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Council of Ontario Construction Associations

The Honourable Caroline Mulroney MPP
The Minister of Transportation
777 Bay Street, 5th Floor
Toronto, ON M7A 1Z8
minister.mto@ontario.ca

June 7, 2021

Dear Minister,

Re: MTO Contracts that Violate the *Construction Act*

The Council of Ontario Construction Associations ("**COCA**") is a federation of 29 construction associations representing approximately 10,000 general and trade contractors that perform work in the industrial, commercial institutional (ICI) and heavy civil construction sector in all regions of Ontario. COCA is mandated to serve as the voice of the ICI and heavy civil construction sectors at Queen's Park.

COCA was among the leading advocates for prompt payment. We appreciated your support in our campaign, both as a member of the PC caucus and in your role as Minister of the Attorney General who oversaw the implementation of the *Construction Act*. We hope that we can rely on your ongoing support for prompt payment.

Adjudication was and is the lynchpin of prompt payment. A statutory right to prompt payment is meaningless without the ability to enforce that right in a timely and cost effective manner. The right of a party to refer a dispute to adjudication and get a determination in about 45 days is what makes prompt payment a reality. We are concerned, therefore, to see the MTO is using a form of contract that is designed to prevent a party from referring disputes to adjudication.

Attached is an excerpt from an existing MTO contract. We have redacted information from the contract that identifies the particular project to which it relates.

Section 13.05(1) of the *Construction Act* permits a party to a contract to refer seven types of dispute to adjudication:

> Availability of adjudication
>
> Contract
>
> 13.5 (1) Subject to subsection (3), a party to a contract may refer to adjudication a **dispute** with the other party to the contract respecting any of the following matters:

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1. The valuation of services or materials provided under the contract.

2. Payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.

3. Disputes that are the subject of a notice of non-payment under Part I.1.

4. Amounts retained under section 12 (set-off by trustee) or under subsection 17 (3) (lien set-off).

5. Payment of a holdback under section 26.1 or 26.2.

6. Non-payment of holdback under section 27.1.

7. Any other matter that the parties to the adjudication agree to, or that may be prescribed. 2017, c. 24, s. 11 (1).

Contrary to section 13.05(1), the MTO form of contract prevents a contractor from referring a dispute to adjudication until it has gone through another form of dispute resolution designed by the MTO.

GC 3.14 provides that the first step in the dispute resolution process is for a contractor to submit a "Compensation Request" to the contract administrator. The contract administrator must render a decision within 60 days, at the earliest. A decision may take longer than 60 days, however, because any request for information or documentation by MTO to the contractor stops the running of the clock until the contractor has complied with the request or advised the MTO that it will not be complying with the request. The contractor does not have a similar ability to request information or documents from the MTO.

The really problematic clause of the MTO contract is GC 3.15.02.01, which provides that there is no "dispute" for the purpose of section 13.05(1) of the *Act* until the contract administrator has rendered a decision pursuant to GC 3.14 or the time for rendering the decision has expired. GC 3.15.02.01 provides as follows:

> GC 3.15.02.01 The parties agree that for the purpose of section 13.5(1)(1.(2.) and (7.) of the *Construction Act*, a dispute does not arise in respect of those matters, and therefore a Notice of Adjudication shall not be given, until:
>
> a) A Decision has been issued on a Compensation Request or;
>
> b) Time to issue the Decision on the Compensation Request has expired.

In our view, GC 3.15.02.01 is clearly contrary to the *Construction Act* in general and section 13.5(1) in particular. There would be no need for the contractor administrator to render a decision on an issue if there was not already a "dispute" between the parties within the meaning of section 13.05(1). GC 3.15.02.01 is specifically designed to prevent a contractor from referring disputes to adjudication by an independent party, which is the contractor's right pursuant to the *Act.*

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A decision by a contract administrator is no substitute for an adjudication by an independent party. The contract administrator is not independent. First, he or she is beholden to the MTO because they are getting paid by MTO on the particular project at issue in the dispute. Second, no doubt that the contract administrator will wonder whether making a decision adverse to the interests of the MTO will affect his or her company's ability to secure future work from the MTO. Third, the contractor administrator and/or his or her colleagues were likely involved in the drafting of the contract at issue in the dispute before them. Therefore, the dispute resolution process designed by the MTO has a structural bias in favour of the MTO.

The MTO is among the largest buyers of construction in Ontario. The MTO should be setting an example to others by making prompt payment a reality. A good place to start is to delete GC 3.15.02.01 from all future MTO contracts and to advise contractors working on existing contracts that the MTO will not be relying on GC 3.15.02.01.

Please don't hesitate to contact us if you need further information or would like to discuss. We will be contacting you to follow up on this important issue.

Sincerely,

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President

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