COUNCIL OF
ONTARIO UNIVERSITIES

CONSEIL DES
UNIVERSITÉS DE L'ONTARIO

November 30, 2015

Bruce Reynolds
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Dear Mr. Reynolds:

Thank you for meeting with representatives of the Ontario university sector on October 29 to discuss the Construction Lien Act (CLA) review being undertaken by BLG. It was a helpful opportunity to better understand the issues outlined in the Information Package.

To follow on that meeting, the Council of Ontario Universities (COU) wishes to provide the following feedback on behalf of the sector, much of which aligns with other Owner stakeholders and, in particular, the opinions of the Ontario Association of School Business Officials (OASBO).

Lienability

The definition of "improvement" should be modified to include repairs: "...any construction, erection, ***repair*** or installation of..."

Holdback and Substantial Performance

COU supports the position that the lien holdback should be preserved at 10 per cent. This is a reasonable amount to be retained and should not be reduced.

On minimum requirements for substantial performance, the current percentage amount is acceptable and should be maintained in order to ensure that the amount of work completed on any given project is not reduced.

Further requirements with regards to substantial performance should be defined in the contract if changes are required. It is our view that a mandatory Certificate of Intention to Release Holdback is unnecessary; it is unclear what substantive purpose this Certificate would serve.

Preservation, Perfection and Expiry of Liens

Generally

The posting of security and vacating liens on lien claimants is supported and should remain as is.

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Preservation

It is recommended that the length of the preservation period be increased from 45 to 60 days in order to allow subcontractors sufficient time to preserve the lien.

Written notices of lien are supported. They allow a claim to be resolved before a lien is registered, making the process less costly.

On the introduction of "mandatory certification of subcontract completion," COU supports the current elective option provided for under Section 33. A mandatory certification would result in a burden to Owners who are not privy to the contract between the contractor and the subcontractor.

In efforts to avoid the potential abuse of lien rights, allowing for written notice and promoting timely payment could be considered.

Perfection

Freedom of contract should remain paramount in any consideration to change elements of the CLA. For example, payment timing should be left to the terms of the contract.

Expiry under Section 37 of the Act

COU supports the two-year limitation period.

Prompt Payment or Timely Payment for Construction Work

As noted above, freedom of contract is a primary concern for the sector; universities should be free to negotiate terms and conditions with contractors, including conditions around progress milestones. Milestone-based payments are an integral component to ensuring work is completed on time, which can be crucial in projects that serve student needs, such as a classroom or other learning facility, or a residence building. These accountability levers are essential. Issues related to the release of holdback should also be negotiated within the contract.

Different Owners will have different project requirements, and we believe these cannot be fulfilled through the CLA. Instead, they should be dealt with directly in contract negotiations.

Universities are committed to paying invoices within a reasonable timeframe and have standard payment terms that are generally much more favourable than the industry standard (~net 50 days). However, there are various factors that contribute to the length of time it takes to pay a contractor's invoice, including the nature of the project, which may require that numerous consultants verify the request for payment. Thus, payment periods should not be mandatory but dealt with in the contract in order to allow for the unique circumstances of each construction project to be taken into consideration.

We recognize that there is concern around the proportion of payments that are significantly delayed. It is important that subcontractors receive payment from their contractor for work completed. However, as the majority of these delays are not caused

by owners, but rather between contractors and sub-contractors, perhaps provisions can be drafted to deal specifically with the relationship between these two parties.

"Pay-when-paid" and/or "paid-if-paid" clauses should not be allowed in contracts. These clauses often provide a disincentive to smaller but otherwise qualified contractors to bid on jobs due to cash flow concerns.

Proof of Financing

Access to proof of financing rights for owners, contractors and subcontractors should not be included in the CLA; specifically, contractors should not be entitled to proof of financing from owners as it could add an unreasonable burden to any owner at the outset of a project.

Trust Provisions & Interrelationship with Insolvency Legislation

COU has concerns with the creation of a "project trust account" that would be jointly administered by contractors and owners, such as the example of the BC Builders Lien Act, 1997, cited during the consultation meeting. Such a process may become onerous, limit the rights of owners and create another format for disputes.

Non-Waiver

As with other issues outlined above, the status quo should be maintained and freedom of contract should prevail.

Bidder Exclusion Provisions

COU believes bidder exclusion provisions should not be included in the CLA. These are rightfully part of the procurement process and they should remain within that process.

Alternative Dispute Resolution

Existing procedures and remedies are generally acceptable to the sector. Most alternate dispute resolution mechanisms can be time consuming, costly, or both, and could have additional drawbacks not yet envisioned. Current processes, while imperfect, are well understood by owners and contractors and should be maintained.

Surety Bonds and Default Insurance

The CLA terms should be left open as they relate to bonding obligations or opportunities for default insurance.

Labour and material payment bonding of all public projects should not be made mandatory.

It is acceptable to provide for the electronic delivery of surety bonds.

Miscellaneous

The sector supports instituting a period review of the Act on a go forward basis to ensure that various elements and potential changes to the CLA remain effective for all parties.

Conclusion

Again, thank you for your broad engagement of public sector owners. We commend the open and transparent process that BLG has established. The opportunity has been appreciated.

Yours sincerely,

Jennifer Grass for the President

Bonnie M. Patterson, C.M., O.Ont.
President and CEO

cc: Sharon Vogel, Partner, Borden Ladner Gervais
Council of Senior Administrative Officers (CSAO)
Ontario Association of Physical Plant Administrators (OAPPA)
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