CITY OF TORONTO
SUPPLEMENTARY COMMENTS ON NEW ISSUES BEING CONSIDERED BY THE CONSTRUCTION LIEN ACT REVIEW
January 2016

The City of Toronto (the "City") provides the following supplementary comments to the Construction Lien Act Review (the "Review") on: (A) the shared holdback trust account issue; and (B) the New Issues List dated January 13, 2016.

(A) The Review introduced consideration of a mandatory holdback trust account or mandatory project bank account at Item #6(b) of the Information Package. The City indicated its opposition to this proposal in written comments submitted on November 19, 2015 (the "City's Submission"). At our Consultation Meeting on November 25, 2015, the Review presented the idea of a mandatory holdback trust account that would be controlled by an owner and contractor. The British Columbia *Builder's Lien Act*, SBC 1997, c. 45 ("BLA") was used as an example.

Upon review of the BLA, we note that it exempts public bodies from establishing holdback accounts (BLA s. 5(8)). "Public bodies" include municipalities and the Greater Vancouver Transportation Authority (BC Reg 265/98, s. 1(a) & (v)).

The City is adamantly opposed to any mandatory holdback trust account, particularly one being held together with a contractor. It would be more costly, extremely taxing on project administration, and would effectively erode the s. 12 set-off rights under the Construction Lien Act (the "Act"). (A contractor is not likely to agree to a set-off from a shared holdback trust account.) The loss of s. 12 rights may lead owners to retain deficiency holdbacks, resulting in less funds being paid out for each draw.

All project costs, including holdback, are accounted for in the City's budgets. Progress and holdback payments are not withdrawn until payment is actually owing. There would be loss to the City and other government entities if holdback funds had to be withdrawn from investments (or borrowed) to deposit into a holdback account for the duration of the project. As there is no risk of bankruptcy of the City, TTC or other municipalities under provincial legislation, there should not be a requirement that these entities create holdback trust accounts, whether shared with a contractor or not.

(B) New Issues List

<u>Lienability</u>

1. As indicated at the Consultation Meeting, the City is opposed to any changes to the current system in the treatment of municipal lands. If all municipal lands become exempt from registration of liens, then the burden of handling liens would shift from the Provincial Land Registry Office ("LRO") to the City Clerk's Office. Costs would also shift from the LRO

(which charges fees for registrations and searches) to the City (which currently does not charge fees in relation to road liens). An entirely new system would need to be implemented at the City, including specialized staff. The simplicity of searching PINs in the LRO would be replaced with a less precise system for locating liens (or discharges, etc), which could also lead to errors.

2. See answer to #23, below.

3. See Item #3 *Preservation* (b) in the City's Submission.

4. See Item #1 in the City's Submission on the definitions of "supply of services" and "improvement". It would be useful to have clarification for IT and service agreements particularly when a large part of the scope is a software solution or technical support. (Could the construction/improvement element in such agreements be carved out?)

5. No comment.

Holdback and Substantial Performance

6. The City supports drawing a distinction with respect to services but not necessarily tied to commencement of construction as design services may continue on. See also Item #2 (b) in the City's Submission.

7. See Item #2 (c) second paragraph in the City's Submission. The City does not support changes that may restrict an owner's right to set-off under s. 12. Any financial instrument that takes the place of cash holdback must be easily accessible. The City may consider an irrevocable and unconditional letter of credit in certain circumstances, but this should be permissive, not mandatory, and cannot interfere with s. 12. There are increased costs when using financial instruments. The City does not support the use of bonds, which can be difficult to realize on.

8. A deficiency holdback can be set out under contract and does not need to be legislated.

9. See Item #2 (b) in the City's Submission.

10. See Item #2 (b) in the City's Submission.

Prompt Payment or Timely Payment for Construction Work

11. Interest should be addressed in the contract, not legislation. It should not be punitive.

12. Professional obligations should not be interfered with by any prompt payment legislative provisions. Engineers and architects must have latitude to determine whether payment applications are complete and if there are any deficiencies in the work before certifying payment.

13. See Item #4 (a) in the City's Submission.

14. This should not be legislated. Technological solutions may improve payment processing

times but cannot replace necessary field inspection. (It could be helpful if the same/compatible programs were used for review, approval and payment by all subcontractors, contractors, payment certifiers and owners. This could potentially confirm when funds have been paid and to whom. These developments will happen in the competitive market and should not be legislated.)

15. This should not be legislated.

Alternative Dispute Resolution

16. See Item #12 in the City's Submission. Any proposal should be clearly outlined so that the City can provide proper comments. If adjudication is included in a contract, reference could be made to use the procedure as set out in the Practice Guide (see Item #15 under *Practice Guide* in the City's Submission).

    (a) It is unclear how adjudication within a lien regime might work.

    (b) This may be an issue.

    (c) This should not be legislated. It should be initially up to the parties (similar to the *Arbitration Act*).

    (d) This will depend on the project what the parties agree to at the outset.

Miscellaneous

17. The City will consider False Claims legislation but it should not be part of the Act.

18. No comment.

19. No comment.

20. See Item #13 in the City's Submission.

21. Agreed. The same terminology should be used so registered documents are not misleading.

22. No.

23. See Item #15 under *Project Identifier* in the City's Submission. Some type of identification would be helpful on all forms under the Act, including the CSP, particularly when one premises has multiple distinct projects (such as within a Wastewater Treatment Plant) or when the work takes place all over the City (such as window replacements or road repairs).

24. As indicated in answer to #4, above, the City is open to considering carve-outs for certain work, such as the IT service/software components of a contract. However, the City does not support the waiver of lien rights that could result in a supplier not having access to holdback (see Item #10 in the City's Submission). There are issues that need to be addressed for specific forms of contract, such as P3s and some other contract arrangements (for instance Waterfront Toronto doing a project for the City). This could possibly be addressed through definitions or new clauses for specific agreements rather than exempting certain

projects from the Act (see Item #9 in the City's Submission).

25. Is there a Ministry internet platform that could be used? (See for instance Ontario's Environmental Registry at https://www.ebr.gov.on.ca)

26. No suggestions, but any conflict should be clarified and resolved, if possible.

27. See Item #15 under *Practice Guide/Interpretation Bulletin* in the City's Submission. Updates to the Practice Guide and new Interpretation Bulletins could be issued periodically onto a Ministry website.

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CITY OF TORONTO

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