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Toronto
Community
Housing

Memo

To: Bruce Reynolds and Sharon Vogel
Borden Ladner Gervais LLP

From: Toronto Community Housing Corp

Date: January 19, 2016

Re: Expert Review of Ontario's *Construction Lien Act* (The "Expert Review Process")

Introduction

The Toronto Community Housing Corporation welcomes the opportunity to participate, as a stakeholder, in the Expert Review Process for Ontario's *Construction Lien Act* (the "*Act*"). As a public body with capital, retrofit, renovation, repair and new build projects underway that have an aggregate value of hundreds of millions of dollars, the TCHC has a vested interested in the outcome of Expert Review Process. The *Act* is a very important piece of legislation that impacts the operations of the TCHC on a daily basis.

As you know, the TCHC was represented at your November 25, 2015 consultation with various owners by its external counsel. Having participated in that meeting and reviewed the written submissions of various stakeholders, the TCHC fully endorses and supports, in particular, the City of Toronto Comments on the Issues Being Considered by the *Construction Lien Act* Review dated November 19, 2015 (the "City of Toronto Report"). Accordingly, rather than duplicating the contents of the City of Toronto Report, the TCHC has decided, for efficiency, to provide very brief comments on only the narrow issues that are set out below.

Background on the TCHC

The TCHC is a not-for-profit provider of social housing that is owned and was created by the City of Toronto under the *Housing Services Act*, 2011. It is also the largest social housing provider in all of Canada and the second largest such provider in North America. The TCHC is the owner of over two thousand buildings including high, mid and low-rise apartments and townhouse and houses. Overall, the TCHC provides homes to almost 60,000 low and moderate income households.

In addition to being a very large property owner, the TCHC is, as described above, the project owner of a wide range of projects in the construction industry, in order to meet its social housing mandate.

In considering the comments of the TCHC below and its general endorsement of the City of Toronto Report, it is important to understand that the TCHC procures its funding from a variety of public sources, including the City of Toronto, the Province of Ontario and the Government of Canada, in addition to revenues procured through the sale of property. The TCHC also partners with the private sector on certain larger projects that fall into the "New Build" category.

The TCHC employs a broad range of project delivery systems and project structures. However, it is quite common for the TCHC, given the nature of many of its projects, to use the structure of a construction management contract (such as a CCDC 5A) and in those instances, therefore enter into direct contracts with many of its major trades. For its many, many projects, the TCHC therefore has an even greater number of vendors, suppliers, contractors and trades to whom it makes direct payments.

Finally, it is also important to understand that no TCHC construction project can proceed until the necessary funding has been arranged.

Comments on Holdback and Trust Provisions of *Construction Lien Act*

Taking into consideration all of the foregoing, the TCHC therefore adds the following comments, in addition to its support of the City of Toronto Report:

<u>Trust Obligations</u>

Section 7(1) of the *CLA* states that the "owner's trust" does not apply to municipalities. It is the TCHC's view that this exception should be expressly extended to public entities such as the TCHC who operate under a municipal umbrella. All of the policy reasons for exempting a municipality from such provisions ought to apply to the TCHC as well. The language of the *CLA* should make this clear.

In addition, for the reasons set out in the City of Toronto Report, the TCHC opposes a mandatory project account, including a joint account, for trust funds. In the context of the facts set out above as to the number of projects and contracts being undertaken by the TCHC at any point in time, it would not be realistic to expect the TCHC to implement such a measure and it would likely only delay payments and increase costs. Further, it would not be consistent with the manner in which funding is received and it would be unnecessary given the manner in which TCHC projects are funded.

<u>Holdback</u>

Automatic Holdback Release

This comment addresses the suggestion that has been raised for an automatic holdback release following the expiry of the construction lien period.

Project owners are currently entitled to assert set-off claims against payments that would otherwise be owing generally, as the result of valid claims for deficiencies or other damages. The mechanism by which this occurs is often negotiated by contracting parties.

The “holdback exception” to such set-off rights serves a particular purpose (i.e. security where there is a defaulting payer). However, once the construction lien period expires, if no liens are preserved, this holdback exception also expires and the former holdback funds simply form part of the amount owing to the contractor.

On a typical project where there are no liens, this structure gives the parties the freedom to negotiate arrangements for an agreed process for the release of final payment, including the former holdback funds. For example, the parties may agree that, prior to final payment, all “punch-list” items must first be addressed, all close-out documents must be delivered to the owner, etc. As a result of this flexibility, it is not always necessary for the parties to include a “deficiency holdback” in their contract, above and beyond statutory holdback.

Any statutory requirement for automatic holdback release would undermine this current structure and only create an incentive for additional, contractual retainage funds to address deficiencies and other project completion issues. In contrast, the current structure allows for a balance. A supplier who loses confidence in the face of a defaulting payer or who is concerned about an insolvent payer, can preserve a construction lien. On the other hand, the owner knows that barring any such defaults, they can rely upon whatever contractual mechanisms have been negotiated as an incentive for all suppliers and contractors to complete the project.

For a combination of these reasons and, perhaps even more importantly, the administrative burden that would be imposed by a mandatory automatic holdback release, the TCHC is opposed to a statutory requirement for automatic holdback release.

Dedicated Holdback Accounts

This comment addresses the suggestion that has been raised for dedicated holdback accounts on a project by project or contract by contract basis.

For the reasons described above in the section on Trust Obligations, dedicated holdback accounts would only create an unnecessary administrative burden for large public owners such as the TCHC. Additional resources would have to be committed to administering hundreds of such accounts at any given time. This would only drive project costs up in circumstances where, given the TCHC’s funding structure, no additional assurances or benefits would be derived from such accounts. For similar reasons, TCHC is opposed, as previously noted, to the concept of “joint holdback” or “joint project” accounts.

To the extent that the purpose of these accounts would be to eliminate an owner’s set-off rights, the TCHC’s response is set out above.

Early Holdback Release

Although the TCHC is not opposed to various contractual mechanisms for early holdback release, it seems that this would be very difficult to implement as a mandatory concept by statute, in a clear manner. It would simply be too difficult to contemplate every type of scenario in which early holdback release could be achieved and, in our view, additional disputes would result.

The *CLA* currently permits early holdback release in certain circumstances where all parties agree. In our view, the circumstances in which early holdback release is permitted ought to be expanded to include phased projects. This would be particularly helpful for complex, multiyear projects. The circumstances in which early holdback release can occur and the mechanisms by which it can occur would then be negotiated by the parties involved in each instance, and incorporated into their contracts. However, there is no clear way, in our view, to make this a mandatory component of all construction projects. To attempt to do so would only result in additional cost, resources and disputes. For example, the types of disputes that now occur regularly over the issuance of a certificate of substantial performance would likely arise in the context of a certificate of completion of a subcontract (which, under the *CLA*, is presently one prerequisite to early holdback release).

Conclusion

We thank you for the opportunity to participate in this important process. Also, we once again reiterate the TCHC's support for the City of Toronto Report on all issues not specifically addressed above.

Please do not hesitate to contact us with any questions you may have arising from this report.