Ministry of Transportation

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Ministère des Transports

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Ontario

November 19, 2015

R. Bruce Reynolds
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Dear Mr. Reynolds:

Thank you for your July 15, 2015 letter to Deputy Minister Carol Layton regarding the expert review of Ontario's Construction Lien Act. Deputy Layton has asked me to provide some comments on the Information Package for Stakeholders included in your letter on behalf of the Ministry of Transportation. As a public infrastructure owner, with direct responsibility for hundreds of highway construction projects each year, the ministry is supportive of your efforts to ensure the effectiveness of this important legislation.

Ministry of Transportation Background

The ministry manages over 16,900 kilometres of provincial highway that includes approximately 2,800 bridges and 2,000 large culverts, 4 tunnels, 29 remote airports and either owns and operates or provides funding for nine ferry services. As well, there are 23 highway service centres and 1 toll freeway under private lease. The replacement value of Ontario's highways and bridges is approximately $82 billion.

The ministry spends about $3 billion on the design, construction and maintenance of the provincial highway system on an annual basis. The ministry uses a variety of contract models to deliver its projects, ranging from the traditional design-bid-build model to alternative project delivery models such as the design-build contract or public-private arrangements. Our comments are primarily focused on the traditional model, unless specifically stated otherwise.

The ministry annually tenders approximately 350 major and minor capital highway construction contracts. On average, we generally receive two to three valid liens a year concerning a ministry construction project and to date no liens have proceeded to trial.

We regularly seek consultations about our construction activities and contract documents with the Ontario Road Builders' Association (ORBA), who represent the interests of contractors and goods and services providers.

We also participate in the coordination of the Ontario Provincial Standards for Roads and Public Works, which details the construction requirements of standard specifications and drawings used in highway construction.

Given this experience, ministry staff and legal counsel have reviewed the Information Package and look forward to meeting with you on November 25, 2015. Before our meeting, I would like to offer a few perspectives that represent our initial thoughts relating to some of the issues identified in the Information Package and being considered by the Review. This is not intended to provide a comprehensive account of the ministry's comments, so I have not responded to all of the issues identified, however, during our review several themes or general topics of interest became evident. Our comments are based on these themes.

Undue Increased Administrative Procedure

The administration of large public infrastructure contracts requires significant effort for both owners, as well as industry partners.

The Construction Lien Act requires several stages of administration by owners and contractors along with defined time commitments. As a result, the ministry is concerned with any new administrative procedure that won't significantly improve either the lien resolution process or the associated risk profiles that may require engaging in a legal process. Also, we're concerned with the possibility of changes resulting in delays for payment and increasing other expenses related to the project.

Our specific comments are as follows:

2(b) Multiple Dates/Points for Early Release of Holdback.

Adding mandatory provisions for early release of holdback will create multiple administrative processes, increase inefficiencies, and timelines to confirm quality of work, invoicing, lien status and to process payments.

The ministry supports the flexibility to allow for the early release of holdback at the owner's discretion with the contractor's agreement. In fact, we employ this approach in our traditional construction contracts under the current legislation.

An optional approach may be to allow owners to work within their contract scheduling and payment terms and conditions.

We believe from an industry perspective the above methods will allow funds to flow most efficiently to contractors and then down to subcontractors and suppliers, reducing contractor and owner financing costs and thereby reducing overall project costs.

2(f) Mandatory Certificate of Intention to Release Holdback

The ministry believes the additional step of an "Intention" provides no significant benefit to the process. As understood, it may place unnecessary responsibility on owners to protect subcontractors when the subcontractor, with its knowledge, is the most appropriate party to protect their interests.

3(c) Mandatory Certification of Subcontractor Completion

This suggestion represents additional administrative process to both the owner and the contractor that will very likely generate significant additional project documentation, potential delays in payment and additional administrative cost to the owner while providing minimal benefit to subcontractors.

6(b) Mandatory Holdback Trust account or project bank account

Establishing a mandatory trust account or project bank account would be very difficult from both an administrative and accounting perspective for public owners and particularly the Crown. The management of such accounts would create several new administrative burdens and management risks.

Impacts on Public Owner's Contractual Rights and Loss of Lien Protection

The ministry notes that several of the concepts or provisions identified in the Information Package have the potential to infringe on important owner rights and may lead to the loss of protections currently provided to owners by the Construction Lien Act. Examples include:

2(d) Eliminating Holdback for Finishing Work

If this provision were implemented the owner will lose the protection of holding back monies for the finishing work of a contract and may assume the additional risk and monies for associated liens. Finishing work undertaken by subcontractors and suppliers can be significant for certain types of ministry projects.

Subcontractors and suppliers undertaking finishing work will also lose the protections currently afforded to them by the Construction Lien Act. The loss of these protections may be passed on to the reluctant owner.

4(a-e) Prompt Payment or Timely Payment

The ministry has concerns with legislation that either dictates or attempts to manage commercial payment transactions so as to override the financial controls the ministry

uses to manage and supervise its payment process. Such mandatory provisions will very likely increase the administration processes of filing claims by the ministry for work that cannot be confirmed as acceptable. This will create new risks for the ministry and likely other owners in ensuring compliance with the specifications of the contract.

The ministry has clear contract language outlining payment terms that is included in all of our contracts. Payment flexibility is very important to the ministry as we continue to develop and expand the use of different contracting models.

Given the complexity and nature of highway construction, we understand many American jurisdictions do not impose prompt payment on State highway projects.

5(a) Proof of Financing

The ministry is of the view that it is not appropriate for legislation to attempt to manage commercial risk assessment between the parties by means of a mandatory requirement for a proof of financing. Requiring proof of financing will add administrative burden on all parties and will be particularly challenging in the case of public owners, such as the Crown.

11(a) Bidder Exclusion

A fundamental contractual right in both private and public procurements includes the right of an owner to decide with whom they will enter into a contract. No party should ever be compelled to enter into a contract with a party they do not wish to be in contract with. For this reason, the ministry is of the opinion that the right to exclude a bidder should not be restricted.

14(c) Mandatory Labour and Material bonding

The ministry is of the opinion that owners should be free to determine for themselves if they wish to employ bonds on contracts. Since the 1950s, the ministry has managed contract security on the majority of its capital program through a programmatic prequalification process. Through this approach, the ministry has achieved substantial cost savings and ensured that contractors have the financial resources to deal with any liens filed on a project.

Freedom of Contract

Where possible, the parties to a contract should be left free to develop their own terms and conditions without unnecessary regulatory restriction. The ministry regularly consults with the ORBA and its members during the development of our contracts, including consulting on contract language and specifications.

The Information Package identified a couple of areas that the ministry feels will create inappropriate interference in the freedom of the parties to draft contracts best suited for their unique needs. For example:

Prompt Payment

Considering the increased variation of payment structures in modern contracts, the parties should be left the freedom to determine how payments should be structured and managed. The parties can then optimize according to their respective interests and continue to maintain their contractual rights. In the event of default by either party, relief can be sought through an agreed upon dispute resolution process or ultimately the legal system.

Dispute Resolution Mechanisms

Within the Information Package there are a few dispute resolution mechanisms suggested and discussed including the mandatory imposition of adjudication. It is our view that if the parties wish to allow for different means to resolve disputes, they should be free to make whatever arrangements they feel are appropriate.

This freedom should be broad in nature and extend either within contractual language or separately to allow the parties flexibility in resolving disputes depending on the circumstances of the dispute. Introducing mandatory requirements or broad adjudication bodies will not likely serve the interests of the industry as the issues are most often highly complex and unique.

The ministry allows for a number of alternative dispute resolution mechanisms in its construction contracts including a stepped dispute resolution/negotiation/review ladder.

Broader Construction Issues

Waiver of Lien Rights

From a review of literature on the Construction Lien Act the ministry believes there may be situations of unequal bargaining power within the industry to allow such provisions. An owner would not know of the waiver by a subcontractor or appreciate its validity, adding to contract administration confusion.

Issues Unrelated to Construction Lien/Prompt Payment Review

During our review we identified a few issues of concern that appear unrelated to your review of the Construction Lien Act and Bill 69 (Prompt Payment Act, 2014). We are concerned with the following issues being part of your Review.

Bidder Exclusion

As mentioned previously, owners should always have the right to determine with whom they wish to enter into a contract. No owner, whether public or private, should be forced or compelled to enter into a contract with a party they do not wish to be in contract with. Public owners, like the ministry, represent the public interest and have robust administrative structures and procedures to make determinations as to qualified and acceptable bidders. The ministry uses bidder exclusion as part of its contractor qualification process. Contractors are pre-qualified for ministry contracts and bidder exclusion is therefore an integral part of the qualification process to ensure performance and quality.

Dispute Resolution

We believe dispute resolution is unrelated to either the Construction Lien Act or Bill 69 as introduced.

Mandatory Surety Bonds

MTO has a well-established prequalification system in place since the 1950s that allows contractors to be prequalified for construction contracts without the use of bonding. The system has contributed to low occurrences of contractor default in comparison to other jurisdictions. Independent reviews of the ministry's prequalification approach in place of bonding have identified significant value and cost savings.

I trust that the information outlined provides your team with some useful insights on the ministry's perspective on some of the issues identified in your Information Package. While the ministry is satisfied with the current Construction Lien Act as it applies to construction projects we remain supportive of your review and any improvements that may result.

Please feel free to contact me if you require any clarification or further information before our meeting. Otherwise, I look forward to meeting with you on November 25, 2015.

Sincerely,

Paul Lecoarer, P.Eng.
Director

c. Carol Layton, Deputy Minister
Gerry Chaput, Assistant Deputy Minister