MISSISSAUGA

November 24, 2015

Construction Lien Act Expert Review
Borden Ladner Gervais LLP
Scotia Plaza Tower
40 King Street West
Toronto, Ontario M5H 3Y4

Attention: Mr. Bruce Reynolds and Ms. Sharon Vogel

Dear Mr. Reynolds and Ms. Vogel:

Subject: *Construction Lien Act* Review

I am writing to provide comments on the *Construction Lien* Act on behalf of the City of Mississauga. City staff will be attending the scheduled stakeholder consultation meeting on November 25, 2015, together with other municipal and public sector owners. At this time, I am providing you with our written comments as requested, in advance of the meeting.

Attached please find the report approved by the City's General Committee containing our further comments. We have highlighted the main issues of interest to the City, based on the questions that you have posed in the Information Package issued in July 2015. Without repeating fully what was contained in the corporate report, I am providing a highlight of certain legal comments on the review below.

Fundamentally, we believe that the Construction Lien Act as it currently stands is working well, and do not see the need for significant changes other than in a couple of areas, such as addressing the P3 regime. If it is the provincial government's desire to re-write the legislation, we warn against any legislative regime that is overly prescriptive and that imposes limitations to the **fundamental freedom of contract**, imposing requirements that, in all other commercial settings, would be left to the discretion of the parties.

Prompt Payment Legislation

While prompt payment to contractors and subcontractors is important, different types of construction may require different types of payment schemes (e.g. progress payments, milestone payments etc.). Any legislative scheme proposed to effect prompt payment should be flexible enough to ensure that parties can continue to agree on payment terms and conditions that are applicable to each construction at hand.

Further, particularly in large construction projects where there are many parties involved through the supply chain, problems with payment are often found in the chain of contractors and their subcontractors from our experience. We warn against any legislative

regime that imposes significant constraints on owners' rights or that effectively penalizes owners for wrongs not necessarily committed by them, in order to effect prompt payment for subcontractors. For example, the legislative right to abandon a project for any delay in payment, and the requirement to pay for estimated work and not just work completed and certified as provided for in last year's Bill 69, amongst other provisions, are extreme measures that protect the rights of contractors and subcontractors to the detriment of owners. We respectfully request that any prompt payment regime created takes into account the interests of owners as well as contractors and subcontractors.

Mandatory Bonding Requirements:

Section 14 of the Information Package provides a list of issues to consider on the topic of bonds. While we appreciate that labour and material bonds may be able to help solve some of the payment issues that could occur in the supply chain, we are concern about the implications of imposing mandatory bonding requirements on projects, when they are not necessarily applicable in all construction projects. Whether bonds are obtained are based on a risk and cost assessments by the parties involved. It is also unclear why public projects are singled out for mandatory labour and material payment bonding. At the end of the day, the costs of additional bonding requirements will be costs to the public owner, and which are ultimately borne by the public. As such, consideration of all requirements on a construction project, including the amount and type of bonding requirements, are part of the project planning and risk assessment undertaken by owners, as they assess their budget and risk tolerance, with a view towards being able to justify the spending and value to the public. The purchaser of construction services should never be forced to have to pay requirements that they deem to be unnecessary.

Bidder Exclusion Clauses

We are also very concern with the consideration of limiting bidder exclusion clauses in procurement for construction services. Removing the right of owners to exclude bidders for prior poor performance, for ongoing litigation, or for other bona fide reasons is a clear erosion of owner's rights to freedom of contract.

More importantly, the use of bidder exclusion clauses are in line with the fundamental principles of tendering laws laid down by the Supreme Court – a purchaser is free to determine the rules of the tendering process and to impose appropriate restrictions and privilege clauses, so long as such rules are applied consistently to all bidders. In fact, the British Columbia Court of Appeal in *Sounds v. Nanaimo*, a case which has been cited in subsequent Ontario decisions, endorsed the ability for owners to take into account past dealings in determining whether to award a tender. As noted by the court, "past dealings are probably the best indicator of how a proposed relationship will come to work out in practice." The criteria to reject a lowest compliant bidder due to previous experience must be exercised with caution and objectivity. But so long as the criteria of fairness and objectivity are met, there is no reason why public owners should be prevented from working contractors that they have had previous negative experiences.

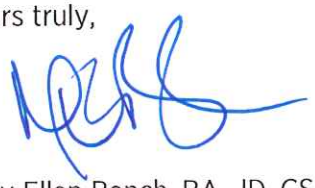
The Information Package references access to justice as an important common law right and that "bidder exclusion provisions have been characterized as restricting the access of contractors to courts." It is unclear how bidder exclusion provisions restrict access to the courts, as a contractor is only excluded from a bidding process but not the court system.

A tender is a commercial process leading to a commercial transaction between two commercial parties. Commercial parties should maintain the right to engage with parties of their choosing. Having appropriate and applicable bidder exclusion clauses is one manner of identifying choices in an open and transparent bidding process.

In any event, we do not believe that the *Construction Lien Act* is the right forum to address bidder exclusion provisions. As the Information Package provided, the Act provides suppliers of services, materials and equipment to construction projects with security for payment, protection against the diversion of funds, and a summary procedure for enforcement of lien rights. As indicated on page of the Information Package, the current review is to assess the "effectiveness of the Act in achieving its policy objectives within the modern context, and is also to address the issue of promptness of payment and the effectiveness of dispute resolution under the Act." Bidder exclusion clauses are therefore respectfully outside of the scope of this review.

In all, we believe that the current legislation is generally working well, except in certain areas which may require some amendments. In considering any changes, we respectfully request that any amendments to the *Construction Lien Act* takes into account not only contractors and subcontractors' rights, but also the interests of owners, and the ability of owners to freely contract for construction services. It is particularly important for public owners, who are spending from the public purse, to ensure that their rights and interests are adequately protected. After all, any additional costs borne as a result of any new legislative requirements will ultimately be borne by Ontario taxpayers.

Yours truly,



Mary Ellen Bench, BA, JD, CS
City Solicitor

Encl.

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City of Mississauga

Corporate Report

MISSISSAUGA

Date: November 5, 2015	Originator's files:
To: Chair and Members of General Committee	Meeting date: 2015/11/18
From: Mary Ellen Bench, BA, JD, CS, City Solicitor	

Subject

Construction Lien Act Review

Recommendation

1. That the report from the City Solicitor dated November 5, 2015 on the "Construction Lien Act Review" be received for information.
2. That staff be authorized to make submissions to the Province and its Counsel to outline the issues of interest to the City in the Construction Lien Act review process.

Report Highlights

- The Province has commenced an expert review of the *Construction Lien Act* (the "Act"). The Act applies to all construction projects in Ontario. It provides payment protection to contractors and subcontractors, through most notably the 10% holdback that all owners and payors need to retain in project payments.
- Currently, the Province, through its Counsel at the law firm Borden Ladner Gervais, is holding stakeholder consultations and receiving submissions. It has issued an Information Package that outlines the issues under consideration.
- Some of the issues outlined in the Information Package do not have a direct impact on the City's operations. However, there are several issues raised that could have serious impact on City projects depending on how the legislation will be ultimately drafted.

Background

In 2013, the *Prompt Payment Act, 2013* was introduced at the provincial legislature as a private member's bill, and went through first and second reading quickly without consultation with owners of constructions, such as municipalities who are major owners of construction projects.

The bill imposed significant restrictions to the freedom of contract in ways that restricts owners' rights in making payments in construction projects. As a result, the City, together with the Association of Municipalities of Ontario, and other public construction owners such as the City of Toronto, made submissions to the Standing Committee on Regulations and Private Bills in 2014, raising significant concerns with the bill. Following these submissions at the Standing Committee, the bill did not proceed further. Instead, the Ministry of Attorney General and the Ministry of Economic Development, Employment and Infrastructure announced that the province will engage in a larger review of the *Construction Lien Act* (the "Act"), and that all stakeholders in the industry will be included in the review.

Present Status

Bruce Reynolds and Sharon Vogel from the law firm Borden Ladner Gervais have been appointed by the Province to act as Counsel and Co-Counsel respectively, to conduct the expert review of the Act. The purpose of the review is to determine the effectiveness of the Act in achieving its policy objectives in the modern context, and to address prompt payment and dispute resolution processes under the legislation.

There are three (3) phases to the review process:

1. Finalization of a stakeholder list; research and preparation of the substantive issues; and preparation of an information package to provide the necessary background for stakeholder participation in Phase 2.
2. Stakeholder consultation through distribution of an Information Package and meetings with stakeholders and acceptance of written submissions.
3. Written submissions and legal opinion from Bruce Reynolds to the Attorney General and the Minister of Economic Development, Employment and Infrastructure.

We are currently in Phase 2 of the review process.

Comments

The *Construction Lien Act* has been in place since 1983, and governs payment relationships for those parties involved in a construction project. The legislation generally provides for:

- Security for payment to those suppliers of services, materials and equipment in the form of a lien, specifically the 10% holdback that payers are required to hold for the benefit of subcontractors;
- Trust protection against diversion of funds; and
- Summary procedure for enforcement of lien rights.

In general, the City has not run into issues with respect to the application of the Act. The legislative requirements are built into our contracts and payment processes for construction projects. In consultation with staff, the consensus is that the process is working fairly well to date.

The main applicable requirement under the Act for the City, as an owner of the construction project, is to hold back 10% of the payment in a construction project until the lien rights expire 45 days after substantial performance. The 10% holdback is to ensure that subcontractors' lien rights are preserved and if their upstream contractors are not paying them, then they can access the

holdback amounts. The City's exposure to subcontractors' claims of non-payment is also limited to the 10% holdback.

Issues under Review:

The Information Package provides a number of questions for consideration by stakeholders. The key issues that would have an impact on the City are as follows:

Sufficiency of the 10% Holdback:

The Information Package inquired about the appropriateness of the amount of the holdback, which is currently set at 10%. In discussion with staff, we believe that the 10% holdback as presently required is sufficient. If the amount goes higher, it means that contractors and their subcontractors will have to carry a higher cost to complete the project, which would translate into higher cost to the City as an owner. At the same time, the holdback should not be reduced. As the owner, the City can set off for deficiencies in a project using the 10% holdback. Thus, we would want to keep a sufficient amount for that purpose.

Mandatory Certification of Subcontract Completion:

Currently the Act provides discretion to the owner to certify completion of subcontracts. The Information Package is inquiring whether this should become mandatory.

Staff recommends that this remains as is. The City has issued certification of completion of subcontracts in the past, when it was clear that the contract was indeed complete with no deficiencies. Generally this was done for early works in a lengthy project (e.g. geotechnical work), and not done for most subcontracts. This is because it is often not clear until the end of the project whether there are any deficiencies, as the work of the trades is often interconnected. If there is a mandatory certification of subcontracts, the owner could be left in a position where it had certified the completion prematurely, only to find deficiencies at a later date.

Further, it is administratively burdensome if the owner is required to review subcontract completion throughout the duration of the contract. Currently, the City reviews progress and completion of the job in its entirety. If the City is required to review every application of subcontract completion over time, it would require more staff and external resources in each project in order to manage the increased workload.

Prompt Payment:

There has been a lot of discussion on the merits of a prompt payment regime since the introduction of the private member's bill in 2013. The previous bill imposed a very rigid regime on the amount of time before payments are made, without consideration of the practicalities surrounding the time required to review the work for satisfactory completion and to issue payments accordingly.

The present consultation does not contain any proposed legislative regime; rather it outlined a series of questions and background information for consideration. It is recommended that any prompt payment regime that is being imposed should include the following:

- Adequate time for review the work for progress and completion;
- Ability for the payor to set off amounts for deficiencies, and not pay for work that has not been satisfactorily completed;

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- Remedies for payment dispute should not include immediate termination of contract or cessation of work as imposed in the 2013 Bill – remedies available should allow for flexibility in the process and time for the parties to work out their differences. The parties should also retain the freedom to contract and determine the best dispute resolution process for their contracts.

While the principle of paying contractors and subcontractors for work completed promptly is important, there must be sufficient safeguards to the interests of the owners and payors. This is particularly important to public owners as we are spending from the public purse.

As well, there must be a balance between a legislated regime and the freedom of contract between parties. At the end of the day, if parties are bound by rigid processes that bring on additional risks to their interests, the risks will be priced into the costs of the project – whether it be in the form of the prices bid by contractors, or in the additional resources required to manage projects on the part of the owners.

Liens on Title:

Currently, a lien claimant can register its lien on title for all projects except in certain circumstances:

- Crown lands
- Public street or municipal highway; or
- Railway right of way.

In these instances, the lien does not attach to the premises but is a charge on the holdback. In other words, no lien claimants can encumber the interest of Crown lands or municipal highway.

It is unclear why this limitation on liens on title is restricted to municipal highways and not expanded to municipal property in general. Just as it is in the public interest to preserve clear title on highways, it is equally important that public properties such as the City Hall and parks and other municipal infrastructure are preserved with clear title. As such, it is recommended that the exclusion of lien registration should extend to cover other municipal properties.

P3 Projects:

The current Act does not address the uniqueness of a P3 project as it was written in 1983 when there were no P3s in Ontario. The concern is that under the current legislation, the special purpose vehicle created to deliver the project ("Project Co") has control over the construction similar to an owner of a project, but by the definitions in the Act, the Project Co would actually not be an "owner" but a "contractor". Project Co has minimal equity and is funded through construction financing generally. And very often, depending on the structure of the agreement between the project sponsor (the government entity) and Project Co, payment obligations are based on milestones and completion, and not traditional progress payments. Therefore, the project sponsor could be stuck with obligations under the Act despite them having much less, if any, control over the construction and progress payments.

It is therefore recommended that the Act be amended to take into account the uniqueness of a P3 project.

Bidder Exclusion Provisions:

One issue that was raised in the Information Package is the consideration of limiting the ability of public owners to impose bidder exclusion clauses in their procurement documents.

The City has bidder exclusion clauses in our procurement documents. This allows the Purchasing Agent to exercise discretion in not awarding to a contractor that is involved in litigation against the City. If, as proposed by the Information Package, that there is no ability for the City to exclude bidders, then the City could be forced to award contracts to a bidder who is currently embroiled in litigation with the City, just because that bidder happens to be the lowest compliant bidder in a tender. There could be instances where the litigation is so contentious that it is impossible to expect real cooperation between the parties on a project while they are litigating on another matter.

Further, legislating against the imposition of bidder exclusion clauses flies in the face of the basic principle of freedom of contract, and defies the common law as confirmed by the Supreme Court of Canada, i.e. that the purchaser can design the rules of a procurement process and impose conditions as it sees fit, so long as it follows the process and rules that it had imposed. In any event, if the objective of the *Construction Lien Act* is to provide for payment protection, it is unclear how bidder exclusion clauses are relevant to this legislation.

Financial Impact

Depending on the scope of the changes that will flow from the expert review on the legislation, there could potentially be additional costs to the City in implementing and managing construction contracts. It is unclear at this point what the financial impact will be, until a draft legislation is presented.

Conclusion

The Province has commenced an expert review on the *Construction Lien Act*. Currently, it is at the stakeholder consultation phase. Many issues have been raised as part of the consultation. There are several key ones that will have an impact to the City depending on the outcome of the legislative review. As such, it is recommended that Council authorize staff to make submissions to the Province, through its Counsel at the law firm Borden Ladner Gervais, on issues relating to the Act.

Mary Ellen Bench, BA, JD, CS, City Solicitor

Prepared by: Wendy Law, Deputy City Solicitor