



Bill 142, An Act to Amend the Construction Lien Act, 2017

Submission to the Standing Committee on the Legislative Assembly

November 1, 2017

AMO, on behalf of our municipal members, advocates for well-considered provincial legislation that enables municipal governments to function for the benefit of our communities and the public interest. Conversely, we work to mitigate unintended consequences of proposed legislation and regulations, identify gaps that need to be addressed, and provide advice to the Province to determine the best implementation.

Bill 142, *An Act to Amend the Construction Lien Act* (2017), is a piece of legislation that exemplifies the positive outcomes of what happens when a proper and thorough consultation takes place. As you know, the construction industry, owners (including municipal governments), contractors, and subcontractors have long argued for reforms to the *Construction Lien Act*, and AMO is encouraged that Bill 142 includes significant improvements to modernize an Act that is over 30 years old.

The Process

AMO appreciates the government for conducting the Expert Panel review of the *Construction Lien Act*, and the commitment and leadership shown by Attorney General Naqvi to get Bill 142 to this stage.

Our written comments will not come as a surprise to the Ministry of the Attorney General or others, as AMO has been actively consulted and involved throughout the four-year process.

Last week, the Attorney General circulated a list of some proposed government motions that have allowed us to narrow the focus on our remarks on Bill 142. We appreciate the Ministry's attempt to strike a balance between all stakeholders, and recognize that some of our concerns may be addressed in these motions. However, it is still important for AMO to highlight issues raised by our members that should be considered by the Committee.

Please note that our general remarks support other municipal governments' individual technical submissions which combined reflect countless hours working through how Bill 142 would affect the operations in their municipalities, and in some cases, have prepared draft alternative language that we hope the Committee will consider.

Areas of Support for Bill 142

AMO has been working closely with the Attorney General's office to identify gaps and unintended consequences of Bill 142. The Ministry is proposing several government motions that would, if passed, address some of AMO's concerns:

- including a transition provision to provide for consistency until the new law comes into effect;
- exempting architects, engineers, and consulting professionals from requiring surety bonds for public projects;

- clarifying that interest for late payments is from the date the invoice was due and payable; and,
- that adjudication may not revive expired liens.

We recommend that the Committee adopt these changes during clause-by-clause consideration.

In addition to these amendments, AMO submits that consideration also be given to our outstanding issues.

Recommended Areas for Refinement

1. Payment should not be made without first receiving a municipal owner's express approval or certification that work was properly completed.

AMO believes in prompt payment and is supportive of a regime that requires payments be made promptly for work that is completed to a standard that an owner has deemed to have been met. We believe that modernizing prompt payment rules is important and that people who have completed work properly should be paid on time.

AMO agrees completely with the Toronto Transit Commission's comments regarding certification, that "requiring payment to be made from the date of a proper invoice instead of certification or owner's approval means there may not be enough time to properly scrutinize an invoice and risks payment for improper or incomplete work. In the US, 20 states allow the trigger event to be either set out in the contract or is expressly certification/approval."¹

We note in the proposed government amendments, Alternative Financing and Procurement (AFP) projects would be allowed "certification of payment prior to the submission of an invoice for AFP projects."² AMO wonders why these same exceptions cannot apply also to municipal projects, given that it provides significant protection to one type of project over another.

Although the government is proposing a motion that provides an owner with the ability to conduct "testing and commissioning" of a project, it does not account for every scenario and this motion, if applied, would only add an additional cost. Without including a certification trigger, the link of prompt payment with a mandatory adjudication regime, means that an owner is not only required to make a payment in 28 days, but adjudication is automatically invoked if not.

This does not give nearly enough time for a municipal government, large or small, to verify that the work has been completed to specifications and to enter into discussions with contractors for any discrepancies that may be identified, which is industry practice.

¹ Toronto Transit Commission. Written Submission on *Bill 142: Construction Lien Act Amendment Act, 2017*, October 25, 2017, pg. 3.

² Email from the Attorney General's Office. "Update on Bill 142: Construction Lien Amendment Act." Received Monday, October 23, 2017.

All municipal governments have a duty to the taxpayer to be diligent in how projects are managed, and to ensure that taxpayer money is only paid for work that is properly performed and meets all of the specifications under the contract. To have the trigger for payment be the receipt of the proper invoice and not certification or other forms of owner's approval lacks the checks and balances necessary to process those payments. It will undoubtedly result in paying for contracts that are not properly completed and increase costs of litigation to resolve those disputes through adjudication.

Therefore, AMO is requesting that the trigger for payment for public projects be testing, commissioning and certification, or alternatively extend the timelines in the prompt payment regime to ensure that public funds are managed properly, and the safety of our projects are maintained for our residents.

2. Before proceeding to combine the lien rights and mandatory adjudication regimes – making Ontario the first jurisdiction in the world to do so – AMO would like the problematic time lags and other practical considerations addressed.

AMO is very concerned about implementing both regimes at the same time. Even if a matter is not resolved to the satisfaction of a contractor or subcontractor, they may bring a lien action during construction. By contrast, an owner does not have any ability to bring an action until the end of the project.

Bill 142 would make Ontario the first jurisdiction in the world to have both regimes (UK has adjudication but no lien rights). Under the prompt payment regime, owners and contractors would not have the same ability to settle a dispute because the timelines are so strict. To make matters more challenging, the government is proposing a motion that the subcontractor would be required to invoke adjudication if the contractor does not pay. These scenarios only drive up project costs and risk delaying construction projects.

We continue to be told that this legislation intends to catch problematic actors, not large owners like municipal governments. As responsible owners, we should be given flexibility to resolve disputes with contractors at far less cost, before being pulled into adjudication.

AMO also submits that the time lags between the "payment date" and the "non-payment notice" for progress payments ought to be extended to 28 days (s. 6.3 (2)), and the "payment date" and the "non-payment notice" for holdback payments should be extended to 60 days (s.27.1). This would better align the payment deadlines, and decrease the risk that contractors would be paid for work that was not properly completed.

Another example is that the extremely short timelines, proposed for adjudication, could result in the owner being taken by surprise in a trial if the contractor has spent time preparing a detailed claim without the owner's knowledge, and then initiates adjudication, with the owner having very little time to prepare a proper response.

These are just some examples that the Committee should address around the prompt payment and adjudication regimes. AMO recommends that the Province explore the implications of enacting both sections, and that stakeholders have the ability to comment on regulations before they are enacted. We have come too far in this process, and with significant alignment amongst stakeholder groups, why not work together to get it right the first time?

3. It is important that municipal governments receive training support and resources to ensure the legislation is properly implemented at the local level, and that they, as owners, are operating in compliance with the law.

AMO encourages the Ministry to find ways to help train municipal staff across Ontario on what has changed should this legislation pass. The size and capacity of municipal governments is equally broad as the value of projects they deliver. For example, about 43% of municipalities have less than six full-time administrative staff to cover statutory duties including a clerk, treasurer, general reception, and perhaps a chief administrator.³ It is highly unlikely that there will be a lawyer on staff.

Conversely, of the 34 Ontario municipalities that have a population over 100,000, their project management and legal staffing budgets will also have to significantly increase because of this legislation, as they, as an example, are the ones doing transit expansion projects.

Regardless of size, Bill 142 will require every municipality to redraft all of their construction contracts, develop new project management procedures, and change processes to ensure faster payment. This will require hiring more legal and project management resources (especially if the timelines do not change), and adding more administrative burden on every municipal clerk who will need to ensure compliance with this legislation, as well as the over 200 other provincial statutes that municipal governments are required to follow.

Given this context, AMO requests that the legislation be delayed in coming into force by one or two years, and echoes the recommendation by the City of Toronto that “there be a Ministry website for construction in Ontario for the publication of all notices under the Act and to provide additional information on individual projects”.

This would be helpful to all parties in the construction pyramid and erase the administrative and cost burden of publications required under the Act. If each project in the Province was assigned a ‘Project Identifier’ number, this would further assist the parties in locating all of the information about a project in one place, on one website.”⁴

³ Ministry of Municipal Affairs, 2016 Financial Information Return, Schedule 80. <https://efis.fma.csc.gov.on.ca/fir/>

⁴ City of Toronto, Oral Remarks on *Bill 142: Construction Lien Act Amendment Act, 2017*, October 25, 2017

Conclusion

AMO believes that Bill 142 has in some ways truly struck a balance between the competing asks of all stakeholders, and should be considered an achievement for industry and owner groups.

That said, we hope that the Committee will carefully consider our remarks and those of our member municipalities. These remarks are intended to ensure the modernization of the *Construction Lien Act* will be as successful as possible by avoiding unintended consequences and mitigating against the potentially costly and burdensome impacts of this legislation.