



For Action with Confidential Attachment

Construction Act: Changes and Impact

Date: September 19, 2019
To: Audit & Risk Management Committee
From: Head of Legal & General Counsel

Reason for Confidential Information

This report contains information related to the security of the property of the municipality or local board.

This report contains advice or communications that are subject to solicitor-client privilege, including communications necessary for that purpose.

Summary

On October 1, 2019 significant changes will come into force under Ontario's *Construction Act* including new regimes for prompt payment and adjudication as well as rules effecting the delivery of liens. These changes will impact all TTC construction and related design contracts and pose increased risks that need to be adequately managed.

Recommendations

It is recommended that the Audit and Risk Management Committee of the TTC Board:

1. Receive this Report and Confidential Attachment for information; and
2. Authorize that Confidential Attachment remain confidential as it contains advice that is subject to solicitor-client privilege.

Financial Summary

Financial impacts are detailed in the Confidential Attachment.

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

Equity/Accessibility Matters

There are no accessibility or equity impacts associated with this report.

Decision History

At the February 9, 2017 Audit & Risk Management Committee meeting, TTC staff were directed to report back to the Committee with details regarding the impact of significant changes in laws/regulations impacting the TTC.

Item 2 – TTC Audit & Risk Management Committee Terms of Reference

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Committee_meetings/Audit_Risk_Management/2017/May_29/Minutes/index.jsp

At the October 16, 2017 meeting, the TTC Board considered a report regarding Bill 142 *Construction Lien Amendment Act*.

http://www.ttc.ca/About_the_TTC/Commission_reports_and_information/Commission_meetings/2017/October_16/Reports/22_Bill_142_Construction_Lien_Amendment_Act.pdf.

In December 2017, Bill 142 amending the *Construction Act* passed and became law. The most significant provisions of Bill 142 will come into effect on October 1, 2019.

Issue Background

Bill 69, *Prompt Payment Act*, was introduced in 2013 to address problems of late payments in the construction industry but abandoned in 2014 in favour of a comprehensive review of the *Construction Lien Act*. In 2015, the Ministry of the Attorney General launched an expert review of the *Construction Lien Act*. The TTC was identified as a stakeholder and participated in the review. This Review resulted in Bill 142, the *Construction Lien Amendment Act*, which became law on December 12, 2017.

The purpose of Bill 142 was to:

- Modernize the construction lien and holdback rules which became effective on July 1, 2018;
- Create prompt payment and adjudication regimes which will come into force on October 1, 2019; and
- Change the way liens are preserved on municipal property as of October 1, 2019.

The *Construction Act* itself was further amended in December 2018 and the Act's Regulations also underwent amendments, the latest being released in May 2019.

Amendments to the Act which came into effect on July 1, 2018 were largely technical in nature, altering the definition of substantial performance and the length of the lien period.

Amendments to the Act which come into effect on October 1, 2019 implement significant changes for the industry. The amendment for prompt payment and adjudication will apply to contracts whose procurement process (i.e. posting request for bid/proposal or prequalification) commences on or after October 1, 2019.

Comments

Key Features of the new *Construction Act*

Prompt Payment

Prompt payment timelines are triggered by the TTC's receipt of a contractor's proper invoice. "Proper invoice" is defined in the Act. The TTC is obligated to pay the amount of the proper invoice within 28 calendar days or it will be liable for interest on any amounts it fails to pay by day 28.

If the TTC disputes any amount of a proper invoice, it must deliver a "Notice of Non-Payment" (NNP) to the contractor within 14 calendar days. If a NNP is not delivered by day 14, the TTC is obligated to pay the entire amount of the proper invoice.

The contractor and all parties down the construction chain have their own statutorily required time lines to flow payment. If the contractor receives a NNP from the TTC, it can only flow down that NNP to its subcontractors if it undertakes to commence an adjudication against the TTC within 21 calendar days.

Adjudication

Adjudication under the *Construction Act* is a fast track dispute resolution system that is binding on all parties. This new regime will be vastly different from traditional litigation or arbitration avenues where the parties had months and sometimes years to review the other side's materials (discovery) and prepare a case. Adjudication will remove the right of discovery, which means that the responding party must put forward its entire case in a matter of days, with only seeing what the claimant has chosen to produce and without examining the claimant under oath. In many respects adjudication will prioritize speed over procedural justice.

Nearly all disputes on a construction project can be subject to adjudication under the *Construction Act*. It is expected that the TTC will primarily be the defendant/responding party to an adjudication by a contractor rather than a plaintiff/complainant.

Adjudications will be conducted by individuals who are authorized to do so by an arm's length government entity called the "Authorized Nominating Authority" (ANA). The ANA is tasked with certifying, training and setting rates for adjudicators. Adjudicators are required to have 10 years of experience in the construction industry and may be lawyers, engineers, architects or others.

Adjudication timelines are triggered by the receipt of a "Notice of Adjudication" (NOA). Only parties to a contract with each other may be served with a NOA; and multiple parties may agree to a consolidated adjudication; however, only a contractor may force a consolidated adjudication on multiple parties.

Adjudication timelines are extremely short. Upon receipt of a NOA, the parties have up to four calendar days to agree on an Adjudicator, thereafter the parties must request an adjudicator be assigned by the ANA within seven days. The complainant must deliver all

documents it relies on for its case within five calendar days of the appointment of an adjudicator. The responding party will have the right to respond and must do so within a timeline set out by the adjudicator. A determination, with reasons, must be provided by the adjudicator within 30 days of receipt of the complainant's documents. There is some ability for the adjudicator (or parties upon agreement) to extend the deadline for an adjudication determination.

An adjudication determination must be paid within 10 calendar days. Failure to pay a determination within 10 calendar days will attract interest and permit the successful party to suspend work until paid. The unsuccessful party will also be liable for the successful party's de-mobilization and re-mobilization costs.

The adjudication determination itself is interim binding which means it is appealable. Appeals are permitted in very limited circumstances; however, and a new court or arbitration proceeding would have to be commenced.

Delivered Liens

On October 1, 2019 all liens in respect of any municipally owned lands will be preserved by delivery of a claim for lien to the Clerk of the municipality and not by registration on title to lands.

Unlike prompt payment and adjudication, there is no transition period for this change and it will apply to all projects regardless of when the procurement process commenced.

Implementation of the Amendments to the *Construction Act*

TTC staff have worked across departments and with the City of Toronto to identify the risks and develop effective mitigation strategies which are designed to reduce those risks while bringing TTC in compliance with the *Act* as described in the confidential attachment.

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Signature

Brian Leck
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Attachments

Confidential Attachment 1 – Construction Act: Changes and Impacts