

November 27, 2017

By email: minister@pwgsc.gc.ca

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Public Services and Procurement
Place du Portage, Phase III R 18A1
11 Laurier Street
Gatineau, Quebec K1A 0S5

Dear Minister Qualtrough:

Please accept this letter in follow-up to our initial correspondence of October 30, 2017. As promised, I am providing a more detailed briefing on the position of the Ontario General Contractors Association (OGCA) in relation to your mandate to ensure a prompt payment process for contractors and sub-contractors who conduct business with your department.

The OGCA remains firmly committed to its belief that for any prompt payment process to be successful it must be developed and informed in consultation with industry stakeholders. The shortcomings of inadequate consultations were readily apparent in the proposed legislation of Senate Bill S-224, which left stakeholders with very real concerns about the impartiality and legitimacy of its proposed adjudication process, as well as the disproportionate power of sub-contractors to halt work on a project. Ontario's broadly consultative process for Bill 142, the *Construction Lien Amendment Act*, in contrast, achieved an informed consensus on the fairness of the process, as well as broad support for the final legislation.

As you and your officials decide how best to meet your mandate commitment regarding the establishment of a federal prompt payment process, the OGCA would like to offer its advice on how the Government of Canada can achieve a high level of stakeholder participation and engagement through a consultation process. Our advice is informed not only by the OGCA's extensive, collective experience in the industrial, commercial, and institutional construction industries, but also our recent experience undergoing a similar, successful review process with the Government of Ontario.

Firstly, we propose consideration of a three-phase review:

- **Phase One** – preparation of a substantive list of issues to define the scope of the consultations and clearly lay out the Government of Canada's expectations for the review
- **Phase Two** – consultations, informed by an Advisory Group to help guide stakeholder engagement and identify opportunities for consensus-building; consultations necessarily should include opportunities for both oral and written submissions
- **Phase Three** – issuance of a final public report

In terms of scope, while I have appended further detail to this letter, the OGCA recommends consideration of the following topics for inclusion within the framework of any review on prompt payment:

1. **Prompt Payment** – consider the causes of payment delays and how they can be addressed effectively. This would include examining the applicability of prompt payment more generally, as well as the potential effects of prompt payment on issues such as freedom of contract and project financing.

2. **Public Private Partnerships** – in considering the application of the federal process to such projects, examine how to align the definitions and structure of the framework with the nature of P3 project delivery.
- 3.

Alternate Dispute Resolution – consider available mechanisms, including adjudication, which can provide for a fair, timely, and transparent conclusion to disputes.

4. **Surety Bonds and Default Insurance** – consider requiring labour and material payment bond sureties to facilitate prompt payment in the event of disputes. Consultations should examine processes for adjusting, paying, and disputing a bond surety.

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Minister Qualtrough, the OGCA understands the magnitude of the task assigned to you in relation to matters of prompt payment. As an organization that represents the interests of 189 Ontario-based and national general contractors that regularly do business with the federal government, the OGCA remains committed to assisting you in developing an informed, consultative process to determine a federal prompt payment process.

We welcome the opportunity to speak with you and your officials to elaborate further on our recommendations noted above, as well as to hear your thoughts on the matter of prompt payment. It is important to ensure the end result of any informed review is the right process for both stakeholders and the Government of Canada.

Sincerely,

ONTARIO GENERAL CONTRACTORS ASSOCIATION



Clive Thurston
President

Attached (3):

Recommended Process for a Federal Review on a Prompt Payment Regime

1. Considerations for the Scope of a Federal Review on a Prompt Payment Regime
2. Considerations for the establishment of an Advisory Group

Attachment 1: Recommended Process for a Federal Review on a Prompt Payment Regime

Phase 1

- Finalization of a complete stakeholder list;
- Research and preparation of a substantive issues list; and
- Preparation of an information package designed to provide the background necessary for the stakeholders to participate meaningfully in the consultations (Phase 2).

Phase 2

- Distribution of the information package;
- Scheduling of a series of consultation meetings
- Receipt of written submissions from stakeholder (all written submissions from stakeholders should be made available to all stakeholders);
- Completion of a Review Questionnaire by stakeholders that will should focus on the substantive issues under consideration; and
- Consultation meetings

Of further note, the Review should be informed by a small subject matter expert Advisory Group that would meet over the course of Phases 2 and 3 to further the discussion of issues of relevance and identify opportunities for consensus building. The Advisory Group should be confidential in nature to encourage open communication.

Phase 3

- Writing and submitting of the final report containing the results of the review and its advice to the Government of Canada
- Immediate public release of the final report

Attachment 2: Considerations for the Scope of a Federal Review on a Prompt Payment Regime

Prompt Payment or Timely Payment for Construction Work

- Consider the causes of payment delays and how they can be addressed (e.g. through regulations, policy, legislation), including the potential effect of prompt payment provisions on the principle of *freedom of contract*;
- Consider making the release of holdback mandatory/automatic after the expiration of lien rights;
- Consider the potential effects of prompt payment provisions and their alignment with industry lenders and sureties;
- Consider the applicability and/or adaptability of any prompt payment provisions to different types of contracts; and
- Consider whether “pay-when-paid” and/or “paid-if-paid” clauses should be made unenforceable

Public Private Partnerships (P3s)

- Consider the application of any federal prompt payment process in relation to such projects; and
- Consider aligning the definitions and structure of the process with the PPP projects delivery system

Alternative Dispute Resolution

- Consider the effectiveness of available procedures and remedies;
- Consider introducing an adjudication mechanism for construction disputes;
- Consider providing for mandatory mediation of lien actions;
- Consider providing for an arbitration mechanism for construction disputes; and
- Consider requiring dispute review boards for certain types of projects.

Surety Bonds and Default Insurance

- Consider requiring labour and material payment bond sureties to promptly pay undisputed amounts;
- Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project;
- Consider mandatory labour and material payment bonding of all public projects;
- Consider requirements in respect of the adjusting of bond claims;
- Consider providing for the electronic delivery of surety bonds;
- Consider whether bond claims should be subject to adjudication; and
- Consider whether changes to the third party beneficiary rule are appropriate in order to enable payment by owners directly to subcontractors and suppliers

Attachment 3: Considerations for the establishment of an Advisory Group

To be completed by OGCA
