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SERVICE 35 YEARS EXCELLENCE

November 18, 2015

Attention: Bruce Reynolds
Borden Ladner Gervais LLP

VIA EMAIL cla-review@blg.com

Dear Mr. Reynolds,

Re: Freedom to Contract and Milestone Payments

During the recent COCA presentation to the CLA review consultation panel we discussed consideration to certain types of contracts or certain categories of owners be exempt from CLA or proposed prompt payment legislation and allowed freedom to contract terms.

Specifically we discussed the use of agreed milestone payments in lieu of monthly construction draws. It is clear to see the interest that those who own or finance construction projects have in divesting construction risk with milestone payments. However, I don't believe I adequately articulated the potential devastating consequences of such terms on sub-trades.

It was mentioned that General Contractors are somewhat indifferent to project payment terms as they usually only finance project management and administrative costs during a project. However, sub trades pay for their labour weekly and their material monthly and bear the lion share of the project costs. Typically sub-trades finance their businesses through lines of credit (LOC) with banks which limit LOC's calculated as a percentage of Accounts Receivable less holdbacks and over 90 day balances. If they are unable to make monthly draws paid in terms they would unlikely survive the duration of a large contract based on milestone payments. Alternatively, if sub trades were to draw monthly, and any amount of a project's receivable remains unpaid after 90 days, banks typically would not consider any part of that project's receivable for their line coverage calculations.

It was discussed that costs and risk of financing would be considered by sub-contractors when projects are bid. The answer is possibly, however frequently subs and usually subs of subs are not availed enough time or even access to bid documents outside their scope where these terms usually reside. Also, the form of the contract is frequently not presented to sub trades until long after a letter of intent has been issued and the sub trade has committed its resources.

I look at the hardship experienced by sub-trades engaged with contracts such as the PanAM Tim Hortons Field where I watched the Ticats season games played while newspapers report Hamiton City councilors bragging that only 20% of the stadiums contract had been paid and IO bragged that the $90mm would not be released until "completion" (some 2/3rds of the contract). Metrolink's multi-year and multi-

station contracts that effectively retain sub trades money for multiple years and have multiple milestones hurdles that are easily frustrated by parties outside of the contract. It is easy to foresee the devastating effects of massive sub contactor defaults in the event of an owner or GC bankruptcy, an economic downturn, inflationary interest rates or a tightened money market.

I believe the principal test of both construction lien and prompt payment legislation content is - does it distribute the financial risks of construction fairly to the participants by their ability to know, control and absorb the risks? This is critical if legislation is to protect our Ontario economy from inevitable financial shocks on the construction industry. I do not believe exemption of certain types of contracts or certain categories of owners from CLA or proposed prompt payment legislation passes this test.

In the absence of improved legislation, financial risks will continue to be downloaded from financiers, to owners, to GCs and finally reside with sub trades who are the least likely to control, afford, or even be privy to the risks.

Respectfully,

BML Multi Trades Group Ltd.

Jim DiNovo
President

Cc: Ian Cunningham, COCA