



May 9, 2019

The Honourable Wayne Easter, Chair,
David Gagnon, Clerk,
Standing Committee on Finance
Parliament of Canada
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Via Fax at 613-947-3089

Dear Sirs:

RE: Prompt Payment for Construction Work 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, and institutional (ICI) sectors in all regions of Ontario. Established in 1975, COCA is mandated to serve as the voice of the ICI sector in Ontario.

COCA is a strong advocate for prompt payment and for the recommendations made by Bruce Reynolds and Sharon Vogel in their June 8, 2018, report, *Building A Federal Framework for Prompt Payment and Adjudication*. Our members want to see the recommendations made by Mr. Reynolds and Ms. Vogel fully and effectively implemented in Federal legislation.

Unfortunately, there is a critical flaw in the proposed *Act* that will largely defeat the objective of prompt payment.

COCA supports the pay when paid principle. The problem with the contractual pay when paid clauses that are now commonplace is that they tend to delay the resolution of the disputes that disrupt the flow of funds. Since a contractor with a pay when paid clause in its subcontract has no obligation to pay its subcontractors, the contractor is not particularly motivated to resolve its underlying dispute with the owner that is delaying payment. Since the subcontractor does not have privity of contract with the owner, it is powerless to bring the dispute between the contractor and owner that is delaying payment to a head. Contractual pay when paid clauses are one of the main reasons for the industry wide trend of slow payment.

Prompt payment as it appears in Ontario's *Construction Act* adopts the pay when paid principle but makes it conditional upon the prompt resolution of disputes. The key to prompt payment in the *Construction Act* is section 6.5(5)(a)(iii) which requires a general contractor serving a notice of non-payment upon a



subcontractor to give an undertaking to refer its dispute with the owner to adjudication within 21 days. Subsection 6.6(6)(a)(iii) imposes the same obligation upon subcontractors who deliver notices of non-payment to their sub-subcontractors. The *Construction Act* effectively combines the pay when paid principle with a mechanism to ensure that disputes that disrupt the flow of funds are promptly resolved.

The flaw in the proposed *Act* is that it adopts the pay when paid principle without making it conditional upon the timely resolution of disputes. There is no equivalent to subsections 6.5(5)(a)(iii) and 6.6(6)(a)(iii) in the proposed *Act*. A general contractor who serves a notice of non-payment to its subcontractor has no obligation to refer its dispute with the Federal government to adjudication. Although the subcontractor has the right to refer its dispute with the general contractor to adjudication, it is hard to see what good it will do them. A general contractor served with a notice of adjudication by a subcontractor will simply point to subsection 10(3) and say that it has no obligation to pay the subcontractor because it was not paid by the government and it delivered a notice of non-payment as required by section 10(3). Unlike the *Construction Act*, the proposed *Act* does not make pay when paid conditional upon prompt resolution of disputes that disrupt the flow of funds. Instead, the proposed *Act* leaves subcontractors and sub-subcontractors twisting in the wind.

Prompt payment legislation is needed to make sure that contractors and subcontractors are paid on time for their work. So we applaud the Federal government to taking up the issue. However, unless the proposed *Act* is amended, it will make the problem that the government is trying to solve even worse.

COUNCIL OF ONTARIO CONSTRUCTION ASSOCIATIONS

Per

A handwritten signature in blue ink that reads "Ian Cunningham". The signature is written in a cursive, flowing style.

IAN CUNNINGHAM – PRESIDENT