



STAFF REPORT ACTION REQUIRED

Submissions to the Ontario Legislature on Bill 69 – *Prompt Payment Act, 2013*

Date:	December 9, 2013
To:	City Council
From:	City Manager and City Solicitor
Wards:	All
Reference Number:	

SUMMARY

In the Ontario Legislature, a private member's bill seeks to introduce new legislation regarding payment for construction services.

This bill proposes legislation that restricts the ability of parties to negotiate payment terms and may have adverse consequences on owners of construction projects, including the City, if it is passed without amendment.

The bill has passed second reading with the support of all three provincial parties and has been referred to a Standing Committee, where it is anticipated it will be considered in the new year.

Municipalities were not consulted on this bill. The Association of Municipalities of Ontario has written to the leaders of all three provincial parties opposing it.

Staff seeks authority from City Council to make oral and/or written submissions to the Ontario Legislature setting out the City's concerns with this proposed legislation.

RECOMMENDATIONS

The City Solicitor and City Manager recommend that City Council authorize the Executive Director, Engineering & Construction Services and the City Solicitor and/or his/her delegate, as appropriate, to make oral and/or written submissions to the Ontario Legislature, including any standing committees or other bodies, to express the City's

concerns with respect to Bill 69 - *Prompt Payment Act, 2013*, and any subsequent bill or regulations dealing with these issues.

Financial Impact

There is no financial impact with the recommendation in this report; however, if this Bill is enacted as proposed, the City will need to assess resource impacts at that time.

COMMENTS

Bill 69 - *An Act Respecting Payments made under Contracts and Subcontracts in the Construction Industry* (short title: *Prompt Payment Act, 2013*) is a private member's bill (the "Bill") introduced by MPP Stephen Del Duca to the Ontario Legislature. The Bill is attached as Appendix "A".

Substantive Issues with Bill 69

The Bill establishes new rules and requirements in relation to payments made under construction contracts. It will apply to all contracts entered into after it comes into force, except for any contracts exempted by the regulations, which have yet to be drafted. We assume that the City will not be exempt from the Bill as it is intended to apply generally to all construction, including contracts entered into by the Province.

As a construction owner, the City spent approximately \$1 billion on construction services in 2012. It will be deeply impacted by the terms of the Bill if it is enacted in its current form.

The key terms of the Bill that will impact the City are as follows:

1. Limited Negotiation of Payment Terms

There is virtually no ability for parties to negotiate payment terms. This limits freedom of contract and prevents payment terms from being structured to best suit the project, having instead to follow a prescribed formula set out in the Bill.

Parties are precluded from agreeing to payment terms tied to milestones, which are used on time critical projects. It is very important to the City that flexibility be permitted in construction contracts in respect of how payments are made.

2. One-day Turn Around to Release Holdback – s.4(2)

Under the Bill, the 10% construction lien holdback must be released within one day after it is no longer required to be retained. This means that the City must: (1) perform title searches of all lands involved in the project (or for roads, check the City Clerk's office) to ensure that there are no claims for lien; (2) requisition payment of the holdback; and (3) make payment; all in this one day period. These steps are not able to be performed earlier

as many liens are not preserved (by registration/giving to the Clerk) until the very last day.

It is neither practical nor responsible for the City to attempt to process holdback release within this time frame. There are often large sums of money being released and the risk of mistakes is increased when a payment process is rushed. If the City is forced to release holdback as required in the Bill, with insufficient time to undertake the checks set out above, a claim for lien could be missed and the City exposed to liability as a result.

3. Limit on Retaining Amounts – s. 4(3)

The City's ability to withhold funds otherwise payable is limited under the Bill to what is required or permitted by the *Construction Lien Act*. This prevents the (temporary) retention of funds on some projects for warranty reserves. These are typically retained and then paid out at the end of the warranty period, thereby ensuring that warranty issues, which are the responsibility of the contractor, are dealt with in a timely manner.

The restriction would also limit the application of the City's Fair Wage Policy, which permits the City to pay workers directly for any back-wages owing from the contractor's progress draw. The back-wages may be due to non-payment of wages or failure to pay the proper union or fair wage rate. The Fair Wage Policy provisions allowing such payments would be unenforceable if the City was not able to withhold funds in order to make these payments to workers.

4. Progress Payments Every 31 days or less – s. 5, 6

Under the terms of the Bill, progress payments must be made at least every 31 days. If the contract does not provide for that, then payments are to be made within 20 days after a contractor submits a payment application (which still needs to be reviewed by the owner). The City's current construction contracts typically require payments be made within 30 days of receiving a payment application but only if that application contains all the proper supporting information. The timelines in the Bill are not realistic for many projects, and would not allow sufficient time to review payment applications for completeness and correctness and then pay.

In addition, the Bill suggests payment applications may include services and materials that "will be supplied". It is unclear how this clause would affect contracts that stipulate payments for only what has already been supplied.

5. Payment Applications Deemed Approved in 10 days – s.12

A payment application is deemed accepted in 10 days unless the City provides written notice that all or part of the payment application is being amended and provides full particulars, including references to contract provisions, about what has not been done. This term has shifted the burden from contractors to owners. There is no obligation on the contractor to resubmit a proper payment application nor any recognition for time wasted

by an owner or its consultant in reviewing exaggerated payment applications and detailing the missing work. The City is still obligated to pay the balance of the payment application.

It is sometimes impossible to certify work within 10 days due to a variety of factors such as verifying quantities; lack of supporting documentation; quality of material testing; and non-compliance with regulatory requirements. This may lead to deemed approval.

6. Interest Payable – s. 13

The Bill introduces mandatory interest on unpaid amounts at the higher of: the prejudgment interest rate set out in the *Courts of Justice Act* (1.3% this quarter) or the rate in the contract. Currently, there is no interest payable under City contracts. When staff reviewed the general conditions for construction contracts in 2011 and adopted the standard CCDC-2 contract for vertical projects, the Ontario General Contractors Association was consulted and raised no issue with the City deleting the article on interest for late payments. It will result in increased costs going forward for late payments if the Bill is enacted.

7. Financial Disclosure – s. 14

There is a requirement for owners to disclose financial information related to an improvement to demonstrate the financial ability of the owner. This should not apply to the City as the financial viability of the City is not an issue and approved budgets are publicly disclosed. The administrative burden to provide financial information for each project would be unnecessary and costly. The City should be excluded from this clause.

Legislative Process

The Bill passed first reading on May 13, 2013 and three days later passed second reading on May 16, 2013, supported by all three provincial parties.

City staff has learned that discussion between trade contractors and the Ontario General Contractors Association took place for a period of eighteen months before the Bill was introduced.

We are not aware of consultation with groups representing owners' interests except for the Ontario Home Builders' Association, which has expressed concern with the Bill (according to the Hansard transcript of the second reading). Some MPPs who spoke at the second reading expressed concerns with the Bill and one member invited input from industry stakeholders at the committee stage.

The Association of Municipalities of Ontario wrote to the leaders of all three provincial parties on November 13, 2013 stating that the municipal sector is quite concerned about the Bill, and highlighting the fact that municipal governments were not consulted during its development. The letter points out some of the concerns with the Bill and requests that

municipal governments be exempt from its requirements. The letter is attached as Appendix "B".

The City of Mississauga intends to make submissions to the Legislature about issues it has with the Bill. Staff also understand that some general contractors intend to express their concerns to the Standing Committee. The Ontario Bar Association – Construction Law Section Executive has also indicated its intention to make submissions about general issues raised by the Bill.

The Bill has been referred to the Standing Committee on Regulations and Private Bills which meets every Wednesday. The agenda is typically published the Thursday before each meeting. It is not anticipated that the Bill will be considered at the Standing Committee until the new year.

It is the opinion of staff that it is in the interests of the City to make oral and/or written submissions at the Standing Committee on the issues described above. The Executive Director of Engineering & Construction Services is prepared to make those submissions, with the assistance of the City Solicitor as required, once authorized by Council. Other interested divisions within the City are also being consulted for input.

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SIGNATURE

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ATTACHMENTS

Appendix "A" – Bill 69 – *Prompt Payment Act, 2013*

Appendix "B" – Letter from AMO to Provincial Party Leaders dated November 13, 2013