
Subject: Bill 142 – Construction Lien Amendment Act, 2017

Report to: Corporate Services Committee

Report date: Wednesday, April 17, 2019

Recommendations

1. That Regional Council **ENDORSE** the recommendations made by the Association of Municipalities Ontario (AMO) to the Ministry of the Attorney General to consider the following additional changes to the recently amended *Construction Act*:
 - Owners should be provided more than 14 days to publish a notice of non-payment to ensure that due diligence is completed before payment of a proper invoice is required (e.g. 21 business days);
 - The time period between December 24th to January 2nd of each calendar year should be excluded from the calculation of time with respect to Prompt Payment and Adjudication;
 - The date for implementing the Prompt Payment and Adjudication regimes should be postponed from October 1, 2019 to one year following the establishment of the Authorized Nominating Authority (ANA); and
 - That the Ministry create and communicate practice guides, interpretation bulletins, and webinars in alignment with Recommendations 97 & 98 of the Expert Panel's Report to educate owners, contractors, and subcontractors of the new regimes;
2. That the Regional Chair **BE DIRECTED** to send a letter to the Ministry of the Attorney General to consider the recommendations made by AMO respecting the changes to the Construction Act; and
3. That Report CSD 29-2019 **BE CIRCULATED** to the local area municipalities.

Key Facts

- The purpose of this report is to inform Council regarding municipal governments' concerns with recent amendments to the *Construction Act* as a result of Bill 142, and recommend that Niagara Region join municipal organizations in support of the four changes outlined by the AMO.
- Of significant concern is that the necessary processes are not in place with the province, preventing municipal governments from planning appropriately for the October 2019 implementation.

- The Association of Municipal Managers, Clerks and Treasurers of Ontario (AMCTO), Municipal Finance Officers of Ontario (MFOA), and other municipal organizations are supportive of the changes outlined by the AMO.

Financial Considerations

There will be a financial impact for the Region to implement and comply with Bill 142; however, the magnitude of the impact cannot be fully understood until the legislation has been in place for some time.

As a result of Bill 142 amendments to the *Act*, there will be cost implications associated with updating contract language, adapting existing processes, and resources required to address prompt payment, mandatory adjudication, risk mitigation, and general compliance with the amended statute. Budgetary and accounting pressures are a factor as mandated payments related to adjudicated disputes will become due mid-project with short timelines for payment.

Staff will be required to develop processes and procedures to respond to new payment and claims pressures under compressed timelines. Additional ongoing legal and contract administration support will also be required to address an expected increase in contract disputes arising from the mandatory adjudication process. Additionally, depending on the yet to be determined regulations, mandatory surety bonds on public projects may also increase project costs, and potentially reduce the competitive pool of available bidders for certain types of work.

Overall, these potential factors introduce significant corporate financial risk to the organization.

Analysis

Bill 142 made numerous amendments to the *Construction Lien Act* (now titled the *Construction Act*), which affect the Region, its professional consultants, general contractors, subcontractors, and contract administrators. These include:

- Modernization of the construction lien and holdback rules and timelines
- Modernization of claims procedures
- Introduction of a prompt payment regime for all construction projects
- Implementation of adjudication as a new process to speed up dispute resolution

The purpose of the amendments was to ensure promptness and security of payment for suppliers of construction materials and services, and to ensure disputes are resolved efficiently to facilitate cash flows between contractors and subcontractors. The amendments are being implemented in three phases and can be categorized as follows:

(1) Minor housekeeping changes which went into effect December 12, 2017; (2) changes with respect to lien modernization, holdback payment, and surety bonding effective July 1, 2018; and (3) changes with respect to prompt payment and adjudication effective October 1, 2019.

Prompt Payment

Effective October 1, 2019, new legislation with respect to a "Prompt Payment" scheme will be implemented which will have an impact on the Region and the construction industry as a whole.

The Act will require that an owner (i.e. the Region) pay according to a "proper invoice" no later than 28 days after receiving said invoice from the contractor. Should an owner dispute the invoice, or a portion thereof, notice of non-payment must be given no later than 14 days after the invoice receipt date. If only a portion of the invoice is disputed, the owner is still required to pay any undisputed portions of the invoice within the 28 day time frame.

Staff are currently working to rewrite contracts and to define what constitutes a "proper invoice" in its contract language. System and process changes related to document management are also required to accommodate these changes. Considerations are also being made in the event the Region loses adjudications of disputes, as interest will accrue on any amounts that are not paid within the legislated time.

In addition, while the Legislative changes related to prompt payment outlined herein come into effect post contract award, the Region's Procurement department recognizes the need for a proactive and upfront commitment of resources to ensure that all associated templates (RFT, RFP, etc.) and contract documentation are updated to reflect the changes related to prompt payment, mandatory adjudication, risk mitigation, and general compliance with the amended statute. To ensure ongoing adherence to the overarching objectives of fairness and transparency, these changes will be incorporated and effectively communicated to the bidding community from the onset of each procurement process that is undertaken.

Adjudication

Also effective October 1, 2019, the Bill 142 amendments will come into force with respect to interim adjudication for construction disputes.

The Minister of the Attorney General is responsible for designating an entity to act as Authorized Nominating Authority (ANA) for the purposes of developing and overseeing programs for training adjudicators; qualifying adjudicators; establishing and maintaining a registry of adjudicators; and appointing adjudicators.

The party to a contract will have the right to refer disputes to adjudication, although adjudications are mandatory if payment is withheld. These disputes could relate to valuation of services or materials; payments under the contract, including change orders; disputes subject to Notices of Non-Payment; amounts retained as set-off; payments of holdback; non-payments of holdback; or any other matter to which the parties to the adjudication agree.

The adjudication procedures are set out in the *Act*, and will include a written notice of adjudication; selecting an approved adjudicator; exchange of documents to be relied upon at the adjudication; powers of the adjudicator; on-site inspection of work projects; and retaining of experts to assist the adjudicator. Strict timelines have been put in place (once adjudication is initiated, parties will have four days to agree to an adjudicator or the Authorized Nominating Authority must appoint one within five days; the initiating party then has five days to provide materials in support of its position; and a decision must be rendered by the adjudicator within 30 days of adjudication).

Liens

Liens are no longer attached to municipal property effective October 1, 2019. Under the current legislation, liens are not attached to crown property or municipal highways; however, if someone wishes to lien other properties such as a community centre, they can register the lien on title. With Bill 142, municipal properties are treated the same as crown lands. All liens are to be served by giving it to the Clerk; they are not to be placed on title. Staff will be required to develop processes and procedures to respond to new liens procedures under compressed timelines.

Staff at the Region have initiated a readiness assessment to identify the gaps and to develop a subsequent work plan to be compliant with Bill 142. Council's endorsement for these recommendations made by AMO and the associated risks as articulated in their letter will help ensure the Region's success in complying with the Bill while staff continue the work to be ready for October 1 or any other date the province may establish as a result of AMO recommendations and their endorsement by the Council.

Alternatives Reviewed

N/A

Relationship to Council Strategic Priorities

N/A

Other Pertinent Reports

N/A

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Appendices

Appendix 1 AMO Submission to the Standing Committee on the Legislative Assembly

Appendix 2 AMO Letter to Attorney General



Bill 142, *An Act to Amend the Construction Lien Act, 2017*

Submission to the Standing Committee on the Legislative Assembly

November 1, 2017

AMO, on behalf of our municipal members, advocates for well-considered provincial legislation that enables municipal governments to function for the benefit of our communities and the public interest. Conversely, we work to mitigate unintended consequences of proposed legislation and regulations, identify gaps that need to be addressed, and provide advice to the Province to determine the best implementation.

Bill 142, *An Act to Amend the Construction Lien Act* (2017), is a piece of legislation that exemplifies the positive outcomes of what happens when a proper and thorough consultation takes place. As you know, the construction industry, owners (including municipal governments), contractors, and subcontractors have long argued for reforms to the *Construction Lien Act*, and AMO is encouraged that Bill 142 includes significant improvements to modernize an Act that is over 30 years old.

The Process

AMO appreciates the government for conducting the Expert Panel review of the *Construction Lien Act*, and the commitment and leadership shown by Attorney General Naqvi to get Bill 142 to this stage.

Our written comments will not come as a surprise to the Ministry of the Attorney General or others, as AMO has been actively consulted and involved throughout the four-year process.

Last week, the Attorney General circulated a list of some proposed government motions that have allowed us to narrow the focus on our remarks on Bill 142. We appreciate the Ministry's attempt to strike a balance between all stakeholders, and recognize that some of our concerns may be addressed in these motions. However, it is still important for AMO to highlight issues raised by our members that should be considered by the Committee.

Please note that our general remarks support other municipal governments' individual technical submissions which combined reflect countless hours working through how Bill 142 would affect the operations in their municipalities, and in some cases, have prepared draft alternative language that we hope the Committee will consider.

Areas of Support for Bill 142

AMO has been working closely with the Attorney General's office to identify gaps and unintended consequences of Bill 142. The Ministry is proposing several government motions that would, if passed, address some of AMO's concerns:

- including a transition provision to provide for consistency until the new law comes into effect;
- exempting architects, engineers, and consulting professionals from requiring surety bonds for public projects;

- clarifying that interest for late payments is from the date the invoice was due and payable; and,
- that adjudication may not revive expired liens.

We recommend that the Committee adopt these changes during clause-by-clause consideration.

In addition to these amendments, AMO submits that consideration also be given to our outstanding issues.

Recommended Areas for Refinement

1. Payment should not be made without first receiving a municipal owner's express approval or certification that work was properly completed.

AMO believes in prompt payment and is supportive of a regime that requires payments be made promptly for work that is completed to a standard that an owner has deemed to have been met. We believe that modernizing prompt payment rules is important and that people who have completed work properly should be paid on time.

AMO agrees completely with the Toronto Transit Commission's comments regarding certification, that "requiring payment to be made from the date of a proper invoice instead of certification or owner's approval means there may not be enough time to properly scrutinize an invoice and risks payment for improper or incomplete work. In the US, 20 states allow the trigger event to be either set out in the contract or is expressly certification/approval."¹

We note in the proposed government amendments, Alternative Financing and Procurement (AFP) projects would be allowed "certification of payment prior to the submission of an invoice for AFP projects."² AMO wonders why these same exceptions cannot apply also to municipal projects, given that it provides significant protection to one type of project over another.

Although the government is proposing a motion that provides an owner with the ability to conduct "testing and commissioning" of a project, it does not account for every scenario and this motion, if applied, would only add an additional cost. Without including a certification trigger, the link of prompt payment with a mandatory adjudication regime, means that an owner is not only required to make a payment in 28 days, but adjudication is automatically invoked if not.

This does not give nearly enough time for a municipal government, large or small, to verify that the work has been completed to specifications and to enter into discussions with contractors for any discrepancies that may be identified, which is industry practice.

¹ Toronto Transit Commission. Written Submission on *Bill 142: Construction Lien Act Amendment Act, 2017*, October 25, 2017, pg. 3.

² Email from the Attorney General's Office. "Update on Bill 142: Construction Lien Amendment Act." Received Monday, October 23, 2017.

All municipal governments have a duty to the taxpayer to be diligent in how projects are managed, and to ensure that taxpayer money is only paid for work that is properly performed and meets all of the specifications under the contract. To have the trigger for payment be the receipt of the proper invoice and not certification or other forms of owner's approval lacks the checks and balances necessary to process those payments. It will undoubtedly result in paying for contracts that are not properly completed and increase costs of litigation to resolve those disputes through adjudication.

Therefore, AMO is requesting that the trigger for payment for public projects be testing, commissioning and certification, or alternatively extend the timelines in the prompt payment regime to ensure that public funds are managed properly, and the safety of our projects are maintained for our residents.

2. Before proceeding to combine the lien rights and mandatory adjudication regimes – making Ontario the first jurisdiction in the world to do so – AMO would like the problematic time lags and other practical considerations addressed.

AMO is very concerned about implementing both regimes at the same time. Even if a matter is not resolved to the satisfaction of a contractor or subcontractor, they may bring a lien action during construction. By contrast, an owner does not have any ability to bring an action until the end of the project.

Bill 142 would make Ontario the first jurisdiction in the world to have both regimes (UK has adjudication but no lien rights). Under the prompt payment regime, owners and contractors would not have the same ability to settle a dispute because the timelines are so strict. To make matters more challenging, the government is proposing a motion that the subcontractor would be required to invoke adjudication if the contractor does not pay. These scenarios only drive up project costs and risk delaying construction projects.

We continue to be told that this legislation intends to catch problematic actors, not large owners like municipal governments. As responsible owners, we should be given flexibility to resolve disputes with contractors at far less cost, before being pulled into adjudication.

AMO also submits that the time lags between the "payment date" and the "non-payment notice" for progress payments ought to be extended to 28 days (s. 6.3 (2)), and the "payment date" and the "non-payment notice" for holdback payments should be extended to 60 days (s.27.1). This would better align the payment deadlines, and decrease the risk that contractors would be paid for work that was not properly completed.

Another example is that the extremely short timelines, proposed for adjudication, could result in the owner being taken by surprise in a trial if the contractor has spent time preparing a detailed claim without the owner's knowledge, and then initiates adjudication, with the owner having very little time to prepare a proper response.

These are just some examples that the Committee should address around the prompt payment and adjudication regimes. AMO recommends that the Province explore the implications of enacting both sections, and that stakeholders have the ability to comment on regulations before they are enacted. We have come too far in this process, and with significant alignment amongst stakeholder groups, why not work together to get it right the first time?

3. It is important that municipal governments receive training support and resources to ensure the legislation is properly implemented at the local level, and that they, as owners, are operating in compliance with the law.

AMO encourages the Ministry to find ways to help train municipal staff across Ontario on what has changed should this legislation pass. The size and capacity of municipal governments is equally broad as the value of projects they deliver. For example, about 43% of municipalities have less than six full-time administrative staff to cover statutory duties including a clerk, treasurer, general reception, and perhaps a chief administrator.³ It is highly unlikely that there will be a lawyer on staff.

Conversely, of the 34 Ontario municipalities that have a population over 100,000, their project management and legal staffing budgets will also have to significantly increase because of this legislation, as they, as an example, are the ones doing transit expansion projects.

Regardless of size, Bill 142 will require every municipality to redraft all of their construction contracts, develop new project management procedures, and change processes to ensure faster payment. This will require hiring more legal and project management resources (especially if the timelines do not change), and adding more administrative burden on every municipal clerk who will need to ensure compliance with this legislation, as well as the over 200 other provincial statutes that municipal governments are required to follow.

Given this context, AMO requests that the legislation be delayed in coming into force by one or two years, and echoes the recommendation by the City of Toronto that “there be a Ministry website for construction in Ontario for the publication of all notices under the Act and to provide additional information on individual projects”.

This would be helpful to all parties in the construction pyramid and erase the administrative and cost burden of publications required under the Act. If each project in the Province was assigned a ‘Project Identifier’ number, this would further assist the parties in locating all of the information about a project in one place, on one website.”⁴

³ Ministry of Municipal Affairs, 2016 Financial Information Return, Schedule 80. <https://efis.fma.csc.gov.on.ca/fir/>

⁴ City of Toronto, Oral Remarks on *Bill 142: Construction Lien Act Amendment Act, 2017*, October 25, 2017

Conclusion

AMO believes that Bill 142 has in some ways truly struck a balance between the competing asks of all stakeholders, and should be considered an achievement for industry and owner groups.

That said, we hope that the Committee will carefully consider our remarks and those of our member municipalities. These remarks are intended to ensure the modernization of the *Construction Lien Act* will be as successful as possible by avoiding unintended consequences and mitigating against the potentially costly and burdensome impacts of this legislation.

Sent via email: caroline.mulroney@pc.ola.org

March 7, 2019

The Honourable Caroline Mulroney
Attorney General
McMurtry-Scott Building, 11th Floor
720 Bay Street
Toronto, Ontario M7A 2S9

Dear Attorney General Mulroney:

I would like to outline the ongoing concerns that municipal governments have with the *Construction Act, 2017*, and to reiterate my request to meet with you on this item. Without legislative amendments and support from the Ministry for implementation, we do not believe that the prompt payment and mandatory adjudication regimes will work effectively by the time the legislation is to come into force.

AMO, and our members, have always supported the principle of prompt payment, as evidenced by various municipal governments that already have policies in place that protect workers and suppliers. That is why we have played an active role in modernizing the *Construction Lien Act* since the work on prompt payment began.

While the *Construction Act* has been modernized in many respects, we recognize that the most significant pieces of legislation come into force on October 1, 2019. With that date fast approaching, AMO is asking the Ministry to consider four amendments:

1. Owners should be provided more than 14 days to publish a notice of non-payment to ensure that due diligence is done before payment of a proper invoice is required (e.g. 21 business days);
2. The time period between December 24th to January 2nd of each calendar year should be excluded from the calculation of time with respect to Prompt Payment and Adjudication, similar to the recently proposed federal legislation;
3. The date for implementing the Prompt Payment and Adjudication regimes should be postponed from October 1, 2019, to 1-year post-establishment of the Authorized Nominating Authority (ANA); and
4. That the Ministry create and communicate practice guides, interpretation bulletins, and webinars in alignment with Recommendations 97 & 98 of the [Expert Panel's Report](#) to educate owners, contractors, and subcontractors on the new regimes.

The proposed 28-day timeline for owners to pay contractors on the receipt of a “proper invoice” does not provide enough time for municipal staff to inspect and certify whether the work has been completed properly. Municipal governments require the ability to certify work before payment is remitted to protect our property taxpayer dollars. This Act essentially prohibits certification before payment, which is problematic and should be reconsidered. Otherwise, the Act leaves municipal taxpayers vulnerable to increasing construction project costs as well as legal fees.

Further, most municipal governments are closed for the holidays or maintain a much reduced staffing level during December 24th to January 2nd. It is important that municipalities are not forced into impossible timelines when those imposed by the legislation are already so tight.

Many details about the Authorized Naming Authority (ANA) are still to be determined. We recognize that the proposed regulations have provided some clarity, and that Expressions of Interest for ANA members were released in January 2019. In order to have the ANA working by October 1st, the Province must develop a certification regime for the adjudicators, ensure that there are sufficient adjudicators to meet demand, and ensure they have all been certified. Only once these details are in place can owners, contractors and subcontractors be educated on how this mechanism will work in practice.

This Act, in its current form, makes Ontario the first jurisdiction in the world to have prompt payment and adjudication regimes run simultaneously. We all need to get it right, and owners are willing to do their part to get ready. To achieve this we strongly encourage the Ministry to create practice guides, interpretative bulletins, and webinars to communicate how to prepare for these regimes prior to coming into force.

One consideration the Ministry should explore is creating a centralized web database hosted for all construction in the province for notices and additional project information. A website commissioned by the Province could have cost-recovery fees and be more affordable than the current proposed vehicle.

I appreciate your thoughtful consideration of these issues, and look forward to meeting to discuss how we can make the *Construction Act* a success for all of Ontario. The Ministry can reach out to AMO staff to clarify any details needed.

Sincerely,



Jamie McGarvey
AMO President
Mayor, Town of Parry Sound

cc: The Honourable Steve Clark, Minister of Municipal Affairs and Housing