

Clause No. 15 in Report No. 2 of the Committee of the Whole was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting on January 23, 2014.

**BILL 69, *PROMPT PAYMENT ACT*, 2013**

**Committee of the Whole recommends adoption of the following recommendations contained in the report dated December 19, 2013 from the Regional Solicitor:**

**1. RECOMMENDATIONS**

It is recommended that:

1. Council endorse the Association of Municipalities of Ontario's request that municipal governments be exempted from the requirements of the *Prompt Payment Act* as set out in Attachment 1 to this report.
2. The Regional Clerk circulate this report to the Clerks of the local municipalities.

**2. PURPOSE**

This report provides information regarding Provincial legislation relating to the provision of payments on construction projects, which is currently being considered by the provincial legislature, and requests Council's endorsement of the position taken by the Association of Municipalities of Ontario (AMO) that municipal governments be exempted from the requirements of such legislation if it comes into force.

**3. BACKGROUND**

**Bill 69, *Prompt Payment Act*, was introduced as a Private Member's Bill in May 2013**

Bill 69 – *An Act respecting payments made under contracts and subcontracts in the construction industry*, which is also known as the *Prompt Payment Act* (the "Act") is a Private Member's Bill introduced to the Ontario Legislature by Vaughan MPP Steven Del Duca. The underlying purpose of the Act is to address the problems of late payments in the construction industry by creating legal obligations around making timely payments to construction contractors.

The main proponents of the Act are members of the construction contracting industry, who have taken the position that late payment practices negatively impact upon the

construction industry because they result in reduced employment and productivity, smaller bidding pools and higher construction costs.

The Act passed its First Reading and Second Reading in the Ontario Legislature in May 2013, and has been referred to the Standing Committee on Regulations and Private Member's Bills. No date has been set for the Standing Committee to review the Act but it is anticipated that this will occur in early 2014.

#### **4. ANALYSIS AND OPTIONS**

The most noteworthy provisions of the Act can be divided into the six categories described below.

##### **(i) No ability to contract out of the Act**

The parties to a construction contract would not be permitted to contract out of the requirements of the legislation. All contracts and subcontracts will be deemed to be amended as required in order to conform to the legislation. However, the Act would not apply to any contract or subcontract made before the Act comes into force. This requirement would eliminate the ability of owners to prescribe or negotiate certain terms and conditions of construction contracts.

##### **(ii) Payment of, and restrictions regarding, holdbacks**

The Act obligates owners to pay *Construction Lien Act* holdbacks to contractors "...within one day after the day the payer is no longer required to retain holdback under the *Construction Lien Act*...". This would mean that the holdback would have to be released on day 46 after publication of the certificate of substantial performance.

The Act also prohibits owners from retaining any type of holdback from a contractor other than as permitted by the Act or the *Construction Lien Act*. This means that owners would not be permitted to retain maintenance holdbacks, deficiency holdbacks or any other types of holdbacks that might otherwise be retained on construction contracts.

##### **(iii) Strict timelines for progress payments and final payments**

The Act mandates that the payment structure, under all construction contracts, follow a progress payment arrangement whereby a contractor will be entitled to progress payments a minimum of every 31 days after services or materials are first supplied to a project. Where a contract does not provide for progress payments every 31 days, then a contractor will be entitled, under the Act, to payment within 20 days after submitting a progress payment application following the conclusion of a monthly payment period.

In addition, a payer will be deemed to accept a progress payment within 10 days of its submission, unless the payer gives written notice that it is disputing the progress payment, with full particulars as to why the payment is being disputed (including amount in dispute, reasons for dispute and applicable contract provisions) within the 10 day period. The disputed amount shall also be limited to a “reasonable estimate” of any direct loss, damage, cost or expense incurred by the owner, and the owner will only be entitled to withhold the disputed amount from the payment.

There is also a provision that specifies time periods for final payments, and mandates that a final payment be made within five days after the day a certificate is issued by the payment certifier, or, if there is no certificate issued, within 10 days of the contractor’s request for payment or 15 days after the final payment application has been submitted.

All late progress payments and late final payments will incur interest at a rate which is agreed to in the contract or at a legislated rate.

**(iv) Progress payments can be based on “reasonable estimates” and for services and materials that “will be supplied”**

The Act states that progress payment applications submitted by contractors may be based on the contractor’s “reasonable estimates” of the work done, and may include services and materials that “will be supplied”. This would be a significant departure from most construction contracts which base progress payments on the owner’s (or consultant’s) estimate of work completed, and which only allow for payment to be made for services actually performed and materials actually supplied.

The Region does not currently pay for services or materials in advance, only for those that have been supplied. Paying for services or materials before they are delivered creates a risk of over payment with no means of ensuring delivery.

**(v) Contractor’s right to suspend work or terminate the contract**

The Act states that, if a contractor is not paid in accordance with the time periods prescribed under the Act, they would be entitled to suspend the work or even terminate the contract. In order to suspend work or terminate the contract after a non-payment, the contractor must provide seven days’ written notice of its intent to suspend or terminate to the owner, during which time the owner may make the payment to avoid suspension /termination. In addition, the contractor may terminate the contract after suspending the work with seven days’ written notice.

If the contractor resumes work after a suspension, then the owner will be liable for reasonable “demobilization” and “remobilization” costs incurred by the contractor. The Act does not include any language which indicates what costs are included demobilization and remobilization payments.

### **(vi) Mandatory disclosure of financial information by owners**

The Act stipulates that, prior to the commencement of a project, an owner will be obliged to provide financial information to the contractor in order to demonstrate its financial ability to make contract payments. The contractor will also be entitled to demand updated financial information from the owner as the project progresses. Owners are obligated to provide this information “promptly”. If the owner refuses to provide financial information or misstates its financial information, then the owner would be liable to the contractor for damages. Contractors may also apply to court for an order compelling an owner to comply with such requests.

The Act mandates that contractors keep all financial information confidential and provides that any breach of confidentiality shall result in damages.

### **The Act has progressed through Second Reading without any meaningful consultation with municipal and other public owners**

Although the Act passed its First and Second Reading in the Ontario Legislature in May 2013, most public owners did not become aware of the existence of the Act until October 2013, as it does not appear that public owners, including municipalities, were consulted during development of the Act.

Over the past few months, public owners such as the City of Mississauga, the Simcoe Muskoka Catholic District School Board and the Ottawa-Carleton District School Board, and public owner associations such as the Ontario Association of School Business Officials and the Association of Municipalities Ontario (“AMO”), have raised concerns about the Act, and requested that it not be passed into legislation in its current form.

### **AMO has requested that municipal governments be exempted from the requirements of the Act**

AMO forwarded correspondence to all Provincial party leaders on November 13, 2013 requesting that, if the Act becomes legislation, municipal governments be exempted from its requirements because the potential financial impacts the Act could have on municipal governments and their taxpayers. A copy of AMO’s letter is attached (Attachment 1).

### **Most of the issues which are intended to be addressed by the Act do not arise in the context of municipal construction projects**

Since government owners were not consulted during the drafting of the Act, it is unclear as to whether the contracting industry has concerns with payments made by government owners. York Region is a financially stable institution with a high credit rating, and the Region has a strong track record in terms of making payments to contractors both on construction and non-construction projects. Given the Region’s strong financial position

and history of consistent payment, it would appear that many of the issues which are intended to be addressed by the Act do not relate to municipal construction projects.

### **Link to key Council-approved plans**

If the Act is adopted without amendment, it could have significant impacts on all Regional construction projects and would, therefore, affect the 2011-2015 Strategic Plan goal of continuing to deliver and sustain critical infrastructure.

## **5. FINANCIAL IMPLICATIONS**

### **The Region's form of construction contract would be modified by the Act, creating financial and other risks**

The Region's current form of construction contract includes terms which contradict various provisions proposed in the Act, all of which would automatically be amended to comply with the Act if it became legislation. Many of these terms were included in the Region's form of contract to protect the Region from financial and other risks, and the modification of these terms would effectively eliminate those protections, exposing the Region to those risks.

For example, the elimination of holdbacks exposes the Region to financial risks in terms of outstanding warranty items and deficient work. Additionally, relying on the contractor's "reasonable estimates" of work completed and requiring the Region to pay for services and materials that "will be supplied" exposes the Region to overpayments if the contractor's estimates are not, in fact, reasonable or the services or materials are not actually supplied.

The Region's construction contracts also currently do not provide contractors with the explicit right to terminate. The termination provisions included in the Act will increase the risk of contractors attempting to terminate contracts. These provisions will also increase the risk of additional costs and project delays if contractors decide to demobilize from sites because of delays in payment.

### **This legislation would restrict the Region's ability to freely negotiate key business terms**

The Region's ability to prescribe or negotiate certain terms and conditions of its construction contracts will also be restricted, especially in relation to key business terms relating to valuation of work, payment process and timelines, and holdbacks. This will result in contracts with less favourable business terms which also exposes the Region to financial risks.

## **6. LOCAL MUNICIPAL IMPACT**

It is anticipated that the Act would have similar impacts on local municipalities at the Region.

## **7. CONCLUSION**

If enacted, Bill 69 would have significant impacts on municipal construction projects. Staff recommends that Council endorse AMO's position that municipal governments be exempted from the requirements of the Act, if it comes into force.

For more information on this report, please contact Jerry Paglia, Senior Counsel at Ext. 5083.

The Senior Management Group has reviewed this report.

*Attachment (1)*



## Office of the President

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November 13, 2013

Hon. Kathleen Wynne  
Premier of Ontario  
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Tim Hudak  
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Andrea Horwath  
Leader - New Democratic Party of Ontario  
Legislative Building - Room 113  
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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.

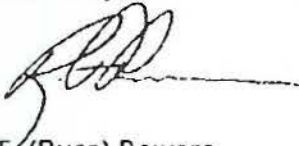
It also does not deal with the reasonable payment process of complex infrastructure projects. It also appears in the draft legislation that a contractor can request to be paid for services and materials that "will be supplied" to the project, rather than asking for payment once work has been completed 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