Ontario Association of Architects

Construction Lien Act Review

Ontario Association of Architects

November 6, 2015

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Who we are

- Self-regulating, self-governing profession established under the *Architects Act*
- Principal objective established under Act to "regulate the practice of architecture…in order that the public interest may be served and protected"
- Set standards of practice, performance and conduct and entry to the profession
- Supports profession with tools & resources to ensure continued competence
- Provide feedback to government and stakeholders on key issues affecting the profession

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The Architectural Profession

- 3,704 architects; 1,450 intern architects; 333 student associates – 1,726 practices
- Majority of firms are small practices
- Architectural profession offers a very diverse range of services and specialties to a wide variety of clients, including other architects
- Architect's role as 'Payment Certifier'

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History/Overview re. CLA:

- OAA pursuing amendment since 2003
- Tentative agreement on amendment reached shortly thereafter
- Commitment from Government through 2005-2006 to introduce amendment but not actioned
- Amendment revisited during *Open for Business Act* but not actioned
- Amendment specific to architects
- Amendment is non-controversial

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Division of Contract or Sequential Contract

- OAA 2005 amendment (as accepted previously by Government) proposed to divide the architect's contract into two phases
- This recognizes the two distinct phases of service an architect performs either independently or under one larger contract
- The amendment was written upon instruction for a non-controversial "surgical" amendment

Why this Matters

- Architects are one of the few entities that are involved from the conceptualization phase through to substantial completion and beyond (e.g. end of warranty review)
- Despite the design phase being distinct and completed, funds are held throughout the duration of the entire contract
- Funds are held unnecessarily and for longer than all other parties

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Release of Statutory Holdback

- There is a lack of legal clarity regarding the applicability of substantial performance to an architect's services
- This translates into a lack of clarity around the timing of the release
- To provide legal clarity, it should be made explicit that substantial performance does apply
- Substantial performance for the phases of an architect's services should then be clearly defined

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Criteria to Determine Substantial Performance

- Lack of clarity currently exists regarding the “triggering mechanism” for substantial performance and/or completion of an architect’s services
- Important to recognize 2005 amendment was written before increased growth in fast-track/design-build/construction management delivery processes
- Special consideration required to address impact of these growing forms of construction delivery on substantial performance for an architect’s services
- OAA has proposed specific criteria to address the issue

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Other Recommendations for Consideration

- The OAA is open to pay-when-paid provisions provided prompt payment could be guaranteed. Otherwise, elimination of clause would perpetuate undue financial hardships
- The OAA supports separate interest-bearing trust accounts
- The OAA would like clarification that lien rights extend through to substantial performance
- The Act must be updated for inflation
- The Act must be clarified regarding Project Creep

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Concluding Remarks

- Appreciate the opportunity to meet and recognition of OAA and architectural profession as key in this review
- OAA recommendations remain consistent with original advice from the Ministry of the Attorney General, and remain focused and non-controversial
- Available to provide additional information and assist as needed