 in Report No. 14 of Committee of the Whole was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting held on September 24, 2015.

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Proposed Amendments to the *Labour Relations Act* –  
Construction Industry Exclusion for Municipal Employers

**Committee of the Whole recommends adoption of the recommendations contained in the following report dated August 25, 2015 from the Regional Solicitor:**

1. Recommendations

1. Council endorse the position of the Association of Municipalities of Ontario in its March 17, 2015 letter to the Minister of Labour requesting that municipalities be excluded from the construction industry provisions of the *Labour Relations Act, 1995*.
2. This report be forwarded to the Premier, Ministers of Labour and Municipal Affairs and Housing, local MPP's, and the Association of Municipalities of Ontario.

2. Purpose

This report seeks Council's endorsement of the position of the Association of Municipalities of Ontario ("AMO") that municipalities be excluded from the construction industry provisions of the *Labour Relations Act, 1995* ("LRA") to ensure that public procurement is open to all qualified bidders and is conducted in an open, fair and competitive manner.

### 3. Background

Construction industry provisions of the *Labour Relations Act* are restrictive and the definition of “construction industry” is broad

The *LRA* provides a legislative framework to facilitate collective bargaining between employers and trade-unions that are freely-designated representatives of employees. The *LRA* governs the processes of certification, collective bargaining, strikes, lockouts and decertification. Based on the unique characteristics of the construction industry, the *LRA* contains a separate framework governing certification and collective bargaining within that industry. The *LRA* defines “construction industry” as “*businesses that are engaged in constructing, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works at the site.*”

The labour relations framework for the construction industry is complex and very restrictive for employers. Province-wide collective agreements are bargained centrally between the union and an employer association. Key provisions of collective agreements, including jurisdiction of work and restrictions on contracting-out are contained in these centrally-bargained agreements.

Municipalities are not currently exempt from the construction industry provisions of the *Labour Relations Act*

Municipal employers are not exempt from the construction industry provisions of the *LRA*. Since 2007, several municipalities including Toronto, Hamilton, Sault Ste. Marie and the Region of Waterloo have been deemed “construction employers” and certified by construction industry unions. Once certified by a construction industry union, the municipality is prevented from awarding any construction contracts to contractors, including their sub-contractors, that are non-union or are certified by a different union. This significantly reduces the pool of qualifying bidders and restricts the ability of the municipality to assign certain work to its own employees in other bargaining units.

### 4. Analysis and Options

Construction industry unions are able to certify municipal employees engaged in construction work with minimal support

Non-construction industry unions, including CUPE, require support of 40% of the employees in the proposed bargaining unit in order to apply to the Ontario

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Labour Relations Board (“OLRB”) for a certification vote. They must win support of more than 50% of all employees within the proposed bargaining unit in order to be certified. However, in the construction industry, if a union can demonstrate that more than 55% of employees who were engaged in construction activities for that employer on that day have signed membership cards, the OLRB can certify the union without a certification vote. This can occur regardless of the actual number of employees in the proposed bargaining unit. As a result, certification can occur through union membership by a very small group of employees. A union can also seek to certify a bargaining unit for which another union is already certified, commonly referred to as “raiding”, during the three months prior to the expiration of the collective agreement (known as the “open period”).

Region of Waterloo was certified by the Carpenters Union after only two employees signed membership cards

The most recent certification of a municipality by a construction industry union occurred in the Region of Waterloo when the Region was certified by the Carpenters’ Union. Two employees were assigned work on a Saturday to build a shed. They were approached by the Carpenters’ Union and signed membership cards. As a result, the union was able to establish that 100% of the employees engaged in construction work on that day were members of their union. The OLRB certified and the Region of Waterloo is now certified by the Carpenters’ Union.

An employer that has been deemed a “construction” employer can make application to the OLRB for a declaration that it is a non-construction employer. If successful, the application would result in the decertification of the construction union. To succeed, the employer must satisfy the OLRB that it performs “*no construction work for which they intend to receive compensation from an unrelated person.*” This language is very restrictive and despite the fact that municipalities do not operate within the construction industry, none have been able to successfully challenge a construction industry certification. Several municipalities, including the Region of Waterloo, have tried unsuccessfully to obtain a declaration that they are a non-construction employer.

Municipalities have been seeking exclusion from the construction industry provisions of the *Labour Relations Act* since 2008

Municipalities and several municipal associations have been asking the Provincial government to exclude them from the construction employer provisions of the *LRA* since 2008. *Bill 73: Fair and Open Tendering Act* was tabled in 2013 but despite widespread support from the municipal sector, the bill

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was ultimately defeated in September 2013. The recent certification of the Region of Waterloo has prompted renewed calls for municipalities to be exempt from the construction industry labour relations provisions.

On March 17, 2015, AMO sent a letter to the Minister of Labour calling on the government to exclude municipal governments from the construction industry provisions (Attachment 1). This exclusion could be accomplished by deeming municipal governments to be non-construction employers or by opening up the restrictive language in the *LRA* that defines a non-construction employer. AMO's position has been supported by several municipalities and municipal associations.

Link to key Council-approved plans

This report is consistent with the 2015 to 2019 Strategic Plan's priority of good government. It supports the Plan's objective of ensuring a fiscally prudent and efficient Region.

## 5. Financial Implications

Employers in the construction industry face increased costs due to lack of competitiveness in the tender process

Since being certified by construction industry unions, municipalities have reported a significant increase in the cost of capital projects due to a reduction in the number of bidders able to participate in competitive bidding processes. Studies suggest that restricted bidding can escalate the costs of capital projects by 20-30 per cent.

Certification as a construction employer also prevents a municipal employer from assigning certain work to its own employees within other bargaining units, including those represented by CUPE. This may result in the layoff of some of those employees and increased costs in delivery of such work.

## 6. Local Municipal Impact

Local municipalities are exposed to the same risks of certification by a construction union as the Region.

## 7. Conclusion

Municipalities have an obligation to operate in an open and transparent manner and to ensure that the public interest is paramount. It is particularly important that municipalities fulfill these requirements when awarding taxpayer funds through the bidding process.

Governments at all levels should strive to ensure that public procurement processes remain open to all qualified bidders and are as open and competitive as possible. Municipalities cannot be said to have a fair and open process if they are forced to exclude a large majority of their highly skilled and qualified workers from bidding on public projects.

For more information on this report, please contact Wes Booker, Associate Counsel, at ext 71414.

The Senior Management Group has reviewed this report. August 25, 2015

Attachments (1)

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Accessible formats or communication supports are available upon request



## Office of the President

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Sent via e-mail: [kevin.flynn@ontario.ca](mailto:kevin.flynn@ontario.ca)

March 17, 2015

The Honourable Kevin Flynn  
Minister of Labour  
400 University Avenue  
14th Floor  
Toronto, ON M7A 1T7

Dear Minister Flynn:

AMO is a strong supporter of municipal procurement processes that are fair, open and competitive. The opportunity to openly tender projects keeps costs efficient in a time when municipal fiscal resources are being stretched. A loophole in Ontario's *Labour Relations Act* that allows municipalities to be treated as "construction employers" runs counter to this objective.

Municipal governments currently deemed "construction employers" are prohibited from openly tendering construction projects and we understand that the process to apply for a "non-construction employer" declaration is time consuming and expensive. We understand that to date, no municipal government has been exempted through this process. As a result, many qualified companies and workers are not allowed to bid or work on projects in their local communities. Restricted tendering increases project costs, harms local economic development and prevents the public from getting the best value for its tax dollars.

AMO believes it is in the public interest to exclude municipal governments from the "construction employer" provisions in the *Labour Relations Act*. Municipal governments provide a broad range of services to their communities and cannot be said to operate a construction business or to primarily engage in construction-related business. They should have the autonomy to choose the most fiscally efficient firms to undertake critical infrastructure and construction projects in their communities.

Yours sincerely,

Gary McNamara  
AMO President

cc: The Honourable Ted McMeekin, Minister of Municipal Affairs and Housing  
The Honourable Michael Harris, MPP, Kitchener-Conestoga