SURETY ASSOCIATION OF CANADA
YOUR BONDING RESOURCE

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Steven D. Ness,
President

January 29, 2016

Construction Lien Act Review
c/o Mr. Bruce Reynolds, FCIARB
Borden Ladner Gervais, LLP
40 King Street West,
Toronto, Ontario
M5H 3Y4

via email

Dear Mr. Reynolds:

Re: Surety Association of Canada – Response to New Issues List

Further to your letter of January 8th, the Surety Association of Canada has reviewed the "New Issues List" that was posted on the Review website on January 13th. In responding to the points raised on this list, we'll continue with our previously established practice of commenting on only those subject areas where we can provide meaningful commentary and constructive suggestions for moving the initiative forward.

Of the 27 new issues identified, we have restricted our focus to four which we see as worthy of additional commentary. In fact, several of the remaining 23 issues were discussed in some detail during our consultation meeting and we see no need for further discussion here. Also, the observations and comments offered contain little in the way of new information and for the most part, elaborate on the remarks made in our written submission or during our December 7th meeting.

Issue No. 7: Consider the use of certain financial instruments (i.e. letters of credit or bonds) or cash for holdback purposes.

As set out in our submission of December 7th, SAC would support a recommendation in favour of securing holdback with a form of bond or other security that would enable all (or more) funds to flow through the payment chain while ensuring the holdback is funded. By extension and for the same reasons, we would also be supportive of a recommendation to allow the posting of an instrument that would replace the need for holdback at the outset.

Issue No. 8: Consider implementing a deficiency holdback.

While this issue was touched upon during our consultation meeting, we thought some additional clarification may be in order. We suggest that imposing an additional holdback against the correction of deficiencies would be punitive, unnecessary and counterproductive to the objective of bringing about more timeliness and certainty of payment within the Ontario construction industry.

6299 Airport Road, Suite 709, Mississauga, Ontario L4V 1N3 Tel: (905) 677-1353 Email: sness@suretycanada.com

Further, we point out that the rectification of deficiencies would fall under the umbrella of the performance bond which ensure accountability of contractors for punch list and warranty items. Mandatory performance bonds, as recommended in our December submission would address the deficiency issue in a non-intrusive and effective manner and enhance the flow of monies on construction projects.

Issue No. 11: Consider punitive "interest" as a mechanism for breach of payment terms.

While SAC has no objection per se to the application of a punitive interest on overdue payments, we respectfully suggest that this is not the most effective means of addressing this vexing issue. While certainly providing payers with a monetary incentive to remit payment promptly, neither this approach nor any of the other proposed and existing remedies (e.g. construction liens, the right to suspend work) achieve the ultimate objective of delivering monies into the hands of the payee.

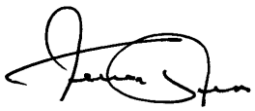
Again, the Labour and Material Payment Bond is the only tool that accomplishes this feat by providing a dedicated pool of funds for the sole purpose of ensuring claimants are paid for services and materials supplied to the bonded project. With the proposed amendments to the standard payment bond as discussed in Appendix A of our submission, we believe this instrument will go a long way to solving the "culture of acceptance" problem that continues to result in ever lengthening payment timelines.

Issue No. 16 d): Consider when an adjudicated decision would have to be appealed.

We refer to Page 15, third bullet point of our December submission and reiterate that SAC enthusiastically supports the introduction of adjudication as a means of resolving construction and payment disputes. However, a key condition of that support is that any adjudicated decision *"…should be binding on all parties on an interim basis,* ***with the ability to seek a review or appeal at a later date or contractual milestone*** (emphasis added) *based on agreed contractual provisions."*

Mr. Reynolds, we hope this information is helpful and again, and thank you for the opportunity to share our perspective. As always, if you have any questions or would like to continue the discussion, please feel free to contact me directly.

Yours Very Truly,



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