



CITY OF HAMILTON
CORPORATE SERVICES
Legal Services

TO:	Mayor and Members General Issues Committee
COMMITTEE DATE:	December 6, 2017
SUBJECT/REPORT NO:	<i>Construction Act</i> Review (LS14004(a)) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Brian Decaire, Solicitor Ext 4707
SUBMITTED BY:	Nicole Auty City Solicitor Ext 4636
SIGNATURE:	

RECOMMENDATION

That the City Solicitor be authorized to make submissions to raise concerns and suggest amendments to the Legislative Assembly of Ontario, committees, ministry, board, or panel of competent jurisdiction and to support the Association of Municipalities of Ontario's position on issues associated with *Bill 142 - An Act to Amend the Construction Lien Act*.

EXECUTIVE SUMMARY

In February 2014 Council authorized staff to make submissions to, as well as support the Association of Municipalities of Ontario (AMO) before the Legislative Standing Committee on then *Bill 69 – Prompt Payment Act*. The authorization extended to any subsequent bill or regulations dealing with similar issues. This report serves as an update to Council as well as to clarify and expand staff authority to comment on subsequent developments.

The Standing Committee heard from a diverse group of stakeholders. *Bill 69* was rescinded at the committee level in favour of a broader review of Ontario's construction industry laws. The Ministry of the Attorney General has since undertaken an unprecedented amount of consultation in arriving a draft of *Bill 142 – An Act to Amend the Construction Lien Act*, including:

- extensive expert report and recommendations by Bordner, Ladner Gervier LLP;
- comparisons with other jurisdictions;

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- review and consultation by an expert panel of key stakeholders (including representation from the City of Toronto and Infrastructure Ontario); and,
- broad public consultation with parties noted at Appendix A.

Bill 142 has the general support of all three provincial parties and represents the most substantive legislative update to the construction industry since the 1980s. Many details are left to be dealt with in future regulations – making a full assessment of the impact to the City difficult. Given the extensive consultation and general political support, there is a sense that the main pillars of Bill 142 will remain intact.

Bill 142 proposes three major legislative changes to the construction industry: (1) modernize construction lien rights, (2) a new prompt payment mechanism, and (3) a mandatory interim adjudication for payment disputes. Given the broader scope of legal remedies contained in Bill 142, the *Construction Lien Act* will be renamed the *Construction Act*. The highlights of the changes from a municipal perspective are summarized in Appendix B.

The City of Hamilton is a significant consumer of construction works and services and will be impacted by any legislative changes to the construction industry. City staff, together with many public owners, are supportive of many of the proposed changes under the *Construction Act*. However, as expanded upon in the Analysis and Rationale for Recommendation section, there remain elements that can be amended or clarified to minimize the impact and hardship to the City.

The recommendations requested will permit the City Solicitor to highlight staff concerns to Bill 142 and subsequent regulations. In doing so, the Legislative Assembly of Ontario will hear and consider the concerns of public owners when determining the appropriate balance of interests in the construction industry.

At the time of writing this report, the Attorney General has addressed some of AMO's concerns by recently introducing motions before the Legislative Standing Committee. The Committee continues with its consultation and has scheduled presenters so as to ensure that a diverse set of stakeholders are heard. AMO has presented, together with a handful of other public owners, and insured that the enclosed concerns are heard. Attached as Appendix C is the written submission of AMO.

The Attorney General has also indicated the importance of clear transition provisions and a lengthy roll out period so market participants can appropriately prepare. Legal

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Services will continue to monitor legislative developments and work with appropriate departments to assist in staff training and implementation of operational changes.

Once Bill 142 and the associated regulations are in effect, a further update will be provided.

Alternatives for Consideration – See Page 7

FINANCIAL – STAFFING – LEGAL IMPLICATIONS (for recommendation(s) only)

Financial: The recommendations have no financial implications.

Staffing: The recommendations have no staffing implications.

Legal: The recommendations have no formal legal implications. However the legislative process seeks input from impacted stakeholders of Bill 142 so that the change in law proposed strikes an appropriate balance the interests in the construction industry. Continued monitoring of legislative developments, prompt comment to committees and regulators, and collective support of AMO will ensure the concerns and impacts to the City are considered in the balancing of interests.

HISTORICAL BACKGROUND (Chronology of events)

The 2017 chronology of Bill 142 before the Legislative Assembly is the following:

- May 31st, Bill 142 introduced by first reading by the Attorney General;
- September 12-14, 27-28, October 3-4th, second reading debate and carried;
- October 4th, referred to Standing Committee on the Legislative Assembly; and,
- October 25, November 1, 15th, consideration of the Bill by Standing Committee
- A further update on the status of Bill 142 will be provided at the General Issues Committee.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

The legislative changes proposed by the Province by Bill 142 are set out in this report under the Executive Summary and supporting Appendixes. The full extent of their implications on City policies will not be known until new regulations under the Act are released.

RELEVANT CONSULTATION

Public Works and Financial Planning, Administration & Policy were consulted in preparation of this report.

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**ANALYSIS AND RATIONALE FOR RECOMMENDATION
(Include Performance Measurement/Benchmarking Data if applicable)**

Highlights of the proposed amendments by Bill 142 are found at Appendix B. These amendments are generally welcomed; however, there remain areas of concern. The proposed amendments are anticipated to have the following impacts to the City:

- costs for mandatory bonding of contractors and consultants;
- increased costs for mandatory interest charges;
- updating new consulting contracts;
- updating new lump sum and unit price construction contracts;
- implementing new payment processing procedures;
- implementing new project management procedures;
- expediting internal processes to ensure faster payment;
- developing and implementing training sessions and modules;
- updating systems to handle receipt and searches of claims for lien;
- potential staffing impacts due to new prompt payment and mandatory adjudication processes.

An analysis of the full impact to the City of Hamilton is premature because many of the details and mechanics Bill 142 are left to be determined in future regulations. Accordingly, it is also premature for City staff to present mitigate measures to offset some of the administrative or cost impacts anticipated by Bill 142. Potentially, however, some mitigation measures may include extending payment processing to bi-monthly instead of monthly, minimizing the use of mandatory adjudication by increasing the opportunity costs of a negative determination; and considering a cost recovery system to cover costs of lien registration and record keeping. Ultimately the operational impacts and mitigation measures implemented are best reserved for comment by the respective Department or Division once known.

There remain areas of concern and uncertainty that public owners, as expressed by AMO, have asked to be reconsidered. It is worth noting that the provincial departments and agencies are not exempt from Bill 142 and thus, as public owners, share in many of the same concerns as the City. City staff would prefer some clarity or revised language on the following issues:

- minimizing cost impacts and the availability of support from the Province;
- phased in and significant lead times for provisions coming into force;
- a Provincial registry/website for posting of notices and declarations;
- timing of payment, need for certification, and need for set-off rights;
- clarity in phased holdback obligations;

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- complications arising from the intersection of lien and adjudication rights;
- disadvantages in responding time to prompt payment and adjudication disputes;
- mandatory interest payments;
- mandatory bonding on public projects;
- the flexibility of the contract consultant to be the adjudicator;
- clarity on the owner and lease hold interests; and,
- other technical items and clarity in definitions.

The Attorney General has addressed some of those concerns by recently introducing motions before the Legislative Standing Committee. The Committee continues with its consultation and has scheduled presenters so as to ensure that a diverse set of stakeholders are heard. AMO has presented, together with a handful of other public owners, and ensured that the above concerns are heard. Attached here as Appendix C is the written submission of AMO.

In addition to the above concerns, the Attorney General has indicated the importance of clear transition provisions and a lengthy roll out period so market participants can appropriately prepare. Legal Services will continue to monitor legislative developments and work with appropriate departments.

ALTERNATIVES FOR CONSIDERATION

(Include Financial, Staffing, Legal and Policy Implications and Pros and Cons for each alternative)

The City could refrain from collaboration with other public owners and be silent on its concerns of Bill 142 and future regulations. This alternative is not recommended given the importance and potential impact of this legislation to the City.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Economic Prosperity and Growth

Hamilton has a prosperous and diverse local economy where people have opportunities to grow and develop.

Healthy and Safe Communities

Hamilton is a safe and supportive city where people are active, healthy, and have a high quality of life.

Clean and Green

Hamilton is environmentally sustainable with a healthy balance of natural and urban spaces.

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APPENDICES AND SCHEDULES ATTACHED

Appendix “A” Parties that the Attorney General consulted with in drafting Bill 142 – An Act to Amend the Construction Lien Act.

Appendix “B” Summary of Bill 142 changes from the municipal perspective

Appendix “C” AMO November 1, 2017 written submissions to the Standing Committee on the Legislative Assembly.

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