EXPERT REVIEW OF ONTARIO'S
CONSTRUCTION LIEN ACT

Commentary from
Ontario's School Boards Associations

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October 23, 2015

The following comments have been prepared as part of the Stakeholders' submission for the Expert Review of Ontario's Construction Lien Act (CLA). The information provided in this report is based on the July 15, 2015 Information Package, specifically Part C *Issues to be Considered by the Review*, provided by the Expert Review team.

The notes below provide a framework for discussion at the Stakeholder interview scheduled for October 29, 2015.

1. Lienability
   Definitions. Improvement. Paragraph (b) should be revised to read: any construction, erection, *repair* or installation,… Delete the word *essential* to the normal or intended use,… ;
   Services or materials. Delete this definition;
   Supply of services. Paragraph (b) should include consultants services throughout the project ie construction management;
   Owner. The definition should not have an impact with education projects
   Comment. Section 14 (1) references the ability for architects to lien projects. A similar note should also reflect the ability for professional engineers to lien a project.

2. Holdback and Substantial Performance
   a. Leave the lien holdback at 10%, as sufficient funds need to be retained for liens/ setoffs;
   b. Release of Holdback is acceptable for majority of school construction projects;
   c. Release of Holdback should be effected as per the defined contract payment terms, and not be mandated nor have the release terms defined under the CLA. The immediate release of the holdback upon expiry of the lien period was one of the flawed items in the Prompt Payment Act, as it would not be practical considering verification and review processes

required by Owners. Considering other forms of security to allow the early release of the holdback could be problematic unless the Owner were to have full control over the security ie letter of credit may be acceptable as compared to a bond which may not be acceptable collateral;

d. Finishing Holdback. Generally not a requirement with smaller projects and not applied to projects;
e. Minimum requirements for Substantial. The current percentage amount is reasonable. Providing a higher amount for Substantial would be problematic as it would allow for an earlier release of funds. The impact would be that less work would be completed on a project and could result in a protracted contract completion.
f. Add details to Substantial Performance. No. If changes are required they can be defined within the construction contract, and could end up being limiting if included in the CLA.
g. Mandatory Certificate of Intention to Release Holdback. Including this certification in the CLA would not be of much value and would add in another step in the process

3. Preservation, Perfection and Expiry of Liens

Generally

a and b. no comment (n/c)

c. Posting security and vacating liens is a supported process and allows for the payment of progress draws;

Preservation

a. Recommend that the preservation period be extended from 45 to 60 days to allow the subcontractors additional time to preserve the lien;
b. Written notices of lien are supported as it would allow for the possible resolution of a claim prior to the formalities and expense of registering a lien;
c. Mandatory certification of a subcontract. This recommendation is not supported as the Owner is generally not be privy to the terms of the contract between the contractor and subcontractors. It would be a substantial task to Owners to manage this change and in the end may result in more complications to the certification process;
d. Abuse of lien rights can be supported by promoting the timely payment to subcontractors ie eliminate Pay-when-paid clauses. Allowing for written notice of lien would also assist in promoting timely payments. These mechanisms would allow for a reduced number of costly liens. Endorsements would not provide much value, similar to Statutory Declarations;

e. n/c

Perfection
a-c. n/c
d. Payment timing should be left within the terms of the construction contract and not the CLA;

Expiry under Section 37

a. A two year limitation period is generally acceptable;
b. n/c

Requests for Information
a. The information requested is generally reasonable and beneficial, however, is there a need for subparagraph 39 (1) 1. v. ",.., liens shall arise and expire on a lot-by-lot basis"?

4. Prompt Payment or Timely Payment for Construction Work
   a. The prime causes of payment delays pertain to progress draws being submitted to the Owner that are incomplete or inaccurate. Payment terms and contractual obligations for submitting progress draws vary from Owner to Owner, and recommend that the freedom of contract remain with the individual contract terms, and not be defined in the CLA. Terms in the Statutory Declaration form CCDC 9A are ambiguous and the certification language needs to be amended and made more transparent. Other details pertaining to improving payment terms, such as instituting a Prompt Payment Code are noted in the May 13, 2015 report, *Ontario School Boards Associations –Review of the Construction Lien Act as it relates to Payment Issues within the Construction Sector*.
   b. Release of Holdback timings and obligations are best defined within the construction contract. There is a need to allow for the right of set-off, and payment terms for the holdback should be as defined within the contract and not the CLA. Note: it is better practice to consider a separate deficiency holdback for specific construction problems rather than setting off the costs to correct deficiencies with the lien holdback. This practice does not then negatively impact the subcontractors that have satisfactorily completed their work.
   c. Prompt Payment Provisions would be better defined as Timely Payment, as the term *Prompt Payment* has negative connotations as part of the proposed flawed Prompt Payment Act. Opportunities for timely payments are outlined in the *Ontario School Boards Associations* report noted above. It is again important to note that different Owners have varying requirements and expectations that are best left within the freedom of contract, and not the CLA.
   d. N/c

e. Pay-when-paid and Pay-if-paid clauses. Yes, these terms should be disallowed in construction contracts as is the case in numerous other jurisdictions.

5. Proof of Financing

   These terms for proof of financing are often eliminated from the standard CCDC2 contract and therefore should not be included in the CLA

6. Trust Provisions

   a,b,c. Mandatory holdback trust accounts would create onerous limitations in managing the accounts as well as limiting the Owner's rights of set-off. They should not be included in the CLA.

7. Interrelationship with Insolvency Legislation. n/c

8. Priorities. n/c

9. Public-Private Partnerships. n/c

10. Non-Waiver

    a. The terminology under Section 4 of the CLA is acceptable.

11. Bidder Exclusion Provisions

    a. These are procurement terms and not a construction contract or CLA matter.

12. Alternative Dispute Resolution

    a. Effectiveness of available procedures are generally acceptable with the consultant's interpretation, negotiation and mediation. Litigation creates added challenges and costs.
    b. Adjudication for construction disputes, would be another alternative for resolution of problems.
    c. Mediation of lien actions is generally available with the contract terms and there would be limited benefit by implementing mandatory mediation for lien actions.
    d. Arbitration mechanisms are included in the CCDC2 contract and do not need to be defined in the CLA
    e. Dispute Review Board would be a very good process to address construction disputes.

13. Summary Procedure

    a,b,c. n/c

14. Surety Bonds and Default Insurance

a. Requiring labour and material payment bond sureties to promptly pay undisputed amounts would be a good practice, however the processing of a bond claim is often very restrictive.
b. Require L&M bond payees to complete their subcontracts would be a good practice.
c. L&M bonding should not be made mandatory for all public projects. This should be left open as part of freedom of contract and would allow for other approaches including default insurance. Note: for some smaller projects, firms are unable to get bonding.
d. n/c
e. Surety bonds should be allowed to be provided electronically.
f. Bond claims should be subject to adjudication.
g. Making payments by Owners directly to subcontractors and suppliers can be a challenge as the Owners may not be aware of the contractual terms between these parties and the prime contractor.
h. Recommend leaving the CLA terms open as it relates to bonding obligations or opportunities for default insurance.

15. Miscellaneous
    a. Comments have been noted above regarding technical irregularities with the CLA.
    b. Use of letters of credit, default insurance, or other methodologies need to be considered over the restrictive practice of providing project bonding. This would help accelerate the cash flow to the subcontractors on a defaulted contracts.
    c. n/c
    d. n/c
    e. Yes, periodic reviews of the CLA would be beneficial especially if significant changes are made to the CLA.