CITY OF HAMILTON

OFFICE OF THE CITY MANAGER
Legal Services Division

Report to: Mayor and Members Committee of the Whole
Submitted by: Peter A. Barkwell
City Solicitor
Legal Services

Date: August 30, 2007
Prepared by: Gary J. Kuzyk, ext. 4216

SUBJECT: United Brotherhood of Carpenters and Joiners of America Local 18 Certification (LS07012) (City Wide)

RECOMMENDATION:

That Report LS07012, Re: United Brotherhood of Carpenters and Joiners of America Local 18 Certification, be received for information.

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EXECUTIVE SUMMARY:

At its meeting on August 8, 2007, Committee of the Whole verbally asked staff to prepare a public report concerning the consequences of certification of the United Brotherhood of Carpenters and Joiners of America ("UBCJA"), Local 18, as a City bargaining unit.

As a result of the UBCJA certification, the negative financial consequences to the City could be in the hundreds of millions of dollars over the next several years. In addition, economic development could be adversely affected, if increased construction costs or lack of experienced bidders prompt the City to delay or cancel some planned construction projects.

A small amendment to the Labour Relations Act, 1995 would eliminate the above concerns, without adversely affecting the individual union members. City staff are presently advocating such change to Provincial representatives.
BACKGROUND:

In the course of the in camera session of the Committee of the Whole meeting held on August 8, 2007, Committee gave staff verbal direction to prepare a public report, without any confidential or privileged information, and dealing with:

a) the consequences to the City and others of certification of the United Brotherhood of Carpenters and Joiners of America, Local 18, as a bargaining unit of the City; and

b) the City’s proposed remedy, involving a legislative change by which the City would be protected from those consequences.

This report complies with those instructions.

1. How the Certification Occurred

For more than thirty years, the City of Hamilton has, through the union hall on a full-time basis, retained carpenters who are members of the United Brotherhood of Carpenters and Joiners of America Local 18, to perform various carpentry work at City premises. As of September 1, 2005, the City’s complement of such individuals consisted of four carpenters who effectively functioned and were treated for payroll purposes as City employees, but were not formally recorded as such.

On September 12, 2005, pursuant to a certification vote by two of the four carpenters, the Ontario Labour Relations Board ("OLRB") issued certificates officially certifying UBCJA Local 18 as the bargaining agent for all construction carpentry work performed by or for the City of Hamilton. The City applied to the OLRB for reconsideration, but its application was denied.

2. Council’s Instructions and Status of Compliance

The consequences to the City are much farther reaching than the mere addition of a bargaining unit to the City’s workforce. These consequences will be dealt with in detail below. In anticipation of such consequences, at its meeting held April 12, 2006, City Council passed the following resolution:

(a) That the City Manager and the General Manager of Finance & Corporate Services continue to seek changes by the Province of Ontario to the Labour Relations Act, 1995, whereby municipalities would be designated as non-construction employers for the purposes of sections 126.1 to 168 thereof;

(b) That the General Manager of Human Resources instruct outside counsel to proceed with an application, including all available levels of review and appeal, under section 127.2 of the Labour Relations Act, 1995, for the City of Hamilton to be designated as a non-construction employer;

(c) That the General Manager of Human Resources instruct outside counsel to proceed with a further request to the Ontario Labour Relations Board for reconsideration of the certification of United Brotherhood of Carpenters and Joiners, Local 18, as a bargaining unit of the City of Hamilton;
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(d) That the General Manager of Human Resources instruct outside counsel to proceed with an application for Judicial Review of the certification of United Brotherhood of Carpenters and Joiners, Local 18, as a bargaining unit of the City of Hamilton, and of all denials of the City’s requests for reconsideration thereof, including all available levels of appeal;

(e) That Report HUR06005/FCS06039 remain confidential as it contains legal advice regarding labour relations.

All three of the proceedings that Council directed be undertaken in the above resolution at clauses (b), (c) and (d) have been initiated, and they are pending. The union is vigorously resisting all of these proceedings. CUPE Locals 5167 and 1041 have filed submissions in the non-construction employer application (see clause (b) of the above resolution), supporting the City’s position.

In addition to the commencement of these proceedings, pursuant to clause (a) of the resolution, the City Manager and the General Manager of Finance & Corporate Services have continued to seek changes by the Province of Ontario to the Labour Relations Act, 1995. A small amendment to that Act would protect the City from all of the adverse consequences of certification, and would eliminate the need to continue with the pending proceedings. The Province need only change the definition of “non-construction employer” in section 126 of the Act, by deeming municipalities to be non-construction employers. Staff are advocating the following amended definition (with the proposed changes being in italics):

“non-construction employer” means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person, and municipalities shall be deemed to be non-construction employers; ...

3. Consequences of Certification to the Four Carpenters

The consequences of certification to the four carpenters employed by the City have been minimal. They have been paid at the same UBCJA rates as was previously the case, and their pension and vacation entitlement is unchanged. The only change of any significance to these individuals is that they have formally become City employees, as a result of which the City is now required to deduct union dues and remit them to the union. Conversely, adoption by the Province of the legislative amendment being proposed by City staff would not adversely affect these four UBCJA members.

4. Baseline Consequences of Certification to the City

The baseline financial consequences to the City are significant.

In the construction industry, trades typically apply for two bargaining units. One bargaining unit covers the Industrial, Commercial and Institutional ("ICI") sector of the industry. This work falls under the scope of a province-wide ICI agreement that is negotiated centrally every three years. The other bargaining unit covers all other
sectors, and is under the scope of agreements that the employer is required to negotiate directly with the union, within a specific geographic area.

Within the ICI sector, as a result of certification, all construction carpentry work done for the City has to be performed by contractors with affiliation to the UBCJA. This means that all contractors and subcontractors performing ICI construction work containing a carpentry component under tenders issued by the City must be signatory to the UBCJA provincial collective agreement.

Outside of the ICI sector, the union is seeking collective agreements in the Residential and Heavy Engineering sectors. Until collective agreements for those sectors are finalized and ratified, it is premature to attempt a full analysis of any potential cost consequences to the City. To the extent that the terms of finalized collective agreements have the effect of narrowing the field of companies eligible to work on City projects in these sectors, increased costs are anticipated in these areas as well.

The best estimate of staff is that the annual increased cost to the City for ICI, Residential and Heavy Engineering sector construction work, i.e., excluding the extraordinary consequences dealt with below, is between $4 and $10 million.

Staff believe that there are two reasons for the increased costs to the City. In the first place, prospective bidders on projects involving construction carpentry work are now prohibited from using, for that work, both non-union workers and unionized workers in other unions. This reduced flexibility results in higher costs, which are passed on to the City. Secondly, the pool of available contractors and subcontractors is significantly smaller, thereby reducing the efficacy of the competitive process. By way of illustration, the City has 260 firms registered under the category of “Large Construction” contractors, only 17 of which are affiliated to the UBCJA. It is believed that the participation of fewer bidders and/or fewer subcontractors results in higher tenders, because bidders know the competition will not be as fierce.

In assessing the increased cost of certification, the staff are hampered by the fact that the City’s tenders are required, by the UBCJA provincial ICI agreement, to exclude bids by firms that are not signatory to that agreement. As a result, it is impossible to say exactly what the cost of projects would have been, had non-signatory firms been participating in the competitive process. However, in the months immediately after the certification orders were issued, there were four projects that did attract bids from both signatory and non-signatory firms. In those four cases, the lowest bids were all from non-signatory firms, and the lowest signatory-firm bids were, in total dollars for these projects, 10.60% higher than the non-signatory bids that were otherwise compliant. The average percentage difference on a per-project basis was 11.74%.

Staff have also undertaken an analysis of ICI projects awarded in the 12 months immediately before certification of the UBCJA. This data must be viewed with some caution, because UBCJA signatory firms did not bother to bid on a significant portion of those projects.
At any rate, there were a total of 26 ICI construction contracts involving carpentry work awarded in the 12 month period immediately before certification. Of those contracts, 14 attracted no bids from firms signatory to the UBCJA provincial agreement. Of the remaining 12 contracts, only 4 were awarded to UBCJA signatory firms. The total value in dollars of those 12 contracts was $10,325,117, and had all of them been awarded to the lowest bidders with UBCJA affiliation, the total cost of those contracts would have been $11,163,754, which is 8.12% higher than the amount actually paid by the City. The average percentage difference on a per-project basis was 9.93%. Having regard to the number of contracts in which there were no UBCJA signatory bidders, staff believe that the above percentages are not truly reflective of the increased costs attributable to certification. The actual percentages are likely higher, taking into account the obvious reluctance of UBCJA signatory firms to bid on some of the City’s construction work.

Had the City been obliged, during the subject 12 month period, to award all of its ICI construction work containing carpentry components exclusively to UBCJA signatory firms, union affiliated contractors that did not bid on projects would be expected to have bid at higher prices for such projects than the above percentages would suggest.

Staff advise that since certification, some projects have not received any compliant bids. Although no firm cost projections can be based upon this fact, it is corroborative of the staff concerns that certification has resulted in reduced pools of bidders.

Having regard to the above analysis and estimates from staff, funding of the anticipated baseline increased annual costs ($4 to $10 million) would require the City either to increase the municipal general tax levy between 1% and 2%, or to reduce capital programs by an amount equal to the above increased costs.

5. Extraordinary Consequences of Certification to the City

Over and above the baseline increases, it is likely that the City will incur extraordinary increases on upcoming specialized work over the next 5 to 10 years, attributable to the UBCJA certification. These costs are difficult to predict, but could be substantial.

The extraordinary costs would be incurred by the City’s Water and Wastewater Division. The City is about to undertake critical plant and facilities upgrades and construction, all of it ICI work, 60% to 70% of which will be carried out within the next 5 years. This construction work was originally budgeted to cost $1.1 billion, but based on opinions from several industry experts, staff are now concerned that the cost may be between 20% and 40% higher (i.e., $220 to $440 million higher) as a consequence of the UBCJA certification. This potential percentage increase is strictly an estimate, but it is believed to be realistic due to the lack of experienced large-scale contractors, and the corresponding reduction in competition for the planned construction work. An early indication of the probability of a significant spike in costs is the tender outcome of a project to restore the Water Treatment Plant (WTP) that was received and opened on August 29th, 2007. The low bid for this project is nearly 83% higher than the City’s $29 million dollar construction budget. It should also be noted that the budget for this project had been set by independent reputable consultants in the water and wastewater industry, hired by the City.
Staff believe that the above range for increased costs could be diminished slightly, but that there might be a corresponding increase in risk to public safety and in financial risk, as described below.

Staff concerns are connected with the fact that constructing and upgrading of Water and Wastewater facilities is large-scale, specialized work that needs to be undertaken without interruption to the production and treatment of drinking water and wastewater. Public safety demands both a high degree of expertise to perform the work competently, and the resources and experience to do so while operations continue.

There is currently a very limited pool of large UBCJA provincial ICI agreement signatory firms that are capable of performing the upcoming work for the Water and Wastewater Division. There are 5 contractors in Ontario that carry out the majority of large water and wastewater treatment projects in Canada (i.e., projects of a value between $30 and $150 million), none of which firms are signatory to the UBCJA. There is currently only one UBCJA signatory firm that has completed a large project in Canada, and that project was at the bottom end of the above range for large projects.

Statistics that staff have recently obtained from one of the large contractors performing a significant amount of water/wastewater work in Ontario show that out of $733 million in water/wastewater contracts in the GTA over the last three years, only $41 million were awarded to UBCJA affiliated contractors. These figures are not comprehensive, but staff are advised that they are representative. If these figures are reasonably accurate, it would appear that most of the experience in water/wastewater construction work resides with firms not having UBCJA affiliation. This data would also tend to indicate that the non-affiliated contractors are less costly. Another noteworthy statistic presented by the subject contractor is that 75% of all bidders (whether successful or otherwise) on water/wastewater projects in the GTA in the last three years did not have UBCJA affiliation. These contractors are presently excluded from bidding on the City’s upcoming water/wastewater work. If this figure is also accurate, competitive price pressures will be substantially reduced.

Virtually all of the City’s construction work involves prequalification of potential bidders, Typically, the City insists that bidders have the expertise, resources, experience and bonding capacity to complete construction work. If the City’s prequalification requirements for the upcoming Water and Wastewater projects are appropriately stringent, the sole UBCJA signatory firm described above could end up being the only qualified bidder for portions of the upcoming work, and it may not even qualify for some of the larger portions of that work.

In light of the foregoing, construction costs have a very real potential to increase in proportion to the narrowing of the field, because bidders (or more likely, the sole bidder) will prepare their or its submissions or submission having regard to the lack of other competitive bidders. Moreover, some portions of the work may not be performed at all. Competition and prospects for performing the work would increase if prequalification requirements were relaxed, because signatory firms that presently lack experience or
resources or bonding capacity to perform this type of construction work may be expected to attempt to enter the field in the expectation of obtaining lucrative contracts. However less stringent prequalification could equate to increased risk to public safety or reduced bonding protection for the City.

It is conceivable that mid-sized UBCJA signatory firms might, over time, acquire the expertise, resources, experience and bonding capacity to perform upcoming Water and Wastewater work, but the resulting delays could prove costly for the following reasons:

1) It could take years for such firms to grow and to meet the prequalification requirements that are presently met by the larger non-signatory general contractors. This could have a significant impact on the City’s Water and Wastewater Master Plans, which in turn would affect future development and economic stimulus.

2) Quality of workmanship and pace of project completion could suffer because of general contractors not being familiar with construction in the water and wastewater industry.

3) Negative environmental events could result (e.g., spills, non-compliance relating to extended process outages, etc.) due to contractors being unfamiliar with water and wastewater plant operations and regulatory issues.

6. Potential Long-Term Domino Effect

If construction costs escalate as anticipated, some projects will be delayed and others may be cancelled entirely. Staff are concerned that this in turn may negatively affect economic development, which could drive revenue-generating businesses out of our community and weaken the City’s economic diversity and base.

**ANALYSIS/RATIONALE:**

See above, under “BACKGROUND”.

**ALTERNATIVES FOR CONSIDERATION:**

Council has already considered its alternatives, and has selected the course of action contained in its resolution of April 12, 2006. Staff accordingly do not propose to deal with alternatives in this Report.

**FINANCIAL/STAFFING/LEGAL IMPLICATIONS:**

See above, under “BACKGROUND”. The cost to the City over the next 5 to 10 years is feared to be in the hundreds of millions of dollars. In addition, economic development could be adversely affected, creating further hardship for the City’s taxpayers.
Policies Affecting Proposal:

N/A

Relevant Consultation:

Staff preparing this report have consulted with all knowledgeable staff and affected departments, including: staff in Human Resources (Labour Relations); staff in Finance (Purchasing); and staff in Public Works (Capital Planning and Implementation and Water and Wastewater). All contributing individuals and departments have verified the information that is attributed to them.

City Strategic Commitment:

By evaluating the “Triple Bottom Line”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Evaluate the implications of your recommendations by indicating and completing the sections below. Consider both short-term and long-term implications.

Community Well-Being is enhanced.  ☑ Yes  ☐ No

In the absence of legislative changes or a tribunal ruling that alters the status of UBCJA Local 18’s certification, local contractors having no affiliation with that union will not be able to bid on future tenders issued by the City for construction projects. Many general contractors will be excluded from bidding.

Environmental Well-Being is enhanced.  ☐ Yes  ☑ No

None of the available options has an environmental impact.

Economic Well-Being is enhanced.  ☑ Yes  ☐ No

In the absence of legislative changes or a tribunal ruling that alters the status of UBCJA Local 18’s certification, non-union subcontractors and subcontractors using other unions for construction work are excluded from bidding on City projects, resulting in additional costs to the City.

Does the option you are recommending create value across all three bottom lines?  ☐ Yes  ☑ No

Only two of the three bottom lines would be enhanced.

Do the options you are recommending make Hamilton a City of choice for high performance public servants?  ☑ Yes  ☐ No

None of the available options affects the status of the City as an employer of choice for high performance public servants.
AREAS OF CERTIFICATION

- INDUSTRIAL, COMMERCIAL, INSTITUTIONAL – "ICI"
- HEAVY ENGINEERING
- RESIDENTIAL
AREAS OF CERTIFICATION

ICI SECTOR INCLUDES:
- PLANTS (EXCEPT ELECTRICAL)
- BUILDINGS WITH RETAIL, OFFICE OR OTHER COMMERCIAL SPACE
- LARGE, MULTI-BED HOMES FOR THE AGED
- PUBLIC SECTOR BUILDINGS, INCLUDING MUNICIPAL BUILDINGS, ARENAS, RECREATION CENTRES AND PARKS

AREAS OF CERTIFICATION

HEAVY ENGINEERING SECTOR INCLUDES:
- BRIDGES
- DAMS
- ANY OTHER CONSTRUCTION INVOLVING THE MOVING OF LARGE AMOUNTS OF SOIL
AREAS OF CERTIFICATION

RESIDENTIAL SECTOR INCLUDES:
- LOW-RISE RESIDENTIAL BUILDINGS
- HIGH-RISE RESIDENTIAL BUILDINGS
- SOME HOMES FOR THE AGED

AREAS OF CERTIFICATION

- ICI – THE CITY IS NOW BOUND BY A PROVINCE-WIDE COLLECTIVE AGREEMENT; THIS IS NEGOTIATED CENTRALLY
- THERE ARE NO SIGNIFICANT TERMS WHICH THE CITY CAN RE-NEGOTIATE ON ITS OWN
AREAS OF CERTIFICATION

- HEAVY ENGINEERING AND RESIDENTIAL — COLLECTIVE AGREEMENTS WILL BE NEGOTIATED "LOCALLY"

- UBCJA AND THE CITY ARE IN NEGOTIATION, BUT NO COLLECTIVE AGREEMENTS HAVE YET BEEN REACHED

- MORE TERMS ARE SUBJECT TO INDIVIDUAL NEGOTIATION

COST TO CITY OF CERTIFICATION

- THE ESTIMATED INCREASE IN COST IS NOT BASED UPON THE LEVEL OF UBCJA WAGE AND BENEFITS RATES

- THE ESTIMATED INCREASE IN COST IS BASED UPON A REDUCTION IN COMPETITIVE BIDDING DUE TO A SUBSTANTIAL REDUCTION IN THE NUMBER OF ELIGIBLE CONTRACTORS
COST TO CITY OF CERTIFICATION

- THE PROVINCIAL ICI COLLECTIVE AGREEMENT REQUIRES THAT THE CITY AWARD ICI SECTOR CONSTRUCTION WORK ONLY TO GENERAL CONTRACTORS WHO ARE SIGNED UP WITH THE UBCJA

- NON-SIGNATORY CONTRACTORS ARE NOW DISQUALIFIED FROM BIDDING ON CITY ICI CONTRACTS

COST TO CITY OF CERTIFICATION

- THE CITY HAS A LIST OF 260 CONTRACTORS REGISTERED AS LARGE CONSTRUCTION CONTRACTORS

- ONLY 17 OF THOSE CONTRACTORS (LESS THAN 7%) HAVE UBCJA AFFILIATION
COST TO CITY OF CERTIFICATION

- The city is intending to spend about $1.1 billion on upgrades to the water/wastewater treatment plants and facilities over the next 5 to 8 years.

- This work falls within the ICI sector.

COST TO CITY OF CERTIFICATION

- Of the five contractors who perform the majority of water/wastewater construction in Canada, none are signatory to the UBCJA.

- Only one UBCJA signatory contractor has even performed a large water/wastewater project in Canada.
COST TO CITY OF CERTIFICATION

- UNTIL A COLLECTIVE AGREEMENT FOR THE HEAVY ENGINEERING AND RESIDENTIAL SECTORS ARE CONCLUDED, WE CANNOT BE CERTAIN WHAT RESTRICTIONS ON CONTRACTORS WILL BE APPLICABLE

- WE ANTICIPATE THAT SOME RESTRICTIONS WILL EXIST THAT WILL LIMIT CONTRACTOR ELIGIBILITY

COST TO CITY OF CERTIFICATION

- TO ESTIMATE THE INCREASED COSTS RESULTING FROM CERTIFICATION, STAFF REVIEWED THE ICI BID HISTORY FOR THE 12 MONTHS BEFORE CERTIFICATION, AND ALL ICI BIDS SINCE CERTIFICATION INVOLVING NON-SIGNATORY BIDDERS

- PRECISE ESTIMATES ARE DIFFICULT, SO ESTIMATES HAVE THEREFORE BEEN EXPRESSED AS A RANGE
COST TO CITY OF CERTIFICATION

- In the water/wastewater area, staff had no internal comparison tenders to use, and therefore sought the advice of industry consultants in order to formulate the estimated range.

COST TO CITY OF CERTIFICATION

- On usual capital projects – estimated increase in costs is between $4M and $10M annually.

- On water/wastewater capital projects risk of increases of up to 40% in overall cost.
WATER/WASTEWATER PROJECTS

- $1.1 BILLION OVER 5 TO 8 YEARS
- EVERY 1% COST INCREASE IS $11M
- 20% COST INCREASE IS $220M
- 40% COST INCREASE IS $440M

WATER/WASTEWATER PROJECTS

- THE FIRST PROJECT HAS BEEN TENDERED
- THE PROJECT BUDGET, SET BY REPUTABLE CONSULTANTS, WAS $29 MILLION
- THE LOW BID WAS $53 MILLION
- THIS IS 83% OVER BUDGET
POTENTIAL 8 YEAR DOWNSIDE

• ON THE LOW END $252M
  [ ($4M \times 8) + $220M ]

• ON THE HIGH END $520M
  [ ($10M \times 8) + $440M ]

PROVINCIAL ROLE

• THE PROVINCE CONTROLS THE CONSTRUCTION LABOUR RULES THROUGH THE LABOUR RELATIONS ACT, 1995

• THE PROVINCE HAS THE POWER TO AMEND THE LABOUR RELATIONS ACT, 1995
PROVINCIAL ROLE

- A SIMPLE AMENDMENT WOULD RESTORE FULL COMPETITION TO THE CITY’S TENDER PROCESS AND AVOID THE FINANCIAL DOWNSIDE IDENTIFIED IN THE REPORT.


PROVINCIAL ROLE

- REPRESENTATIONS HAVE BEEN MADE TO THE PROVINCE BOTH AT THE POLITICAL LEVEL AND AT THE STAFF LEVEL.

- THE CITY’S REQUEST FOR AN AMENDMENT TO THE ACT IS CURRENTLY UNDER REVIEW BY THE MINISTRY OF LABOUR.
AMENDMENT REQUESTED

- THAT THE DEFINITION OF "NON-CONSTRUCTION EMPLOYER" IN S. 126 OF THE LABOUR RELATIONS ACT, 1995, BE AMENDED TO ADD:

   "and municipalities shall be deemed to be non-construction employers"

QUESTIONS

- IMPACT ON TENDERING, BUDGETS AND TAX LEVIES: JOE RINALDO, GENERAL MANAGER OF CORPORATE SERVICES

- IMPACT ON WATER/WASTEWATER AND ECONOMIC DEVELOPMENT: SCOTT STEWART, GENERAL MANAGER OF PUBLIC WORKS

- IMPACT ON UBCJA UNION MEMBERS AND STATUS OF PROCEEDINGS: GARY KUZYK, SENIOR SOLICITOR