



Tuesday, July 5, 2016

Mr. Peter Wallace
City Manager
City of Toronto
11th Floor, East Tower, City Hall
100 Queen Street West
Toronto, Ontario
M5H 2N2

Dear Mr. Wallace:

I am writing on behalf of the Canadian Construction Association (CCA), to bring to your attention our Board's opposition to the use of exclusion clauses that could bar a contractor from participation in City of Toronto tenders based solely on their involvement in an alternative dispute resolution process, or current or past litigation against a public owner.

The use of exclusion clauses based on prior legal action against a public owner or involvement in dispute resolution is particularly insidious as it, *de facto*, limits the ability of a contractor to seek redress through the Canadian courts when engaged in a dispute with a public owner. Such a practice, in our opinion, is inconsistent with a contractor's democratic and legal rights. Consequently, the CCA Board of Directors in 2014 issued the following policy statement:

CCA supports procurement of construction projects in an open and transparent manner in accordance with the procedures and practices recommended in CCDC 23 – A Guide to Calling Bids and Awarding Construction Contracts.

CCA opposes the practice by public owners of excluding construction contracting firms and suppliers from bidding their projects, or otherwise penalizing them, solely because of past or current litigation or other contested disputes with that public owner, or other public owners.

Similarly, the Association of Consulting Engineering Companies Canada adopted the following motion also in opposition to the use of these types of exclusion clauses:

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, ACEC-Canada 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.

ACEC therefore opposes the practice 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.

ACEC 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. ACEC 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.

In 2015, the Ontario Road Builders Association (ORBA) successfully persuaded the Ministry of Transportation in Ontario to abandon the use of similar exclusion clauses on the grounds of fairness.

Ultimately, vexatious legal disputes are in no one's best interests; however, forcing contractors to forgo their legal rights under the threat of a possible five-year ban is not only inappropriate, but also undemocratic and likely in violation of a contractor's legal rights. CCA urges you to reconsider the use of such clauses and encourages you to engage our Ontario partner associations in meaningful consultation to address the City's concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Atkinson', with a long, sweeping horizontal stroke extending to the right.

Michael Atkinson
President

cc: His Worship Mayor John Tory
City of Toronto

Toronto City Council

Giovanni Cautillo
Executive Director
Ontario Sewer and Watermain Construction Association

Clive Thurston
President
Ontario General Contractors Association

Ian Cunningham
President
Council of Ontario Construction Associations

John Mollenhauer
President
Toronto Construction Association