

Construction Lien Act Review Consultation Meeting Summary Ontario Public Works Association

December 9, 2015 (9:00 a.m. to 10:00 a.m.)

Attendees: John Haasen, 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 BLG, please see document titled BLG Consultation Introduction.

1. Overview of the Ontario Public Works Association

The Ontario Public Works Association (“OPWA”) is a chapter of the American Public Works Association (“APWA”), which represents North America. There is also a Canadian Public Works Association. The APWA advocates on behalf of public works entities associated with municipalities.

There is outreach regarding best practices associated with municipal and public works operations (e.g. road ways, landfill, garbage, sewer, and water). The US has a strong lobby group for the public sector. This is not the case in Canada. In Ontario, it is focused on coordinating with other associations like the Ontario Good Roads Association and other umbrella groups. There is a lot of asset management and accordingly, there is a lot of overlap with municipalities and different organizations with that specific focus.

The OPWA is focused on municipalities. There are some consultants and suppliers. Its mandate is to advocate on behalf of municipalities and develop joint efforts and initiatives. This includes best practices and training, public works management or related issues, such as public-private partnerships (“P3”) and asset management.

The general process that the OPWA followed was to review the information package and the survey. Comments were then presented to the OPWA Board (the “Board”) in September. The Board determined what role they wanted to play and gave direction to send the information package to the membership for comments. Some members provided comments.

OPWA cannot speak for each municipality. They did not take a strong position on the issues because they wanted the members to deal with them on a case-by-case basis.

2. Holdback and Substantial Performance

A significant issue for OPWA was whether you adjust the holdback or not. OPWA members may use it as a lever to ensure completion of the project. There is a lot of concern expressed about reducing the amount as it would remove the ability to address the many items that would end up on a deficiencies list or punch list at the end of a project.

The issue of phasing of the holdback was recognized by the Board OPWA suggested that there should be a way to phase the release, whether by geography, number of owners impacted, or the type of work involved.

The issue of annual release did not come up in the OPWA's discussions. OPWA explained that it would be hard to implement and to define what work is included in the year.

OPWA suggested that the Review could consider a partial release and then do more work and have a portion of the holdback at the end of the work to ensure that the work is completed.

The OPWA does not support mandatory or automatic release of the holdback. The contractor must meet the intended purpose of the project. Substantial completion in public projects is based on the Act and meeting the intended purpose. This is where contractors get frustrated because the project may take longer than anticipated. This issue will always be there, so making mandatory payment would be problematic for municipalities. There needs to be leverage to make sure that the work is done properly.

There should be some mechanism to determine that the work has been done. The intended purpose is where it gets lost. The contractor thinks that when they do their work it is done, but it must meet the intended purpose.

The OPWA supports mandatory certification of subcontracts because the general contractor is exposed to everything and the owner is not privy to the flow down to the subcontractors. It would be good to have a mandatory aspect so there is a flow down to the subcontractors. OPWA suggests that there should be expectations on the general contractor to flow down to the subcontractor.

3. Lienability

There is lack of clarity with respect to some of the definitions in the Act, which can result in litigation. OPWA also raised an issue with respect to whether engineering services are lienable.

4. Preservation & Perfection

OPWA stated that forty five days is sufficient time for liens.

5. Alternative Dispute Resolution

The OPWA raised dispute review boards as an alternative dispute resolution mechanism in its written submission. Another idea is adjudication. OPWA understands that some owners would prefer that ADR be optional, rather than mandatory.

The OPWA suggested that adjudication and mediation were things that are very viable and give an advantage for the resolution of liens to avoid delays. These methods require the parties to address the issues and there is an objective third party. It is a mechanism to deal with disputes without having to use the Act.

The issue of projects getting bogged down in litigation was discussed. It can be time consuming and very expensive. The Review team heard a lot about adjudication and how it has worked in the UK in the past 20 years.

6. Prompt Payment

OPWA explained its position that the public sector industry is good about paying contractors. Most clients pay within two weeks. It takes two weeks to certify a draw. It would be ideal to have 30 day cycles according to OPWA. In several examples discussed by OPWA, the set-offs must be addressed before the holdback is released.

Some stakeholders have advised the Review that there has been a gradual elongation of payment and the process has become more complicated and time consuming in terms of what is expected. The review by the consultant an owner is also more time consuming and there are checks and balances by the owner that adds a lot of time to the process.

OPWA has not heard about this from its membership. Their members want to receive a draw from a contractor which includes an estimate. The consultant will review it with the client and there will be payment. Most clients are diligent about moving the cash for the contractor because, for example, they are financing the equipment and they are not getting paid. The issue is a contractor determining how much work the contractor has done. Towards the end of the project, the commissioning aspect comes into play and this can stretch out the payment because the warranty has not started yet.

OPWA stated that many industry stakeholders think they are doing it well and that everyone is aware of the fact that the contractor has put out a lot of money and they are entitled to be paid. The only complexity comes when they get to the last 20% of the project.

7. Surety Bonds

According to OPWA, it is often assumed that public entities may have a 50 percent performance bond and a 50 percent labour bond. Members have indicated that they have lower bonds. OPWA doesn't see any reason to change the process.