

**Construction Lien Act Review Consultation Meeting Summary**  
**Infrastructure Ontario, Ministries of Municipal Affairs and Housing, Ministry of Energy, Ministry of Economic Development, Employment and Infrastructure, and Ministry of Health and Long-Term Care, and Ministry of the Attorney General (Court Services Division)**

**December 15, 2015 (9:00 a.m. to 11:00 a.m.)**

Attendees: Eric Tilley, Ann Walters, Marty Venalainen, Marta Zoladek, Cheryl Carson, Hena Sial, David Morley, Adam Lawlor, Dan MacKay, Nina Gandhi – representing Infrastructure Ontario, Ministries of Municipal Affairs and Housing, Ministry of Energy, Ministry of Economic Development, Employment and Infrastructure, and Ministry of Health and Long-Term Care, and Ministry of the Attorney General (Court Services Division) (collectively, the “Stakeholder Group”)

Bruce Reynolds, Sharon Vogel, James Little

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.

## **1. General Comments from Infrastructure Ontario and the Ministries**

Infrastructure Ontario (“IO”) understands that there are complexity issues and there are strong competing views on some issues. They have a strong position based on the work that they do. They also have a nuanced perspective because they are mandated to protect the public interest and transfer risk.

The Ministry of Economic Development, Employment & Infrastructure (“MEDEI”) will review IO’s submission, but will likely not submit its own. IO is its delegate on these issues.

A representative from the Ministry of Health and Long-Term Care (“MOHLTC”) attended the meeting for the discussion on traditional procurement. Many hospitals do not have the expertise to handle large construction projects. They work collaboratively with IO. A small number of big projects are Alternative Financing and Procurement (“AFP”) projects and a large number of small projects are traditional projects.

A representative from Court Services Division (“CSD”) attended the meeting to provide advice on court processes. The Review team noted it had met with the Masters and they discussed their situation. There are one and a half lien masters in Toronto and one in Ottawa. In other areas the situation is difficult. The Review has been told by some stakeholders that there are resourcing issues.

CSD administers mandatory mediation. If this is a recommendation, they would want to comment on it.

## **2. Public-Private Partnerships and Alternative Financing and Procurement Contracts**

One important issue for this Stakeholder Group was how the Act could be changed to reflect AFP contracts. IO was concerned about the entire supply chain but they look at it from a value for money perspective. They are effecting their mandate through a programmatic approach through the AFP process.

The Review noted that the issue of P3 projects has come up in almost every stakeholder meeting. For example, some stakeholders have noted that the definitions in the Act do not accommodate P3s and some find the process of liening a P3 project to be confusing.

The question was asked as to how to reconcile risk transfer and certainty around cost with the reality that the risk is being transferred to someone else. There is a trickle-down effect. The other aspect is that you can change anything, but there is a cost. If you change the risk transfer, it will cost money. The government would need to accept this change in risk profile and additional cost.

The Stakeholder Group suggested that the Review would need to consider the administrative flexibility and nimbleness for reinforcing the bureaucracy and the reasonableness of timelines and timeframes. This includes finding ways to have reasonable time frames to administer things that are commercially viable. IO does not want to promise something knowing that they cannot deliver it.

The Review noted that one of the tensions that is relevant is between simplicity and complexity. If you make the Act too complex, the majority of users will not be able to administer it. The Review is sensitive to the need to avoid complexity.

Some stakeholders have suggested excluding AFP projects from certain aspects of an amended Act but many stakeholders have said they do not want AFP projects excluded from the Act. Some stakeholders have said that it is a tool they have in relation to trying to get paid. If they lien the project, they may get paid even though it is an expensive and cumbersome process. There are small contractors on big projects. Some large owners encourage general contractors to use small subcontractors.

IO noted that while an exemption from the Act for AFPs would solve some issues, if some of the other things are addressed, the discussion about an exemption falls away. These issues affect the relationship between AFP projects and the Act (e.g. the definitions of owner, contract, and improvement). If these things can be addressed, the exemption is not necessary. If the other issues are fixed, then you would not have a problem with having these projects in the Act

On the real estate side of its mandate, IO wants clarity on certain issues as well. IO delivers most of these real estate projects on a master service agreement. The provider retains sub-trades below. Questions have been raised as to which contract is the contract for the purposes of substantial performance under the Act.

### **3. Municipal Lands and other Lienability Issues**

The Review noted that a new issue has been brought forward by some stakeholders in terms of registering a lien on title. Some municipalities have suggested that the exemption for Crown lands should also apply to municipal lands.

Also, the Review noted that some stakeholders have raised the issue of definitions, how you give notice, and who you give it to. Further, they have asked the Review to consider whether there should be a notice of lien or not. Some stakeholders have said the Review should consider recommending removing the right to give a notice of lien. IO advised they would consider these issues.

### **4. Release of the Holdback**

In terms of the release of holdback, the Review has heard various suggestions about the phased release of the holdback. There have been many suggestions about how to do it and what kinds of projects this should apply to (e.g. dollar value and type). In this context, the definitional terms are difficult.

The definitions of “owner”, “contract”, “improvement” and “subcontract” are things that do not work in the realm of IO agreements. IO has tried to come up with solutions to ensure that what they need is properly reflected in the contract and risk transfer is properly allocated.

These are some of the issues that will be explained in the IO submission once it is submitted. Availability is the main driver of AFP payments. They are not focusing on earned value and status of construction.

While IO is the owner, they are looking for Project Co to bear most of the risk. There is a frequent disconnect with the concept of “owner” and how IO is allocating risk. IO needs to ensure that the right party and the right contract are reflected in the Act. The design-build contract requires certification pursuant to the Act. The focus should be on these contracts and dealing with construction. Design-Build-Finance-Maintain (“DBFM”) contracts add an additional layer of payment.

Redefining the contract for the purposes of certification would be right approach. Alternatively, there could a redefinition of the term “owner”, including who needs to give certification and how it is given. IO does not issue the substantial performance certificate. There is an independent certifier.

For DBFM projects, IO is concerned about the definition of “improvement”. If you say that the project agreement is the contract, you would need to consider whether or not repairs count as an improvement, which goes to which stage it is substantially performed. IO’s understanding is that the design-build agreement is the contract and this is the one that requires certification under the Act. The main driver is progressive release of holdback.

Many IO projects extend over many years. The Review has heard from some stakeholders that this puts trades in a difficult position. This is also an issue for the

design community because a significant portion of their services are performed before construction starts. Also, suppliers may require trades to pay 100 percent for all equipment that they use. In addition, although unionized workers wages may get paid, pension and benefit remittances may not get paid. This is not always clear to workers until they go to collect a benefit and find that the premium has not been paid so there is no benefit.

The Review noted that the sub-trade level, some stakeholders have indicated that subcontractors may be paying for wages and materials, but effectively financing the holdback for a long period of time. There has been some discussion about phased release of the holdback based on milestones.

Some stakeholders have suggested annual release of holdback. The Act presently does not contemplate annual release.

Also, some stakeholders have focused on partial release under section 33 of the Act. At present, this section is rarely used. It is optional because it is difficult to administer and there is risk taken onboard. There is a concern that if you do early release regularly, it diminishes the holdback. If you get the certificate of completion, then the value only goes down by the outstanding contract.

The MOHLTC is finding that with hospital renovations, there may be phased development, for example in relation to early works. Trades will do early work and then suspend activity and come back to do more work. They are in and out in a variety of phases. We need to start thinking that complexity will increase on brownfield projects.

The driving principle of AFP is availability according to IO. This is an issue between Project Co and the contractor. Banks do not advance the holdback. Their view is that if they do not hold it back, then they could be liable as well. If the Act allows for progressive release of holdback, Project Co would have to finance it and there would be an increase in their financing costs. The question is whether the owner should make small payments if the availability is not there.

## **5. Key Issues**

The Review was retained to make recommendations that will achieve the policy objectives of the Act. Three key issues to be considered are the original policy objectives of the Act, which is to provide protection to those who provide services and materials to an improvement, prompt payment and dispute resolution.

The Review noted that there is a tension between freedom of contract and regulation. The Act already constrains freedom of contract. The question is how far on the spectrum do you move, and to what extent you can regulate to constrain freedom of contract. Some have said that Bill 69 was a significant constraint on freedom of contract. The Stakeholder Group suggested that the Review be conscious that its recommendations do not disrupt successful processes, including those created by IO.

## **6. Suggested Changes to Definitions**

IO explained that what often happens is that the subcontractor will register a lien against the ultimate owner and IO will get notice of it. The contractor then bonds it off. IO is insulated because, based on its contract, if a lien is registered or outstanding, there is an issue for Project Co because it will not get its substantial performance payment, so the lien gets bonded off and IO does not get involved.

IO explained that in relation to its real estate mandate, service providers must comply with KPIs, which include timelines, or they could lose their fees. IO's data suggests that service providers have been taking the measures required (i.e. they bond off liens, resolve issues, and pay invoices on time). IO establishes minimum standards for their performance can they are vetted quarterly.

The KPI is an important part of the contract. Many people want IO to be the problem solver when there is conflict. IO wants the project to be successful, but if the contractor has a contract with someone else they should sort it out with them.

The Review is hearing from some stakeholders that the sub trades are financing the holdback. To the extent that the payment cycle is elongated, they are also experiencing a stranding of working capital at that level. If contracts were to impose KPIs on participants regarding the payment cycle, IO would potentially be in a position to impose a discipline in relation to issues like prompt payment. For example, a standard in terms of paying subcontractors would have to be met or project participants could be subject to consequences.

There was a discussion around whether it would be possible to create a standard that applies in various contracts where there is a reporting obligation focused on the timeliness of payment.

The concept of a KPI as a method of motivating prompt payment is something that the Review will consider further.

## **7. Project Trust Account**

In British Columbia, project trust accounts are used, which are jointly administered by the owner and the general contractor. A suggestion from some stakeholders to use a similar project trust account structure in Ontario has come to light as a result of a number of insolvencies and the interaction between the *Companies Creditors Arrangement Act* ("CCAA") and *Bankruptcy and Insolvency Act* ("BIA").

Some owner stakeholders have advised that there has been an increase in the number of times this issue has come before the courts. The project trust account deals with the problem of the issue of certainty of subject matter and the clash between the BIA, CCAA, and the Act. IO advised they would consider this issue.

## **8. Prompt Payment**

The Review noted that PPO retained Ipsos Reid to prepare a trade contractor survey. The survey data shows issues being brought forward by PPO.

IO monitored the Bill 69 process but did not make a submission. There has been an issue about the way that the Bill came forward and came on people's radar. It was unexpected.

IO noted that it has tried to create successful processes. They engage stakeholder representatives from the supply chain when finalizing and negotiating the agreements in relation to their real estate mandate. The contractors and others are at the table and negotiate the contract. The standard payment terms in the master service agreement is 10 day, plus 45 days. This includes 10 days to review, accept or reject a draw, and 45 days to pay from the time of approval. It is possible that someone could be paid sooner.

There are contract administrators involved. This has been working and IO has had buy in from the stakeholders. IO has explained the basis and reasons why they have these timelines. It creates the impetus for people to ensure that submissions are complete and it speeds up the payment process.

From the AFP perspective, it is based on availability. Once certification has been achieved, IO has two days to make payment. IO is not aware of instances where it has not paid on time, except where there are actual delays on a project where substantial performance has not occurred.

IO agrees that people should be paid on time. IO advised that at one time there was a one day payment period being contemplated. This is not practical given the approval process.

The Review noted that some stakeholders have proposed extending the preservation period to 60 days or 90 days. Others have proposed that there should be payment within 5 days after certification. It is about the gap. Some stakeholders have suggested that lien rights should extend, for example, to five days after the payment period in the contract. IO has not considered extending the period for liens.

The Review is also hearing from stakeholders about elongation of payment terms. The payment draw process has become more complex over the years. It takes longer to review. On the owner side, it may be reviewed by project people, the finance division, and others, which results in elongation of payment.

The Stakeholders Group at this meeting explained that the province has limited ability to influence municipal procurement practices.

Mandatory release of the holdback would be challenging for IO. Mandating monthly payment schedules would also be difficult. Monthly certification would be very challenging. Parties should have the right to structure their contracts in a way that suits their needs. Mandating payment will not work for AFP contracts. Availability is still the

crux for payment. The AFP structure is vital to the structures that the government has in place. IO would not want prompt payment provisions to affect that.

Projects are availability-based, which is broader than substantial completion. IO would not want to see that principle affected. They are looking for a turnkey solution and this is what makes it turn key (i.e. commissioning, testing and satisfying requirements for substantial completion).

## **9. Adjudication**

The Review has been getting positive feedback on the introduction of adjudication in Ontario. Some owners in written submissions have said they prefer dispute resolution to be optional. The Review explained adjudication and the United Kingdom experience.

The Review team is aware that IO has adjudication in some of its contracts. IO will mention it in their submission. IO makes the independent certifier's determination binding pending dispute resolution going through its course. Where you have sophisticated parties that have turned their mind to dispute resolution, that process should be allowed to govern.

IO has put a lot of time and thought into the dispute resolution process. There should be the ability to waive, or be exempt from, the dispute resolution process where parties have one in their contract. This is where IO would want an exemption because they want to rely on the process they have developed. They have a true ladder of dispute resolution.

The Review team is conscious that some entities have invested resources in crafting dispute resolution processes. IO does not want to be limited to adjudication and not have the option to go to litigation.