

Report No. 1 of the Regional Solicitor was adopted, without amendment, by the Council of The Regional Municipality of York at its meeting held on December 14, 2017.

Bill 142 - *Construction Lien Amendment Act, 2017*

Regional Council recommends adoption of the following recommendation contained in the report dated December 5, 2017 from the Regional Solicitor:

1. Council endorse comments submitted to the Standing Committee on the Legislative Assembly in respect of Bill 142, the *Construction Lien Amendment Act, 2017*.
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Report dated December 5, 2017 from the Regional Solicitor now follows:

1. Recommendations

It is recommended that:

1. Council endorse comments submitted to the Standing Committee on the Legislative Assembly in respect of Bill 142, the *Construction Lien Amendment Act, 2017*.

2. Purpose

This report provides Regional Council with an update on Bill 142, and seeks Council's endorsement of staff's November 15, 2017 written submission to the Standing Committee on the Legislative Assembly (the "Standing Committee").

3. Background

Pursuant to Bill 142, the *Construction Lien Act* is being extensively amended by the Province, and was recently

considered by the Standing Committee on the Legislative Assembly

On May 31, 2017, the Ontario Attorney General introduced Bill 142, which is intended to modernize the *Construction Lien Act* (the “Act”). Among other amendments, the Act will be renamed the “*Construction Act*”. The Act has not been extensively reviewed by the Province since 1983.

The main policy considerations driving Bill 142 are promptness and security of payment for suppliers of construction materials and services and efficiency in resolving construction disputes. The Bill passed First Reading on the day it was introduced, and passed Second Reading on October 4, 2017.

After Second Reading, the Bill was considered by the Standing Committee which received submissions from stakeholders throughout late October and into mid-November 2017. A clause-by-clause review of the draft Bill for inclusion of amendments by the Standing Committee proceeded on November 22, 2017. In this amended form, the Bill was ordered back to the Legislative Assembly for Third Reading.

The Bill passed Third Reading on December 5, 2017, but the timeline for Royal Assent and Proclamation is not presently known

The Bill was introduced into the Legislative Assembly for Third Reading on December 4, 2017, and following a single day of debate, it passed Third Reading on December 5, 2017. At the time of this report it is not known when the Bill will receive Royal Assent or when key sections will come into force. It is expected that the implementation of new legislation will be staggered to allow for the development of associated regulations, and to provide industry stakeholders with an opportunity to develop transition measures.

The Region has been a significant participant in the Bill 142 consultation process

In February, 2015, the Attorney General initiated a *Construction Lien Act* consultation and review process chaired by senior construction lawyers from the Toronto law firm of Borden Ladner Gervais LLP (“BLG”). As part of a broad consultation process to gather information from stakeholders, BLG created an “Owners’ Group” including representatives from York Region Legal Services, the Association of Municipalities of Ontario (“AMO”) and in-house legal staff from numerous other municipalities and public agencies throughout the Province. In a subsequent phase of the review process, BLG invited a York Region staff lawyer to provide technical information through an “Expert Advisory Group”. BLG

ultimately produced a final report with recommendations in the fall of 2016 which formed the basis of the amendments to the *Act* reflected in Bill 142.

#### 4. Analysis and Implications

At AMO's request, Legal Services staff provided written submissions to the Standing Committee in support of AMO's submission on the potential impacts and implications of Bill 142

On November 15, 2017, in response to a request from AMO to its members, Legal Services staff provided written technical submissions to the Standing Committee which supported AMO's written submission presented on November 1, 2017. AMO's written submission may be found at Attachment 1, and the Region's written submission may be found at Attachment 2.

York Region's submission to the Standing Committee included the following:

- Support and appreciation for the Province's *Construction Lien Act* review process to date, which had invited stakeholder consultation and addressed the long-standing need for modernization
- A request that the proposed "prompt payment" regime should not impose unreasonable timelines on public owners for appropriate certification of work
- A request that the proposed mandatory adjudication process be tempered so as not to expose public owners to increased litigation and staff resource costs
- A request for further consultation during the development of statutory regulations, which have not yet been presented for review, but which will ultimately drive the administrative processes associated with the amended *Act*
- A request that sufficient transition time be allowed to enable public owners to adapt existing contracts and processes and to train staff

The Region's submissions to the Standing Committee aligned with and supported AMO's position in all respects, and further aligned with the submissions of other large municipal stakeholders

York Region's position on major issues as reflected in its written submission to the Standing Committee is either directly aligned or consistent with positions advanced by AMO and other key stakeholders including, among others, the City of Toronto, the City of Mississauga, the Region of Peel and the Toronto Transit Commission. Table 1 describes the key issues and the alignment of the respective municipal stakeholders.

**Table 1**  
**Key Issue and the Position of the Respective Stakeholders**

York Region	AMO	Toronto	Mississauga	TTC	Peel
Prompt Payment	✓	✓	✓	✓	✓
Adjudication	✓	✓	✓	✓	✓
Transition Provisions	✓	✓	✓	*	✓
Development of Regulations	✓	✓	✓	*	*

\* Stakeholder position was not provided on this issue

The Standing Committee's amended version of Bill 142 which passed Third Reading addressed some of the concerns raised by municipal stakeholders including York Region

The substance of the Bill was amended by the Standing Committee to address some of the concerns raised by York Region and other large municipal stakeholders as reflected in the submissions to the Standing Committee. The amendments, which passed Third Reading, include:

- the timing for payment of invoices under the prompt payment provisions will allow owners to commission and test infrastructure
- clarification of the impact of adjudication decisions on project accounting
- the "triggering event" for the commencement of an adjudication under the prompt payment provisions has been extended from 14 days to 21 days
- transition of the prompt payment and adjudication schemes coming into law has been clarified, with the exception of timing

Several specific concerns raised by York Region in its written submission were not addressed through the Standing Committee review, including some requested technical changes to the proposed prompt payment and adjudication schemes. Additionally, the Standing Committee did not address the development of further regulations or the specific timing of when the transition provisions will be used to enact the prompt payment and adjudication schemes following passage of the Bill into law.

Legal Services staff will continue to advocate for the participation of stakeholders as regulations are developed, and will work with Regional construction delivery, contract administration and finance staff to ensure that risk mitigation efforts and related challenges are adequately addressed once the Bill formally passes into law, as expected.

## 5. Financial Considerations

As a result of amendments to the *Act*, there will be potential cost implications associated with amending contract language and adapting existing processes and resources to address prompt payment, mandatory adjudication, risk mitigation and general compliance with the amended statute. Budgetary and accounting pressures may also arise as mandated payments related to adjudicated disputes will become due mid-project with short timelines for payment.

Staff will be required to develop processes and procedures to respond to new payment and claims pressures under compressed timelines. Additional Legal and contract administration support will also be required to address an expected increase in contract disputes arising from the mandatory adjudication process. Additionally, depending on the as yet undetermined regulations, mandatory surety bonds on public projects may also increase project costs and potentially reduce the competitive pool of available bidders for certain types of work.

## 6. Local Municipal Impact

There are no direct local impacts associated with this report. All local municipalities involved in construction delivery will face similar challenges arising from the passage of Bill 142 and the implementation of the *Construction Act*.

## 7. Conclusion

The Region was a key participant in the stakeholder consultation process associated with Bill 142, which included providing written submissions to the Standing Committee, which staff recommend that Council endorse. Bill 142 will impact the delivery of Regional construction projects. Legal Services will work with Regional staff to assess, address and mitigate impacts and challenges associated with passage of the Bill. Staff will report back to Council with further details as they become available.

For more information on this report, please contact Dan Kuzmyk, Deputy Regional Solicitor, Dispute Resolution and Construction Law, at 1-877-464-9675 ext. 71401.

The Senior Management Group has reviewed this report.

December 5, 2017

Attachments (2)

#7995509

Accessible formats or communication supports are available upon request



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

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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."<sup>1</sup>

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."<sup>2</sup> 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.

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

<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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

<sup>4</sup> 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.

Written Submission of The Regional Municipality of York  
to the Standing Committee on the Legislative Assembly  
Regarding Bill 142, *An Act to Amend the Construction Lien Act*



**THE REGIONAL MUNICIPALITY OF YORK**

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**November 15, 2017**

The Regional Municipality of York (“York Region”) is a significant municipal infrastructure owner in the Province. In 2017 York Region budgeted capital expenditures of over \$940 million on both new construction and state of good repair work. Like many other construction industry stakeholders, York Region recognizes a need to modernize the existing *Construction Lien Act* (“CLA”).

York Region is appreciative of the consultative process implemented in the current review of the CLA as initiated by the Ministry of the Attorney General. York Region participated in consultations throughout the previous Expert Review and we are grateful for the opportunity to provide this written submission to the Standing Committee on the Legislative Assembly for consideration.

In preparing this written submission we have reviewed the list of government amending motions to Bill 142 circulated by the Attorney General on October 23, 2017, and we recognize several improvements to Bill 142 in this list. Notwithstanding this, Bill 142 continues to present challenges for municipal owners as highlighted by the Association of Municipalities of Ontario (AMO) in its written and oral submissions of November 1, 2017, to this Standing Committee.

York Region’s submission focuses on several significant issues of concern for the Region as a municipal infrastructure owner and provides proposed technical amendment solutions where appropriate. A summary chart of our recommendations is enclosed for ease of reference. We submit that these recommendations support the meticulous balance of interests which Bill 142 has carefully sought to achieve in prompt payment and adjudication and include additional responsible and reasonable measures to mitigate certain risks to public funds in the payment for construction services under Bill 142.

York Region respectfully submits these following items for the Standing Committee's consideration:

**A. PROMPT PAYMENT**

**1. THE DEFINITION OF A "PROPER INVOICE" SHOULD BE PERMITTED TO INCLUDE CERTIFICATION OR OWNER APPROVAL AS A CONDITION SET BY CONTRACT TERMS TO TRIGGER AN OWNER'S PROMPT PAYMENT OBLIGATIONS**

Under the proposed prompt payment regime, owners must pay contractors no later than 28 days after receiving a "proper invoice" or be subject to a defined interest penalty on unpaid amounts. Bill 142 establishes the basic criteria of a "proper invoice" and allows for contractual and other regulatory requirements to further define this benchmark. The Bill prohibits the inclusion of the certification of work or owner approval as a condition to the delivery of a proper invoice. Should a basis to withhold any portion of the proper invoice payment be identified, owners are required to prepare and deliver a Notice of Non-Payment in the prescribed form with supporting detail within 14 days from receipt of a proper invoice. The cumulative effect is that the certification of work listed within a proper invoice must occur within a 14 day window, constrained by the time for an owner to deliver a Notice of Non-Payment.

York Region identifies this "14 day window" for certification as too short to account for a fulsome review of construction services performed in all contexts. Regional projects can involve requests for payment in substantial amounts, requiring possibly detailed and large scale testing and analysis by payment certifiers. This short period for certification resultantly saddles owners with risks related to overpayment and payment for incomplete, deficient or defective work. We submit that this identified risk can be effectively and fairly

mitigated by allowing owners an opportunity to certify completed work as part of the “proper invoice” process.

***Proposed Technical Amendment #1:***

- Delete sections 6.2(2) and 6.2(3) from Bill 142 that currently restrict the prior certification of work or owner approval as it relates to the delivery of a proper invoice.

**2. THE TIME FOR ISSUANCE OF AN OWNER NOTICE OF NON-PAYMENT SHOULD BE INCREASED TO 28 DAYS SO AS TO ALLOW OWNERS AN OPPORTUNITY TO ENSURE NO DEFECTS IN THE WORK AND TO EXERCISE RIGHTS OF SET-OFF**

As discussed above, should a basis to withhold any portion of the proper invoice payment be identified by an owner following delivery of a proper invoice, owners are required to prepare and deliver a Notice of Non-Payment in the prescribed form with supporting detail within 14 days. York Region submits that the time for an owner to issue a Notice of Non-Payment should be extended to 28 days from the date of delivery of the proper invoice from the current 14 day period.

The inclusion of this additional time avoids the “time lag” between the contractor’s expected time for payment, being 28 days, and the much shorter 14 day period currently allotted to owners to both certify work and ensure that no defects arise. Owners should not have to be faced with the untenable situation of having to pay for defective work that arises after day 14 in the prompt payment process.

We identify that addressing this time lag would provide the following advantages:

- (i) Owner payments would reflect amounts properly owing for work free from defects and deteriorations or any other basis for set-off that may arise after day 14 but before release of payment funds;
- (ii) It allows for additional time for the resolution of problems that may arise without having to resort to the preparation and delivery of a formal Notice of Non-payment with details (e.g. time for business management meetings or on site meetings amongst all parties involved); and
- (iii) If a Notice of Non-Payment is required, it provides a reasonable opportunity for better documentation to be collected by the owner and for the owner to consult with external advisors if necessary. In short, such an extended period could result in better Notices of Non-Payment that could later assist all parties in the construction pyramid to understand, assess and potentially respond to owners' identified concerns.

***Proposed Technical Amendment #2:***

- Amend section 6.3(2) of Bill 142 to increase the time for an owner to give the contractor a Notice of Non-Payment from 14 days to 28 days.

**B. ADJUDICATION**

- 3. MANDATORY ADJUDICATION WILL INCREASE COSTS FOR MUNICIPAL OWNER PROJECT DELIVERY AS IT RELATES TO CLAIM RESOLUTION AND RELATED IMPACTS TO STAFFING. THE INCLUSION OF AN ADJUDICATION TRIGGERING EVENT IN THE PROMPT PAYMENT PROVISIONS WILL COMPOUND THESE INCREASED COSTS.**

Bill 142 includes a mandatory adjudication process for statutorily defined disputes, disputes specified in a contract, and disputes to be subsequently prescribed by Regulation. These

disputes are to be resolved by a qualified independent adjudicator under defined short timelines. York Region is concerned that the inclusion of an adjudication process in Bill 142 may precede a number of unintended impacts to public owners, discussed below, resulting in increased costs for in the delivery of infrastructure.

Currently the Bill also includes a defined triggering event for adjudication which we believe unnecessarily forces this adjudication process on parties where other dispute resolution processes should remain equally available. This triggering event arises where, following an owner's delivery of a Notice of Non-Payment, contractors must make full payment to its subcontractors listed in the proper invoice unless a subsequent contractor's Notice of Non-Payment is issued to the relevant subcontractors with an undertaking to refer the subject matter of the owner's non-payment to an adjudication with the owner within 14 days. We believe that this requirement to provide an undertaking to take the matter to adjudication is problematic and results in a deepening of the foreseeable cost consequences of adjudication for public owners.

We identify the following impacts resulting from mandatory adjudication:

- (i) The adjudication process will frustrate the ability of parties to try to resolve matters on their own, through potentially less taxing and costly methods than the adjudication process; and
- (ii) the imposition of mandatory adjudication forces owners into a constant defensive process, preparing for the next adjudication with each progress payment instead of focussing on the practical steps to ensure that the delivery of the project continues.

York Region, like several other public owners, is concerned that these impacts will affect staffing and resources required for project delivery, from staff who work to facilitate the construction for the municipality and staff who provide dispute resolution support. We

further believe that these impacts are increased when adjudication is considered as a process in addition to the existing lien remedies which remain available to complainants after an adjudication has occurred.

York Region submits that adjudication should instead be broadly construed in the Bill to be one of several dispute resolution processes available to the parties, with other options being informal discussions, contractual dispute resolution processes agreed to by the parties, or other statutorily-informed procedures (lien rights procedures, breach of trust claims). We think that this alternative framing of adjudication provides parties with flexibility to participate in dispute resolution processes that are commensurate to the nature of the dispute.

Based on the foregoing, York Region submits that the adjudication process should be an elective procedure to be determined by the parties to the construction contract at the time that the contract is formed. Additionally, York Region submits that the triggering event for adjudication should be removed from the prompt payment process and that parties should be allowed to exercise discretion as to the applicable dispute resolution process that would apply as each dispute arises.

***Proposed Technical Amendment #3:***

- Add language to Part II.1 (Construction Dispute Interim Adjudication) of Bill 142 to allow for the construction service contract to optionally include the adjudication process as parties to the contract agree.
- Delete section 6.4(5)(iii) from Bill 142 to remove the triggering event of adjudication in the prompt payment process.

**4. THE BILL SHOULD BE AMENDED TO INDICATE THAT AN OWNER’S PAYMENT OF AN ADJUDICATOR’S DETERMINATION IS SUBJECT TO THE PAYMENT OBLIGATIONS CONCERNING THE EXISTING LIEN SCHEME, NAMELY HOLDBACK AND “NOTICE HOLDBACK” RETENTION, AND THAT SUCH PAYMENT CAN BE SUBJECT TO AN OWNER’S SET-OFF**

York Region identifies that the current provision in Bill 142 on the payment of an adjudicator’s determination is not sufficiently clear to be reconciled with an owner’s existing holdback obligations (i.e. the basic holdback of 10% on the price of services or materials provided) or the retention of funds necessary following receipt of a written notice of lien. Additionally, the right of a set-off is also not addressed in the provisions. We submit that these changes are necessary to bring clarity to all parties on how payment is to be made following an adjudicator’s determination.

On the matter of the availability of set-off, York Region submits that the right to set-off should not be restricted to the improvement, as currently proposed in Bill 142, but should continue to extend to debts, claims and damages in relation any other dealings between the owner and the contractor as is currently permitted.

***Proposed Technical Amendment #4:***

- Amend section 13.19 of Bill 142 to include that an adjudicator’s determination to pay an amount is subject to (i) section 22 (the Retention of Holdbacks), (ii) section 24 (Payments that may be made where a payer has received notice of a lien), and (iii) section 12 (Set-off by Trustee), each as applicable.
- Delete the proposed amendments to sections 12 and 17(3) in Bill 142 which limit set-off to those debts “related to the improvement” and retain the existing CLA language in these sections.

**5. THE TIME FOR THE PAYMENT OF AN ADJUDICATION DETERMINATION SHOULD BE INCREASED FROM 10 DAYS TO ALLOW PUBLIC OWNERS AN OPPORTUNITY TO OBTAIN FUNDS AND PROCESS PAYMENT**

The Bill currently provides that following an adjudicator's determination requiring one party to make a payment to another party, the payment shall be made in 10 days. In the event that payment of such funds is not made in full, interest is applicable and the contractor or subcontractor, as the case may be, may suspend work. The resulting costs of resuming the work following a permitted suspension of work are to be borne by the party that did not make the payment within the 10 day period.

This 10 day payment period is short in the municipal owner context given the authorizations and procedures that are typically applied to any release of public funds. More concerning, however, may be the potential scenario where an adjudication determination provides for payment above and beyond a public owner's identified budget for construction. A recourse for staff may be to obtain municipal council approval for additional budget funding.

Municipal councils across Ontario set their own frequency of meetings and quite often meetings during the summer holidays do not occur. Given the potential short duration of the adjudication process in Bill 142, it is conceivable that a dispute could arise, an adjudication occur, and a determination be received between council meetings. In order to provide public owners with a practical length of time to make payment following a determination and to avoid the unnecessary costs of a work suspension, we submit that the time to pay an adjudication determination should be increased beyond 10 days, to a period being of at least 21 days.

***Proposed Technical Amendment #5:***

- Amend section 13.19(1) of Bill 142 to increase the time for payment of an adjudication determination to a longer period, being a minimum period of 21 days.

**C. SURETY BONDS****6. FLEXIBILITY FOR PUBLIC OWNERS SHOULD BE PRESCRIBED IN THE REGULATIONS RELATED TO THE OBLIGATION FOR PUBLIC PROJECTS TO HAVE BROAD FORM SURETY BONDS**

Section 85.1 of Bill 142 requires broad form surety bonds (labour and material bonds and performance bonds) in prescribed forms to be issued for all public sector projects where the contract price exceeds an amount to be prescribed by Regulation for the applicable owner. York Region is concerned that the forthcoming regulatory requirements may remove necessary flexibility in the amount and type of performance security requested for public projects resulting in challenges for the Region to retain either the appropriate contractors or sufficient numbers of contractors to ensure a competitive tendering process offering best value for rate payers. For example, projects with a significant information technology component often involve information technology contractors who are normally not bonded and York Region has considered alternative forms of performance security on past projects in an effort to address the aforementioned concerns.

York Region requests the Regulations be drafted such that the mandatory surety bonding requirement should only apply to public projects with an estimated construction cost in excess of a certain threshold value (such as \$1,000,000). In addition, York Region also requests that the Regulations be drafted to allow for a carve out for certain types of projects – for example projects with a significant information technology component. York Region

also requests that municipalities be given the opportunity to participate in the process of developing standard form surety bonds.

**D. TRANSITION**

**7. THE APPLICATION OF PROMPT PAYMENT AND ADJUDICATION SHOULD OCCUR AFTER PUBLIC OWNERS ARE PROVIDED WITH A REASONABLE OPPORTUNITY TO ADJUST OR ACQUIRE NECESSARY RESOURCES, REVIEW PROCESSES AND PROVIDE ADEQUATE TRAINING**

Like many other public owners, York Region is concerned about the timelines to implement the prompt payment and adjudication regimes with existing processes to ensure adequate opportunities for training and acquisition of additional resources (staffing, IT resources, etc.) as necessary to account for the CLA processes should Bill 142 become law. York Region submits that the extensive work to accommodate the prompt payment and adjudication regimes can only occur after the finalization of the Regulations as it will only be at that time that owners will be able to fully assess the steps required to implement the CLA changes. Allowing for this important time for transition will ensure that public owners are prepared and it will assist to mitigate unnecessary risks to public funds.

**8. YORK REGION REQUESTS CONTINUED CONSULTATION THROUGH THE DEVELOPMENT OF THE REGULATIONS**

York Region is appreciative of the consultation that the Ministry of the Attorney General has instituted in the development of Bill 142. We request that this consultation continues in the development of any Regulations.

Reference Chart of York Region's Recommendations  
With Related Proposed Technical Amendments

#	<u>York Region Recommendation</u>	<u>Proposed Technical Amendment</u>
1.	<b>Prompt Payment:</b> The definition of a "proper invoice" should be permitted to include certification or owner approval as a condition set by contract terms to trigger an owner's prompt payment obligations.	<ul style="list-style-type: none"> <li>• Delete sections 6.2(2) and 6.2(3) from Bill 142 that currently restrict the prior certification of work or owner approval as it relates to the delivery of a proper invoice.</li> </ul>
2.	<b>Prompt Payment:</b> The time for issuance of an owner Notice of Non-Payment should be increased to 28 days so as to allow owners an opportunity to ensure no defects in the work and to exercise rights of set-off.	<ul style="list-style-type: none"> <li>• Amend section 6.3(2) of Bill 142 to increase the time for an owner to give the contractor a Notice of Non-Payment from 14 days to 28 days.</li> </ul>
3.	<b>Adjudication:</b> Mandatory adjudication will increase costs for municipal owner project delivery as it relates to claim resolution and related impacts to staffing. The inclusion of an adjudication triggering event in the prompt payment provisions will compound these increased costs.	<ul style="list-style-type: none"> <li>• Add language to Part II.1 (Construction Dispute Interim Adjudication) of Bill 142 to allow for the construction service contract to optionally include the adjudication process as parties to the contract agree.</li> <li>• Delete section 6.4(5)(iii) from Bill 142 to remove the triggering event of adjudication in the prompt payment process.</li> </ul>
4.	<b>Adjudication:</b> The Bill should be amended to indicate that an owner's payment of an adjudicator's determination is subject to the payment obligations concerning the existing lien scheme, namely holdback and "notice holdback" retention, and that such payment can be subject to an owner's set-off.	<ul style="list-style-type: none"> <li>• Amend section 13.19 of Bill 142 to include that an adjudicator's determination to pay an amount is subject to (i) section 22 (the Retention of Holdbacks), (ii) section 24 (Payments that may be made where a payer has received notice of a lien), and (iii) section 12 (Set-off by Trustee), each as applicable.</li> <li>• Delete the proposed amendments to sections 12 and 17(3) in Bill 142 which limit set-off to those debts "related to the improvement" and retain the existing CLA language in these sections.</li> </ul>
5.	<b>Adjudication:</b> The time for the payment of an adjudication determination should be increased from 10 days to allow public owners an opportunity to obtain funds and process payment.	<ul style="list-style-type: none"> <li>• Amend section 13.19(1) of Bill 142 to increase the time for payment of an adjudication determination to a longer period, being a minimum period of 21 days.</li> </ul>

#	<u>York Region Recommendation</u>	<u>Proposed Technical Amendment</u>
6.	<p><b>Surety Bonds:</b> Flexibility for public owners should be prescribed in the regulations related to the obligation for public projects to have broad form surety bonds</p>	<ul style="list-style-type: none"> <li>• Regulations should include a high threshold for mandatory public bonding (such as \$1,000,000) with stated exceptions for particular types of work (ex. IT work).</li> <li>• Public owners should be consulted in the development of any standard form surety bonds as stipulated by Regulation.</li> </ul>
7.	<p><b>Transition:</b> The application of prompt payment and adjudication should occur after public owners are provided with a reasonable opportunity to adjust or acquire necessary resources, review processes and provide adequate training.</p>	<ul style="list-style-type: none"> <li>• The timelines for implementation of adjudication and prompt payment should be considered following the development of Regulations.</li> <li>• York Region will require time to properly implement the changes to the CLA proposed by Bill 142, adapting established processes, acquiring additional resources as appropriate and ensuring adequate training of staff.</li> </ul>
8.	<p><b>Transition:</b> York Region requests continued consultation through the development of the Regulations.</p>	<ul style="list-style-type: none"> <li>• Ongoing consultation with public owners during the development of associated Regulations to Bill 142.</li> </ul>