

April 23, 2019

Ms. Kimberley Kitteringham
City Clerk
City of Markham
101 Town Centre Boulevard
Markham, ON L3R 9W3

Dear Ms. Kitteringham:

Re: Implementation of Construction Act Prompt Payment and Mandatory Adjudication Provisions

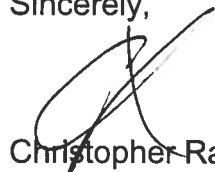
On April 18, 2019, adopted the following recommendations:

1. Council endorse the request by the Association of Municipalities of Ontario that the Ministry of the Attorney General consider amendments to the Construction Act related to implementation of Prompt Payment and Adjudication, as described in Attachment 1.
2. The Chair advise the Attorney General of Council's support for the amendments to the Construction Act suggested by the Association of Municipalities of Ontario.
3. The Regional Clerk circulate this report to the Clerks of the local municipalities.

The original staff report is enclosed for your information.

Please contact Dan Kuzmyk, Deputy Regional Solicitor, at 1-877-464-9675 ext. 71401 if you have any questions with respect to this matter.

Sincerely,



Christopher Raynor
Regional Clerk

Attachments

The Regional Municipality of York

Committee of the Whole
Finance and Administration
April 11, 2019

Report of the Regional Solicitor

Implementation of *Construction Act* Prompt Payment and Mandatory Adjudication Provisions

1. Recommendations

1. Council endorse the request by the Association of Municipalities of Ontario that the Ministry of the Attorney General consider amendments to the *Construction Act* related to implementation of Prompt Payment and Adjudication, as described in *Attachment 1*.
2. The Chair advise the Attorney General of Council's support for the amendments to the *Construction Act* suggested by the Association of Municipalities of Ontario.
3. The Regional Clerk circulate this report to the Clerks of the local municipalities.

2. Summary

This report seeks Council's endorsement of the Association of Municipalities of Ontario's ("AMO") March 7, 2019 request to the Ministry of the Attorney General ("the Ministry") to consider four amendments related to implementation of the Prompt Payment and Adjudication regime under the *Construction Act*, which are scheduled to come into force on October 1, 2019.

Key Points:

- Significant amendments to the *Construction Act* relating to prompt payment and mandatory adjudication are scheduled for implementation on October 1, 2019
- These changes dramatically impact municipal owners and expose them to risk for failure to comply
- AMO has requested that the Ministry consider amending specific sections of the *Construction Act* that will assist in mitigating risk associated with prompt payment and allow sufficient time to prepare for the mandatory adjudication regime

- AMO has also requested that municipalities endorse AMO's requested amendments and communicate the endorsement to the Ministry

3. Background

The *Construction Lien Act* was amended in late 2017

In early 2015, the Ministry initiated a consultation and review process intended to modernize the *Construction Lien Act* which had not had any significant amendments or modernization since 1983. The main policy considerations driving the review were promptness and security of payment for contractors and efficiency in resolving construction disputes. Ultimately, to reflect the transformative nature of the changes, the name of the *Construction Lien Act* was changed to the *Construction Act*.

Regional staff were very involved in the consultation leading up to the amendments

The Ministry heard from over 60 stakeholders, including contractors' and suppliers' associations, owners' associations and numerous Provincial ministries. York Region, the City of Toronto and AMO were also stakeholders who had a seat at the table. Participating public agencies included Infrastructure Ontario, Metrolinx, the Toronto Transit Commission and the Toronto Community Housing Corporation. In a subsequent phase of the review process, York Region also contributed a senior staff lawyer to the expert Advisory Panel which provided technical information and advice, much of which was ultimately included in the *Construction Act* and supporting regulations which became law in December, 2017.

The Prompt Payment and Adjudication provisions scheduled for implementation on October 1, 2019 will impose strict time lines on owners, and where payment disputes arise, an adjudicator may be appointed

Modernization of the *Construction Lien Act* is intended to ensure that suppliers and contractors are paid promptly for goods and services and that construction disputes would be resolved quickly and economically. However, since both of these areas involve significant changes to the existing contractual and administrative landscape, the Ministry elected to delay implementation until October 1, 2019, to allow all stakeholders to prepare for the new regime.

Once implemented, prompt payment will require owners to pay general contractors within 28 days after the owner receives the invoice from the contractor. Where payment is not made within 28 days, contractors will have the right to charge mandatory interest on late payments, beginning when the amount is due.

Where owners do not agree that goods or services have been provided as described in an invoice, the owner will be permitted to deliver a notice of non-payment to the contractor within 14 days of receiving the invoice. The notice of non-payment will trigger an adjudication process which will provide interim, binding decisions on disputes related to

goods and services provided for in construction contracts. The general consensus among owners is that 14 days is not a sufficiently long period, as further discussed below.

4. Analysis

An Authorized Nominating Authority will be appointed to administer and oversee adjudicators

The adjudicators who ultimately decide construction disputes will be experts with extensive experience in the industry and experience or training in dispute resolution. A yet to be identified “Authorized Nominating Authority” (ANA) will, among other things, develop and oversee training and qualification for adjudicators, maintain a registry of qualified adjudicators and establish a code of conduct for adjudicators.

The Ministry initially indicated that the ANA would be in place by late 2018, but in fact the public procurement process is still underway which puts significant pressure on all parties to be ready for October 1, 2019

Under the *Construction Act* regulations, a private (ie. non-governmental) body will be designated by the Attorney General to act as ANA following a public application process. Although the Ministry had initially indicated that the ANA would be elected by Fall, 2018, the application process has not yet concluded, with a Request for Expressions of Interest having been posted in January, 2019 and a Call for Applications having been posted on March 15, 2019.

The first step for the new ANA will be to identify and train selected adjudicators with respect to process and conduct of arbitrations, provide an adjudicator registry, and communicate with contractors. Given these complex tasks, there is significant concern among owners, which is shared by York Region staff and AMO, that the October 1 deadline should be extended, which would require an amendment to the *Construction Act*.

Staff support AMO’s request that the Ministry consider amendments to the *Construction Act*, particularly with respect to timing of implementation, in order to better support prompt payment administration and facilitate orderly and effective transition to the new adjudication regime

In consultation with municipal owners, including York Region, AMO has asked the Ministry to consider making four amendments to the *Construction Act*, as described in *Attachment 1*. The requested amendments, along with staff comments, are described below:

AMO Requested Amendment #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. AMO has suggested a minimum of 21 days.

Comment: The current 14 day window for payment certification is too short to allow a fulsome review of construction services performed in all contexts. Regional projects, for example, can involve requests for substantial payment, often requiring detailed and large scale testing and analysis by payment certifiers. This will result in risk to owners related to overpayment or payment for incomplete, deficient or defective work. This does not represent prudent stewardship of taxpayer funds.

AMO Requested Amendment #2: The time period between December 24 to January 2 of each calendar year should be excluded from the calculation of time with respect to Prompt Payment and Adjudication.

Comment: Most municipal government offices, including York Region, are closed between December 24 and January 2. Effectively removing eight days from municipal owners' already tight 14 day certification timeline will unreasonably limit the ability to properly certify work submitted for payment immediately prior to the holiday period, and expose owners to risk of late payment.

AMO Requested Amendment #3: The date for implementing the Prompt Payment and Adjudication regimes should be postponed from October 1, 2019 to one year post-establishment of the ANA.

Comment: Six months before the present implementation date, there are significant unknowns related to the adjudication process, including the identity of the ANA, whether there will be a sufficient number of potentially qualified adjudicators, and what the certification process will look like.

AMO Requested Amendment #4: The Ministry should create and communicate practice guides, interpretation bulletins and webinars to educate owners, contractors and subcontractors on the new regimes.

Comment: Once the unknowns surrounding the ANA and adjudicators have been clarified, owners and contractors will need to educate themselves on how to administer and manage projects which are likely to be subject to potentially complex and resource-intensive preparation for, and participation in, an adjudication process, while still working to complete the project. In fact, the Expert Advisory Panel recommended that the involved Ministries provide education, awareness and support for industry participants with respect to the *Construction Act* amendments, none of which have been done or would appear to be on the horizon a mere six months from implementation.

Staff have been preparing for the Prompt Payment and Adjudication regime, and will be ready for October 1, 2019 if implementation proceeds as scheduled

Staff have been preparing for the Prompt Payment and Adjudication regime, and will be ready for implementation on October 1, 2019, if necessary. Legal Services presented a series of education sessions in early 2018 to provide staff with *Construction Act* amendment updates and education and to provide the context and framework for the required changes. As well, a cross-corporate Working Group led by Legal Services and supported by internal process improvement and change management experts has been formed and the group is

working with representatives from all departments to review and update existing construction contracts, forms, documents, processes and systems related to construction administration, certification and payment.

Expert external construction lawyers have also been retained to provide additional support and guidance, particularly with respect to best practices, document management and recommended workflow associated with dispute adjudication.

5. Financial

There is no financial impact associated with the recommendations in this report. All cost implications associated with preparing for and implementing amendments associated with the *Construction Act*, including the Prompt Payment and Adjudication regime, have been included in approved capital program budgets.

6. Local Impact

There are no direct local impacts associated with this report

7. Conclusion

Staff recommend that Council endorse AMO's request to the Ministry of the Attorney General to amend the *Construction Act* as described in this report, and that Council's endorsement be communicated to the Ministry.

For more information on this report, please contact Dan Kuzmyk, Deputy Regional Solicitor, at 1-877-464-9675 ext. 71401. Accessible formats or communication supports are available upon request.

Recommended by: **Joy Hulton**
Regional Solicitor

Approved for Submission: **Bruce Macgregor**
Chief Administrative Officer

March 29, 2019
Attachments (1)
9281342

Office of the President

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.

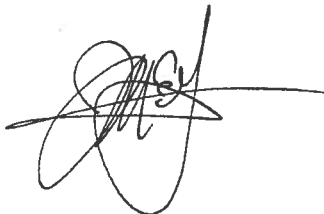
Many details about the Authorized Naming Authority (ANA) are still to be determined. We recognize that the proposed regulations have provided some clarity, and that Expressions of Interest for ANA members were released in January 2019. In order to have the ANA working by October 1st, the Province must 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