

**Construction Lien Act Review Consultation Meeting Summary
Association of Municipalities of Ontario**

December 3, 2015 (2:30 p.m. to 3:30 p.m.)

Attendees: Monika Turner, Craig Reid, Gary McNamara, 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. Registration of Liens on Municipal Property

The key issue for the Association of Municipalities of Ontario (“AMO”) is that municipalities are different than private corporations as owners and should be treated no differently than the provincial or federal government owners. AMO explained that municipalities are a mature order of government and are responsible for two-thirds of the infrastructure in Ontario. They manage, operate and repair property for the greater good of citizens. They operate for the public safeguard and they are transparent. They have accountability and oversight mechanisms governed by many statutes. Local government plays a major role in keeping the economy going and protecting the environment.

According to AMO, because the role of municipalities is essential, municipal projects should be treated the same as Crown land. AMO also suggested that liens should not attach to certain municipal properties but holdbacks should still apply.

2. Municipal Infrastructure Planning

AMO noted that through the initial Bill 69 process contractors wanted greater disclosure on projects from owners. AMO suggested that municipal governments are different as they operate a capital budget every year. Administrative staff will determine which projects are deemed essential. Most municipalities have publicly available 10-year capital plans and they establish projects as they move along and tender the projects.

The budget process is very public. In terms of finances, the audited financial statements are public and they include operations and reserves. Municipalities encourage all constituents to come forward. AMO suggested that this is similar to what the province does where they seek out advice throughout the province. Residents are invited to provide input and critique the process on a yearly basis.

AMO explained that the municipal plans developed through public consultation guide infrastructure development. There is tremendous input from the public in terms of how the plans are developed and how they unfold. Many municipalities have established an asset management program and have submitted to Ontario capital work plans for the

next 10 years. Some have established a full life cycle plan on infrastructure over the next 10 years (e.g. water, waste, and bridges).

AMO explained that when a municipality develops an infrastructure management plan and they are moving towards putting funding in place to realize that plan, it can apply to the province for grants. Some municipalities that are in a strong financial position do not get the support that others do. In addition, municipalities receive gas tax revenue for transit and the federal gas tax revenue, which goes towards capital works.

By way of example, and acknowledging that not all municipalities are the same, AMO explained that the Town of Tecumseh reviewed its assets and determined how old they were, the life expectancy and replacement cost. They created an asset management program and identified their net worth. They found that in order for them to be fully funded, they had to tax, maintain reserves and consider their debt. They identified how much money had to be put into the bank account to deal with those assets and once they reached the end of life and the cost of replacement. Reserve funds identify assets that need to be replaced. There are a certain amounts needed to replace the assets. When the time for replacement comes, the dollars are drawn from dedicated reserve funds.

Before any construction begins, there is the infrastructure plan that identifies the funding. Provincial and federal funding serves the policy goals of these governments, which may diverge from municipal goals. Municipalities try to focus on what they have control over. Federal and provincial funding is important for that plan, but there is a lot that municipalities do in-house.

3. Municipal Procurement Process

The Review has heard that some contractor stakeholders put in bids on municipal projects that are irrevocable for 60 to 90 days, but they are subsequently told that the funding is not approved and it has to be rolled into the next budget year. In some cases, it has been said by stakeholders that certain municipalities want contractors to hold their prices for up to a year. Contractors have said this is onerous because margins are thin and commodities go up in price, so holding the price erodes the profit margin built into the contract. Some have provided examples to the Review where projects have been delayed because of a need for multiple levels of review by different levels of government.

AMO explained that it would be great if the contractors could guarantee the price because these are circumstances beyond the municipality's control. AMO stated that it did not know of any situations where a municipality has asked the contractor to hold their price.

AMO explained that the objectives of provincial and federal government are driven by a specific agenda of that particular government. For example, there may be a federal funding project where they are looking to spend the money very quickly for a very definite objective. Municipalities are looking to line up such funding with their own objectives and there may be some steps to take after they get the contractors in line.

The government may be looking for bids to be ready to go, but the funding has not come through. Sometimes projects get re-profiled in response to funding changes, it is not very predictable.

AMO administers the federal gas tax for all municipalities except the City of Toronto. AMO explained that this is the only predictable provincial or federal money that municipalities can count on. It must go to particular categories and there must be an asset management plan. Municipalities also have their own municipal revenue streams. The better managed the municipality, the less likely it will get a grant. Municipalities have to follow certain rules and procurement by-laws and obtain Council approval.

Federal commitment for funding would allow a municipality to look at its infrastructure plan and apply for funding to build something in its plan. Again as an example, the Town of Tecumseh took advantage of such funding and partnered with the City of Windsor to bring full municipal service to an industrial park in Tecumseh and get the sanitary sewer under Highway 401. Windsor received a grant to develop system for a jail and the Town was able to partner with it to take advantage of the funding. AMO noted that there are many other examples where facilities were built ahead of schedule when monies were made available.

With respect to funding, AMO also explained that under the Municipal Act, municipalities cannot have an operating deficit and there is a 25% debt ceiling. This is a problem for some smaller communities. The municipalities spend 100% dollars until they can turn a project around to the federal or provincial government for funding. There is a tiered approach, much like a construction project.

4. Dispute Resolution Processes

AMO stated that one of the issues of some concern is that municipalities are different than the private sector because of the higher level of accountability and strict legislative framework. AMO's membership does not want to be leveraged to settle disputes between general contractors and subcontractors.

One of the things that others have proposed to the Review is that, on a project with a major dispute, there seems to be a consensus that spending three or four years to sort it out with very high legal and expert consultant fees is not working. The current dispute resolution system is considered by many stakeholders to be flawed.

Part of the mandate of the Review is to consider the efficiency of dispute resolution mechanisms that get applied to construction disputes. One of the issues under consideration is how disputes can be managed in a way that is efficient and more cost effective than the current system.

AMO recognized the reality that the judicial system is bogged down in many ways and there are better ways to spend resources. As far as AMO is concerned, it is really about alternative dispute resolution and the ability to work with contractors. As far as optional alternative dispute resolution, AMO stated that it would be willing to consider ADR as an option with certain caveats. Municipalities would be supportive and welcome ADR, so

long as it observed the principles of public money, accountability and stewardship built alongside freedom of contract.

AMO expressed that it was happy with how the Act is working overall. AMO had not heard major concerns from its membership. AMO explained that there is a public accountability scheme and municipalities are stewards of public money, including the holdback, milestones, and certification.

5. Adjudication

The Review introduced the concept of Adjudication, being a process that is been in place in the United Kingdom (“UK”) for over two decades. The Review explained the concept of Adjudication and the UK experience with it thus far in the construction industry.

Many stakeholders have suggested to the Review that adjudication is something that they would like to see adopted as a solution for “gridlocked” projects where monies are not flowing and it can take a long time to resolve the dispute.

AMO explained that municipalities have had a negative experience with “interest arbitration” and the selection of members of the arbitration panel. They have found it to be unfair. AMO suggested that there are more trades than owners, so if the adjudicator wants to be employed they may give favourable decisions to the trades.

In discussing fairness, the Review commented that to make the system operate as it does in other jurisdictions, you need to have people qualified to be adjudicators. This tends to be quantity surveyors, lawyers, architects, and engineers. In the UK they designated a fresh class of adjudicators by choosing very senior people from these disciplines who would be able to make a determination on the dispute. They established a core group of people and then created an education program so that others could be educated and get a license. Once they had the original group and others who had qualified, they had a sizable group and a roster. The rule was that once a notice of adjudication was delivered, the parties had seven days to agree on the adjudicator. Neither party has any influence over the rota.

It was discussed that the foundation for any successful ADR process is a neutral third party. In order to maintain the neutrality, it was suggested that the Review could recommend that the Ministry of the Attorney General maintain the roster of adjudicators.

As a matter of principle, AMO explained that municipalities would prefer that adjudication be optional, as opposed to mandatory.

AMO suggested that there be scoping for adjudication to eliminate any opportunity for a party to game the system (i.e. some form of parameters or a threshold for usage). There is some sensitivity from municipal perspective if claims of all nature are included in this process.

The Review explained that in the UK, residential projects are outside the scope, but it has been working so well that they have been talking about expanding it.

6. Prompt Payment

According to AMO, municipalities are not against prompt payment. AMO explained that the issue is prompt payment without certification of the work. From AMO's perspective, there were elements of the Prompt Payment Act, 2013 ("Bill 69") that were untenable and unworkable. Once payment is certified, municipalities agree that payment should be made. The concern with Bill 69 related to the arbitrary timelines, and payment based on estimates. From an accountability point of view, AMO felt that the payments would be arbitrary and result in public criticism.

The Review has heard from some contractors and subcontractors that since the Act was last revised, the degree of complexity of projects has increased greatly. Viewed from the municipal perspective, AMO suggested that this means they have an enhanced responsibility as stewards of the public purse to make sure that the more complex process is properly managed at every stage.

The Review has heard that from the perspective of some stakeholders, they understand this, but see a progressive elongation of the time it takes to process a draw request. From owner stakeholders, the Review has heard that draw requests are not properly completed by contractors and they are sent back for correction before the contractor can get a payment certificate.

With respect to counting timelines in prompt payment, certain stakeholders want to count the delay from the submission of the progress request. The owner stakeholder groups have said you cannot start counting from the submission of the request but rather, you should count from the approved payment certificate. According to AMO, many would agree that a 30 day time line is ideal from a policy perspective, if you can achieve it while still satisfying other policy objectives.

AMO reiterated that municipalities are responsible to ensure that the project is done correctly before they make any payments. They would not object to a way to do it reasonably. It was suggested that many municipalities have tried to do fair pay processes but there must be accountability to certification and an ability to ensure that the work is done correctly.

AMO stated that when a municipality receives a large grant from federal and provincial governments, they are accountable. The project is audited and reports go to the federal and/or provincial government. If there are discrepancies, the municipalities do not get the money. They must make sure everything is done correctly. For large scale projects, attention to detail is very important. There is scrutiny and accountability from taxpayers, different orders of government, and the media.

A very large stakeholder for local municipalities is the sub trades. They often reside in those communities and it is a bad story if municipalities are not paying them.

The Review team is very sensitive to the tension between freedom of contract and regulation. The question is to what degree, from a policy perspective, the province should regulate credit in the construction industry. AMO suggested that the Review

needs to find a balanced point that does not unreasonably constrain the ability of municipalities to manage these projects.