



Report to: General Committee

Date Report Authored: February 25, 2014

SUBJECT: Bill 69 – Prompt Payment Act, 2013
PREPARED BY: Alex Moore, Senior Manager Purchasing & Accounts Payable

RECOMMENDATION:

- 1) That the Report titled “ Bill 69 – Prompt Payment Act, 2013” be received;
- 2) That Council endorse the Association of Municipalities of Ontario's (AMO) request that municipal governments be exempt from the requirements of the Prompt Payment Act as set out in Attachment 1 to this report;
- 3) That the Mayor, on behalf of Council, forward a letter to the members of the Standing Committee, the party leaders and the local MPPs requesting Bill 69 - Prompt Payment Act be amended to:
 - reflect more realistic timelines for payments in infrastructure projects;
 - allow time for due diligence before accepting work and certifying payments; and
 - allow payments to continue to be tied to project milestones;

That Staff be authorized and directed to do all things necessary to give effect to this resolution.

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. Additionally, Staff requests Council's endorsement of the position taken by the Association of Municipalities of Ontario (AMO) that municipal governments be exempt from the requirements of such legislation or that it be amended to mitigate any impacts on municipal construction projects.

BACKGROUND:

Ontario Bill 69, *an Act respecting payments made under contracts and subcontracts in the construction industry* (the “Bill”) is a Private Member's Bill introduced in May 2013 to the Ontario Legislature by Vaughan MPP, Steven Del Duca. The Bill proposes to create a new statute called the Prompt Payment Act (the “Act”).

The main proponents of the Act are members of the construction contracting industries, 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.

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, several public agencies including the Regional Municipality of York, City of Mississauga, the Simcoe Muskoka Catholic District School Board and the Ottawa-Carleton District School Board have raised concerns about the Act, and requested that it not be passed into legislation in its current form.

In addition, the Ontario Association of School Business Officials and Ontario Public Buyers Association have all written to the Premier of Ontario and Leader of the Opposition expressing their opinions and their lack of support for this legislation. Association of Municipalities of Ontario ("AMO") has also forwarded correspondence to all Provincial party leaders on November 13, 2013 requesting that, if the Act becomes legislation, municipal governments be exempt from its requirements because of the potential financial impacts the Act could have on municipal governments and their taxpayers.

The Act has been referred to the Standing Committee on Regulations and Private Member's Bills, however, no date has been set for the Standing Committee to review the Act but it is anticipated that this will occur in early 2014.

OPTIONS/ DISCUSSION:

The Act would not apply to any contract or subcontract made before the Act comes into force; however, in its present form, the Act would have the following impacts, among others:

1. No ability to contract out of the Act

The parties to a construction contract will 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.

This requirement will eliminate the City's ability to identify or negotiate certain terms and conditions of construction contracts, thereby, limiting the rights of the City to negotiate different payment terms.

2. Payment of, and restrictions regarding, hold backs

The Act obligates owners to pay holdbacks to contractors under the *Construction Lien Act* "within one day after the day the payer is no longer required to retain holdback". 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 will not be permitted to retain maintenance holdbacks, deficiency holdbacks or any other types of holdbacks that might otherwise be retained on construction contracts.

This requirement will eliminate the City's ability to include a maintenance holdback into contracts for longer than 46 days. Currently, Markham may hold a 3-5% maintenance holdback on certain contracts for 365 days to ensure all deficiencies (if required) for contractors are completed before final payment is made.

3. 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, an owner (Markham) will be deemed to accept a progress payment within 10 days of its submission, unless the owner 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 5 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.

4. 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 will 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.

Markham does not currently pay for services or materials in advance, only for those that have been supplied. This requirement of paying for services or materials before they are delivered is contrary to established norms across almost all industries and creates a risk of over-payment with no means of ensuring delivery.

5. Contractor's right to suspend work or terminate the contract

The Act states that, if a contractor is not paid in accordance with the prescribed time periods, they will be entitled to suspend the work or even terminate the contract. In order to suspend work or terminate the contract after such a non-payment, the contractor must provide 5 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.

This requirement would put Markham at financial risk for added demobilization, remobilization payments and the risk of delays to projects by contractors suspending or terminating projects.

6. 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.

FINANCIAL CONSIDERATIONS AND TEMPLATE:

Markham'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 City of Markham's contract to protect the City from financial and other risks, and the modification of these terms would effectively eliminate those protections, exposing the City to those risks such as:

1. Elimination of holdbacks exposes the City to financial risks in terms of outstanding warranty items and deficient work.
2. Relying on the contractor's "reasonable estimates" of work completed and requiring the City to pay for services and materials that "will be supplied" exposes the City to overpayments if the contractor's estimates are not, in fact, reasonable or the services or materials are not actually supplied.
3. Markham's construction contracts 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.

Therefore, Staff recommends that Council endorse the Association of Municipalities of Ontario's (AMO) request that municipal governments be exempt from the requirements of the Prompt Payment Act.

Staff further recommends that Mayor, on behalf of Council, forward a letter to the members of the Standing Committee, the party leaders and the local MPPs requesting Bill 69 - Prompt Payment Act be amended to exempt municipalities.

HUMAN RESOURCES CONSIDERATIONS:

Not Applicable.

ALIGNMENT WITH STRATEGIC PRIORITIES:

Not Applicable

BUSINESS UNITS CONSULTED AND AFFECTED:

Legal and Finance have been consulted in preparation of this report. The various project managements will be consulted as Bill 69 will directly affect them.

RECOMMENDED

BY:

26/02/2014

28/02/2014

X 

Catherine Conrad
City Solicitor

X 

Joel Lustig
Treasurer

ATTACHMENTS:

Association of Municipalities of Ontario request that municipal governments be exempted from the requirements of the Prompt Payment Act.