Construction Lien Act Review Consultation Meeting Summary
Association of Municipalities of Ontario, City of Toronto, City of Mississauga, City of Brampton, City of Thunder Bay, Ontario Public Buyers Association, Toronto Transit Commission, Toronto Community Housing Corporation, Region of Durham, Halton Region, Peel Region

November 25, 2015 (12:00 p.m. to 4:00 p.m.)

Attendees: Samantha Ambrozy (Toronto Transit Commission), Tiffany Canzano (City of Brampton), Wendy Law (City of Mississauga), Monika Turner (AMO), Tanya Litzenberger (City of Toronto), Howard Krupat (TCHC), Daniel Kuzmyk (York Region), Bill De Angelis (City of Toronto), Michael D'Andrea (City of Toronto), Nadia Koltun (Thunder Bay), Randy Rason (Brampton), Nicholas Caughey (Halton), Arend Wakeford (Durham), Tony Cetra (Peel Region), Bart Menage (OPBA by phone) (collectively, the "Municipal Stakeholders")

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 the Ontario Public Buyers Association

The Ontario Public Buyers Association ("OPBA") was pleased to be listed as a stakeholder. It has shared the issues for discussion with its members. As a not-for-profit association, it endeavoured to solicit feedback from its members. The comments made at the meeting may not be consistent with all of the membership. The OPBA endorses the City of Toronto submission, as it most closely represents the concerns of the membership.

The OPBA is familiar with the process that began with Bill 69. In its view, prompt payment should be dealt with on the contract side, as opposed to through legislative means. It would be too difficult to develop a one-size fits all approach in legislation.

ADR and payment certification were areas identified in the discussion by the owners group including OPBA. These are key issues for the membership and areas where there has been the most concern. The OPBA looks forward to remaining an active participant as the Review moves forward.

2. Lienability

In the City of Toronto ("Toronto") submissions, there is a concern about the definition of price, including damages for delay in price. The issue is that the holdback amount does not include any amount that could be attributable to damages. By way of example, Toronto explained that if the cost of bricks is $100, the holdback is $10. If the labour

cost is $100, the holdback is $10. If delay and costs are $50, this raises the cost to $150. If you include a delay claim in a lien claim, the cost would exceed the holdback.

Certain Municipal Stakeholders agreed with Toronto. According to the Municipal Stakeholders' noted that contractors include loss of profit or lost opportunity to bid as part of their delay claims. The lien amount should be limited to the supply of goods or services.

The Review noted that other stakeholders are concerned with the lack of clarity around determining what you can lien for and what you cannot. Some stakeholders have suggested that delay claims should be included and others say they should not.

According to some of the Municipal Stakeholders, one person's delay damage is another person's implied request for additional services. It is difficult to get the courts to make early decisions on these claims.

With respect to delay damages, the Municipal Stakeholders suggested that they try to distinguish between direct and indirect costs when looking at an attempt to lien for damages as opposed to something else.

The Review has heard from some stakeholders that the case law is not clear on direct versus indirect costs. In addition, consequential damages are also debated in the case law. This also comes up where the contract is deemed to be invalid and the claim is put forward on a *quantum meruit* basis.

The Municipal Stakeholders raised the issue that a repair is lienable and conversely, maintenance is not. Sometimes they are combined. In certain circumstances, it was suggested that one may have construction and then maintenance and repair included in the contract. The stakeholders suggested the Review consider clarifying these concepts.

One Municipal Stakeholder indicated that the Act works in its present form.

The Municipal Stakeholders explained that there may be a more efficient way to provide notice of lien to the owner. Once the owner receives notice, they can effectively deal with it. In addition, when the owner receives the written notice of lien, tax is an issue that is considered. The Municipal Stakeholders noted that it would be helpful to have this clarified by the Review.

Exemption for Municipal Property

The Municipal Stakeholders raised the issue that municipal property should not be lienable.

Several Municipal Stakeholders suggested that there was no difference between municipalities and the Crown. Further, they stated that the difference was an artificial construct. It was suggested by one of the Municipal Stakeholders that the original rationale for treating these two entities differently is that the Crown is obligated to pay orders in judgments. The Municipal Stakeholders explained that this is equally

applicable to municipalities, even though it may not be codified in statute and that there is no real risk those municipalities will not adhere to the judgment.

Generally, it is understood that the purpose of the Act is to make sure that there is security for those at the bottom of the pyramid. The ability to sell the land must be available.

The Municipal Stakeholders suggested that the same rational should apply to municipally held property and specifically that, unlike the United States, an Ontario municipality cannot go bankrupt. It is local government and has the highest level of transparency of any level of government in Canada. Municipalities are governed by the *Municipal Act* with respect to financial transactions. They are creatures of the Crown, but local government has always existed and is subject to many statutes.

There is a public policy question as to whether a supplier should be permitted to initiate a process that allows for the sale of publicly held property. There is the public interest perspective in terms of whether public property can be sold.

3. Holdbacks

The Municipal Stakeholders explained that the holdback allows the owner to ensure that the work is completed. If it were a lower amount, it may not be worth it for the contractor to come back and do the work.

One Municipal Stakeholder suggested decreasing the holdback for small contracts (e.g. $100,000).

Others have said that lien claims under a certain value (e.g. $25,000) could be dealt with in small claims court or a small claims court-like process. They would therefore no longer be governed by the Act.

One issue raised by the Municipal Stakeholders was that small projects often turn into larger projects. Projects that are otherwise below a threshold may turn into emergency work and go beyond the threshold. There are jobs that get complicated and there is unforeseeable work. This would be difficult administratively. This would cause confusion as to how would the supplier know whether they have lien rights under the Act.

The Municipal Stakeholders stated that from a procurement perspective, when you put out a bid, you do not know what amount it will come back at and so the group generally was unsure of how to address this.

4. Substantial Performance and Early Release of the Holdback

IT Projects

According to the Municipal Stakeholders, with IT projects, there is no substantial performance and municipalities make payments on the basis of various testing phases. It is a totally different regime when it comes to payment. There can be rail or transit projects with IT and construction elements. This can create uncertainty about whether it is an improvement or just an IT project.

Some municipalities err on the side of caution and still apply the Act, but it is difficult to do so. The Municipal Stakeholders were unsure how to determine when the lien period would end for IT contracts. The way IT contracts are structured is very different. A lot of IT projects include long-term maintenance payments. With ongoing IT services, it is one big contract. It was not clear to the Municipal Stakeholders how to address this issue.

Phased Release of the Holdback

The Municipal Stakeholders stated that the Act should look at phases as having separate lien obligations under them. You certify a certain phase of work and then there is a completion of that phase. If there are phases there could be release of the holdback as each phase is certified. For example, there may be a multi-year repair contract that undertakes the same work on different buildings. There could be a release of holdback once the work on each building is completed.

The Review has heard from some stakeholders about the idea of phased release of the holdback. Owner groups have said this is difficult to administer. Another idea is annual release for multi-year projects.

The Municipal Stakeholders noted that there should be flexibility under the Act. There should be restrictions on how often release can take place. Generally, owners are supportive of phased release but it should occur at a logical point in the project. The problem is defining the phases. It must be logically connected to the project and the progress of it according to the Municipal Stakeholders.

With respect to early release of the holdback on a subcontract, the Review has heard that subcontractors want their holdback earlier and if we could do it in phases, this accomplishes the goal of paying them, while protecting the owner from liability.

The Municipal Stakeholders noted that if they keep stripping away the holdback, there is nothing to force the contractor to come back to the job. It was submitted by the Municipal Stakeholders that there should be permissive phased release.

The consulting community has several representative stakeholder groups that have said they are involved in design work and have to wait a long time to get their holdback. Sometimes 70 to 80 percent of their work is in the design phase. They have expressed to the Review a desire to have this work treated as a separate phase. Their mandate still continues after the design phase, but it may just be 20 percent of their work.

Certain Municipal Stakeholders support phases for any contractor, including the consulting community as it recognized the issue but noted that not all municipalities treat consultants the same way. Design work is a very distinct phase in design-bid-build projects.

The Municipal Stakeholders stated that in practice, there is a mixed scope of practice where the consultant provides some services that are lienable and some that are not. Certain Municipal Stakeholders disagreed stating that in larger areas, this does not occur very much anymore. Rather, most of the work is lienable under the heading of ‘construction management’.

There was a discussion about the fact that as an owner, there is a risk if you do not retain the holdback. If you do not have the fund maintained there can be liability. The Municipal Stakeholders stated that it would be helpful if there were a better delineation between what is lienable and what is not, particularly on more complex projects.

Some Municipal Stakeholders stated that from their experience, design work is no more than 70 percent of the consultant's work. Rather, a great deal of the consultant's work is focused on certifying the work as the project progresses. If the design is incorrect this causes a backlog and people do not get paid. If there is not enough money in the reserves, it is very difficult to bring people back to the negotiation table.

Certain Municipal Stakeholders suggested that lien issues only occurred on about one percent of the projects and that of those lien issues, there were often issues related to vendor performance. Specifically, certain Municipal Stakeholders stated that it should be tougher for non-performers to enter the industry and not pay their respective subcontractors.

Mandatory Release of the Holdback

Many of the submissions do not support mandatory release of holdback. When Bill 69 was being considered, the mayors and councillors did not want release of holdback to be mandatory because it is not flexible and particular to the project. The commentary from elected officials and senior staff of the Municipal Stakeholders members was that the work should be done to specifications and verified because it is public money. The prospect of an automatic payment regime was a significant issue in relation to Bill 69 according to the Municipal Stakeholders.

Municipal Stakeholders submitted that, regarding the release of the holdback, there were significant administrative burdens. Generally however, there was an interest in doing phased released in terms of the context of the contract.

Set-Off Rights

Municipal Stakeholders stated that owners do not want to lose set-off rights. If this is taken away, the contracts would be amended to address deficiencies. The Municipal Stakeholders suggested that the current status quo as it relates to the holdback and set-off should not be changed.

The Review has heard that some stakeholders view the holdback as a fund that the owner retains to the benefit of the contractors. In order to access it, the contractor must preserve a lien. If they decide not to preserve it, they have an expectation that the funds should flow down through the general contractor to them.

Other stakeholders have suggested that from owner's perspective, once the holdback is no longer a holdback because liens have expired, it can be used as an incentive mechanism to motivate the contractor to complete the punch list. If contractor does not complete the work, then rights of set-off could be asserted. The extent of the punch list is driven by the project administrator. There will be more issues with deficiencies on smaller projects where there is less efficiency and the stakes are lower.

Certain stakeholders have expressed the view that there are situations where the punch list issues get bogged down by minor deficiencies that often would not be present. If the relationship between an owner and contractor has broken down and the project reaches this stage, the administration of the punch list becomes ground zero of end of the relationship.

Some of the Municipal Stakeholders explained that certain subcontractors are taking issue with owners when they should take issue with the contractors. The Review has heard from some stakeholders that the big contractors have 'pay when paid' provisions in their contracts and there is no obligation to pay the subcontractors until the money flows down.

The Municipal Stakeholders discussed that if the owner does not pay the contractor because of deficiencies, the general contractor should still pay the subcontractor if they were not responsible for the deficiency. The owner should not be responsible for making sure that the general contractor is paying the subcontractor. A concern was raised that if owners have to release a holdback to a contractor when they owe the subcontractor money, taxpayers may have concerns.

5. Preservation, Perfection and Expiry of Liens

According to the Municipal Stakeholders, there should be a form for written notices of lien and the proper criteria should be included in the form. Certain Municipal Stakeholders agreed with the OBA Section Committee submission on creating a written notice of lien with the ability to cross examine on it. There could also be a form for the withdrawal. Contractors would still need to lien properly or the lien rights will expire.

Other Municipal Stakeholders suggested that there should be notice to the legal department of the municipality because it is important to know that contractors are not getting paid so that they do not put a lien on the property.

The Review has heard from some stakeholders that there should be no written notices of lien. The issue of service has been brought up on various occasions by various stakeholders. The Review has also heard submissions about who the notice should be addressed to. The Municipal Stakeholders explained that many municipalities do not have a city solicitor, so some Municipal Stakeholders suggested sending a written notice of lien to the clerk as a mandatory statutory provision.

According to the Municipal Stakeholders, even if the Review does not exclude municipal land it needs to address premises that liens attach to and the types of premises that liens do not. This issue applies to railways and utilities by way of example.

The Toronto submission suggests altering the language of substantial performance to include consulting work. There should be the ability to release the holdback even if the project is not ready for use yet. Work may be stopped for an excessive period of time and if there is something that is published, the holdback could be released.

Other Municipal Stakeholders disagreed with this suggestion because the property needs to be ready for the intended purpose as a crucial piece of substantial performance.

6. Proof of Financing

Some stakeholders have told the Review that they want to see proof of financing to ensure that the budget money is in place. For example, a tender may be issued before the budget money is in place and the contractor is asked to hold their price for a year. The contractor ends up bearing the risk.

Some Municipal Stakeholders noted that they consider this situation would happen very rarely. It was explained that a project cannot go out if the money has not been approved by Council. There could be a situation where you tender and the project is more than you thought it would be.

According to the Municipal Stakeholders, each municipality has its own procurement rules and by-laws but the basic rules are the same. Contractors have the ability to ask about funding during the procurement process. If municipalities publish how much the project is worth and then tender it, the bids would be very high.

7. Prompt Payment

The Review has received a lot of research material on prompt payment. Prompt Payment Ontario ("PPO") conducted a trade contractor survey report which deals with the issue of late payment being a systemic problem in Ontario in the construction industry.

Municipal Stakeholders suggested that payments should be made and timelines should be reasonable so that a municipality can actually make the payments.

Payment Process for Municipalities

According to the Municipal Stakeholders, there are certain steps to be taken in making payments. They must ensure that there is a project and work has been done, in order to avoid fraud. If there is auditing on a project, there must be time for that. The payment certifier may certify and the project manager may agree, but another body may double check before the payment is processed. There must be realistic timelines. Certain Municipal Stakeholders stated that they want to flow money and ensure that payments are made.

The municipalities must ensure that there are no claims for liens. There may be liens on the property and roadway. Invoices must be certified and there cannot be a deemed approval provision. Payment can only be made for work that is done. Municipalities can ensure that project managers make the payments sooner.

One Municipal Stakeholder noted that getting payment guaranteed within a certain amount of days cannot be done in the public sector. When an invoice is submitted, consultants take an average of two weeks to review it and then it goes to the

municipality. This process could take one week. It then goes to check run, which takes up to two weeks. This all assumes the invoice is certified as correct. Most of the time, the invoice has to be changed.

The Municipal Stakeholders suggested that there must be a different process for the public sector. The timeline must address the *Municipal Act,* deal with the financing department and include a process for construction that is different than the regular process.

The Review has heard from some stakeholders that cheque runs and timing in an electronic banking age should not take so long. The Municipal Stakeholders explained that some smaller municipalities have limited staff resources.

For example, it was noted that in respect to smaller municipalities there are maybe only one or two people doing this work. Some Municipal Stakeholders agreed that contractors should be paid and it takes measures to meet the deadline negotiated in the contract.

Certain Municipal Stakeholders suggested they would prefer that payment dates be negotiated because it allows for flexibility in meeting the time periods. The payment deadline in its CCDC is twice or three times as long (45 or 60 days and occasionally 90 days). In smaller municipalities there may only be five or six contractors. They come to the municipality if they want work and they make a good profit.

The Municipal Stakeholders explained that it should be clear that in the last five to ten years there has been a change in the way things are done in the municipal sector. Governments are tying funding to capacity and the ability to deliver. You get the work done and payment will be made quickly to motivate the contractor. Funding in the public sector is tied to completion. The process has to be dealt with so the financing department can do a check run for construction.

Certain Municipal Stakeholders noted that need to make sure that the payment is certified. There are lump sum and unit price contracts. For unit price where there is no dispute, there is no reason why standard payments cannot be process in their course. The clock should start once there is agreement between the owner and general contractor. For lump sum, if there is agreement on when work has been done, the clock should start ticking from that point.

The Review has suggested that the Bill 69 approach speaks to one part of the prompt payment equation. It was attempting to regulate the ordinary payment process through statute. It tried to impose very finely sliced time limits on the steps that go into payment certification and the payment process. This relates to projects where payment occurs in the ordinary course (e.g. monthly draws).

There is a second aspect to prompt payment that may be characterized as the “gridlock” scenario. Under this scenario, the project has encountered a major dispute and is in delay. There are damages at every level.

There has been unanimous agreement from the stakeholders to date that prompt payment has these two aspects. When you look at the ordinary course aspect in the United States, the first piece of prompt payment legislation was at the federal level. The states then began to pass similar legislation. These pieces of legislation are not homogenous.

The Review has heard there are different types of prompt payment legislation and some are less intrusive than others that focus on elements of the process that may not disrupt internal owner procedures.

The Review is looking at what can be done to incent people appropriately and keep funds flowing. It is a tension between freedom of contract and statutory regulation. The Act currently imposes restrictions on freedom of contract (e.g. non-waiver provision and holdback). The tension is how much you regulate the conduct of the parties. It is about trying to strike a fair balance that allows necessary processes to occur.

The Municipal Stakeholders stated that there has been a growing emphasis on funding only being provided if the project is completed. There is a desire for 'shovel-ready' projects. If there is a requirement, it must be post-certification and it cannot be done in isolation of financial legislation related to municipalities.

Municipal Stakeholders were concerned about the tight timeline in Bill 69 and the right to terminate or stop work. This raised serious concerns. Bill 69 would have required 30 days for payment, and the Act has 45 days. Bill 69 was about making sure money flows. The Review has heard that the current Act puts an onus on subcontractors to bear the risk of whether the money will flow or not.

8. Adjudication

The Review discussed the concept of Adjudication that had developed out of the United Kingdom in the context of the construction industry. This process has been suggested as a way to unlock the "gridlock" issue. Most of the stakeholders support this idea, some are still considering it.

There could be thresholds and certain classes of work could be excluded (some jurisdictions exclude domestic construction contracts). The timeline for determination could also be adjusted. Different jurisdictions do it very differently.

The Review has not yet considered issues around whether contractors would be required to continue to work through the adjudication process and how it would work with lien rights. These are issues that they will have to deal with.

Stakeholders suggested that the Review would need to consider the weight that the adjudicator's decision will have in a subsequent court decision as a disincentive to re-litigating.

Dispute Resolution Boards

One Municipal Stakeholder recently completed a project where there was a dispute resolution board ("DRB") provision in the contract. The DRB was used several times to unlock the gridlock. They completed a very large project with no lien claims or litigation. They lost more than they won, but there was a resolution.

Certain Municipal Stakeholders do a lot of DRBs, with mixed success. It depends on nature of the dispute and expertise of the board members. Adjudication is different than the dispute resolution board process in that a DRB is where you have a standing panel who are not lawyers as an ongoing process (with associated costs that large projects can sustain). The adjudication process could apply from the smallest project to the largest.

With respect to dispute resolution, some Municipal Stakeholders prefer ADR to be elective and not mandatory.

9. Trust Provisions

Municipal Stakeholders are opposed to the idea of mandatory holdback accounts. It is unnecessary to have a requirement to keep a bank account for those funds because the money is there and municipalities are solvent.

The Review noted that the account could be an interest bearing account. In British Columbia, such accounts are jointly administered by the general contractor and the owner. No money is paid without both parties signing off. The intention is to protect the trust funds in the event of general contractor insolvency.

The Review explained the current issues involving the statutory trusts of the Act in relation to insolvency legislation and ongoing cases on the issue.

One Municipal Stakeholder questioned how the owner would get money out of a trust account for set-off. The concern was that if it is a contentious situation, the general contractor will not sign off on the use of holdback funds for set-off purposes. If the holdback will not be paid until later, the municipality has to come up with those funds earlier in the process. If the contractor is insolvent and liens go on because of insolvency, the owner could not claim set-off. The cost of managing the account could be significant for a municipality.

Some stakeholders have suggested that the Review recommend the BC model. It is important to determine whether this creates issues for municipalities.

Certain Municipal Stakeholders suggested that there is good reason that the project bank account solution should be separate solution for the public sector as opposed to private.

There are lender concerns when you consider the financial implications. This has been brought to the attention of the Review in the context of P3s.

The Municipal Stakeholders suggested that there were concerns with P3s in how it would tie into any prompt payment as the payments are milestone based and it's difficult

to define certain aspects of the project. The Review would need to consider how to treat P3s differently and for what purpose.

Non-Waiver Provision

If it is meant to allow for opting out of certain provisions, municipalities would support the city opting out of proof of finance provisions. Generally the Municipal Stakeholders felt that in this context, the status quo was preferred.

10. Bidder-Exclusion Provisions

Some municipalities questioned the connection between bidder-exclusion provisions and the Act. The Review noted the connection to the issue of efficiency of dispute resolution.

One Municipal Stakeholder explained that it was fundamentally opposed to the idea that the bidder exclusion denies people access to the courts.

It was suggested that not all bidder exclusion provisions are written the same and not all contain the same criteria. Municipal Stakeholders suggested that there can be a fair and balanced bidder exclusion provisions that are enforceable.

Contractor Performance Evaluation

The Municipal Stakeholders explained that contractor review and analysis is an important part of what many municipalities do. They analyze the performance of the contractor and make determinations based on that in terms of their willingness to work with them in the future.

One consideration is outlawing what you do not want, as opposed to only allowing what you do. If the municipality finds that contractors are in a conflict of interest then that would be an issue.

Certain municipalities have a contractor performance evaluation and public safety is paramount. It requires a formal report to council to approve the suspension. It is a due process that is not taken lightly. The Municipal Stakeholders stated that this issue should be separate from the Act.

Municipalities must be able to manage the relationship, measure performance and take steps where there are contractors who are bad actors.

11. Surety Bonds

Certain Municipal Stakeholders were fundamentally opposed to a mandatory requirement for surety bonds because it undermines freedom of contract. It should not be a legislated regime. This is a best practice.

In the United States you cannot lien a public project and the countervailing initiative is to require labour and material bonds.

One Municipal Stakeholder suggested that there could be a false claims provision in the Act similar to what is used in the United States. This was mentioned in the Charbonneau Report. From a policy perspective, it would be a good check and balance to the other parts of the Act. There should be a disincentive for contractors to make inflated lien claims.

12. Miscellaneous

Municipal Stakeholders suggested that consideration could be given to recommending the development of a practice guide or interpretation bulletin so that people can understand the Act once it is amended. This would be useful for lawyers and non-lawyers.