

## ***Construction Lien Act Review Consultation Meeting Summary*** **Ministry of Education**

**November 30, 2015 (9:00 a.m. to 10:00 a.m.)**

Attendees: Cettina Cuffaro, Grant Osborn, James Little, Bruce Reynolds, Sharon Vogel

Sheryl Cornish, Counsel at the Ministry of the Attorney General, attended the meeting to record a summary.

For the introduction provided by the Review, please see document titled BLG Consultation Introduction.

### **Prompt Payment**

Prompt Payment Ontario (“PPO”) has said that the Review team can disclose the results of a trade contractor survey that it commissioned on elongation of payment. The Review discussed these results generally.

Slow payment is a global issue and there are prompt payment movements aimed at freeing up capital more rapidly. PPO has provided examples of legislative approaches around the world. The proposition is that the payment cycle is unreasonably long and efforts should be made to reduce it.

### ***Pay When Paid Provisions***

The Review team is hearing about the owner not paying the general contractor, but the general contractor including a ‘pay when/pay if paid’ clause so that they are not obligated to pay until they get paid. One issue the Review is considering is whether to allow these clauses to continue.

Some stakeholders have said that the school boards are amongst the most difficult in terms of paying in a timely way. The issue is not non-payment, but that there is a large amount of capital trapped in the payment system for extended periods of time and the implications are significant for the industry.

The Ontario Association of School Business Officials (“OASBO”) proposed the elimination of ‘pay when paid’ provisions to promote timely payment to subcontractors. The general contractor would have to pay their subcontractors even if they have not been paid by owner.

According to some stakeholders, there are three aspects to promptness of payment. Throughout the job there is the ordinary course of payment. It appears that this payment cycle in the ordinary course is taking 60 to 90 days. There is also the situation of the owner keeping the holdback at the end of the job, after substantial performance, in order to get the contractor to complete the work promptly. The third aspect is where the project encounters a major dispute and the money stops flowing and there is “gridlock”. Bill 69 focused on the first and second, but mostly the ordinary course payment cycle. The public sector owners are concerned about their role as custodians

of the public purse and making sure that they get work done properly and promptly. Certain owner stakeholders see the 10 percent holdback as an important part of achieving this objective.

### *Late Payment from School Boards*

The Review is hearing about the difficulty of receiving payment from school boards, although the trade contractor survey puts school boards in the middle of the pack. The Review is also hearing about bid processes where contractors are asked to keep their prices alive for a long period of time when funding is uncertain. This relates to a request that the Act be amended to allow for disclosure of financial information from owners. Some have said funding for school board projects is uncertain and contractors are asked to hold their prices for up to a year. The profit margins get eroded very quickly, and if they do not agree to hold the price, they lose the bid.

In the ordinary course payments, the Review is given the example that it takes too long for payments to be processed. Contractors say that they submit a progress draw, the consultant reviews it and there is internal processing. If someone is on vacation, this delays the process. The checks and balances and proper audit trails are very important.

The Ministry has put more emphasis on the capital side for school boards in the past few years. The question was whether it is an issue of administrative processes that the boards could get better at, or is it an issue of deficiencies.

### *Payment Process for School Boards*

The Ministry explained that when progress draws come in they can be flawed and they have to go back for changes. There is a question of when you start the counting of days, whether it is measured from the first submission of the draw, which could be defective, or when the payment certification takes place.

According to the Ministry, the contract administration capabilities of some school boards are less effective than others. You would need to start counting from a properly completed payment request. The payment process starts with a payment request, which is submitted to the owner and contract administrator. The contract administrator reviews it and comes up with a proposed certificate, which it reviews with the owner. It then goes into the owner's internal processes. In municipalities, there is a bifurcation between the public works department and finance and each has their own processes. They issue a payment certificate and then submit to a check run, but it may not occur for two weeks. This adds more time to the cycle.

From the contractors, the Review has heard that this is unreasonable in this day and age. Contractors have said they should not suffer because of antiquated procedures. Some in the prompt payment community would say that you do incent owners to pay timely through regulation because it will not change unless it is enforced through statute. The Review needs to be sensitive to constraining freedom of contract according to the Ministry.

OASBO raised an issue about the quality of progress draws. It was noted that there are limited resources and there may just be one person who is responsible for reviewing the draws. Municipalities have taken the position that until you have planning approval the clock does not start. School boards may have been working on the project long before planning approval was granted.

The Ministry explained that school boards vary in terms of expertise for construction projects. Boards in rural and northern Ontario do not always have steady capital funding. They do not build often so it is a new experience every time. The Ministry has been working on getting capital construction more closely aligned. There was an issue a few years ago where bills were being paid but the work had not been done.

The Ministry pays once it sees that the work is completed. They only pay twice a year and they also cover all short-term financing. If a school board uses internal reserves, the Ministry pays interest because they want boards to pay the contractors. There is a lot of money flowing to education capital over the last five to ten years (over 1 billion). Some flows fairly regularly (e.g. renewal funding), but money for new construction requires a business case. School boards do not know if they have funding until they get an approved business case. The larger boards always get approval, but the smaller ones require more time.

There are a core group of consultants (architects) who work on schools. OASBO is very good at connecting and sharing best practices and commenting on key issues. Small boards are connected to people in the sector who have more experience. The Ministry also helps smaller boards and may hire a consultant to help them get through the process. If delayed payment is linked to the board's internal process, the Ministry could address it from their side. The boards are stressed on the administration side. They would see hiring a consultant as taking money out of the classroom. Boards are lean on administrative help within the board office. The payment issue may be a symptom of this.

The Review has heard that boards were concerned that the holdback provides leverage to get work done and they want to protect it.

### **Public-Private Partnerships**

The Ministry is not considering grouping boards or going P3 because they have not found anyone who can beat the current prices available. They have looked at it in areas where they do not build a lot. They consider it periodically. The risk is not that high because they have alternatives if schools are not open on time.

Universities are not 100 percent funded so they have more flexibility and less ministry control. The Ministry has a very fixed budget for building. On high schools, they have looked at building more amenities. Elementary schools are very basic. Compared to universities there are not as many amenities. The Ministry is trying to get the most out of the money it has. The need is huge on the renewal side.

The Ministry explained that it and the Ministry of Transportation ("MTO") are the most closely aligned with construction and the need for a tool to make sure that deficiencies

are addressed. MTO has a rigorous system of contractor performance review, payment, and a new dispute resolution mechanism that will be launched in 2016.

The Ministry does not have a standard form construction contract. The boards that do construction collaborate to develop a standard contract that is more board friendly. It may be a CCDC with supplementary conditions. Architects will create a set of supplementary conditions.

## **Adjudication**

In terms of alternative dispute resolution, one mechanism that has been discussed with the Review is adjudication. It is an interim binding form of resolution of disputes which provides a quick resolution to resolve payment disputes. This has been presented to the Review team as a potential solution. This is one of the key issues of the Review. Prompt payment is about how to improve things for those at the bottom. Adjudication is a potential solution to the “gridlock” problem.

MTO was discussed as an example of a public sector owner which has a positive relationship with contractors. The new process was developed with the Ontario Road Builders Association and the Consulting Engineers of Ontario. They have come up with a referee process which is binding on an interim basis so that if the project is completed and either party wants to reopen it, they can do that.

MTO devotes significant resources to these issues because building roads is a core part of what they do. They have looked at issues of timely payment and making sure that the project is completed on time and on budget.

The Ministry explained that it is a bit different because they fund the owner; they are not directly involved in construction. They are involved with respect to accountability issues. For many years the Ministry was focused on growth. Northern schools did not get much money. As the Ministry changed the model, it got more involved and became more operational. They hired a consultant who oversees the school board consultants. The Ministry also helps the board talk to architects to discuss what they need. Some do not provide detailed instructions to the architect and then they run out of money during the project.