January 12, 2016

R. Bruce Reynolds
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Dear Mr. Reynolds:

Metrolinx is pleased to participate in the expert review of the Construction Lien Act (the "Act") being undertaken by the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure.

Metrolinx, an agency of the Government of Ontario under the *Metrolinx Act*, 2006, was created to improve the coordination and integration of all modes of transportation in the Greater Toronto and Hamilton Area. The organization's mission is to champion, develop and implement an integrated transportation system for our region that enhances prosperity, sustainability and quality of life. Metrolinx launched The Big Move, a Regional Transportation Plan, in September 2008. Metrolinx delivers its projects through its operating divisions, GO Transit, the Union Pearson Express, and Presto, and through its other initiatives, such as Rapid Transit Initiative and Regional Express Rail ("RER").

There are many projects already underway in support of the Regional Transportation Plan. These include major transit infrastructure improvements such as the Union Pearson Express (currently in-service), the Eglinton Crosstown, Finch West and other Light Rail Transit initiatives ("LRT"), the revitalization of Union Station, building of the East Rail Maintenance Facility, network electrification, and RER. Metrolinx also undertakes track work, bridge expansions, grade separations, communications and maintenance facilities, and building of stations and parking complexes.

Metrolinx uses various procurement methods to deliver such infrastructure, including the use of the alternative financing and procurement model. Metrolinx spends approximately $1 billion a year on procurements of construction and design projects. This budget will be increased with the commitment of billions towards LRT, RER and Electrification projects.

Metrolinx has been identified as an important stakeholder in the expert review of the Act, and has carefully considered the issues raised in the Information Package provided by BLG in July 2015 (the "BLG Report"). The following are Metrolinx's comments.

1. Lienability

The definition of "supply of services" requires clarification particularly when it comes to the application and management of consulting services. Consulting services form a significant part of the work undertaken by Metrolinx. Such services can be required over an extended time to support projects. Owners must undertake significant analysis to determine if such services are subject to a holdback and whether holdback is required to be held for the duration of a contract, which could last several years. Retaining holdback is costly and committing to withhold is often done in the face of other owners where the treatment of holdback is inconsistent even where the supply of services seems lienable.

As such, the owner is often pressured to either release the hold back early or introduce a security product and contract language to reduce the risk of any early release of holdback or of not taking the holdback.

Metrolinx also agrees with the BLG Report that definition of "owner" requires clarification. The standard procedure of subcontractors to "lien everyone" is an unnecessary burden on those parties who are not responsible for payments. Metrolinx has interests in some land where title is confusing or unclear, and is often given written notice of a lien and/or a claim for lien for "improvements" in circumstances where Metrolinx is not a "payer" under the Act.

Metrolinx is of the view that the "price" that is lienable and discussed on page 2 of the BLG Report, should not include damages, delay claims, or other costs. A lien claim significantly affects the flow of funds to a project, and should only include the price of services actually supplied.

2. Holdback and Substantial Performance

Metrolinx supports the holdback amount not increasing above 10% or conversely being reduced below 10%for all lienable work. The 10% holdback ties up a significant but reasonable portion of capital and with an increase in the complexity, length, and pricing of projects, the owner bears an increased cost on these sophisticated projects.

Metrolinx is interested in reviewing phased release of holdback for projects that carry over years. It is felt the Act should be permissive to allow an owner to create the periods tied to phased completions and holdback release. As part of this discussion, Metrolinx would not be in favour of an automatic release of holdback, or a release tied to arbitrary time intervals. Metrolinx is also not in favour of removing the right of set-off under the Act.

Metrolinx has reviewed the use of holdback release bonds, and in general finds bonds costly and administratively burdensome.

Metrolinx would not support the removal of holdback for finishing work as the holdback protects both the party providing the supply and the owner.

Metrolinx would be interested to discuss increasing the financial threshold requirements for substantial performance and would want to further discuss how substantial performance is defined as it relates to consulting services.

Metrolinx does not agree with the introduction of a mandatory "Certificate of Intention to Release".

3. Preservation, Perfection and Expiry of Liens

Metrolinx has no issue with the forty-five (45) day periods for preservation and perfection.

Metrolinx is of the view that the concept of "termination" should be added to section 31of the Act, to cause lien rights to expire.

Metrolinx strongly believes that liens should continue to not attach to Crown lands.

Metrolinx would like to discuss the concept of written notice of holdback. This concept is unclear and confusing under the Act and has the result of creating its own litigious situation. Notice holdback can result in significant funds to a project being halted which in turn can result in projects failing as an unintended consequence.

Metrolinx is of the view that Section 33 of the Act should remain permissive. Subcontract certification is administratively a burden and the potential for the introduction of phased certification would further complicate the working of Sections 25 and 33 of the Act. Further, early release of subcontract holdback should not impact owner set-off rights. As well, it is practically difficult for an owner to confirm completion of a subcontract.

Metrolinx is willing to discuss the use of mechanisms to avoid abuse of lien rights. The adjudication system is fraught with abuse and excess costs.

Metrolinx is of the view that the two year limitation period is acceptable and that no further extension should be allowed.

Metrolinx is also of the opinion that Section 39 requests should be further clarified as expectations as to the information provided is often different between the requestor and the owner.

4. Prompt Payment or Timely Payment for Construction Work

Metrolinx has concerns with legislation that dictates or attempts to manage commercial payment terms. New project vehicles, such as P3's require flexibility between parties to negotiate payment terms. The Act cannot be expected to create a "one-size-fits-all" approach.

An owner should not be mandated to make payments that could be disputed or that limit any right to set-off. Certain payment processes, as required by a payee and payor, such as due diligence and certification should not be removed.

Metrolinx is also of the view that automatic release of holdback would significantly harm an owner as money could be paid that is not owed with the result of litigation to claim back monies improperly paid.

The freedom to contract is an important consideration for Metrolinx and Metrolinx would have significant concerns with any proposed prompt payment provision. We understand that while

prompt payment legislation is in place in certain U.S. jurisdictions, we understand that transportation projects are exempt from such legislation in 12 states.

5. Proof of Financing

Crown agencies such as Metrolinx should be exempt from requirements to provide proof of financing to contractors or subcontractors as financial viability should not be an issue.

Metrolinx is of the view that the Act should not address this issue. Further, any prequalification of a contractor would not eliminate a change in a contractor's financial ability or any mischief it would undertake during the project.

Metrolinx is further of the view that a contractor could default on payment to subcontractors despite any approval provided at the start of a project by a surety. Bonds are a costly product and sureties do not always respond to claims on them.

6. Trust Provisions

Metrolinx opposes a mandatory holdback trust account or project bank account for Crown Agencies. The creation of separate accounts would be administratively burdensome and increase costs. Metrolinx does not view holdback funds to be at risk under its management.

Metrolinx would be interested in clarifying and discussing the use of trust funds to deal with issues of garnishment and directions to pay third party beneficiaries.

7. Interrelationship with Insolvency Legislation

Metrolinx is willing to further discuss the issues identified in the BLG Report under this section.

8. Priorities

Metrolinx is willing to further discuss the issues identified in the BLG Report under this section.

9. Public-Private Partnerships

Metrolinx agrees that the Act does not properly address issues raised through P3 projects. The Act should address such projects, but should also allow for flexibility to allow parties to negotiate payment terms, phasing and release of holdback. Dictating the release of holdback at certain times increases project delivery risk and reduces an owner's ability to manage non-compliance. Metrolinx has a number of large, long-term projects that are currently under an AFP model that has existing payment structures and risk transfer that should be exempt from any changes to the Act.

On a going-forward basis, Metrolinx could consider the ability to reduce holdback amounts and phased release of holdbacks as the cost of financing such holdbacks on large projects is held by the taxpayer. Such discussions would require an examination of cost and risk transfer.

10. Non-Waiver

Metrolinx is willing to discuss the waiver of lien rights but initially sees these rights as meant to benefit contractors, subcontractors, owners and provide certainty into a project.

11. Bidder Exclusion Provisions

Metrolinx views the right to determine with whom it can contract with a fundamental right afforded to it as a public procurement body. It is important that the Act not restrict this right. Through privilege clauses, and vendor performance requirements, Metrolinx reserves the right to not award a contract to the lowest bidder or exclude a bidder from participating in a tender. Metrolinx is of the view that bidder exclusion provisions is outside the scope of, and ought not be addressed within, the Act.

12. Alternative Dispute Resolution

Metrolinx is of the view that the current court system does not facilitate timely or cost effective resolutions of lien matters. The system can be an administrative burden with contractors using the process to purposely frustrate bonefide claims against it and for purposes other than the resolution of lien matters.

As with Dispute Review Boards, their use varies with the quality of the members and the complexity of the issue. They can often devolve into tests of a member's preconceived solution rather than an application of facts, law and the contract.

Further, the ongoing and continuous use of arbitration, mediation or other methods during a project may appear to make sense from an expediency point of view, but it may shift a project from focusing on completion to focusing on claims management. As well, solutions to a court process should be economical and not further burdensome from a financial, timely or resource perspective.

Metrolinx initially believes that parties should be free to contract its own dispute process without any mandated system placed in an Act. Current Metrolinx contracts allow for various manners of dispute resolution. Metrolinx is very interested in an improved adjudication process.

13. Summary Procedure

Metrolinx is open to the Act addressing summary procedures. Particularly, discussion should be around the ability to appeal an interlocutory order and whether a party should be able to make a judicial review claim against such an order.

14. Surety Bonds and Default Insurance

Metrolinx is of the view that owners should be free to determine for themselves if they wish to use bonds or certain insurance products on contracts. Bonding represents a significant cost to an owner and the realization of a bond is most often an administrative burden. Metrolinx is aware that a certain government entity uses a prequalification process to eliminate the need for bonding and is further interested in such application. Such a process would reduce costs to a project and allow saved money to be used for new projects.

15. Miscellaneous

Metrolinx endorses the use of Letters of Credit with international commercial conventions referenced in their terms and for providing greater precision in setting out the technical irregularities that can be cured under the Act. As well, a periodic review of the Act should be considered as the changes undertaken as part of the BLG Report will most probably require monitoring and adjustment.

Metrolinx is also willing to discuss and review the application of consequences similar to the *False Claims Act* in the United States. False claims provisions as applied to the construction industry should be seen as a tool to obtain damages against contractors who make false claims and be a deterrent to contractors in making false or exaggerated claims.

Metrolinx appreciates the opportunity to comment on the Act and looks forward to further participation in the BLG Report process.

METROLINX

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