Ontario
Home Builders'
Association

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February 6, 2014

Steven Del Duca, MPP Vaughan
Ministry of Finance
7th Floor, Frost Building South
7 Queen's Park Crescent
Toronto, Ontario M7A 1Y7

Dear Mr. Del Duca,

OHBA is writing to you regarding our ongoing concerns with your Private Members' Bill 69, Prompt Payment Act, 2013 - *An Act representing payments made under contracts and subcontracts in the construction industry*. We initially raised our concerns to all Members of Provincial Parliament prior to second reading of the Bill.

Mr. Del Duca, your advocacy regarding prompt payment has resulted in an important conversation in the construction sector; however, OHBA cannot support Bill 69 as there continues to be significant issues specific to the proposed legislation.

OHBA initially raised our concerns to all Members of Provincial Parliament prior to second reading debate. Since Bill 69 passed second reading on May 16th, OHBA has identified a number of specific concerns to you, and participated in a meeting you organized in early fall. We thank you for your continued leadership in trying to bring all construction stakeholders together, and considering the significant impact your proposed legislation will have on all construction contractual agreements in Ontario by all purchasers of construction services, we are again calling on your leadership to respond to the concerns raised by OHBA and others specific to your proposed Bill 69.

OHBA recognizes that as a Private Members' Bill there are limitations to the consultation process that the office of an MPP can coordinate, we have attached some public documents from various sources that have identified and raised similar concerns regarding your PMB to this letter.

As OHBA has discussed with you, the proposed legislation takes away the freedom and flexibility of construction parties to negotiate specific terms for projects. The payment term provisions will dramatically affect current and future contractual relationships while creating an enormous administrative burden for all parties involved in construction. The scale and impact of the legislation on construction contracts is significant and the consequences for all purchasers of construction services are unknown. The Act also provides contractors and sub-contractors a right to the purchaser of the construction services' financial and corporate information by virtue of the contractual relationship. We are not aware of another jurisdiction where this 'right' exists. Recognizing the limitations of the Private Members' process, it is important to note that there was no broad stakeholder consultation on this legislation prior to its introduction, or a process to engage the broader legal construction sector in this important discussion.

Attached to this letter are a number of documents from municipalities, school boards, and the Association of Municipalities Ontario (AMO) documenting similar concerns to OHBA. As stated by the City of Mississauga:

> If this Bill is passed and becomes law, there could potentially be significant financial impact on owners such as the City. There are stringent requirements with respect to payment to contractors under the legislation. Failure to comply – even for bona fide reasons – could potentially mean the suspension of work by general contractors and/or their subcontractors, which could bring upon delay in project completion and delay claims, as well as additional costs associated with demobilization and remobilization of forces to complete the work. The legislation also removes the right to include finance tools to ensure performance such as warranty and maintenance reserves, which means that owners would resort to expensive litigation if deficiencies are not resolved in accordance with the contract. (p.6 City of Mississauga, Corporate Report, October 9, 2013)

In order to remedy their concerns AMO has requested to have your Bill 69 amended to exempt municipal governments from its requirements. We believe it would be irresponsible to simply provide an exemption for municipalities as it does nothing to address their legitimate concerns that affect *all* purchasers of construction services impacted by your proposed legislation. It is important to note that in all jurisdictions with prompt payments requirements we are aware of, there is a higher standard placed upon governments relative to private enterprise.

Again, OHBA looks forward to your leadership in responding to these legitimate concerns regarding the impact of your Private Member's Bill.

Enclosed is correspondence and submissions related to Bill 69 from the City of Toronto; City of Mississauga; Association of Municipalities Ontario; Simcoe Muskoka Catholic District School Board; Halton District School Board; Ottawa-Carleton District School Board; and the Operations, Maintenance & Construction Committee of the Ontario Association of School Business Officials. OHBA acknowledges and supports the main concerns identified in the enclosed documents.

In addition, enclosed are publicly available legal briefs from Gowlings LLP and Davis LLP.

Respectfully,

Eric DenOuden
President
Ontario Home Builders' Association

cc: Premier Kathleen Wynne
Tim Hudak, Leader of the Official Opposition
Andrea Horwath, Leader of the Third Party

TORONTO

STAFF REPORT
ACTION REQUIRED

Submissions to the Ontario Legislature on Bill 69 – *Prompt Payment Act, 2013*

Date:	December 9, 2013
To:	City Council
From:	City Manager and City Solicitor
Wards:	All
Reference Number:	

SUMMARY

In the Ontario Legislature, a private member's bill seeks to introduce new legislation regarding payment for construction services.

This bill proposes legislation that restricts the ability of parties to negotiate payment terms and may have adverse consequences on owners of construction projects, including the City, if it is passed without amendment.

The bill has passed second reading with the support of all three provincial parties and has been referred to a Standing Committee, where it is anticipated it will be considered in the new year.

Municipalities were not consulted on this bill. The Association of Municipalities of Ontario has written to the leaders of all three provincial parties opposing it.

Staff seeks authority from City Council to make oral and/or written submissions to the Ontario Legislature setting out the City's concerns with this proposed legislation.

RECOMMENDATIONS

The City Solicitor and City Manager recommend that City Council authorize the Executive Director, Engineering & Construction Services and the City Solicitor and/or his/her delegate, as appropriate, to make oral and/or written submissions to the Ontario Legislature, including any standing committees or other bodies, to express the City's

concerns with respect to Bill 69 - *Prompt Payment Act, 2013*, and any subsequent bill or regulations dealing with these issues.

Financial Impact

There is no financial impact with the recommendation in this report; however, if this Bill is enacted as proposed, the City will need to assess resource impacts at that time.

COMMENTS

Bill 69 - *An Act Respecting Payments made under Contracts and Subcontracts in the Construction Industry* (short title: *Prompt Payment Act, 2013*) is a private member's bill (the "Bill") introduced by MPP Stephen Del Duca to the Ontario Legislature. The Bill is attached as Appendix "A".

Substantive Issues with Bill 69

The Bill establishes new rules and requirements in relation to payments made under construction contracts. It will apply to all contracts entered into after it comes into force, except for any contracts exempted by the regulations, which have yet to be drafted. We assume that the City will not be exempt from the Bill as it is intended to apply generally to all construction, including contracts entered into by the Province.

As a construction owner, the City spent approximately $1 billion on construction services in 2012. It will be deeply impacted by the terms of the Bill if it is enacted in its current form.

The key terms of the Bill that will impact the City are as follows:

1. Limited Negotiation of Payment Terms

There is virtually no ability for parties to negotiate payment terms. This limits freedom of contract and prevents payment terms from being structured to best suit the project, having instead to follow a prescribed formula set out in the Bill.

Parties are precluded from agreeing to payment terms tied to milestones, which are used on time critical projects. It is very important to the City that flexibility be permitted in construction contracts in respect of how payments are made.

2. One-day Turn Around to Release Holdback – s.4(2)

Under the Bill, the 10% construction lien holdback must be released within one day after it is no longer required to be retained. This means that the City must: (1) perform title searches of all lands involved in the project (or for roads, check the City Clerk's office) to ensure that there are no claims for lien; (2) requisition payment of the holdback; and (3) make payment; all in this one day period. These steps are not able to be performed earlier

as many liens are not preserved (by registration/giving to the Clerk) until the very last day.

It is neither practical nor responsible for the City to attempt to process holdback release within this time frame. There are often large sums of money being released and the risk of mistakes is increased when a payment process is rushed. If the City is forced to release holdback as required in the Bill, with insufficient time to undertake the checks set out above, a claim for lien could be missed and the City exposed to liability as a result.

3. Limit on Retaining Amounts – s. 4(3)

The City's ability to withhold funds otherwise payable is limited under the Bill to what is required or permitted by the *Construction Lien Act*. This prevents the (temporary) retention of funds on some projects for warranty reserves. These are typically retained and then paid out at the end of the warranty period, thereby ensuring that warranty issues, which are the responsibility of the contractor, are dealt with in a timely manner.

The restriction would also limit the application of the City's Fair Wage Policy, which permits the City to pay workers directly for any back-wages owing from the contractor's progress draw. The back-wages may be due to non-payment of wages or failure to pay the proper union or fair wage rate. The Fair Wage Policy provisions allowing such payments would be unenforceable if the City was not able to withhold funds in order to make these payments to workers.

4. Progress Payments Every 31 days or less – s. 5, 6

Under the terms of the Bill, progress payments must be made at least every 31 days. If the contract does not provide for that, then payments are to be made within 20 days after a contractor submits a payment application (which still needs to be reviewed by the owner). The City's current construction contracts typically require payments be made within 30 days of receiving a payment application but only if that application contains all the proper supporting information. The timelines in the Bill are not realistic for many projects, and would not allow sufficient time to review payment applications for completeness and correctness and then pay.

In addition, the Bill suggests payment applications may include services and materials that "will be supplied". It is unclear how this clause would affect contracts that stipulate payments for only what has already been supplied.

5. Payment Applications Deemed Approved in 10 days – s.12

A payment application is deemed accepted in 10 days unless the City provides written notice that all or part of the payment application is being amended and provides full particulars, including references to contract provisions, about what has not been done. This term has shifted the burden from contractors to owners. There is no obligation on the contractor to resubmit a proper payment application nor any recognition for time wasted

by an owner or its consultant in reviewing exaggerated payment applications and detailing the missing work. The City is still obligated to pay the balance of the payment application.

It is sometimes impossible to certify work within 10 days due to a variety of factors such as verifying quantities; lack of supporting documentation; quality of material testing; and non-compliance with regulatory requirements. This may lead to deemed approval.

6. Interest Payable – s. 13

The Bill introduces mandatory interest on unpaid amounts at the higher of: the prejudgment interest rate set out in the *Courts of Justice Act* (1.3% this quarter) or the rate in the contract. Currently, there is no interest payable under City contracts. When staff reviewed the general conditions for construction contracts in 2011 and adopted the standard CCDC-2 contract for vertical projects, the Ontario General Contractors Association was consulted and raised no issue with the City deleting the article on interest for late payments. It will result in increased costs going forward for late payments if the Bill is enacted.

7. Financial Disclosure – s. 14

There is a requirement for owners to disclose financial information related to an improvement to demonstrate the financial ability of the owner. This should not apply to the City as the financial viability of the City is not an issue and approved budgets are publicly disclosed. The administrative burden to provide financial information for each project would be unnecessary and costly. The City should be excluded from this clause.

Legislative Process

The Bill passed first reading on May 13, 2013 and three days later passed second reading on May 16, 2013, supported by all three provincial parties.

City staff has learned that discussion between trade contractors and the Ontario General Contractors Association took place for a period of eighteen months before the Bill was introduced.

We are not aware of consultation with groups representing owners' interests except for the Ontario Home Builders' Association, which has expressed concern with the Bill (according to the Hansard transcript of the second reading). Some MPPs who spoke at the second reading expressed concerns with the Bill and one member invited input from industry stakeholders at the committee stage.

The Association of Municipalities of Ontario wrote to the leaders of all three provincial parties on November 13, 2013 stating that the municipal sector is quite concerned about the Bill, and highlighting the fact that municipal governments were not consulted during its development. The letter points out some of the concerns with the Bill and requests that

municipal governments be exempt from its requirements. The letter is attached as Appendix "B".

The City of Mississauga intends to make submissions to the Legislature about issues it has with the Bill. Staff also understand that some general contractors intend to express their concerns to the Standing Committee. The Ontario Bar Association – Construction Law Section Executive has also indicated its intention to make submissions about general issues raised by the Bill.

The Bill has been referred to the Standing Committee on Regulations and Private Bills which meets every Wednesday. The agenda is typically published the Thursday before each meeting. It is not anticipated that the Bill will be considered at the Standing Committee until the new year.

It is the opinion of staff that it is in the interests of the City to make oral and/or written submissions at the Standing Committee on the issues described above. The Executive Director of Engineering & Construction Services is prepared to make those submissions, with the assistance of the City Solicitor as required, once authorized by Council. Other interested divisions within the City are also being consulted for input.

CONTACT

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Solicitor
Legal Services Division
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Tony Pagnanelli
Director of Business Improvements
Engineering & Construction Services
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SIGNATURE

_____
Anna Kinastowski
City Solicitor

_____
Joe Pennachetti
City Manager

ATTACHMENTS

Appendix "A" – Bill 69 – *Prompt Payment Act, 2013*
Appendix "B" – Letter from AMO to Provincial Party Leaders dated November 13, 2013

10.

Corporate Report

Clerk's Files

Originator's Files

DATE: October 9, 2013

TO: Chair and Members of General Committee
Meeting Date: October 23, 2013

General Committee
OCT 23 2013

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

SUBJECT: **Bill 69 - *Prompt Payment Act, 2013***

RECOMMENDATION:

1. That the report titled "Bill 69 – *Prompt Payment Act, 2013*" by the City Solicitor be received for information.

2. That staff be authorized to make submissions to the Standing Committee on Regulations and Private Bills to outline the concerns with the proposed legislation as raised in this report from the City Solicitor, titled "Bill 69 – *Prompt Payment Act, 2013*".

3. That the report from the City Solicitor, titled "Bill 69 – *Prompt Payment Act, 2013*" be forwarded to the local MPPs and the Association of Municipalities of Ontario for their information.

REPORT HIGHLIGHTS:

- Bill 69 is a Private Member's Bill that received First Reading on May 13, 2013 and Second Reading on May 16, 2013. The Bill was referred to the Standing Committee on Regulations and Private Bills.

- Apparently the Bill has been in the works for up to 2 years within the construction industry but there does not seem to have been much, if any, consultation with owners. Staff only became aware

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of the Bill in late August.

- The Bill imposes a significant limit on the freedom of contract for construction services in ways that curtails the rights of construction owners such as the City. The legislation cannot be contracted out - all contracts will be deemed to be amended in order to comply with the legislation. There is no ability for the owners and contractors to freely negotiate the most suitable payment arrangements in their projects.

- Some concerns with the proposed legislation includes: a) stringent timelines on making payments by the owner; b) restrictions on the payment certification process in favour of contractors; c) allowing contractors to request payment on the basis of reasonable estimates of work done or for services and materials to be supplied in the future in certain circumstances; d) statutory 10% holdback is the only money that can be held back, which means that the City can no longer hold warranty and other reserves to ensure quality work being completed; and e) potentially increase cost to owners.

BACKGROUND:

In late August, it came to Legal Services' attention that Bill 69, being *An Act respective payments made under contracts and subcontracts in the construction industry,* or the *Prompt Payment Act, 2013*, has been referred to the Standing Committee on Regulations and Private Bills after receiving First and Second Reading in May 2013. Bill 69 is a Private Member's Bill introduced by Liberal MPP Steven Del Duca. At the time of this report, the Standing Committee has not established any dates or process for review and/or consultation of this Bill.

This proposed legislation was put forward based on the efforts of the construction industry, led by the Ontario caucus of the National Trade Contractors Coalition of Canada and the Ontario General Contractors Association. To staff's understanding, there has been minimal, if any, consultation with owners of constructions, such as municipalities who are major owners of construction projects.

COMMENTS:

At the heart of the proposed legislation is a significant limit on the freedom of contract for construction services in ways that restricts

construction owners' rights. The legislation cannot be contracted out - all contracts are deemed to be amended in order to comply with the legislation. There is no ability for the owners and contractors to freely negotiate the most suitable payment arrangements in their projects. This is evident in the key provisions of the Bill, which raises the following major issues of concern:

1. Extremely short timelines to make payment:

    - Under the Bill, owners must pay lien holdbacks to GCs within one (1) day of the *Construction Lien Act* no longer requiring the owner to retain the holdback. This does not allow for any reasonable circumstances whereby payment cannot be made within one day, such as the need to complete title searches to ensure that the titles are clear of liens in major projects spanning many properties prior to release of holdback payment, or the practical reality that often payment processing requires more than one day to be completed.

    - Under the proposed legislation, either the contract allows for payment becoming payable at least every 31 days after the first day of services or materials, or it is deemed to be payable within 20 days upon submission of progress payment application. These timelines do not take into account the realities of the need to review work and the certification of payments process. Often, additional information is required before an owner can properly certify work. Depending on the extent of the work completed, time is required to adequately review the work and discussions between the owner and general contractors are often necessary before payment can be certified.

2. If the contract does not stipulate payment every 31 days from the day that work starts as noted above, the contractor can provide "reasonable estimates" of the work done and that would be sufficient to support payment application. The contractor can also request to be paid for services and materials that "will be supplied" to the improvement, rather than simply requesting payment for work that has been completed or materials already supplied. It is standard (and reasonable) practice that payment will only be paid

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for work actually done, not "reasonably estimated" to have been done. This also begs the question as to how work can be properly reviewed and certified for payment, when only a reasonable estimate is being provided or when future work is included.

3. Payment applications are deemed to be approved 10 days after submission by the contractor, unless the owner provides within that 10 days full particulars of the problems in writing. There are also limits placed on what an owner can refuse to certify and it is unclear as to how that would operate in reality.

4. Instead of allowing for the dispute resolution mechanisms agreed upon in a contract to apply where there are disputes over the amount of payment due, under the Bill, if payments are not made in accordance with the legislation, the contractor can suspend work or terminate the contract upon seven days' notice.

   As noted above, given the reality of the time and discussions required prior to payment being properly certified, it would be very difficult to comply with the legislated timeframe. The ability of contractors to suspend work or terminate the contract upon such short notice could have significant impact on public works as many major construction projects have a short window of opportunity to complete due to the weather conditions in winter. Further, there will likely be additional costs to the owner and potentially significant delay to project completion for every demobilization and remobilization by the general contractor or its subcontractors if they suspend work.

5. Holdbacks other than those required under the *Construction Lien Act* will be prohibited under the Bill. This significantly limits the flexibility and ability of owners to utilize payment tools to ensure that work is completed to standard. For example, currently, the City's primary construction contracts that are administered by the Facilities and Property Management Division require certain warranty and deficiency reserves to be withheld, to protect the City if the contractor does not carry out warranty work or correct deficiencies. These reserves will be prohibited under the proposed legislation and forces the City to initiate litigation in order to enforce our claims in cases of deficiencies. Alternatively, the City

could request letters of credit or additional bonding requirements prior to making an award to a contractor, which not only could lead to an increase in the bid price, but which is administratively challenging and not preferred by either the City or many contractors in the industry.

6. Under the proposed legislation, before entering into a contract, owners must provide to the contractor financial information as prescribed by the regulations in support of the owner's financial viability to carry out the work, and the contractor may request at any time for further updated financial information at which time the owner must promptly provide such information. This right is extremely broad, and there are no limits as to how often a request for update financial information would be made. As a side note, not only would this apply to public and corporate owners, but individual homeowners retaining contractors to do work on their property will also be subject to this legislation and the requirement to produce their financial records to contractors.

The above concerns have significant impact on the City and other owners of construction projects, including the Province and the broader public sector. This bill is currently being reviewed by some municipalities, but we are not aware of any municipality having taken a position on it at this time. It is recommended that this report be shared with our local MPPs and the Association of Municipalities of Ontario as this legislation has on municipalities across Ontario.

FINANCIAL IMPACT: If the Bill is passed and becomes law, there could potentially be significant financial impact on owners such as the City. There are stringent requirements with respect to payment to contractors under the legislation. Failure to comply – even for bona fide reasons – could potentially mean the suspension of work by general contractors and/or their subcontractors, which could bring upon delay in project completion and delay claims, as well as additional costs associated with demobilization and remobilization of forces to complete the work. The legislation also removes the right to include finance tools to ensure performance such as warranty and maintenance reserves, which means that owners would resort to expensive litigation if deficiencies are not resolved in accordance with the contract.

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Alternatively, owners could ask for security (such as a letter of credit or maintenance bond) as a condition of contract award to protect themselves, but that would mean additional administrative resources and potentially higher bid prices being submitted for construction projects as bidders try to recover their cost to obtain these instruments.

CONCLUSION:

Bill 69, being the *Prompt Payment Act, 2013*, is a Private Member's Bill that has significant impact on owners' rights in construction projects. It has been developed based on the construction industry's input, but unfortunately, with minimal – if any – consultation with owners of major projects in Ontario, such as municipalities. The Bill has been referred to the Standing Committee of Regulation and Private Bills, and it is proposed that the concerns as raised in this report be presented to the Committee. It is also recommended that this report be forwarded to our local MPPs and the Association of Municipalities of Ontario as this legislation may have on municipalities.

Mary Ellen Bench, BA, JD, CS
City Solicitor

Prepared By: Wendy Law, Deputy City Solicitor – Municipal Law

Sent via e-mail and mail: kwynne.mpp@liberal.ola.org
tim.hudakco@pc.ola.org
ahorwath-co@ndp.on.ca

November 13, 2013

Hon. Kathleen Wynne
Premier of Ontario
Legislative Building - Room 281
Queen's Park
Toronto ON M7A 1A1

Tim Hudak
Leader of the Official Opposition
Legislative Building - Room 381
Queen's Park
Toronto ON M7A 1A8

Andrea Horwath
Leader - New Democratic Party of Ontario
Legislative Building - Room 113
Queen's Park
Toronto ON M7A 1A5

Dear Provincial Party Leaders:

We are writing to you today regarding the Private Member's Bill, Bill 69 - *An Act representing payments made under contracts and subcontracts in the construction industry*. The municipal sector is quite concerned about this Bill and its potential impacts on municipal governments as construction owners. Municipal governments were not consulted during the development of Bill 69 or during the debates to date at the Ontario Legislature.

In our review of the draft legislation, it would appear that it places a significant limit on the freedom of contract for construction services that would restrict municipal governments' and other construction owners' rights. The draft Bill provides no ability for owners and contractors to freely negotiate the most suitable payment arrangements for their projects. In our understanding of the draft Bill, there are extremely short timelines to make payment that do not allow for reasonable review of the work and certification of the payments process.

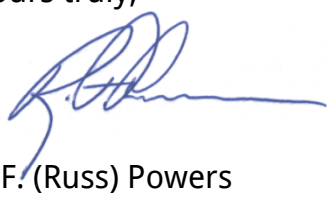
It also does not deal with the reasonable payment process of complex infrastructure projects. It also appears in the draft legislation that a contractor can request to be paid for services and materials that "will be supplied" to the project, rather than asking for payment once work has been completed or for materials that have actually been supplied. It is a standard business practice that payment is only to be provided once work has actually been done. This Bill appears to trump or amend established contract law that is in place on behalf of all the involved parties.

There are proposed stringent requirements to pay contractors even if there are valid reasons for withholding payment. Under the draft legislation, this could mean that general contractors and/or subcontractors could suspend work which could bring on project completion delays which would also involve stoppage and restarting costs. The proposed legislation also removes the right to include financial tools to ensure performance such as warranty and maintenance revisions, which could mean the only way to resolve potential disputes would be litigation for resolving deficiencies that are not done in accordance with the contract. These are only some of the concerns that municipal governments have raised upon reviewing Bill 69.

We would ask that this proposed Bill, should it go forward, be amended by agreement of all three parties to exempt municipal governments from its requirements. If the Bill becomes law without this exemption, it would have significant financial impacts on municipal governments and our property taxpayers.

We would look forward to discussing this further with you and your members. We appreciate your serious consideration of our and the municipal sector's request with respect to Bill 69.

Yours truly,



R.F. (Russ) Powers
President

cc: Hon. Linda Jeffrey, Minister of Municipal Affairs and Housing
Steven Del Duca, MPP Vaughan
Cindy Forster, MPP Welland, NDP Municipal Affairs Critic
Jim McDonell, MPP Stormont-Dundas-South Glengarry, PC Municipal Affairs Critic

To: Chair and Members
Of the Committee of the Whole

DATE: 19 November 2013

RE: Bill 69: Prompt Payment Act, 2013

Trustee Scott has given notice that she will move as follows at the Committee of the Whole meeting on 19 November 2013:

WHEREAS the Simcoe Muskoka Catholic District School Board has shared concerns (attached as Appendix A) about Bill 69: Prompt Payment Act, 2013, which has passed second reading in the provincial legislature; and

WHEREAS staff has indicated that similar concerns exist for the OCDSB;

THEREFORE, BE IT RESOLVED:

THAT the Chair write to the Premier of Ontario to endorse the concerns expressed by the Simcoe Muskoka Catholic District School Board regarding Bill 69: Prompt Payment Act, 2013.

Jennifer Adams
Director of Education and
Secretary of the Board

Michèle Giroux
Executive Officer
Corporate Services

Signatures on this Notice of Motion confirm that the Notice was submitted in accordance with Annex 5, Section 3.4 of the Board's By-laws and Standing Rules.

SIMCOE MUSKOKA CATHOLIC
DISTRICT SCHOOL BOARD

Appendix A

Simcoe Muskoka Catholic District School Board
46 Alliance Boulevard
Barrie, Ontario, Canada L4M 5K3
Tel 705.722.3555
Fax 705.722.6534

October 30, 2013

Honourable Premier Kathleen Wynne
Legislative Building
Queen's Park
Toronto, Ontario
M7A 1A1

Dear Premier Wynne:

Re: Bill 69, Prompt Payment Act-2013

I am writing on behalf of the Simcoe Muskoka Catholic District School Board to share our concerns regarding the Private Member's proposed Bill 69, *Prompt Payment Act-2013*, as it relates to taxpayer-funded school construction contracts across Ontario.

The board recognizes that prompt payment for acceptable construction work completed under the terms of contract is an essential component of a successful project. However, the language contained within the draft Bill has significant gaps that will result in added school construction costs, impacts on taxpayer-funded budgets, delayed school project openings within communities, and potential over-payments to contractors. The *Prompt Payment Act*, while potentially well-meaning in its intent, will have a negative impact on Ontario's school construction initiatives and will not provide added value to Ontario taxpayers and students. Our most significant concern with Bill 69 is that there has been no known consultation with public or private owners.

The Explanatory Note on Bill 69-2013 states: "The Act sets out various rules and requirements in relation to payments made under construction contracts ... [The Act] entitles contractors and subcontractors to receive progress payments and to suspend work or terminate a contract if such payments are not made. It also provides that payments can only be withheld if the payer notifies the payee that a payment is disapproved or amended within 10 days after it is submitted. Limits are imposed on the amount that can be withheld ... [The Act also] requires owners to provide contractors with certain financial information before entering into a contract."

If the *Prompt Payment Act -2013* is approved, there will be several negative implications to Ontario school boards. The specific concerns are outlined below.

Contractor's Right to Terminate the Contract. The *Act*, as drafted, allows a contractor to suspend work or terminate a contract if the contractor is not paid a progress payment. This is one of the more troublesome provisions of Bill 69-2013. There could be myriad reasons for not releasing a progress draw. As an example, the contractor's certificate may not be accurate or complete and may need to be returned to the contractor for correction; or funds may need to be retained by the owner for the contractor's deficient work, etc. Should these situations arise and the contractor chooses to suspend or terminate work on a school construction project, then significant problems will arise with delayed project completion and a resulting inability to meet the educational and accommodation needs of students and school communities.

Payment of Lien Holdbacks. The proposed *Act* directs that, "A payer shall pay the value of a holdback within one day after the day the payer is no longer required to retain the holdback." This directive differs from the current practice under the *Construction Lien Act*, which prescribes that the lien holdback must be released following the 45th day after substantial performance of the contract, but not necessarily on the 46th, or 47th or later date. Directing a release of the holdback by the owner to the contractor "within one day" means that on the 46th day, payment shall be made. As it can take several days to confirm that there are no liens on the property and to process the payment, the result of this direction could be deemed default by the owner. This could then trigger a termination of the contract by the contractor based on a delayed payment.

No Additional Holdbacks. The proposed *Act* restricts an owner from retaining holdbacks other than a lien holdback as allowed under the *Construction Lien Act.* The problem with this section is that it will limit a school board from retaining funds for holdbacks needed to offset the full costs of deficient work. Furthermore, owners would not be able to offset other funds to vacate liens. Retaining insufficient deficiency holdbacks often results in defective and unacceptable work not being properly corrected by the contractor. As a result, the owner does not receive completed work to the standard defined in the contract. A contractor's failure to complete their work, which can result with no other holdback provisions, can also delay the issuance of occupancy permits and the necessary completion of school program spaces for neighbouring communities.

Payment Timing. Under the *Act*, "A payer shall make a progress payment, …, within 20 days after the day the payee submits the progress payment application." This short period is unreasonable considering the time needed for the consultant to review the application, submit it to the owner for their review and the processing of the payment. Standard contract clauses with school boards often have a 40-day payment period – a reasonable amount of time for the reviews and payment. Generally, this time period has not been an issue as contractors are aware of these payment terms when entering into the contract.

Equally important is the fact that this section of the proposed *Act* does not prescribe the standards for the submission of a progress payment application. Generally, there are other conditions that need to be satisfied for an application to be proper, such as acceptable dollar values, WSIB clearance certificate, payment statutory declarations, construction schedules, etc. Progress payment applications without these standard submission requirements from the contractor are not, and would not be, acceptable construction project management practice and would add risks to both sub-contractors and owners. In many cases, existing *Prompt Payment Acts* in the United States address this Bill 69 shortfall with wording defining an acceptable quality of the progress submissions. A late payment with this short review period could result in the contractor invoking the contract termination.

Also, the proposed Bill provides that, "a payment application is deemed to be approved (by an owner) 10 days after the day the payee submits the application, unless before the 10th day, (the owner) provides a written disapproval." Under standard school board contracts, the consultant has 10 days to review the application before forwarding it to the owner, so it would mean that school boards would not be able to consider or even complete the application review within the 10-day notice period. Furthermore, the wording does not reference that the application needs to be a valid and complete application.

In addition to the above-noted concerns, there are issues with a number of other clauses in Bill 69, including the obligation by the owner to provide confidential financial information to the contractor which raises privacy concerns. Also there are references to "regulations" to the *Act*, which do not appear to have yet been developed.

The *Act* also allows for advance payments for work to be completed, which would result in overpayments to contractors.

The draft *Prompt Payment Act -2013* as it stands, would shift the balance of the school construction contracts so that school boards would not have the ability to retain the required funds for contractors' project deficiencies or liens. The *Act* would result in the late completion of school constructions and delayed school openings, with direct implications to the learning and teaching environments of Ontario students, teachers and educational staff.

The Board acknowledges that the timely payment to contractors for acceptable work completed within the terms of the construction contract is key to successful school construction projects. However, the terms detailed in Bill 69, Prompt *Payment Act- 2013* will be detrimental to school construction work on behalf of the communities and citizens of Ontario.

Accordingly there should be open public consultation on Bill 69, *Prompt Payment Act - 2013* and the Bill should not be approved as presented.

Sincerely,

Clayton R. J. Ferguson
Chair, Board of Trustees
Simcoe Muskoka Catholic District School Board

cc: Hon. Liz Sandals, Minister of Education
Chairs of Ontario School Boards
Marino Gazzola, Ontario Catholic School Trustees' Association
Bill Blackie, Ontario Association of School Business Officials

Halton District School Board

David Euale, *Director of Education* Kelly Amos, *Chair of the Board*

January 28, 2014

The Honourable Kathleen Wynne
Premier of Ontario
Legislative Building
Queen's Park
Toronto, ON M7A 1A1

Re: Ontario Bill 69: Prompt Payment Act, 2013
Implications to School Boards

Dear Premier Wynne:

The Halton District School Board would like to express its significant concerns regarding the *Prompt Payment Act, 2013* and its significant impact on construction work with school boards. The *Act*, introduced as a Private Member's Bill, received second reading approval from the Ontario Legislature in May 2013. Prior to third reading consideration, the Halton District School Board would strongly urge open public consultations on this Bill.

The Board recognizes prompt payment for acceptable construction work completed under the terms of a contract is an essential component of a successful project; however, the language contained within the draft Bill has significant gaps that will result in added school construction costs, impacts on taxpayer-funded budgets, delayed school project openings within communities, and potential over-payments to contractors.

The *Prompt Payment Act*, while potentially well-meaning in its intent, will have a negative impact on Ontario's school construction initiatives and will not provide added value to Ontario taxpayers and students. Our most significant concern with Bill 69 is there has been no known consultation with public or private owners.

The Explanatory Note on *Bill 69-2013* states: "The *Act* sets out various rules and requirements in relation to payments made under construction contracts ... [The *Act*] entitles contractors and subcontractors to receive progress payments and to suspend work or terminate a contract if such payments are not made. It also provides that payments can only be withheld if the payer notifies the payee that a payment is disapproved or amended within 10 days after it is submitted. Limits are imposed on the amount that can be withheld ... [The *Act*] also requires owners to provide contractors with certain financial information before entering into a contract."

cont'd

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The draft *Prompt Payment Act,-2013* as it stands, would shift the balance of the school construction contracts so school boards would not have the ability to retain the required funds for contractors' project deficiencies or liens. The *Act* would result in the late completion of school constructions and delayed school openings, with direct implications to the learning and teaching environments of Ontario students, teachers and educational staff.

The Operations, Maintenance and Construction Committee of the Ontario Association of School Business Officials has completed a comprehensive review of Bill 69, and has provided comments on the background issues and implications, should the Bill be approved. These major concerns are documented in the attached report.

The Halton District School Board acknowledges timely payment to contractors for acceptable work completed within the terms of the construction contract is key to successful school construction projects. However, the terms detailed in *Bill 69, Prompt Payment Act, 2013* will be detrimental to school construction work on behalf of the communities and citizens of Ontario.

Accordingly, the Halton District School Board strongly suggests open public consultation on *Bill 69, Prompt Payment Act, 2013,* and the Bill should not be approved as presented.

Sincerely,

Kelly Amos

Kelly Amos, Chair
Halton District School Board

encl.: *OMC Report on implications to school boards of Ontario Bill 69: Prompt Payment Act*

cc.: *Ontario Minister of Education, Liz Sandals*
Ontario Members of the Legislative Assembly
Halton Coterminous Boards
OPSBA and Member Boards
OABSO
Region of Halton
Municipalities of Halton (Burlington, Halton Hills, Milton, Oakville)

OMC Construction Practices Group

Commentary on
Bill 69 - Prompt Payment Act, 2013

July 23, 2013

Overview:

Ontario's 2013 Bill 69 – "An Act respecting payments made under contracts and subcontracts in the construction industry" (the "Prompt Payment Act") is a private member's bill (presented by Liberal MPP Steven Del Duca), which was tabled in the Legislative Assembly of Ontario and has recently passed a first and second Reading in the Legislature. The Bill is now slated to go before a Standing Committee on Regulations and Private Bills where it is to undergo a public consultation process. To date, there appears to have been little, if any, consultation with Ontario's public and private owners of construction projects who will be directly affected by the Prompt Payment Act, if it passes a third Reading and becomes law.

The Explanatory Note on Bill 69 comments that:

"The Act sets our various rules and requirements in relation to payments made under construction contracts." It "entitles contractors and subcontractors to receive progress payments and to suspend work or terminate a contract if such payments are not made. It also provides that payments can only be withheld if the payer notifies the payee that a payment is disapproved or amended within 10 days after it is submitted. Limits are imposed on the amount that can be withheld." The Act also "requires owners to provide contractors with certain financial information before entering into a contract."

There are a number of conditions in Bill 69 ("the Act") that would have a significant impact on owners implementing construction contracts and generally could include issues with overpayments, delayed project completion and correction of outstanding deficiencies, among other impacts.

The implications to school boards managing their annual capital budgets for the construction of new school facilities, school renewals, additions and Full Day Kindergarten expansion, could be significant. This report provides some background information on the current construction practices applied by Ontario school boards and delineates sections of the Act with the related challenges for school boards.

This report has been prepared as a confidential and privileged information document for the Ministry of Education by the Operations, Maintenance and

Construction (OMC) Committee, a sub-committee of the Ontario Association of School Business Officials.

Background:

The majority of Ontario school boards use the CCDC 2- 2008 industry standard document as a base agreement for their construction contracts. The CCDC 2 is a stipulated price contract between an owner and a contractor that was revised by the Canadian Construction Documents Committee in 2008. The 30-page document defines and prescribes the roles and responsibilities of the parties to the contract including, the payment terms, default notices, dispute resolution, delays, insurance, health and safety and other related project obligations. There are, within the standard CCDC 2 document, a number of terms that may be considered as providing more control and rights to the contractor rather than an owner, and as a result sophisticated owners typically implement Supplementary Conditions and Amendments to the CCDC 2 standard terms and conditions, in an effort to provide an improved balance to the parties' obligations and risks under the CCDC 2 document. The use of Supplementary Conditions has become standard within the construction industry and different Supplementary Conditions are used by owners – including school boards, colleges and universities, municipalities, and project architects. To provide a standardized template for Ontario's school boards, the OMC Committee released a consolidated set of Supplementary Conditions in 2009 (OMC Supps) that were available for use by school boards.

Ontario's contractors raised some concerns with the terms and conditions detailed within the OMC Supps, so in November 2012 and January 2013 the OMC Construction Practices team met with representatives of the Ontario General Contractors Association (OGCA) and the Ontario Association of Architects (OAA) to discuss those concerns. The objective of those discussions was to review the interests of owners, contractors and architects in relation to the provisions in the OMC Supps, and agreement was reached on many of the concerns raised by the OGCA and OAA. Some of the sections now proposed in Bill 69 were also discussed with the parties at these two meetings, and the rationale for these statements in the OMC Supps was explained which resulted in an appreciation of the need for certain amendments to the CCDC 2 document. The changes to the OMC Supps that were agreed to during those discussions, have been included in a revised set of OMC Supps that have been released to school boards.

It is recognized that prompt payment for construction work completed under the terms of a contract is an essential component of a construction project and these payment terms are defined in the OMC Supps. Prudent Owners appreciate that providing timely payments allows for the work of contractors, sub-contractors and suppliers to proceed successfully. However, the terms under the Prompt Payment

Act could and likely would, in the view of the OMC, have a negative impact on long-established construction processes in Ontario.

The Prompt Payment Act, if enacted, would supercede and void a number of the provisions contained within the OMC Supps –provisions that were set in place to protect school board interests, provide enhanced tools to manage school construction projects and in the end protect the capital expenditures for these projects in a manner that ultimately benefits the taxpayers of Ontario. The Prompt Payment Act will, in the opinion of the OMC, negatively erode school boards' freedom to contract, by imposing payment and other terms that could , and likely would, have a significant effect on the management of the construction contracts by school boards.

Implications of Bill 69:

There will be several far-reaching issues for school boards to contend with if the Prompt Payment Act is enacted into law. These issues would include problems ranging from: overly restrictive payment conditions; potential over-payments to contractors; delayed school opening dates; overall higher construction costs; and slower or non-completion of deficient work and warranty work. The specific details and resulting concerns with the Prompt Payment Act are noted in the following section.

Part II –Payments.

(i) Duty to Pay Holdbacks.

Section 4 (2) provides: "A payer shall pay the value of a holdback within one day after the day the payer is no longer required to retain the holdback,.." (note: underlining is for emphasis on this point)

Comment: the day referred to in this section is generally the 45th day after Substantial Performance of the contract, pursuant to the provisions of the Ontario Construction Lien Act, which does not prescribe when the lien holdback must be released, only when it cannot be released. However, by prescribing a release of the holdback by the owner to the contractor on the 46th day (being the day after the day the payer is no longer required to retain the holdback under the Construction Lien Act), an owner first needs to verify through legal counsel that no liens have been registered against title to the project, following which, if there are no liens, payment approvals have to be processed for payment (typically from the project office to the owner's accounting office). In the OMC's experience, this process can take two weeks before a cheque is ready for release to the contractor. Consequently, it is anticipated that school boards could find themselves to be in breach of the

requirements of section 4(2) of the Prompt Payment Act and thereby exposed to potential contract suspension or termination rights by the contractor under Bill 69.

(i) No Additional Holdbacks.

Section 4 (3) provides: "A payer shall not withhold any payment other than those payments that the payer is permitted or required to withhold under this Act or the Construction Lien Act."

Comment: The concern with this statement is that it will prevent an owner from retaining funds for deficiency holdbacks and to offset for the costs of deficiencies including required remedial work. Furthermore owners would not be able to offset funds to vacate liens. It would appear to essentially eradicate an owner's legal rights of set-off. The OMC has explained to the OGCA that deficiency holdbacks (retainage) pending rectification of outstanding work by the Contractor, provide motivation for the Contractor to complete such work. Retaining insufficient deficiency holdbacks often results in defective and unacceptable work not being properly corrected by the Contractor, so that the Owner ultimately does not receive completed work as defined in the contract. A contractor's failure to re-attend, after it has received most of its payments under a contract, can also delay the issuance of occupancy permits and other sign-offs by municipal authorities.

When a lien is registered on a property, the Owner may retain funds, in addition to the 10% Construction Lien holdback, from the payment certificate to cover the total costs to vacate the lien. An inability to set aside funds to cover a lien would add to the project risk and costs for an Owner.

(iii) Payment Period

Section 6 (2) provides: "A payment period,.., begins on the first day of the month of every month and ends on the last day of that month."

Comment: This condition would appear to restrict payments outside of the end of the month period, regardless of when the performance cycle begins, whereas currently payments could be made, benefitting the contractor, at any date within the month.

(iv) Progress Payment Application

Section 6(3) provides: "A contractor,.., shall prepare,.., a progress payment application that sets out the value of the services and materials that have been or will be supplied to the improvement,…". (note: underlining is for emphasis on this point)

Comment: The statement above mandates that a contractor submit a progress payment application (arguably even in the case of short-term projects that might

otherwise provide for a single payment). Furthermore, the underlined words indicate that contractors are permitted to bill for future work that has not yet been performed. If the materials have not been received on site or incorporated into the works then such costs are not the proper subject of a progress application and should not have to be paid by an owner; doing so, would result in overpayment.

(iv) Estimates

Section 6 (4) provides: "A progress payment may rely on reasonable estimates." (note: underlining is for emphasis on this point)

Comment: Which party determines what is "reasonable"? What a Contractor may view as being a reasonable estimate may be very different from that of an Owner, again resulting in more confusion and dispute. Since the CCDC 2 document provides for a defined role of the "Consultant", who would then become the payment certifier. The Consultant, who determines the actual value of the quantities of work invoiced by a progress application, needs to retain that role. This Act appears to be removing the authority of the Consultant as the contract's independent payment certifier.

(v) Submission of Application

Section 6 (5) 1. Provides: "A contractor shall submit a progress payment application to an owner,…"

Comment: Progress applications, under the CCDC 2 contracts, are sent to the Consultant for review and recommendation prior to going to the Owner.

(vi) Payments, Timing

Section 6 (6) provides: "A payer shall make a progress payment,…, within 20 days after the day the payee submits the progress payment application,…".

Comment: A 20 day payment period is not reasonable. Firstly, the payment application needs to reviewed by the Consultant and after their acceptance the application is submitted to the Owner for review and acceptance. Considering mailing time, other work priorities, vacations and processing of the payment by a central accounting office common to school boards, there is a significant risk that school boards will be late in making payments according to the tight schedule prescribed by this Act. The OMC Supps contract has a 10 day review period for the Consultant and a 20 day Owner review and payment period and generally this time period has not been a significant issue as contractors are aware of these payment terms when entering into the contract.

Equally as important is the fact that this section of the Act does not prescribe the standards for the submission of a progress payment application. Generally there are other conditions that need to be satisfied for an application to be proper, such as a

WSIB Clearance Certificate, payment statutory declarations, construction schedules, etc. Progress payment applications without these standard submission requirements from the contractor would not be acceptable construction project management and would add risks to both sub-contractors and Owners.
Also, section 6(6) must be read in conjunction with the other provisions of the Act, notably section 12, which provides that "a payment application is deemed to be approved" (by an owner) "10 days after the day the payee submits the application, unless before the 10th day, the payer" (owner) "provides a written disapproval". This would mean that school boards using the OMC Supps could not meet the 10 day notice period if they had a disagreement with a contractor's application, because the application would be in the hands of the Consultant for up to 10 days.

(vii) Right to Suspend Work or Terminate Contract

Section 7 (1) "A payee may suspend work or terminate a contract,.., if the payee is not paid a progress payment,…"

Comment: This is one of the more alarming provisions of the proposed Act. It permits a contractor (and subcontractors pursuant to section 8(5)) to suspend work and terminate a contract if a progress payment is delayed. There may be a number of reasons why a progress payment is not made, or not made on time. As noted above, the Contractor's certificate may not be accurate or complete and may need to be returned to the Contractor for correction; funds may need to be retained for deficient work etc. Should these situations arise and the Contractor suspends or terminates work on a school construction project then it could result in significant problems in meeting the educational needs of the students with a delayed project completion. The contractor's ability to suspend work and potentially terminate the contract, also raises issues as to whether a contractor who is otherwise in default of its work (or responsible for project delays) might use these payment provisions in an effort to shift the default to an owner and avoid responsibility for delays, or a potential call on its performance bond. Similar issues arise at the contractor-subcontractor level.

(viii) Suspension of Work or Termination of Contract, Default Rules

Section 8 (1) provides: "This section applies where a contract,.., does not authorize a payee to suspend work or terminate the contract,.., if the payee is not paid a progress payment."

Comment: See notes above for section 7 (1).

Section 8(2) provides" "Where a payee has not been paid a progress payment, the payee may suspend work or terminate a contract or subcontract…"

Comment: This provision is not acceptable for the reasons noted above, but at an absolute minimum, should be stated to be "Subject to section 12…".

Section 8(5) is not clear on who the "payer" is who is required to receive written notice of the suspension. Does the Act propose for subcontractors to provide notices to owners, notwithstanding the absence of privity of contract between those parties?

(ix) Demobilization and Remobilization Costs

Section 8 (7) provides: "If a payee resumes work following a suspension, the payer shall pay the payee for any reasonable demobilization and remobilization costs incurred by the payee."

Comment: Again, the challenge is defining what are reasonable costs. Do they include loss of profit, indirect costs, etc. Which party determines what is reasonable. Also, the Act is not clear on what is to occur in a situation where the contractor agrees to resume work following a suspension, but a subcontractor elects to still terminate, pursuant to section 8(6)

(x) Approval of Applications

Section 12 (1) provides: "A payment is deemed to be approved 10 days after the day the payee submits the application unless,…"

Comment: This clause promises to create major problems. Issues with this section, include the following:

a. Firstly, as noted above, the Act does not recognize the need to have the Consultant complete the payment application review prior to submitting to the Owner for their review and payment. Having the analysis by the Consultant is a critical component of the payment review process. By the time the Owner then receives the application from the Consultant the 10 day period will most likely have passed resulting in an obligation to effect payment as submitted by the Contractor;
b. Secondly, it does not reference that the application needs to be a valid and complete application. What if the application is in error, or has inflated payment values, or does not include the other contractual submissions, which do not go to the price of the application.
c. Thirdly, is the submission of the application the date that it is mailed to the Consultant for review, or the date it is received by the Consultant. If the former, it would leave even less time for the Consultant to perform its required contractual review and would result in more situations whereby premature payments are required to be made under the Act.

(xi) Limitation on Amount Disapproved or Amended

Section 12 (2) provides: "The amount of a payment that is disapproved or amended shall be limited to a reasonable estimate of any direct loss, damage,...".
Comment: As noted previously, who determines what is a reasonable estimate? What about delay damages, would these be considered "direct losses"? Further, could an owner use this provision to disallow or adjust a payment application to address the cost of known deficiencies, or would this conflict with the prohibition on such withholdings under section 4(3), discussed above? Would this mean that funds could not be retained for deficiency holdbacks, liens, etc? It again could result in overpayment of a progress certificate.

(xii) Withholding Disapproved or Amended Payments

Section 12 (3) provides: "If a payment application is not approved,.., a payer may withhold that part of the payment that is disapproved or amended, but may not withhold any more than that part."

Comment: As identified above, funds could not be held back for deficiencies, liens, etc. under this section resulting in over payments.

(xiii) Interest on Overdue Payments

Section 13 provides: "Interest is payable on any unpaid amount of a progress payment,…"

Comment: Any unpaid amount could apply to funds retained for cleanup of deficiencies, or for covering lien costs, etc. So, if these funds were retained, would interest need to be paid out at a later date?

PART III - Right to Information

(xiv) Right to Financial Information

Section 14 (1) provides: ",…, an owner shall provide the contractor with the financial information provided by the regulations,…"; and

Paragraph 14 (2) provides: ",.., the owner provide updated financial information,…".

Comment: These sections are similar to GC 5.1 of CCDC 2 2008 contract, which are deleted in the OMC Supps. Financial information is not required to be provided for government projects.

Moreover, section 14(2) entitles the contractor to request "updated financial information" "at any time", failing which an owner is liable "for any damages sustained by reason of the failure to provide the information…" (section 14(8)). It is conceivable, that a contractor looking to avoid its contractual obligations, could

submit daily or weekly ("at any time") requests in an effort to trigger liability on the part of an owner and avoid its own default. Also, does the Act consider whether "any person" would extend personal liability to employees of a school board. Finally, it is to be noted that throughout the Act, there are references to "regulations" to the Act, which do not appear to have yet been developed. In the case of section 14(1), the regulations are where the particulars will be prescribed on the type of financial information that an owner must divulge.

Summary Comments:

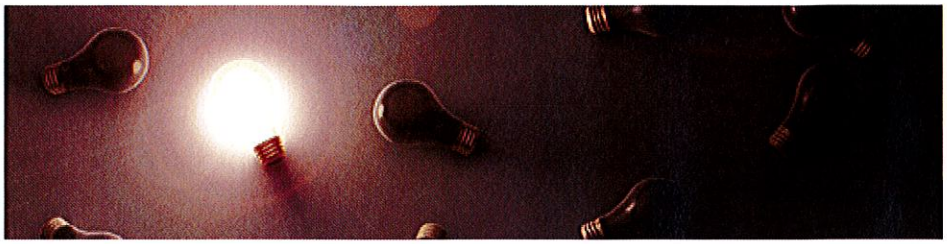
The OMC Construction Practices group, representing the interests of the majority of Ontario school boards, met with the Ontario General Contractors Association together with their contractor representatives, and with the Ontario Association of Architects and discussed areas of concerns with the standard construction documentation used by school boards. Many of the issues raised by the OGCA and OAA were resolved in this forum however it appears that the topics not resolved are being unilaterally enforced through legislation via Bill 69.

Bill 69 -Prompt Payment Act, 2013 would, if enacted, impose a number of significant obligations with school board construction projects. The Act would affect the payment process and could result in overpayments. It would shift the required balance of the construction contract so that the owner would not have the necessary abilities to retain required funds to allow for a timely project completion. Additionally, there would be limitations on the ability of an Owner to retain funds for deficiency correction by the Contractor and setting off lien costs that would result in school boards not receiving projects completed to an acceptable or contractual standard. The suspension or termination of a contract due solely to a late payment could impact on school construction project schedules resulting in delayed school openings.

These proposed changes to the construction contract agreements would not result in the best allocation of the limited funding from the taxpayers of Ontario.

Furthermore, the language in Bill 69 -Prompt Payment Act, 2013 could result in late project completions with direct implications to the learning environment of our students.

Considering the significant implications of Bill 69 for many public sector owners, including school boards, it is proposed that the Bill not be approved and that the measures stipulated in the Bill be considered in a consultative and cooperative process by the many parties which would then allow for a full discussion of the many perspectives relating to the construction contracts.



Bill 69, The Prompt Payment Act - The Good, The Bad and the Ugly

December 2013

By **Edward G. (Ted) Betts**

It is hard to object to the notion of "a fair day's pay for a hard day's work", which is perhaps why Bill 69, the *Prompt Payment Act, 2013* received all party support when it passed second reading in the Ontario Legislature in May 2013.

For a Bill that proposes significant changes to some common industry practices, it is a little surprising how little attention Bill 69 has received in the construction industry as a whole.

Most private member's bills do not become law and that may be the fate of this Act, but many in the industry think that this little Act has a more than passing chance. It is now with the Standing Committee on Regulations and Private Acts and several construction industry associations which are backing the Act have started to ramp up their efforts to push it forward. And, in a minority government under pressure to make peace with opposing parties to avoid an election, who knows? An Act which purports to assist the smallest player on construction projects could easily, and quickly, become law.

Nevertheless, there has not been any public consultations and awareness of the substance to date and impact of the Act is not widely spread, especially among developer, owner and project finance groups.

If Bill 69 is ever to become law, it will need public consultation to iron out some uncertainties, and to address some obvious concerns with the Act as it is currently drafted.

Objectives

The Act focuses on three primary objectives: (1) prohibit all holdbacks on a construction project other than those required under the *Construction Lien Act*, (2) impose mandatory payment terms on construction parties, both in terms of timing and consequences of non-payment, (3) establish new financial disclosure obligations on construction parties.

The Act attempts to address a number of problems faced by contractors, all related to cash flow on the project, as the full name of the Bill suggests (*An Act respecting payments made under contracts and subcontracts in the construction industry*). None of the issues addressed in the Act are new issues. In fact, in some ways, the Act merely attempts to codify into law certain provisions that are often (but not always) found in construction contracts, including the CCDC standard form contracts.

However, in doing so, it will remove the freedom and flexibility of construction parties to negotiate specific terms for particular projects and impact the allocation of project risks. In setting out to protect contractors and subcontractors, it is not clear that the full impact of the proposed law has been fully considered: some of the unintended consequences of the cure may be worse for them than the disease.

Applies to All Contracts

The Act will apply to every construction contract or subcontract related to an improvement. Existing contracts are grandfathered, but all other contracts are deemed to be amended to comply with the Act.

RELATED SERVICES -

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Edward G. (Ted) Betts

It should be noted that the Act contemplates regulations that have not been drafted yet. These will no doubt provide for certain exceptions or clarifications relating to the application of the Act, such as perhaps smaller home renovations, but the clear intention of the Act is that it will apply to nearly all construction projects.

Prohibition on non-CLA Holdbacks

The Act changes industry practice on holdbacks. It will require the statutory holdback of the *Construction Lien Act* to be paid within one day after the applicable lien period ends. The Act also prohibits any holdbacks other than the holdbacks permitted or required to be withheld under the *Construction Lien Act*.

The only holdback that will be permitted under the Act is a holdback for amounts claimed in an invoice for which the payer objects within 10 days. It seems that this would prevent an owner from avoiding payment of an invoice even if a deficiency is discovered relating to prior, already paid invoices.

Final milestone payments, deficiency or completion reserves, set-offs will not be permitted under the Act. This appears to conflict with section 17(3) of the CLA, which allow set-off of claims and payments, as well as common law rights of set-off. The Act and the CLA will need to be reconciled before Bill 69 is to become law.

The Act will also prevent a payer from holding back any funds for deficiencies at the end of the project when all progress payments have already been made since the Act requires payment of the statutory holdback the day after the end of the lien period and prohibits all other holdbacks. This is a significant change to customary industry practice in the interest of protecting contractors and suppliers.

If the *Prompt Payment Act* became law, owners, developers and project lenders, and even general contractors, will need to consider means of security and protection for deficiencies on projects other than retention of payment. This could include additional bonding, letters of credit or other financial security requirements. It could also result in an advantage for larger contractors with more financial backing and stronger balance sheets.

Mandatory Progress Payments

The Act will codify into law several payment obligations, effectively giving statutory force to some payment regimes that are common in some, but not all, contracts and giving them some teeth.

It establishes a progress payment regime for all projects. If your contract or subcontract provides for progress payments, then those progress payments will now become payable no later than 31 days after the first day that services or materials are supplied to the construction project.

If your contract does not provide for progress payments, then the Act requires an owner to pay its contractors within 20 days after submitting their monthly invoice and requires contractors to pay their subcontractors within 10 days after a payment certificate is issued or 30 days after the subcontractor submits its invoice.

Payment structures are designed to reflect a balance between cash flow and allocation of

risk on the project. It is not clear how the Act will impact those many types of projects that do not fit neatly into a monthly progress payment structure. Many larger or multi-faceted projects are, for example, often paid on a milestone basis which would not be permitted under the Act. It is equally unclear how the Act will be applied to contractual relationships that involve a fee for ongoing operation and maintenance that includes some repair and occasional construction work. How are deposits treated under the Act?

There is also no protection in the Act for an owner that is relying upon project financing or landlord payments (for leasehold improvements), and has not received its advance on time.

So what happens under the Act if a payer doesn't pay on time? The Act, not surprisingly, provides payees with a few remedies that are not uncommon in construction contracts, and would now be statutorily enforceable in all cases.

Deemed Acceptance of Invoices

First, all invoices submitted by payees are deemed to be approved by the payer 10 days after the day the payee submits its invoice, unless the payer provides written notice of disapproval or amendment, with full particulars of the disapproval or amendment. This is a very short period of time, especially if third party engineers or municipal inspectors are required to certify payments or assess deficiencies.

Interest Charged

Interest Charged

Second, all late payments will accrue interest from the date a payment was payable at the greater of (a) the prejudgment interest rate determined under the *Courts of Justice Act* and (b) the rate specified in the contract or subcontract.

"Pay when paid?"

Third, and perhaps most significant, the law permits a payee to suspend work or terminate a contract or subcontract if the payee is not paid a progress payment that the payee is entitled.

This new rule will apply to all payers, including general contractors which fail to pay subcontractors. This, of course, puts general contractors in a bind. What if they haven't been paid yet by the owner? They could be really squeezed. The Act gives them an out, or at least a bit of an out. There is a sort of "pay when paid" clause. If a contractor or subcontractor has not been paid a progress payment, then it does not have to pay further down to its subcontractors.

However, it is only a sort of "pay when paid" clause because there are two significant caveats. First, if a payee who is also a payer wants the protection of the "pay when paid" clause, it will have to either suspend its own work or terminate its own contract or start to enforce its lien rights for *every delayed payment*. This obviously will have an adverse impact on owner-contractor relations, financing for the project and scheduling.

Second, the protection only lasts until the *earliest* to occur of (1) the date that the contractor receives payment from the owner, (2) the date that the payment dispute is resolved or finally determined or settled, or (3) the date that its lien rights expire. Ultimately, a general contractor will have to either pay out of its own pocket to keep the peace on the project, or it will have to pay or start fighting the owner for payment.

Right to Information

The third objective of the Act is to impose more financial transparency on projects to the benefit of contractors and subcontractors. It attempts to accomplish this by establishing two disclosure obligations: one on the owner and one on all other payers including general contractors.

Ability to Pay

Before entering into a construction contract, the Act will require that an owner demonstrate to its contractor that it has the financial ability to pay for the project. It is not clear how this would get satisfied since regulations have not been drafted yet.

The CLA imposes certain financial obligations on construction parties, but these principally relate to limited financial status items relating to the project and not the owner's financial strength or solvency or liquidity. The Act will go much further and require disclosure of confidential, personal or commercial information such as a business' operational revenues, a homeowner's salary, details about lending terms, etc.

The Act does impose some confidentiality obligations, but in practice it is difficult, if not impossible, to prove that a particular contractor breached the confident obligations. It is not clear whether owners, developers and municipalities will take any comfort from the Act's confidentiality protections.

There are some further disclosure items like updates. The failure of an owner to disclose what it is required to under the Act, or to provide incorrect information negligently, will make the owner liable to contractors and subcontractors for any damages sustained by reason of the failure to make the disclosures properly.

Receipt of Payments

Once the project gets underway, there is a disclosure obligation on payees. Whenever a contractor or subcontractor receives a payment on the project, it must promptly notify all of its subcontractors of the payment and must post the information on a website that can be accessed by those subcontractors. Some general contractors have expressed concern regarding the heavy administrative burden this imposes on contractors, especial on large projects with hundreds or thousands of subcontractors and suppliers. The computer systems and project management requirements resulting from the Act may provide larger general contractors with an advantage over newcomers or small players.

Next Steps

As noted at the outset, the *Prompt Payment Act, 2013*is now before committee and has not yet been brought forward to the committee's agenda for discussion. Some MPPs, in speaking on the Act in the Legislature, noted that several concerns would need to be

addressed in committee. To date, the bill has not had any public hearings or even any invitation for public comment, and hopefully it will.

Gowlings' National Construction Law Group is following the course of the Act closely as it will have a direct and significant impact upon many of our clients and the industry as a whole.

Please sign up for our Construction Law Bulletins to keep current on developments with Bill 69, the *Prompt Payment Act 2013,* and in the construction industry.

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Proposed Prompt Payment Legislation in Ontario: The Cure for Payment Problems on Construction Projects?

Construction Law Blog

September 17, 2013 by Howard Krupat

A recent development that likely has the full attention of the Ontario construction industry is the May 16, 2013 second reading, with the support of all three provincial parties, of Private Member's Bill 69 – An Act respecting payments made under contracts and subcontracts in the construction industry. The proposed legislation has now been referred to committee before it can be eligible for third and final reading and passage into law. If enacted, Bill 69 will have a dramatic impact on the terms of construction contracts, the day-to-day administration and flow of funds on large and small public and private projects and the types of claims that arise. In other words, this is definitely a matter worth studying for both construction lawyers and industry participants.

The Concerns Giving Rise to the Proposed Prompt Payment Legislation

For many years now, a hot topic of debate within the Ontario construction industry has been whether the Construction Lien Act adequately addresses the demands of increasingly complex construction projects.

Holdback Release

One of the classic complaints of payees (i.e. contractors, subcontractors and suppliers) is that although the Construction Lien Act stipulates a mandatory holdback retention period, it does not contain a positive obligation for holdback funds to be released immediately following the expiry of construction lien deadlines. Absent a contract provision addressing this issue, the payee who is concerned about the receipt of its holdback funds is therefore left with two options: (i) lien before the deadline in order to preserve its claim against the holdback funds; or (ii) allow the lien deadline (and therefore its security) to lapse and hope that the holdback funds will follow.

Both options have drawbacks.

The first scenario would conceivably result in the registration of liens on every project. In addition

to freezing the flow of project funds altogether, this practice would obviously not be a good long term strategy for any contractor or supplier who is eager to build lasting business relationships.

In the second scenario, the payee essentially gives up its security by waiting for its lien deadline to lapse and then hoping for the best. In my experience, however, the holdback funds are ultimately released in the overwhelming majority of cases. If that were not the case, it is difficult to imagine that anything would ever get built.

Late Payments

Another concern is the perception that while the CLA addresses outright payment defaults, it does not really offer a practical solution for late payments. Although lien rights arise from the date that a party commences its supply of services or materials (section 14), it would generally not be wise for a contractor or supplier to lien every time a payment is a few days late, or even a few weeks late.

Ostensibly in order to address these and other issues, Bill 69 was put forward after lots of industry discussion, including among representatives of a broad spectrum of the contractor and trade side of the construction industry – the National Trade Contractors Coalition of Canada and the Ontario General Contractors Association. As noted above, the Bill has passed its first two readings and will now be scrutinized at the committee level before third reading and the potential passage of the Bill into law.

The concept of prompt payment in exchange for work that is properly done and approved should not on its own be controversial. The questions that may arise in connection with this draft legislation include whether: (i) the proposed legislation achieves the industry's objectives; and (ii) whether it is consistent with the contracts that are now being entered into on large, complex

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Key Provisions

Without providing an exhaustive summary of the Bill, here are some of the highlights:

1. All contracts and subcontracts will be deemed to be amended as required in order to conform to the legislation;

2. Holdback would be due and payable within one day after it is no longer required to be retained under the Construction Lien Act;

3. No funds are permitted to be withheld by a payer from a payee other than as permitted by the proposed legislation (see the reference to unapproved payment applications below) or the Construction Lien Act;

4. If a contract or subcontract does not provide for progress payments every 31 days after services or materials are first supplied to a project, then a contractor would be entitled under the Act to payment within 20 days after submitting a progress payment application following the conclusion of a monthly payment period and a subcontractor would be entitled to payment within the later of 10 days after a payment certificate is issued or 30 days after submitting a progress payment application;

5. A payee who is not paid in accordance with the timing prescribed by the legislation would be entitled to suspension and termination rights as the result of same (upon providing seven days' notice of same in accordance with the relevant provisions of the Act);

6. The legislation imposes a specific mechanism for final payment under a contract or subcontract where the contract or subcontract itself does not provide for same;

7. A payment application is deemed to be approved 10 days after it is submitted unless a written notice that all or part of the application is being disapproved or amended is issued in accordance with the Act;

8. Where a payment application is not approved for final payment, the payer would be entitled to withhold only the portion of the payment that is disapproved or amended; and

9. Prior to the commencement of a project, an owner would be obliged to provide financial information for the purpose of demonstrating the financial ability of the owner to make contract payments.

Potential Impact of the Proposed Prompt Payment Legislation

The above summary touches on only some of the highlights of Bill 69. Developers, project owners, contractors, trades and supplies would all be well-advised to review the Bill carefully and consider how they might be affected (see here).

In the current infrastructure environment, it is not uncommon for parties to negotiate payment mechanisms that are not necessarily consistent with what is proposed by Bill 69. In addition, payments may be tied to the requirements of the project lender or whatever financing arrangements have been negotiated by all of the major parties involved in a project. Public-private partnership (P3) projects in particular are known to include complicated payment provisions.

It appears that the proposed legislation could therefore have a significant impact upon, among other things: (i) negotiated payment provisions that are tied to milestones rather than monthly deadlines; (ii) contract clauses permitting set-off or the withholding of funds for deficient work or delays; (iii) "pay-when-paid" provisions (i.e. contract clauses stating that a payer is not obliged to make a payment to its payee until the payer itself is in receipt of the money that is owing to it for the corresponding work); and (iv) liquidated damage clauses.

Regardless of whether Bill 69 is passed into law, the debate will certainly be an interesting one to follow.