



STAFF REPORT ACTION REQUIRED

Bill 142 Construction Lien Amendment Act

Date:	October 16, 2017
To:	TTC Board
From:	Head – Legal Department & General Counsel

Summary

The *Construction Lien Act* creates a system of rights and obligations imposed on owners, contractors and subcontractors in the Ontario construction industry, most notably, the construction lien. TTC is an owner under the *Act*.

Bill 142 passed second reading October 4, 2017. It amends the *Construction Lien Act* by modernizing the current provisions and implementing new prompt payment and adjudication mechanisms. It has been referred to the Standing Committee on the Legislative Assembly.

The three main areas of reform proposed by Bill 142 are as follows:

1. Modernizing technical aspects of the *Act*.
2. Introduction of statutory prompt payment requirements.
3. Streamlined adjudication process.

Modernization of the *Construction Lien Act* is generally welcomed industry-wide, however the introduction of prompt payment and adjudication regimes will be a sea change for the industry and have the potential to significantly impact TTC.

TTC legal staff, in consultation with TTC Engineering, Construction & Expansion, Materials & Procurement and Finance Departments, have been working closely with other owners, especially the City of Toronto, to review the potential impacts of Bill 142. The TTC's participation in the Bill 142 process and its alignment with other owners and stakeholders has the best chance of advancing TTC's interests and ensuring Bill 142 when passed reflects a balanced consideration of the issues.

Recommendations

It is recommended the Board:

1. Request staff provide written responses, request standing and if granted, make oral submissions on Bill 142 consistent with this report regarding:
 - a. Modernizing technical aspects of the *Act*
 - b. Prompt payment
 - c. Adjudication
 - d. Bill 142 impacts and consequences
 - e. False claims protection for publicly funded projects
2. Request staff work with other owners and stakeholders in advancing common interests consistent with this report.

Financial Summary

There are no financial implications resulting from the adoption of this report. However, Bill 142 once passed into law will have future cost impacts to the TTC (e.g. new adjudication system). TTC staff are currently working with other owner stakeholders, including a number of municipalities, to better understand the cost implications associated with Bill 142. Future cost impacts will be addressed through the budget process.

The Chief Financial Officer has reviewed this report and agrees with the financial impact information.

Accessibility/Equity Matters

Recommendations have no accessibility or equity issues.

Decision History

None

Issue Background

Bill 69 Prompt Payment Defeated

In late 2013 now Minister of Transportation Steven Del Duca tabled a private member's Bill to enact a prompt payment regime in the Ontario construction industry. Public owners including municipalities, agencies, and school boards, were not involved with the drafting of the Bill. Although the notion of prompt payment was generally accepted, the

bill, as drafted, was problematic because it put significant public funds at risk and did not include any public owner stakeholder involvement. TTC worked in concert with public and private owners, as well as large general contractors, to advocate for common interests and made written submissions about the detriment Bill 69 would cause to TTC.

Largely due to the joint efforts of public owners, Bill 69 was abandoned in 2014 in favour of a comprehensive review of the current *Construction Lien Act*.

Expert's Review of the *Construction Lien Act* and Bill 142

In late 2015 the Ministry of the Attorney General launched an expert's review of the *Construction Lien Act*. In the course of the review the TTC was identified as a stakeholder. TTC legal staff, in consultation with TTC Engineering, Construction & Expansion, Materials & Procurement and Finance Departments, met with other owners, the expert review panel and the Attorney General to provide and comment on issues with the current *Act* and the expert panel's report. The expert report contained 100 recommendations including how to modernize existing provisions and the introduction of prompt payment and adjudication regimes.

On May 31, 2017, Bill 142 the *Construction Lien Amendment Act* passed first reading in the Ontario Legislature. Adopting nearly all of the expert report recommendations, the Bill attempts to modernize the current *Construction Lien Act* and implement new prompt payment and adjudication mechanisms. TTC has worked with City of Toronto and both parties provided feedback to the Attorney General on technical conflicts within Bill 142 on August 1, 2017. The Bill passed second reading October 4, 2017 and has been referred to the Standing Committee on the Legislative Assembly. It is expected that TTC, in accordance with the recommendations of this report, will make written responses and, if granted standing, oral submissions to the Committee in late October to November 2017.

Comments

Bill 142's amendments to the *Construction Lien Act* focused on three main areas:

1. Modernizing technical aspects of the *Act*
2. Prompt payment
3. Adjudication

Modernization of the *Construction Lien Act* is generally welcomed industry-wide, however the introduction of prompt payment and adjudication regimes will be a sea change for the industry and have the potential to significantly impact TTC.

Modernization of Technical Aspects

The modernization amendments to the current *Act* proposed in Bill 142 are largely desirable. Holdback is the obligation of TTC to retain 10% from every payment made to

a contractor until the end of a project. The amendments will provide more efficient and effective delivery of TTC construction projects by allowing holdback to be released in phases prior to the end of the project (to allow more flexibility in cash flow for contractors). The amendments will also allow the delivery (rather than registration) of all liens in respect of municipal lands which, if implemented as desired, will result in private home and business owners being removed from lien disputes. However certain minor technical refinements are required to fully harness the potential of modernization as certain gaps were identified within the initial Bill.

Bonding requirements are also now a legislative requirement for projects that exceed a yet to be announced threshold. This removes the ability of TTC to determine if the increase in a bid price due to a bonding requirement is balanced by the protection provided by that bond.

Prompt Payment

Prompt payment will mandate TTC pay contractors within timelines that are similar to TTC's current payment timelines. However, Bill 142 will also mandate:

- required interest on late payments
- detailed notices of non-payment to contractors including publicly published non-payment of holdback notices
- the requirement of contractors to commence an adjudication (see below) in the face of any non-payment notice

Prompt payment provisions will require payments of invoices within 28 days of receipt of the invoice. To dispute an invoice, the TTC is required to provide notice of the dispute within 14 days of receipt of the invoice. The 28 day payment period is not a significant change to our current 30 day payment practice.

Of particular concern to TTC staff are time lags between the required notices of non-payment and payment deadlines potentially resulting in improper payments to contractors, as well as ambiguity in the hierarchy of payments, holdbacks and set-offs. Currently, the right of set-off allows that if a contractor owes TTC an amount, TTC can retain that amount from funds it owes the contractor. It is unclear how prompt payment will affect that right.

Adjudication

Bill 142 also introduces a mandatory adjudication process for payment disputes. The adjudication decisions are "interim" decisions but must be followed until a court or arbitration determines otherwise.

TTC staff are concerned how adjudication could affect project budgets and staffing, as well as the timelines of adjudication proceedings, the quality of adjudication determinations and apparent conflicts with other provisions of the *Act*.

Bill 142 leaves the details of the adjudication procedure to be set out in as yet unreleased regulations and therefore the process is unknown. However Bill 142 does indicate:

- nearly all disputes, other than termination, may be subject to adjudication rather than traditional court proceedings
- an adjudication is only between contracting parties but consecutive adjudications for common issues may be allowed
- an adjudicator must be selected or assigned 4-13 days after a notice commencing the adjudication is served
- the party who commenced the adjudication must provide all documents to the adjudicator within 5 days of his/her appointment
- an adjudicator must render a determination within 30 days of receiving the documents, unless the parties agree to an extension
- adjudication determinations are not appealable except in very rare circumstances
- adjudication determinations must be paid within 10 days and attract interest on late payments
- contractors and subcontractor may suspend their work if an adjudication determination is unpaid
- lien rights are not affected, and may even be expanded, by adjudication
- adjudicator fees (including costs of any assistance obtained by the adjudicator) will be borne equally by the parties
- adjudication determinations are binding until a court or arbitrator determines otherwise
- adjudicators may not be designated in the contract
- adjudicators will be appointed and trained by a new body created for that purpose

Furthermore, Bill 142 contains gaps that leave unanswered questions including the application of holdbacks, set-offs, substantial performance calculations and others.

Although similar adjudication processes exist in other common-law jurisdictions around the world, the suggested changes as set out in Bill 142 are somewhat unique as it would allow for both lien rights and adjudication at the same time. TTC staff are not aware of any other jurisdiction in which lien rights exist together with an adjudication process in the manner contemplated in Bill 142.

TTC staff are concerned with how an adjudication system and lien system can be simultaneously maintained and Bill 142 does not provide sufficient clarity on the issue. As a result, an owner may have the obligation to pay an adjudication determination within 10 days (or be subject to interest or suspension rights) but at the same time be obligated to retain holdback funds in respect of the same issue. This places the cost risk with the owner.

While liens are primarily concerned with security and adjudication is primarily concerned with timely dispute resolution, if Bill 142 is to permit both systems to exist

simultaneously, it must ensure they can be employed in a way that does not create inconsistencies or unfairness.

Bill 142 Impacts and Comments

There is no immediate financial impact by adopting the recommendations of this report. However, if Bill 142 passes in its current form, it will cause project budgets to increase in the medium to long term. Costs will include:

- unwarranted payment of contract funds when deficiencies or set-off rights are discovered during the payment lag periods
- interest on holdbacks, non-payments and retentions adjudicated to be incorrect
- additional internal staff required to respond to and participate in adjudication as the project is ongoing (as noted above the adjudication timelines are very short)
- fees for external counsel and experts for multiple concurrent adjudications;
- fees of the adjudicator
- extremely quick turnaround times for documents will require the investment in additional resources and technology
- the potential requirement to “pay twice” when faced with both lien notice holdback and adjudication determinations

TTC staff have been working closely with other owners, especially the City of Toronto, to review the potential impacts of Bill 142 and to strategically ensure the benefits and concerns raised in Bill 142 are known to the Attorney General.

TTC’s participation in the opposition to Bill 69 and its collaboration with other owners and stakeholders contributed to the government’s decision to abandon Bill 69 and undertake a larger review of the *Construction Lien Act*. The TTC’s participation in the Bill 142 process and its alignment with other owners and stakeholders has the best chance of advancing the TTC’s interests and ensuring the *Construction Lien Amendment Act* reflects a balanced consideration of the issues.

False Claims Protection for Publicly Funded Projects

As part of the TTC’s submissions to the expert panel, the TTC requested additional protections for owners, including the possible introduction of false claims protections, which is standard practice in most American jurisdictions (including the federal government and more than 30 states). The notion of false claims protection provision (or a False Claims Act) was also included as a recommendation in the Quebec Charbonneau Commission.

Generally, the false claims provisions impose liability on companies working on publicly funded projects that are found to have submitted false (or exaggerated) claims relating to a project. In 2016, the U.S. federal government alone obtained more than \$4.5 billion in false claim settlements and judgements.

The issue of false claims protections was added to a list of issues by the expert panel but ultimately they concluded that it was not within the current scope of the review and was therefore not included in any of the recommendations. Likewise, Bill 142 does not currently include any false claims protection provisions.

As part of its submissions TTC will advocate that the notion of false claims protection for public sector owners should be included in an effort to ensure that claims on publicly funded projects are proper.

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