ONTARIO PUBLIC WORKS ASSOCIATION
A Chapter of APWA/CPWA
1525 Cornwall Rd., Unit 22, Oakville, ON L6J 0B2
tel 647-726-0167 / fax 289-291-6477

November 23, 2015

R. Bruce Reynolds, FCIARB
Borden Ladner Gervais, LLP
Scotia Plaza, 40 King St. W
Toronto, ON M5H 3Y4

Dear R. Bruce Reynolds:

Regarding: Review of Construction Lien Act
Ontario Public Works Association (OPWA) Comments

On behalf of the OPWA we would like to thank you for the opportunity to review the information package provided as part of the Expert Review of Ontario's Construction Lien Act. The OPWA's membership consists of public works agencies, private companies, and individuals dedicated to promoting professional excellence in public works and in construction practices. As a result, our membership regularly applies the Construction Lien Act as part of Public Works projects and is intimately familiar with its intent and requirements. We provided the background information to our membership for comments and one of our directors, Mr. John Haasen, a Senior Vice President with AECOM Canada Ltd. has consolidated OPWA's general comments, issues and/or concerns in the order outlined in the information package.

1. <u>Lienability</u>

- We would agree that the definition of "owner" should be expanded or clarified to address as an example Public/Private Partnerships (3Ps), and to reduce a "lien everyone" approach potential by subcontractors
- We agree further clarity is required around who can be a lien claimant.
- We agree that further clarity is required around the term "services or materials", "supply of services" and define who this would apply to, and "price" versus "damages" as examples.
- We agree "Improvement" and/or lienability definition should be expanded upon to address large projects that impact large areas or are over long distances with multiple involved parties, thereby increasing "lien everyone" potential.

2. <u>Holdback and Substantial Performance</u>

- We see no reason to change the 10% Holdback provision given in most instances sufficient funds are retained to address liens as they may come forward, and incentivize project completion to meet both the Lien Act <u>and</u> intended performance requirements.
- We do support the early release of holdback for phased projects once each phase of a project has been completed in totality. This we feel will address long term/multi contract projects as well as 3Ps.
- We do not support the release of holdback being mandatory and automatic after expiration of the Lien Act, to ensure sufficient holdback should be retained to incentivize full completion of the project and meet intended performance requirements.

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- We do support the release of holdback upon posting of a holdback release bond or some other defined form of security acceptable to public sector clients and/or municipalities.
- We would not support revisions to minimum substantial performance requirements, again to incentivise full project completion and meet intended performance requirements.
- We feel the requirements for certificates of substantial performance are satisfactory at present. We see no need for any new requirements for a mandatory certificate of intention to release holdback.

3. Preservation, Perfection and Expiry of Liens

- We support clarifications with respect to the release of liens and alternatives to release and discharge. This should include the effects of posting security and vacating liens on lien claimants.
- We would support revisions to the length of the preservation period to allow sufficient time to perfect a lien.
- We would support mandatory certification of subcontract completion so they are held to the same standard as a general contractor is when it comes to work completion as per the Lien Act, and meeting intended performance requirements.
- Preservation aspects should consider the context of phased projects, over multi-years from a 3P perspective.
- We support changes to perfection requirements such as allowing for or including mandatory steps to attempt settlement prior to perfection as well as adjusting requirements for phased projects.
- We feel expiry within a 2 year limitation period remains appropriate.

4. Prompt Payment or Timely Payment of Construction Work

- We would agree in principal with the assessment of causes of payment delays and how they could be better addressed in the Act or other legislation. Issues such as: balancing competing interests; the provision of alternate forms of security; protection mechanisms for owners, lenders and contractors as payers when disputes arise; utilizing other contractual agreement remedies to address set off if there is dispute; and issues impacting cash flow significantly should all be considered.
- We would not support the release of holdbacks being mandatory or automatic after the expiration of lien rights.
- We would support considerations with respect to the applicability and adaptability of any prompt payment provisions to different types of contracts.
- We would support the enforcement of “paid when paid” and/or “paid if paid” clauses versus being made unenforceable.

5. Proof of Financing

- We would continue to support bonding and insurance versus proof of financing provisions being included in public sector contracts and attempting to pre-qualify contractors on a financial basis.

6. Trust Provisions

- We would support the clarification and strengthening of trust provisions in the Act, and assessing the overall effectiveness of the trust provisions.

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7. Interrelationship with Insolvency Legislation

- We support addressing conflicts between the Lien Act, the Bankruptcy and Insolvency Act and CCAA and to regulate stay proceedings in the face of registered liens.

8. Priorities

- We would support assessing whether or not any amendments are necessary to clarify lien right claimants and/or mortgages and defining financing for the intent of acquiring a property or for construction on the property.

9. Public-Private Partnerships (3Ps)

- We support the need to review and modify the Act to address the myriad of 3P models that have and/or could be implemented to preserve contractor/sub-contractor lien rights or provisions.
- We support revising definitions and structure of the Act with 3P projects to: better align each; address phasing over multi-year contracts; provide for specific definitions applicable to 3P projects; address substantial performance and certification aspects on a phased basis; and define alternative dispute mechanisms to ensure issues can be addressed without impacting project cash flow.

10. Non-Waiver

- No comment.

11. Bidder Exclusion Provisions

- No comment

12. Alternative Dispute Resolution

- We would support a review of the effectiveness of available procedures and remedies for alternative dispute resolution. This should include: adjudication; mediation; arbitration and Dispute Review Board applications along with:
    - clarifying the language or methodology to address the complexity of construction disputes;
    - the expense of pursuing legislated procedures and relative timing particularly with respect to phased projects.
    - clarifying processes for coordinating and scheduling related proceedings and the use of dispute resolution as a way to prevent the hold up of cash flow during construction disputes.
    - considering dispute resolution with respect to small lien claim items and /or fairness issues for small or medium sized businesses.
- We would support the introduction of an adjudication mechanism to address project set offs, progress payment claims and performance bond claims, and would support mandatory mediation of lien actions.
- We would consider alternate arbitration mechanisms including an assessment of their effectiveness and the ability to consolidate multiple arbitrations relative to the same project.

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13. Summary Procedure

- We would support the need to review changes required with respect to "summary" proceedings under the Act given the complexity and nature of projects today and anticipated in the future. This should include the identification of efficiencies to improve the procedure.

14. Surety Bonds and Default Insurance

- We would support the provision of labour and material payment bonds as part of any public works contract above a certain threshold value (say $100,000), and would support requiring labour and material bond payment payees to complete their subcontracts in the best interest of the project.
- We would not support adjustments to bond claims to support the sureties right to properly investigate and confirm outstanding amounts for payment.

15. Miscellaneous

- We support the use of letters of credit in lieu of cash holdbacks, and support periodic review of the Act on a go forward basis.

We appreciate the opportunity to provide our comments with respect to the Construction Lien Act review and confirm that by no means are we speaking on behalf of any of our member municipalities, consultants, suppliers and contractors. Each will have to address their concerns with respect to the Construction Lien Act review from their own perspective. Our comments are merely general in nature based on polling of our memberships thoughts and concerns on the issues to be considered as part of the Construction Lien Act review.

I look forward to meeting with you December 9th to further expand on our comments. In the interim, should you have any questions or require any further information, please feel free to contact me at 519-963-5889 or john.haasen@aecom.com .

Sincerely,
Ontario Public Works Association

John H. Haasen, PMP, CET
Senior Vice President
AECOM Canada Ltd.
john.haasen@aecom.com

JHH:sw
Encl.
cc: Debbie Korolnek, OPWA President
Sam Sidawi, OPWA Vice-President
bc: Doug Allingham