Ontario *Construction Lien Act* Reform

OGCA Task Force

DISCUSSION

October 23, 2015

WE BUILD ONTARIO

ONTARIO GENERAL CONTRACTORS ASSOCIATION

Process

OGCA is not aware that its members interests are being represented on the Review's Advisory Committee.

We recommend that a broader representation of contractors, owners, and design professionals be included.

We recommend that the final Report to government be made public.

OGCA Construction Lien Review Overview

1. Lien Act Requires Updating:
    - Several suggestions for updates
2. Prompt Payment Issue:
    - OGCA believes that (a) there are improvements that could be made to improve payment and (b) disputes are a significant reason that payments are delayed, an issue which was not addressed in Bill 69.

Lien Act Suggested Revisions

1. Separate Trust Accounts:
    - Endorse separate trust accounts at the Owner/GC level (similar to BC)
    - Accounts to be established by the Owner and jointly administered with the GC
2. Endorse mandatory owner financial disclosure requirements to manage risk and indirectly improve cash flow
3. PPP – Clarify definitions

Concerns with Bill 69 Approach to Prompt Payment

- Removes parties' ability to agree to payment terms and procedures that are commercially sensible in their circumstance.
  - The sector is too diverse for 30 day terms to be workable across the board.
  - Parties should remain free to agree to payment terms, and legislation should focus on *consequences* of breach.
- Onerous consequences: The material consequence of breaching payment terms in Bill 69 was suspension. Suspension of work, however, can cause an otherwise viable project to collapse.
  - Suspension rights are a "nuclear option." One sub suspension can impair entire project and trigger cascade of payment defaults to other subs.
  - Creates delay damages for parties which can easily exceed the original dispute and can be harder to negotiate and resolve.
- Inadequate handling of slow payment arising from owner breach and insolvency: Bill 69 would have required GC to lien (or suspend or terminate) in order to suspend payment obligations to sub, creating cost (or worse) for GC to avoid being the "meat in the sandwich."
- Misaligns with many contractual arrangements (e.g. AFPs, EPCs with milestones)
- Overly broad in application – unlikely that all parts of industry have the same issues, but legislation would treat them all the same.

Proposals to Address Prompt Payment

1. Mandatory Release of Holdback:
    - Support mandatory release of holdback provided that payer has not provided prior notice to the payee of a bona fide dispute
    - Improving subcontractor HB release will improve cash flow
2. Subcontractor Lien/Holdback Rights
    - Improve system for early release of HB to subcontractors (change “may” to “shall”)
    - Consider staged release of HB similar to Saskatchewan
    - Improving subcontractor HB release will improve cash flow
3. Consider payment of interest after a reasonable cure period as a less disruptive consequence (than suspension) of late payment.

Mandatory Adjudication

OGCA encourages consideration of adjudication as an option.

1. Adjudication would be a significant change and there are many issues to consider, including:
   - Interplay with Lien Act (e.g. if a lien action was stayed until the end of a project, a GC could be forced to incur hundreds of thousands of dollars in lien bond costs over several years with no opportunity to have the lien discharged)
   - Need to develop a pool of qualified (and perhaps licensed?) adjudicators
   - Potential for adjudication costs/process to make the system inaccessible
   - UK Act - Conditional payment permitted in event that payer is insolvent (this is a critical point for OGCA)
   - Scope of matters to consider, i.e. would issues not involving payment (e.g. QA/QC) be subject to adjudication?
   - Who can participate? Suppliers? Consultants?
   - Remedy if failure to pay per adjudication decision?
   - How would adjudication apply under a PPP format? Concern that lenders might see risk in ProjectCo being de-equitized by claims directly against it.

2. Critical that GCs not be subject to bidding exclusion bylaws that may be a disincentive to accessing adjudication (preventing them in practice from flowing sub claims up to owners).