

**March 23, 2018**

**Singleton Urquhart Reynolds Vogel LLP  
150 King St West, Suite 2512  
Toronto, ON M5H 1J9  
Attn: Bruce Reynolds/Sharon Vogel**

**Re: Expert Review of Prompt Payment and Adjudication on Federal Construction Contracts**

Dear Mr. Reynolds and Ms. Vogel;

Thank you for your letter of February 21, 2018 together with the Information Package. The Canadian Construction Association (CCA) is proud to be the national voice for the Canadian construction industry and represents nearly 20,000 member companies employing close to 1,400,000 people through a network of 63 regional and local construction associations. CCA's membership includes suppliers, manufacturers, service providers, civil, trade and general contractors in all sectors across Canada, from coast to coast to coast, generating close to \$120 billion in economic activity annually.

With respect to payment within the construction industry the CCA's policy (4.15 Payment) is as follows:

*CCA advocates contractual payment and related terms that are fair, reflecting the industry consensus expressed in CCDC and CCA standard documents. Further, CCA advocates that project owners, prime contractors, subcontractor, suppliers, payment certifiers and other stakeholders in the payment chain comply with all statutory/legal requirements and honour commitments and contractual obligations on time, and in the spirit of the following general principles:*

- Contracting parties, both payers and payees, should be responsible for understanding all agreed contractual terms affecting obligations to make and entitlement to receive payment, and*
- Project owners should share with others in the project payment chain the dates on which they make payments to prime contractors to enable parties to comply with and benefit from contract payment provisions with confidence.*

*While CCA supports free competitive enterprise and individual freedom (CCA policy statement 1.1), CCA does not object in principle to the use of effective regulation and legislation where there is broad industry consensus that this is necessary in specific circumstances in order to correct imbalances or preserve an efficient and productive economic and commercial environment for the benefit of the whole construction industry.*



Broadly, CCA endorses the balance achieved in Ontario's new *Construction Act*. As the only current example in Canada of payment legislation that has, at least in its local market, achieved consensus among industry stakeholders and government, we believe that to the extent possible federal legislation governing payment in the construction industry should be aligned with the principles and mechanisms in the Ontario *Construction Act*.

Further, we believe there is economic benefit to both industry and government in creating alignment in legislation and regulation between federal and provincial jurisdictions. A largely common set of rules across jurisdictions reduces risk for industry and reduces costs associated with training and compliance. We believe consistency also enables competition across Canada on a level playing field.

Given the very brief time available for our response, the four sector councils that represent the membership of the CCA had limited opportunity during our recent annual conference to consider the issues. While time has not permitted broad consultation with the membership, some common themes did emerge from this initial discussion. Our comments on the specific issues/questions on which you have invited comment are in the appendix to this letter.

We would urge you to consider approaching government to extend this Review to allow for another two months of stakeholder engagement to improve the likelihood of full engagement and consensus. We believe that with modest accommodation within the legislative drafting process (as was made in Ontario) a date of July 1, 2018 for delivery of your report and recommendations would leave ample time for government to prepare draft legislation for introduction in the fall of 2018.

Thank you for inviting the CCA to participate in this important process. We look forward to the opportunity to meet with you to discuss our comments, and we will make our best efforts to support your work in the time available.

Sincerely,

Mary Van Buren  
President  
Canadian Construction Association

Cc

Brendan Nobes, Chair, CCA General Contractors Council  
John Rasenberg, Chair, CCA Trade Contractors Council  
Henry Borger, Chair, CCA Civil Infrastructure Council  
Yvan Houle, Chair, CCA Manufacturers, Suppliers & Services Council  
Ray Bassett, 3<sup>rd</sup> National Vice-Chair, Co-Chair of the Government-Industry Working Group – Prompt Payment Initiative

Appendix

**1. Payment Legislation Questions**

**1.1 What kinds of contracts should it apply to? What kinds of work should it apply to?**

- Contracts with a Government of Canada (GoC) department, agency, crown corporation or special agency ([canada.ca/en/government/dept.html](http://canada.ca/en/government/dept.html)) for:
- Any “improvement” (as described in the *Ontario Construction Act*) and/or any “supply of services” (as described in the *Ontario Construction Act*, but including RP1 and RP 2 services contracts) related to an improvement to any land owned or directly or indirectly controlled by the Government of Canada (or its departments, crown corporations, agencies or special agencies), and an improvement to the interest of the Government of Canada in any land (i.e. tenant improvement and/or repair);
- Projects on First Nations lands should be bound under this legislation, even though contracts would/may not include the GoC as a party.
- “Improvement” should include IT/energy improvements/retro fit work.
- Terms should be clearly defined. For example, we use the term “GoC” in this Appendix in the same sense the term “owner” is used in the *Ontario Construction Act*. In this context it stands for any department, agency, Crown Corporation or special agency of the Government of Canada, but also the “SPV” in a federal P3 transaction (following the re-alignment in the *Ontario Construction Act*) as well as a First Nations entity that contracts for federally funded construction. Similarly, “subcontractor” should clearly include suppliers.
- Contracts would be deemed amended to comply (i.e. no contracting out).

**1.2 Should there be any exclusions or different treatment for certain types of projects? (e.g. P3 projects)?**

- No exclusions (i.e. include P3 projects, IPD and Real Property 1& 2 contracts.) With respect to transition,
  - RP 1 & 2 contracts should be grandfathered but only until expiry of the current term – i.e. exercising an option to extend would bring those contracts under the new

legislation.

- Legislation should apply to “subcontracts” under an RP 1 & 2 contract immediately upon proclamation. For example (based on the Ontario model), even though the RP 1 “prime” contract may not fall under the federal legislation (and would not benefit from the 28-day payment requirement), a new subcontract signed after proclamation would benefit from a requirement for payment within 7 days the date the RP 1 contractor receives payment from the GoC.
- Allow procurements initiated prior to proclamation to continue under old rules (as in Ontario).
- The accommodation in the *Ontario Construction Act* for AFP / P3 procurements to the effect that the SPV is deemed to be the contractor, the project agreement is deemed to be the contract, the design-build contractor is deemed to be a subcontractor, and the design-build agreement is deemed to be a subcontract, should be followed.

**1.3 What levels of contract should it apply to in the construction pyramid?**

- Prime, subcontract, sub-subcontract and suppliers.

**1.4 What should be the trigger for starting the clock running on a payment period?**

- Submission by the (prime) contractor of a “proper invoice”, following the Ontario model.
- The contractor’s proper invoice should trigger the clock.

**1.5 What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid?**

- Follow the scheme in the *Ontario Construction Act* – namely, 14 days for owner to deliver notice of non-payment, 28 days for owner to pay undisputed amounts, 7 days from receipt of payment for contractor to pay subcontractors and suppliers included in the proper invoice, 7 days from receipt of payment for subcontractors to pay other subcontractors.

**1.6 What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?**

- There should be no limitations placed on the parties in agreeing on invoicing terms. Where invoicing terms are not agreed in a contract then follow the *Ontario Construction Act* model and default to a monthly basis.

- Require a general contractor to notify subcontractors and suppliers during the bidding process if (but only if) the invoicing terms on the prime contract are other than monthly.

**1.7 Should certification be permitted as a pre-condition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern?**

- The solution in the Ontario *Construction Act* permitting certification as a pre-condition to delivery of a proper invoice on public-private partnership projects is a reasonable exception. Otherwise, this should not be permitted.

**1.8 On what basis can payment be withheld and when? Should there be any limits on a set off (e.g. in relation to other projects)?**

- The scheme in the *Ontario Construction Act* is reasonable, including:
  - Undisputed amounts should be paid in normal timelines;
  - GoC can withhold a disputed amount if it disputes entitlement on a contractor invoice;
  - Contractor can withhold payment to subcontractor or supplier because GoC has not paid all or part of the contractor's invoice – subject to proper notice of non-payment to the subcontractor or supplier and undertaking to commence adjudication with GoC (follow applicable Ontario scheme);
  - Contractor can only withhold payment to a subcontractor or supplier of disputed amounts (regardless of whether the GoC has paid the contractor) if the contractor disputes the subcontractor's or supplier's entitlement. Undisputed amounts must be paid.
- Set-off by the GoC should be restricted to amounts arising under the Contract.

**1.9 Should payment information be posted? If so, where?**

- GoC should utilize its existing websites to post public notices of :
  - Date on which a proper invoice is submitted;
  - Date on which payment is made to a contractor;
- CCA would support disclosure of other information on a 'by request' basis that would have been required by applicable provincial lien legislation (i.e. Section 39(1), especially subsections 1 and 2 of the Ontario *Construction Act*.)

### **1.10 What should the consequences be of a failure to pay?**

- CCA would support the approach in the Ontario *Construction Act*, namely
  - The right to commence an adjudication;
  - Mandatory statutory interest;
  - The right to suspend work (without breach) if an adjudicator's determination is not paid within 10 days;
  - Resumption of work after suspension would be conditional on payment of a determined amount, interest, reasonable costs incurred by the payee as a result of the suspension of work.

## **2.0 Adjudication**

### **2.1 Who can require adjudication and when?**

- CCA would support the approach in the Ontario *Construction Act*.

### **2.2 Who can adjudicate a dispute?**

- Adjudicators should have significant (i.e. at least 7 years) relevant and Canadian experience in the construction industry and may include but should not be limited to those in the legal, engineering or architectural professions, experienced construction and project managers and construction executives.

### **2.3 How should an adjudicator be nominated?**

- Follow the Ontario model.

### **2.4 What is the role of an authorized nominating authority?**

- To the extent that some agency would be required to administer the roster of adjudicators, CCA would support the idea of an authorized nominating authority (ANA).
- CCA would also support placing this authority in the first instance with a GoC Minister to ensure it can be executed and delegated.
- Some considerations, however, include:
  - CCA generally would support GoC delegating this to the private sector through a procurement process.

- Careful consideration should be given to adequate funding for an ANA to ensure that its resources and effectiveness are not dependent on its volume of work, especially during the start-up phase and accommodate any surges in demand. In other words, a private-sector ANA should not be required to take a “traffic” risk.
- Consider the GoC deferring to a Provincial ANA where it exists – this would be a more efficient use of resources and may promote consistency in approach.

***2.5 What types of disputes should be adjudicated? Should there be limits to the quantum of the disputes that are subject to adjudication?***

- CCA would support the “targeted” adjudication approach in the Ontario *Construction Act*, with the focus being on issues around payment.
- CCA would also support adjudication of disputes other than payment if the parties agree.
- CCA would support the Ontario approach to consolidation of adjudications initiated at different payment levels where there are common facts.
- Within the CCA membership there are two views on the question of whether adjudication of disputes should or should not be mandatory if the amount of the dispute exceeds a set threshold.
  - There is support among CCA’s general contractor members for setting a threshold proportional to the value of a contract or subcontract, beyond which adjudication would require the agreement of the parties. It is felt that some disputes are too complex or of too high a value to resolve on an interim binding basis, and that the consequences of an adverse determination are worse than the delay associated with the judicial process.
  - CCA’s subcontractor and supplier members favour the Ontario approach with no thresholds on adjudication.
- There is a concern over security for payment of an adjudicator’s determination and security for recovery should a judicial review be granted and succeed. There is concern expressed by CCA’s general contractor and larger subcontractor members that they may be required to pay an adjudicator’s determination initially, then succeed in a judicial review, but be unable to collect given the passage of time.

### ***2.6 What should an adjudication process look like?***

- CCA's Councils have not reached consensus on the degree of discretion that should be given to an adjudicator to determine the process. It is acknowledged that the role of the adjudicator as 'inquisitor' with broad power to investigate and to design a process that is proportional to the dispute in hand is a strength of the adjudication process. There is concern though that broad discretion creates uncertainty and, therefore, risk, including financial risk. For example, the costs to the parties (i.e. direct expense and loss of productivity) associated with participating in the process will be determined largely by the process that the adjudicator designs and will be difficult to predict, budget and manage, especially for smaller and medium sized firms.
- The time period to initiate an adjudication should be limited to a number of days, (i.e. to 14 days). Referring to the Ontario model, in a situation in which the owner pays the proper invoice in full, but the contractor disputes a subcontractor's entitlement to payment (either in whole or in part) based on subcontract terms (i.e. other than pay when paid), and issues a notice of non-payment to the subcontractor, the subcontractor should be required to initiate an adjudication of the dispute with the contractor within, say, 14 days or else forfeit its right to adjudicate (except by agreement).
- The adjudication process should include the right and a timeline for the respondent to make an initial submission to the adjudicator. In the Ontario model the participation and timelines for submissions (if any) by the respondent are within the discretion of the adjudicator.

### ***2.7 How should the costs of an adjudication process be addressed?***

- CCA would support the Ontario model.

### ***2.8 What should the process for enforcing adjudication decisions look like?***

- CCA would support the approach in the Ontario Construction Act (section 13.20) for enforcing a determination as if it were an order of the court upon filing of the determination with the court.



### ***3.0 Jurisdictional Aspects***

***What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?***

#### ***3.1. Are there potential conflicts between such federal legislation and provincial legislation?***

- For the transparent and efficient functioning of the construction market in Canada, it is important that industry (general contractors, subcontractors, suppliers) must be able to easily identify whether their contract or subcontract is subject to provincial payment/lien legislation or federal payment legislation.
- Potential conflicts between other federal legislation (other than payment legislation – i.e. federal insolvency legislation and its impact on deemed trusts under provincial lien legislation) we believe are beyond the scope of this Review.

#### ***3.2 If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?***

- No comments.

#### ***3.3. Would some combination of federal legislation and amendments to standard form contracts be appropriate?***

- While we would expect legislation to deem contracts amended to comply, revisions to standard contracts should be made by industry and GoC following enactment of federal legislation to promote clear understanding and avoid uncertainty and unnecessary disputes.
- A federal scheme for prompt payment and adjudication should be contained within the legislation. There is no consensus that an effective outcome would be achieved by placing some elements in legislation and other elements in contracts.

#### ***3.4 Are there any operational concerns that federal legislation could be different than provincial/territorial legislation (i.e. would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?***

- CCA would support efforts by the GoC to align federal legislation with provincial legislation, primarily with the Construction Act in Ontario as the only example at present. We believe alignment on issues like triggers and payment timelines, adjudication process and administration of a roster of adjudicators, and enforcement of determinations, will allow

industry to better manage internal processes, training risk management, cash flow and capital planning, and enable competition across Canada on a level playing field.

- Where there are competing and different schemes across provincial, territorial and federal jurisdictions, contractors doing business in more than one jurisdiction, and small and medium sized enterprises looking to expand their businesses incur additional cost in designing business processes, training, risk management.

**3.5 From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?**

- CCA would support separate federal payment legislation, even where provincial legislation exists. We believe this would help avoid uncertainty in the market.

**4.0 Any other comments, suggestions**

- CCA would support a recommendation that the GoC discontinue its practice of keeping a blanket holdback of 10% (or 5% with bonds), with a recommendation therefore that no holdback be retained down the payment chain. Where holdback to manage performance risk (E.g. warranty, manuals, as-builds, commissioning, etc.) is negotiated by the GoC in a prime contract (or by a general contractor on a subcontract or supply contract) these amounts should be clearly itemized and dealt with in the normal course of the invoicing and payment process.
- Consideration should be given to introducing a trust regime applying to funds received by a general contractor, subcontractor, supplier and other “payors” down the chain. The GoC would not be a trustee. In the absence of a lien remedy, and with no other security for payment that is mandatory under the legislation, a trust regime aligned with that in the *Ontario Construction Act* would heighten accountability within the payment chain and increase the overall effectiveness of legislation.