Supplementary Submission to the Independent Review of the Construction Lien Act

DECEMBER 23, 2015

This supplementary submission to the Independent Review of the Construction Lien Act is in response to Counsel's request for Consulting Engineers of Ontario's (CEO) position on the potential for Ontario's construction sector payment system to include the phased release of holdback funds on construction projects.

To inform its response to this possible change CEO surveyed its member firms via its weekly electronic newsletter.

CEO's members reinforced that the *Construction Lien Act* (the Act) currently fosters a payment system disproportionately favouring owners-through the mandatory withholding of project holdback funds without the reciprocal requirement for the timely release of those funds. For those projects that CEO members undertake involving construction-related work, it is our position remains that any holdback funds taken should be returned within the current lien right period of 45 days, once that work has been certified as complete and correct.

Feedback we received also reiterated that the majority of project services provided by professional engineers should not be subject to the taking of holdback under the Act. For example, in a typical design–bid–build approach a separate engineering consultant is hired to design the proposed work and a separate contract is issued by the owner making the construction contractor responsible for the performance of the work. In this instance, an owner's desire to retain holdback under the Act until substantial performance is met by the construction contractor is not warranted; the consultant should not be held responsible for the performance of the work by the contractor. By doing so the owner is using the holdback as a warranty rather than to protect themselves from claims from sub consultants.

This same logic can be applied in situations where the owner retains the consultant to provide construction contract administration services. Provided the agreement leaves the contractor responsible for the performance of the work, retaining a holdback from the consultant in such instances is inappropriate as the completion of the construction contract is not the responsibility of the consultant.

Given this response CEO stresses that for professional engineers any amendments to legislation impacting the payment system for construction in Ontario must emphasize the owner obligation for timely payment for services received. Any amendments must also clearly define the conditions under which terms such as holdback are to be applied-in a consistent, timely and just manner. It is not clear to CEO's members how a system implementing a phased release holdback funds could be effectively implemented.

Thank you for the opportunity to provide these additional comments as part of our submission to the Independent Review of the Act.