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<th><strong>TO:</strong></th>
<th>Mayor and Members General Issues Committee</th>
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<td><strong>COMMITTEE DATE:</strong></td>
<td>February 19, 2014</td>
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<tr>
<td><strong>SUBJECT/REPORT NO:</strong></td>
<td>Submissions to the Ontario Legislature on Bill 69 - Prompt Payment Act, 2013 (PW14018/LS14004) - (City Wide)</td>
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<td><strong>WARD(S) AFFECTED:</strong></td>
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| **PREPARED BY:** | Gary Moore (905) 546-2424, Extension 2382  
Brian Decaire (905) 546-2424, Extension 4709 |
| **SUBMITTED BY:** | Gerry Davis, CMA General Manager Public Works Department |
| **SIGNATURE:** | Janice Atwood-Petkovski City Solicitor City Manager’s Office |

**RECOMMENDATION**

That the General Manager of Public Works and the City Solicitor and/or his/her delegates, as appropriate, be authorized to:

(a) make oral and/or written submissions to the Ontario Legislature, including any standing committees or other bodies, to express support for the Association of Municipalities of Ontario’s position on Bill 69 - Prompt Payment Act, 2013;

(b) raise the City of Hamilton’s concerns as set out in Report (PW14018/LS14004) with respect to Bill 69 - Prompt Payment Act, 2013, and any subsequent bill or regulations dealing with these issues.

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**OUR Vision:** To be the best place in Canada to raise a child, promote innovation, engage citizens and provide diverse economic opportunities.

**OUR Mission:** WE provide quality public service that contribute to a healthy, safe and prosperous community, in a sustainable manner.

**OUR Values:** Accountability, Cost Consciousness, Equity, Excellence, Honesty, Innovation, Leadership, Respect and Teamwork
EXECUTIVE SUMMARY

In the Ontario Legislature a private member's bill seeks to introduce new legislation regarding the payment for construction services to contractors and subcontractors. Bill 69 - Prompt Payment Act, 2013 proposes legislation that restricts the ability of parties to negotiate payment terms and may have adverse consequences to owners of construction projects, including the City, if it is passed without amendment.

Bill 69 passed second reading with the general support of all three provincial parties. It was referred to the Standing Committee on Regulations and Private Bills for public consultation. The agenda for the standing committee will be set upon the return of the Legislature in February 2014.

The City routinely works with contractors, subcontractors, and industry associations to ensure a competitive, fair, and robust practice in balancing the interests of tax payers, contractors, subcontractors, and employees. For example, the City uses standard CCDC contracts and implemented recommendations of the Canadian Construction Association. The City’s Fair Wage Policy preserves the interests of trade workers. The City often requires a labour and material payment bond on projects for the exclusive benefit of subcontractors and suppliers. The City’s typically practice obliges it to issue payment within 20 days and staff strive to make payments much sooner.

Staff are unaware of a systemic concern in late payments by the City to contractors – suggesting that Bill 69 is directed at concerns with private enterprise and/or contractor to subcontractor relations. Municipalities were not consulted on the drafting of Bill 69 and its general application fails to accommodate reasonable timeframes for ensure checks and balances in the use of tax dollars, erodes the collaborative practices and measures installed for the benefit of subcontractors and employees, and limits the flexibility of the City to tailor contracts for specific projects.

The Association of Municipalities of Ontario has written to the leaders of all three provincial parties expressing concern with the draft legislation and requesting that municipalities be excluded from its application.

Staff seeks authority from City Council to make oral and/or written submissions to the standing committee regarding amendments to Bill 69.

Alternatives for Consideration - See Page 6

FINANCIAL - STAFFING - LEGAL IMPLICATIONS

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HISTORICAL BACKGROUND

MPP Stephen Del Duca introduced to the Ontario Legislature private members Bill 69 - *An Act Respecting Payments made under Contracts and Subcontracts in the Construction Industry* (short title: *Prompt Payment Act, 2013*). Bill 69 passed first reading on May 13, 2013 and three days later passed second reading on May 16, 2013, with the general support of three provincial parties. Bill 69 – *Prompt Payment Act, 2013* is attached as Appendix A.

Staff have learned that no less than eight months of discussions amongst trade contractors and the Ontario General Contractors Association preceded the introduction of Bill 69 into the Ontario Legislature. With the exception of the Ontario Home Builders’ Association – who expressed concerns - staff are unaware of consultation with owner representative groups in the drafting of Bill 69. Municipalities, being significant consumers of construction services, were not consulted in the drafting of Bill 69. On the second reading of Bill 69 some MPPs expressed concerns and one member invited input from industry stakeholders at the committee level.

The Association of Municipalities of Ontario wrote to the leaders of all three provincial parties on November 13, 2013 expressing concerns with Bill 69. AMO requests that Municipalities be made exempt from Bill 69 in its letter, attached hereto as Appendix B.

Both the City of Toronto and the City of Mississauga intend to make submissions to the Legislature regarding concerns with Bill 69. Staff understands that the Ontario Bar Association – Construction Law Section Executive have also indicated an intention to make submissions about general issues raised by Bill 69.

Bill 69 has been referred to the Standing Committee on Regulations and Private Bills. It is understood that the committee sits every Wednesday. The committee typically posts its agenda the Thursday preceding the sitting of the committee. The standing committee’s agenda will be set upon the return of the legislative assembly. Staff understand that considerable pressure is being exerted by contractor associations to ensure Bill 69 is addressed promptly in view of concerns that the Legislative Assembly may be dissolved with a call for a provincial election.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

Should Bill 69 - *Prompt Payment Act, 2013* become law without amendments it will profoundly impact on the current contractual and payment practices for construction services implemented by Departments at the City. As discussed more fully in the Analysis and Rational for Recommendation section, Bill 69 will limit the City from freedom of contracting payments terms, implementing additional holdbacks, approving progress draws, and enforcing the Fair Wage Policy. Furthermore, Bill 69 would oblige the City to onerous and unnecessary financial disclosure as well as mandate unreasonable timeframes for progress review and payment.
RELEVANT CONSULTATION

Financial Services (Corporate Services Department) was consulted and the advice received is incorporated in this Report.

ANALYSIS AND RATIONAL FOR RECOMMENDATION

The City continues to work with the construction industry associations to address concerns with its processes and policies. For example, the City adopted the use of CCDC contracts and industry recommendations of the Canadian Construction Association. The City has working groups with the local Hamilton-Halton Construction Association to address matters on an ongoing basis. Staff is unaware of a systemic concern in its practices regarding late payments. The City strives to implement best practices, be transparent, and accountable in the procurement and payment of all construction services.

Should Bill 69 – Prompt Payment Act, 2013 be implemented without amendments it will profoundly impact on the City's current practices in consuming construction services. The key terms of Bill 69 that will impact the City include:

1. **Limited Negotiation of Payment Terms**

   Bill 69 severely restricts parties to a construction contract from negotiating payment terms. This limitation of freedom of contract prevents payment terms to be tailored to suit the project. For example, there would be no flexibility to negotiate payment terms tied to milestones, major deliveries, completion for short term projects, or other arrangements. Flexibility in project payment methods and timing is a material benefit to both the City and contractors – particularly given the diverse nature of construction projects – which permits the parties to tailor payments to suit specific projects.

2. **Non-Payment Requirements**

   The inflexibility in payment terms set out in Bill 69 fails to consider non-financial requirements of a contractor that coincide with a contractor's progress payments. Consistent with industry practices, the City typically insists a contractor comply with insurance requirements, WSIB clearance certificates, and statutory declarations that subcontractors/suppliers accounts are current as part of the progress payment process.

   Bill 69 would oblige the City to pay contractors promptly upon the filling of payment applications regardless of any outstanding non-financial contractual or statutory obligation of the contractor. Bill 69 would remove the City's ability to ensure contractor compliance with statutory and contractual terms in this efficient, effective, and industry standard process.

3. **Unrealistic Timeframe for the Release of Holdback**

   Bill 69 would require the City to release the 10% statutory holdback within one day after it is no longer required to be retained. This timeframe is unrealistic and fails to address the realities of large infrastructure projects undertaken by public entities. To comply, the City would need to perform title searches of all lands involved to ensure no claims for lien, requisition payment of the holdback, and physically make the payment within one day.
day. This assumes there are no concerns or project complications, delays, or deficiencies for which a set off of the holdback release would be justified.

It is neither practical nor responsible for the City to attempt to process the release of holdback within one day. There is considerable coordination required between various departments and sometimes third party consultants to ensure the appropriate release of holdback is made. There are often large sums of money being released and if rushed there is the increased risk of mistakes. If the holdback release were to take place in the face of a lien the City could be exposed to statutory liability.

4. **No other Retention / Maintenance Holdback**

It is a common industry practice for there to be negotiated retention of funds or holdbacks in addition to that prescribed by the *Construction Lien Act*. For example, a maintenance holdback may be contractually negotiated to be held over the warranty period, or an environmental holdback may be negotiated until LEED standards are achieved on the project. Excluding the statutory holdbacks, Bill 69 prohibits flexibility in negotiating releases tied to project milestones.

Bill 69 also restricts the City in applying its Fair Wage Policy. Under this policy the City may ‘withhold making payment, progress payment or release of holdback’ otherwise owing to the contractor. The Fair Wage Policy would be unenforceable if the City is restricted from holding back such funds from a contractor’s progress draws.

5. **Progress Payments**

Bill 69 would require progress payments be made at least every 31 days. If the contract does not provide for monthly progress billing, then payment is to be made within 20 days after a contractor submits a payment application. Currently the City’s typical construction contract specifies payment be made within 20 working days of approval of the payment application (triggered by the issuance of the certificate of payment).

Bill 69 also suggests that a contractor may apply for payment of services and materials that ‘will be supplied’. Bill 69 if enacted will provide a mechanism to contractors to apply for prepayment of work and materials and not strictly based on the progress of work achieved at the project site.

Pursuant to the scheme set out in Bill 69, a contractor “may rely on reasonable estimates” when submitting a progress payment application. There is no corresponding language that expressly entitles the City to challenge the contractor’s estimates. Indeed, the City’s right to challenge “the amount of a payment that is disapproved or amended shall be limited to a reasonable estimate of any direct loss, damage, cost or expense incurred by the City that is recoverable under the contract”. Particular concern is raised to the lack of defined terms: “direct loss”, “damage”, “cost” or “expense” as well as the necessity for such amounts to have already been “incurred” by the City to entitle it to set off against a progress payment application. Staff is of the view that Bill 69 will expose the City to additional project and financial risks.
6. Deemed Approval of Payment Applications

Under the proposed legislation a contractor’s payment application is deemed approved within 10 days unless the City provides written notice disputing the application together with the full particulars, including references to contractual provisions, supporting the City’s disagreement with the application.

Bill 69 represents a complete shift in demonstrating the progress for payment. Currently City practice requires the contractor – in collaboration with the consultant or project manager – to demonstrate the progress and the corresponding amount of payment. It is the contractor who has the informational advantage - who has control of the site, directs the project work, and maintains the project schedule. Often the consultant is tasked as an independent expert to value progress. Bill 69 introduces a conflict of interest favouring the contractor by having the contractor itself independently set the progress standard for its own payment application.

Bill 69 further fails to oblige the contractor to resubmit a revised payment application, how to account for time lost from disputes, or a mechanism to resolve differences in ‘reasonable estimates’ of progress values – assuming the owner has a right to challenge a contractor’s reasonable estimates of progress values.

7. Financial Disclosure

If enacted Bill 69 would oblige the City to disclose financial information related to a project sufficient to demonstrate the financial ability of the City. This is particularly onerous as against the City, whose financial viability is materially different from private enterprise and whose budgets are publicly disclosed. Some projects are funded through provincial or federal programs, further complicating the disclosure on a project by project basis. The administrative burden to provide financial information for each project would be unnecessary and costly.

From the concerns noted above, staff is of the opinion that it is in the interests of the City to make oral and/or written submission to the standing committee in support of the position taken by the Association of Municipalities of Ontario and/or on the issues described above. Once authorized by City Council, the City Solicitor together with the General Manager of Public Works, or their delegates, are prepared to make those submissions with the continued consultation and input from other interested divisions within the City.

ALTERNATIVES FOR CONSIDERATION

An alternative approach is to defer any action until after the standing committee has made their recommendations to the Legislative Assembly and, at such time, reconsider commenting on Bill 69 as it enters the house for third and final reading. This alternative is not recommended as the primary reason Bill 69 was referred to the standing committee was to seek public consultation from stakeholders.
ALIGNMENT TO THE 2012 - 2015 STRATEGIC PLAN

Strategic Priority #1 - A Prosperous & Healthy Community
WE enhance our image, economy and well-being by demonstrating that Hamilton is a great place to live, work, play and learn.

Strategic Objective
1.2 Continue to prioritize capital infrastructure projects to support managed growth and optimize community benefit.

Strategic Priority #2 - Valued & Sustainable Services
WE deliver high quality services that meet citizen needs and expectations, in a cost effective and responsible manner.

Strategic Objective
2.1 Implement processes to improve services, leverage technology and validate cost effectiveness and efficiencies across the Corporation.

Strategic Priority #3 - Leadership & Governance
WE work together to ensure we are a government that is respectful towards each other and that the community has confidence and trust in.

Strategic Objective
3.1 Engage in a range of inter-governmental relations (IGR) work that will advance partnerships and projects that benefit the City of Hamilton.
3.4 Enhance opportunities for administrative and operational efficiencies.

APPENDICES AND SCHEDULES ATTACHED
Appendix “A” Bill 69, Prompt Payment Act, 2013
Appendix “B” November 13, 2013 letter of the Association of Municipalities of Ontario
Bill 69

An Act respecting payments made under contracts and subcontracts in the construction industry

Mr. Del Duca

Private Member’s Bill

1st Reading May 13, 2013
2nd Reading
3rd Reading
Royal Assent

Projet de loi 69

Loi concernant les paiements effectués aux termes de contrats et de contrats de sous-traitance dans l’industrie de la construction

M. Del Duca

Projet de loi de député

1re lecture 13 mai 2013
2e lecture
3e lecture
Sanction royale
EXPLANATORY NOTE

The Bill enacts the *Prompt Payment Act, 2013*. The Act sets out various rules and requirements in relation to payments made under construction contracts.

Among other things, Part II of the Act entitles contractors and subcontractors to receive progress payments and to suspend work or terminate a contract if such payments are not made. It also provides that payments can only be withheld if the payer notifies the payee that a payment application is disapproved or amended within 10 days after it is submitted. Limits are imposed on the amount that can be withheld.

Part III of the Act requires owners to provide contractors with certain financial information before entering into a contract. It also entitles subcontractors to receive certain financial information.

Part IV of the Act authorizes the Lieutenant Governor in Council to make various regulations, including regulations that exempt contracts or subcontracts from the application of the Act.

NOTE EXPLICATIVE

Le projet de loi édicte la *Loi de 2013 sur les paiements rapides*, laquelle énonce diverses règles et exigences relativement aux paiements versés aux termes de contrats de construction.

Entre autres, la partie II de la Loi donne aux entrepreneurs et sous-traitants le droit de recevoir des paiements proportionnels et de suspendre les travaux ou de résilier le contrat si ces paiements ne sont pas effectués. Elle prévoit également que les paiements ne peuvent être retenus que si le responsable du paiement avise le bénéficiaire du rejet ou de la modification d’une demande de paiement dans les 10 jours de sa présentation. Le montant qui peut être retenu est plafonné.

La partie III de la Loi exige que les propriétaires fournissent aux entrepreneurs certains renseignements financiers avant de conclure un contrat. Elle donne également le droit aux sous-traitants de recevoir de tels renseignements.

La partie IV de la Loi autorise le lieutenant-gouverneur en conseil à prendre divers règlements, notamment des règlements qui soustraient les contrats ou les contrats de sous-traitance à l’application de la Loi.
Bill 69 2013

An Act respecting payments made under contracts and subcontracts in the construction industry

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I
GENERAL

Definitions, Construction Lien Act

1. (1) The terms used in this Act have the same meaning as in the Construction Lien Act, unless the context requires otherwise.

Same, regulations

(2) In this Act, “regulations” means the regulations made under this Act.

Application

Act binds Crown

2. (1) This Act binds the Crown.

Exemptions

(2) This Act does not apply to any contract or subcontract prescribed by the regulations.

Transition

(3) This Act does not apply to any contract or subcontract made before the day this Act came into force.

Contracts to conform

3. Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.

PART II
PAYMENTS

Holdbacks under the Construction Lien Act

4. (1) Any entitlement to receive payments under this Act is subject to the payer’s obligation to retain holdbacks under the Construction Lien Act.

Projet de loi 69 2013

Loi concernant les paiements effectués aux termes de contrats et de contrats de sous-traitance dans l’industrie de la construction

Sa Majesté, sur l’avis et avec le consentement de l’Assemblée législative de la province de l’Ontario, édicte :

PARTIE I
DISPOSITIONS GÉNÉRALES

Définitions de la Loi sur le privilège dans l’industrie de la construction

1. (1) Les termes utilisés dans la présente loi s’entendent au sens de la Loi sur le privilège dans l’industrie de la construction, sauf indication contraire du contexte.

Idem : règlements

(2) La définition qui suit s’applique à la présente loi. «règlements» Les règlements pris en vertu de la présente loi.

Champ d’application

Obligation de la Couronne

2. (1) La présente loi lie la Couronne.

Exemptions

(2) La présente loi ne s’applique ni aux contrats ni aux contrats de sous-traitance prescrits par les règlements.

Disposition transitoire

(3) La présente loi ne s’applique ni aux contrats ni aux contrats de sous-traitance conclus avant le jour de son entrée en vigueur.

Contrats conformes

3. Les contrats et les contrats de sous-traitance portant sur des améliorations sont réputés modifiés dans la mesure nécessaire pour les rendre conformes à la présente loi.

PARTIE II
PAIEMENTS

Retenues au sens de la Loi sur le privilège dans l’industrie de la construction

4. (1) Tout droit à des paiements dans le cadre de la présente loi est assujetti à l’obligation de retenues que la Loi sur le privilège dans l’industrie de la construction impose au responsable du paiement.
Duty to pay holdbacks

(2) A payer shall pay the value of a holdback within one day after the day the payer is no longer required to retain the holdback under the Construction Lien Act.

No additional holdbacks

(3) A payer shall not withhold any payment other than those payments that the payer is permitted or required to withhold under this Act or under the Construction Lien Act.

Right to receive progress payments

5. Every contractor and subcontractor is entitled to be paid progress payments in accordance with the following:

1. If a contract or subcontract provides for progress payments that become payable at least every 31 days after the first day that services or materials are supplied to the improvement under the contract or subcontract, the payments shall be made in accordance with the contract or subcontract.

2. If a contract or subcontract does not provide for progress payments as described in paragraph 1, the payments shall be made in accordance with section 6.

Progress payments, default rules

Application

6. (1) This section applies where a contract or subcontract does not provide for progress payments that become payable at least every 31 days after the first day that services or materials are supplied to the improvement under the contract or subcontract.

Payment period

(2) A payment period referred to in this section means the period of time that begins on the first day of every month and ends on the last day of that month.

Progress payment application

(3) A contractor or subcontractor shall prepare, in respect of every payment period, a progress payment application that sets out the value of the services and materials that have been or will be supplied to the improvement under the contract or subcontract during the payment period.

Estimates

(4) A progress payment application may rely on reasonable estimates.

Submission of application

(5) Progress payment applications shall be submitted in accordance with the following schedule:

1. A contractor shall submit a progress payment application to an owner on or after the last day of the payment period.

1. Le responsable du paiement verse la valeur d’une retenue au plus tard un jour après le jour où il n’est plus tenu d’effectuer la retenue en application de la Loi sur le privilège dans l’industrie de la construction.

Retenues supplémentaires interdites

(3) Le responsable du paiement ne doit retenir aucun paiement autre que ceux que la présente loi ou la Loi sur le privilège dans l’industrie de la construction l’autorise ou l’oblige à retenir.

Droit à des paiements proportionnels

5. Les entrepreneurs et les sous-traitants ont droit au versement de paiements proportionnels conformément à ce qui suit :

1. Si un contrat ou un contrat de sous-traitance prévoit des paiements proportionnels qui deviennent exigibles au moins tous les 31 jours après le premier jour où des services ou matériaux sont fournis en vue des améliorations aux termes du contrat ou du contrat de sous-traitance, les paiements sont versés conformément au contrat ou au contrat de sous-traitance.

2. Si un contrat ou un contrat de sous-traitance ne prévoit pas de paiements proportionnels de la façon indiquée à la disposition 1, les paiements sont versés conformément à l’article 6.

Paiements proportionnels : règles par défaut

Champ d’application

6. (1) Le présent article s’applique lorsqu’un contrat ou un contrat de sous-traitance ne prévoit pas de paiements proportionnels qui deviennent exigibles au moins tous les 31 jours après le premier jour où des services ou matériaux sont fournis en vue des améliorations aux termes du contrat ou du contrat de sous-traitance.

Délai de paiement

(2) Un délai de paiement mentionné au présent article s’entend de la période qui commence le premier jour de chaque mois et qui se termine le dernier jour de ce mois.

Demande de paiement proportionnel

(3) L’entrepreneur ou le sous-traitant prépare, à l’égard de chaque délai de paiement, une demande de paiement proportionnel indiquant la valeur des services et des matériaux qui ont été ou seront fournis en vue des améliorations aux termes du contrat ou du contrat de sous-traitance pendant le délai de paiement.

Estimations

(4) La demande de paiement proportionnel peut s’appuyer sur des estimations raisonnables.

Présentation de la demande

(5) Les demandes de paiement proportionnel sont présentées conformément à l’échéancier suivant :

1. L’entrepreneur présente une demande de paiement proportionnel au propriétaire le dernier jour du délai de paiement ou après ce jour.
2. A subcontractor shall submit a progress payment application to a contractor before the last day of the payment period.

3. A subcontractor shall submit a progress payment application to another subcontractor within the time period prescribed by the regulations or, if no such time period is prescribed, within a reasonable period of time that would enable the other subcontractor to comply with this subsection.

Payments, timing

(6) A payer shall make a progress payment in accordance with the following schedule:

1. In the case of a payment to a contractor, within 20 days after the day the payee submits the progress payment application.

2. In the case of a payment to a subcontractor, by the day that is the later of,

   i. 10 days after the day a certificate is issued by a payment certifier in respect of the payment, if applicable, and
   ii. 30 days after the day the payee submits the progress payment application.

Right to suspend work or terminate contract

7. (1) A payee may suspend work or terminate a contract or subcontract if the payee is not paid a progress payment that the payee is entitled to under this Act.

Same

(2) A suspension or termination shall be done,

   (a) in accordance with the contract or subcontract; or
   (b) if the contract or subcontract does not authorize such a suspension or termination or both, in accordance with section 8.

Suspension of work or termination of contract, default rules

8. (1) This section applies where a contract or subcontract does not authorize a payee to suspend work or terminate the contract or subcontract if the payee is not paid a progress payment.

Same

(2) Where a payee has not been paid a progress payment, the payee may suspend work or terminate a contract or subcontract if,

   (a) the payee provides the payer with written notice of the intention to suspend work or terminate the contract or subcontract if the payment is not made within seven days after the day the payee provides the notice;
(b) the payer has not made the payment within seven days; and
(c) the payee provides the payer with written notice of the suspension or termination.

Same

(3) If a payee has suspended work under subsection (2), the payee may terminate the contract or subcontract during or after that time if,
(a) the payee provides the payer with written notice of the intention to terminate the contract or subcontract if the payment is not made within seven days after the day the payee provides the notice;
(b) the payer has not made the payment within seven days; and
(c) the payee provides the payer with written notice of the termination.

Same, copy of notice to subcontractors

(4) A payee shall provide a copy of any written notice provided to a payer under subsection (2) or (3) to any subcontractor who supplies services or materials to the improvement under a subcontract with the payee.

Same, suspension by subcontractor

(5) A subcontractor who receives notice of a suspension under subsection (4) may suspend work if the subcontractor provides the payer with written notice of the suspension.

Same, termination by subcontractor

(6) A subcontractor who receives notice of a termination under subsection (4) may terminate the subcontract if the subcontractor provides the payer with written notice of the termination.

Demobilization and remobilization costs

(7) If a payee resumes work following a suspension, the payer shall pay the payee for any reasonable demobilization and remobilization costs incurred by the payee.

Right to pay when paid

9. (1) This section applies where a payee has not been paid a progress payment and the payee has taken steps to suspend work, terminate the contract or subcontract, or enforce the payee’s lien rights.

Same

(2) Any obligation of the payee under this Act to make a payment by a specified date shall be extended and the payment shall become payable on the earliest of the following days:

1. The day on which the default on the payment is corrected.

b) le responsable du paiement n’a pas effectué le paiement dans les sept jours;

c) le bénéficiaire remet au responsable du paiement un avis écrit de la suspension ou de la résiliation.

Idem

(3) Le bénéficiaire qui a suspendu les travaux en vertu du paragraphe (2) peut résilier le contrat ou le contrat de sous-traitance pendant ou après la suspension si les conditions suivantes sont remplies :

a) le bénéficiaire remet au responsable du paiement un avis écrit de son intention de résilier le contrat ou le contrat de sous-traitance si le paiement n’est pas effectué dans les sept jours qui suivent la re-mise de l’avis par le bénéficiaire;

b) le responsable du paiement n’a pas effectué le paiement dans les sept jours;

c) le bénéficiaire remet au responsable du paiement un avis écrit de la résiliation.

Idem : copie de l’avis aux sous-traitants

(4) Le bénéficiaire remet une copie de tout avis écrit remis au responsable du paiement en application du paragraphe (2) ou (3) aux sous-traitants qui fournissent des services ou des matériaux en vue des améliorations aux termes d’un contrat de sous-traitance conclu avec lui.

Idem : résiliation par le sous-traitant

(5) Le sous-traitant qui reçoit un avis de suspension au titre du paragraphe (4) peut suspendre les travaux s’il remet un avis écrit de la suspension au responsable du paiement.

Idem : résiliation par le sous-traitant

(6) Le sous-traitant qui reçoit un avis de résiliation au titre du paragraphe (4) peut résilier le contrat de sous-traitance s’il remet un avis écrit de la résiliation au responsable du paiement.

Coûts de démobilisation et de remobilisation

(7) Si le bénéficiaire reprend les travaux à la suite d’une suspension, le responsable du paiement lui paie les coûts de démobilisation et de remobilisation raisonnables qu’il a engagés.

Droit à un paiement

9. (1) Le présent article s’applique si un paiement proportionnel n’a pas été versé au bénéficiaire et que celui-ci a pris des dispositions pour suspendre les travaux, résilier le contrat ou le contrat de sous-traitance ou faire valoir son privilège.

Idem

(2) Toute obligation qu’a le bénéficiaire de verser un paiement au plus tard à une date déterminée en application de la présente loi est reportée et le paiement devient exigible au premier en date des jours suivants :

1. Le jour où le défaut de paiement est corrigé.
2. The day on which the default on the payment is resolved by settlement or agreement.

3. The day on which a final determination of the payee’s lien rights is made, if applicable.

4. The day on which the payee’s lien rights expires.

Right to receive final payment

10. Every contractor and subcontractor is entitled to be paid a final payment in accordance with the following:

1. If a contract or subcontract provides for a final payment, the payment shall be made in accordance with the contract or subcontract.

2. If a contract or subcontract does not provide for a final payment, the payment shall be made in accordance with section 11.

Final payment, default rules

Application

11. (1) This section applies where a contract or subcontract does not provide for a final payment.

Final payment application

(2) A contractor or subcontractor shall prepare a final payment application that sets out the outstanding amount owing under the contract or subcontract.

Submission of application

(3) Final payment applications shall be submitted in accordance with the following:

1. A contractor shall submit a final payment application on or after the date the contract is deemed to be completed and services or materials are deemed to be last supplied to the improvement under subsection 2 (3) of the Construction Lien Act.

2. A subcontractor shall submit a final payment application on or after the date on which the subcontractor last supplies services or materials to the improvement under the subcontract.

Payment, timing

(4) A payer shall make the final payment in accordance with the following schedule:

1. In the case of a payment to a contractor, the payment shall be made by the day that is,
   i. five days after the day a certificate is issued by a payment certifier in respect of the payment, if applicable, and
   ii. if payment is not dependant on such a certificate or if the certificate is not issued within 10 days of the contractor’s request to do so, 15 days after the day the payee submits the final payment application.

2. Le jour où le défaut de paiement est réglé par voie de transaction ou d’accord.

3. Le jour où une décision définitive portant sur le privilège du bénéficiaire est rendue, s’il y a lieu.

4. Le jour où le privilège du bénéficiaire est éteint.

Droit à un paiement final

10. Les entrepreneurs et les sous-traitants ont droit au versement d’un paiement final conformément à ce qui suit :

1. S’il est prévu par un contrat ou un contrat de sous-traitance, le paiement final est versé conformément à ce contrat.

2. S’il n’est pas prévu par un contrat ou un contrat de sous-traitance, le paiement final est versé conformément à l’article 11.

Paiement final : règles par défaut

Champ d’application

11. (1) Le présent article s’applique lorsqu’un contrat ou un contrat de sous-traitance ne prévoit pas de paiement final.

Demande de paiement final

(2) L’entrepreneur ou le sous-traitant prépare une demande de paiement final indiquant le solde impayé aux termes du contrat ou du contrat de sous-traitance.

Présentation de la demande

(3) Les demandes de paiement final sont présentées conformément à ce qui suit :

1. L’entrepreneur présente une demande de paiement final au plus tôt à la date où les travaux prévus par le contrat sont réputés achevés et les derniers services ou matériaux réputés fournis en vue des améliorations au titre du paragraphe 2 (3) de la Loi sur le privilège dans l’industrie de la construction.

2. Le sous-traitant présente une demande de paiement final au plus tôt à la date où le sous-traitant fournit les derniers services ou matériaux en vue des améliorations prévus par le contrat de sous-traitance.

Paiement final : échéancier

(4) Le responsable du paiement verse le paiement final conformément à l’échéancier suivant :

1. Dans le cas d’un entrepreneur, le paiement est versé au plus tard le jour qui tombe :
   i. cinq jours après le jour où la personne qui autorise le paiement délivre un certificat à l’égard du paiement, s’il y a lieu,
   ii. 15 jours après le jour où le bénéficiaire présente sa demande de paiement final, si ce paiement ne dépend pas d’un tel certificat ou si le certificat n’est pas délivré dans les 10 jours qui suivent la présentation d’une demande de l’entrepreneur à cet effet.
2. In the case of a payment to a subcontractor, the payment shall be made by the day that is the later of,
   i. 10 days after the day a certificate is issued by a payment certifier in respect of the payment, if applicable, and
   ii. 30 days after the day the payee submits the final payment application.

Approval of applications

12. (1) A payment application is deemed to be approved 10 days after the day the payee submits the application, unless,
   a) before that tenth day, the payer provides the payee with written notice that all or part of the application is being disapproved or amended; and
   b) the written notice contains full particulars, including,
      i. the reasons for the disapproval or amendment,
      ii. the amount of the payment that is disapproved or amended,
      iii. any provisions of the contract or subcontract that are relevant to the disapproval or amendment, and
      iv. any other information prescribed by the regulations.

Limitation on amount disapproved or amended

(2) The amount of a payment that is disapproved or amended shall be limited to a reasonable estimate of any direct loss, damage, cost or expense incurred by the payee that is recoverable under the contract or subcontract.

Withholding disapproved or amended payments

(3) If a payment application is not approved under subsection (1), a payer may withhold that part of the payment that is disapproved or amended, but may not withhold any more than that part.

Interest on overdue payments

13. Interest is payable on any unpaid amount of a progress payment or a final payment at a rate that is the greater of,
   a) the prejudgment interest rate determined under subsection 127 (2) of the Courts of Justice Act; and
   b) the rate specified in the contract or subcontract.

PART III
RIGHT TO INFORMATION

Right to financial information

14. (1) Before entering into a contract related to an improvement, an owner shall provide the contractor with

PARTIE III
DROIT À L’INFORMATION

Droit aux renseignements financiers

14. (1) Avant de conclure un contrat portant sur des améliorations, un propriétaire fournit à l’entrepreneur les
the financial information prescribed by the regulations for the purpose of demonstrating the financial ability of the owner to make the payments provided for under the contract.

**Right of subcontractor**

(3) If a subcontractor who supplies services or materials to the improvement requests in writing that the contractor provide a copy of the information provided under subsection (1) or (2), the contractor shall promptly provide the information.

**Right to information re payments**

(4) If a subcontractor who supplies services or materials to the improvement requests in writing that the payer provide the dates on which payments in relation to the improvement become payable to the payer, the payer shall promptly provide the information.

**Confidentiality**

(6) Any person who receives information under subsection (1), (2) or (3) shall keep the information confidential and shall not use or disclose the information for any purpose other than for which it was provided.

**Liability for breach of confidentiality**

(7) Any person who contravenes subsection (6) is liable to the owner for any damages sustained by reason of the contravention.

**Liability for failure to provide information**

(8) Where a person who is required under subsection (1), (2), (3), (4) or (5) to provide information does not provide the information as required, or knowingly or negligently misstates the information, the person is liable to the person who is entitled to the information for any damages sustained by reason of the failure to provide the information or misstatement of the information.

**Order by court to comply with request**

(9) Upon motion to the Superior Court of Justice, the court may order the person who is entitled to the information to provide the information.

**Liability for failure to provide information**

(8) Where a person who is required under subsection (1), (2), (3), (4) or (5) to provide information does not provide the information as required, or knowingly or negligently misstates the information, the person is liable to the person who is entitled to the information for any damages sustained by reason of the failure to provide the information or misstatement of the information.

**Order by court to comply with request**

(9) Upon motion to the Superior Court of Justice, the court may order the person who is entitled to the information to provide the information.
court may at any time, whether or not an action has been commenced, order a person to comply with a requirement to provide information under this section and, when making the order, the court may make any order as to costs as it considers appropriate in the circumstances, including an order for the payment of costs on a substantial indemnity basis.

PART IV
REGULATIONS

15. The Lieutenant Governor in Council may make regulations prescribing anything referred to in this Act as prescribed by the regulations or as otherwise dealt with by the regulations.

PART V
COMMENCEMENT AND SHORT TITLE

16. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

17. The short title of this Act is the Prompt Payment Act, 2013.

de justice peut, qu’une action ait été introduite ou non, ordonner à qui que ce soit de se conformer à une obligation de fourniture de renseignements prévue au présent article. En rendant cette ordonnance, le tribunal peut statuer sur les dépens selon ce qu’il estime opportun dans les circonstances, y compris sur le paiement des dépens sur une base d’indemnisation substantielle.

PARTIE IV
RÈGLEMENTS

15. Le lieutenant-gouverneur en conseil peut, par règlement, prescrire toute question que la présente loi mentionne comme étant prescrite par les règlements ou régie autrement par ceux-ci.

PARTIE V
ENTRÉE EN VIGUEUR ET TITRE ABRÉGÉ

16. La présente loi entre en vigueur le jour que le lieutenant-gouverneur fixe par proclamation.

17. Le titre abrégé de la présente loi est Loi de 2013 sur les paiements rapides.
November 13, 2013

Hon. Kathleen Wynne  
Premier of Ontario  
Legislative Building - Room 281  
Queen’s Park  
Toronto ON M7A 1A1

Tim Hudak  
Leader of the Official Opposition  
Legislative Building - Room 381  
Queen’s Park  
Toronto ON M7A 1A8

Andrea Horwath  
Leader - New Democratic Party of Ontario  
Legislative Building - Room 113  
Queen’s Park  
Toronto ON M7A 1A5

Dear Provincial Party Leaders:

We are writing to you today regarding the Private Member’s Bill, Bill 69 - An Act representing payments made under contracts and subcontracts in the construction industry. The municipal sector is quite concerned about this Bill and its potential impacts on municipal governments as construction owners. Municipal governments were not consulted during the development of Bill 69 or during the debates to date at the Ontario Legislature.

In our review of the draft legislation, it would appear that it places a significant limit on the freedom of contract for construction services that would restrict municipal governments’ and other construction owners’ rights. The draft Bill provides no ability for owners and contractors to freely negotiate the most suitable payment arrangements for their projects. In our understanding of the draft Bill, there are extremely short timelines to make payment that do not allow for reasonable review of the work and certification of the payments process.
It also does not deal with the reasonable payment process of complex infrastructure projects. It also appears in the draft legislation that a contractor can request to be paid for services and materials that “will be supplied” to the project, rather than asking for payment once work has been completed or for materials that have actually been supplied. It is a standard business practice that payment is only to be provided once work has actually been done. This Bill appears to trump or amend established contract law that is in place on behalf of all the involved parties.

There are proposed stringent requirements to pay contractors even if there are valid reasons for withholding payment. Under the draft legislation, this could mean that general contractors and/or subcontractors could suspend work which could bring on project completion delays which would also involve stoppage and restarting costs. The proposed legislation also removes the right to include financial tools to ensure performance such as warranty and maintenance revisions, which could mean the only way to resolve potential disputes would be litigation for resolving deficiencies that are not done in accordance with the contract. These are only some of the concerns that municipal governments have raised upon reviewing Bill 69.

We would ask that this proposed Bill, should it go forward, be amended by agreement of all three parties to exempt municipal governments from its requirements. If the Bill becomes law without this exemption, it would have significant financial impacts on municipal governments and our property taxpayers.

We would look forward to discussing this further with you and your members. We appreciate your serious consideration of our and the municipal sector’s request with respect to Bill 69.

Yours truly,

R.F. (Russ) Powers
President

cc: Hon. Linda Jeffrey, Minister of Municipal Affairs and Housing
Steven Del Duca, MPP Vaughan
Cindy Forster, MPP Welland, NDP Municipal Affairs Critic
Jim McDonell, MPP Stormont-Dundas-South Glengarry, PC Municipal Affairs Critic