

**Association of Municipalities of Ontario (AMO)
Analysis of Bill 69 – *Prompt Payment Act***

**Presented to the Standing Committee on
Regulations and Private Bills**

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Municipalities
of Ontario

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Introduction:

Bill 69 will, if passed, limit the contractual freedom of municipal governments, the province and other infrastructure owners to negotiate with contractors/suppliers. The Bill trumps established contract law with respect to payment and would require the amendment of contracts. It also does not take into account that payments may be tied to the requirements of a project lender or whatever financing arrangements have been negotiated by all of the major parties involved in a project. Alternative Finance and Procurement/Public-Private Partnerships in particular are known to include complicated payment provisions. If it is passed without substantial and thoughtful amendments, the Bill will affect municipal governments' ability to exercise due diligence over public funds.

This current approach contradicts the needs and desires of Ontario residents, tax payers, consumers and provincial and municipal governments for the exercise of proper stewardship of financial resources.

Therefore AMO, and other public and private sector owners, are calling for the legislation to be pulled from the current legislative process and that a government-lead review with all affected stakeholders be commenced to ensure good public policy results that takes into account the needs of all parties.

Analysis:

This section will review the major legislative flaws identified with comments on the Bill's provisions and impacts.

Timelines:

Bill 69 will impose on construction owners stringent timelines to make payment that does not account for the time required to review and properly certify work.

Municipalities, provincial ministries and agencies and other entities that enter into construction contracts must exercise due diligence over finances to ensure that construction is properly and satisfactorily completed. Bill 69 impedes this ability because:

- Payments tied to milestones are not permitted.
- There is no ability to negotiate payment terms.
- The Bill requires progress payments every 31 days or less s. 5.6 – regardless of which day of the month work started. If contract doesn't provide for that, then payments are to be made within 20 days if the contractor submits a payment application.

- There is no definition of payment application—generally contracts specify completeness and accuracy requirements of such applications before a review can occur. Payment would occur after a satisfactory review and certification of work.
- The Bill provides extremely short timelines to make payment that do not allow for appropriate review of the work and certification of the payments process.
- The legislation does not deal with the realistic payment process for complex infrastructure projects.

Estimates:

Bill 69 allows contractors to submit reasonable estimates of work done to justify a request for payment. The contractor may also request to be paid for services and materials to be (but not yet) supplied. Allowing estimates of work completed and services and materials not yet supplied to be the basis for a payment application puts the whole process of financial due diligence into question. Coupled with stringent timelines to review work and certify payment, the possibility of inappropriate payment, payment for unacceptable work or potential legal remedies is raised. The Bill:

- Does not allow prudent management of taxpayers' money to pre-pay for "promised" work—could lead to work not completed or overpayment.
- It is a standard business practice that payment should only be provided once work has actually been done and certified.

Payments Deemed Accepted:

The legislation also provides very particular and stringent timelines for approval of payment applications before they are deemed approved and shifts the onus to the owner for justification of the rejection of payment rather than upon the contractor to prove work has been acceptably completed. The legislation raises the following issues:

- A payment application is deemed accepted in 10 days unless the payer 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.
- There is no obligation on the contractor to resubmit a proper payment application or any recognition for time wasted by an owner or its consultant in reviewing potentially exaggerated payment applications and detailing the missing work. The payer 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.

Holdbacks:

Holdbacks in complex public construction projects have become a standard practice for many construction owners and municipalities. These are a prudent application of financial stewardship through holding back some of the payment to ensure that work is properly completed. Warranty holdbacks also ensure that construction owners are able to ensure that deficiencies are remedied if needed after a project has been completed. This Bill imposes a prohibition on holdbacks other than those required under the *Construction Lien Act* (CLA). It provides for:

- A one-day turn around to release CLA holdback – this provision will make it impossible to do the required title searches, requisition the holdback payment, and make the payment in one day.
- No ability to withhold funds such as the temporary retention of funds on some projects for warranty or maintenance 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.

Work Stoppage:

Bill 69 allows for contractors and subcontractors to potentially suspend or terminate work on a project if the contractor is not paid a progress payment. As noted there could be a number of reasons a progress payment is not made or made within the times specified in the Bill. This provision could lead to serious delays in a project's timelines and completion and substantial costs for mobilization and re-mobilization of labour. If this provision is enacted public projects could become much more costly and less timely, which would in turn create concern for the public.

Financial Information:

The Bill allows contractors to request financial information regarding the construction owners financial viability to carry out work before entering into a contract and after without limit. It includes a requirement for owners to disclose financial information related to an improvement to demonstrate the financial ability of the owner. Municipal budgets are public documents. To require duplication of this would impose both duplication and an administrative burden on the municipal government to prepare this information for each project. AMO advises that this provision should not apply to municipal governments.

Summary:

To satisfy our residents, tax payers and the provincial government, municipal governments must exercise prudent management of public funds.

This draft Bill does not allow for this due to:

- Extremely short time lines that don't permit the appropriate review of work done and certification of payment processes (e.g. CLA 1-day payment, progress payment triggers and approvals).
- The limit imposed upon retaining amounts for warranty and maintenance reserves.
- The inability to structure payments tied to project milestones—these are critical to managing on-time and on-budget complex projects.
- The ability to submit a payment application based on estimates of work and materials supplied or to be supplied to a project.
- The administrative burden to produce financial information when municipal budget information is already both public and transparent.

Conclusion:

In conclusion, the Association of Municipalities of Ontario cannot support the current legislation or advise the members of the Standing Committee on Regulations and Private Bills on amendments to make Bill 69 as drafted workable.

Rather, AMO and other public and private bodies submit that the legislation be withdrawn from consideration of the legislature and that all concerned stakeholders enter into a government-led process of review of prompt payment issues and practices to ensure a balanced and workable solution is created.