



Construction & Design Alliance of Ontario

May 20, 2020

Honourable Rod Phillips
Minister of Finance
Chair, Jobs and Recovery Committee
Frost Building South, 7th Floor
7 Queen's Park Cres
Toronto, ON M7A 1Y7

Dear Minister Phillips:

RE: COVID-19: The need for legislated relief in project contracts

The members of the Construction and Design Alliance of Ontario (CDAO) would like to provide you and the Jobs and Recovery Committee with a follow up to our April 22 correspondence that contained specific recommendations to the Province regarding Ontario's post COVID-19 economic recovery.

In our April 22 correspondence, the fourth recommendation focused on the need to inject more certainty into the procurement process and allow contractors, subcontractors, consultants, sub-consultants and design professionals (herein after referred to as "construction and professional services") to mitigate the risk of COVID-related delays and work stoppages. Specifically, the recommendation called for a legislated provision that would level the playing field by providing relief for the broader construction and professional service industries in a manner that was fair and reasonable to all industry participants. It read:

A legislated provision for accommodation (time and compensation) should be inserted into all construction and professional services contracts where the effects of COVID-19 might result in failure to perform or delay, including workforce and supply chain considerations. This could be performed under the Emergency Management and Civil Protection Act.

In this correspondence, we will elaborate upon that recommendation and provide more details as to the rationale, objective and recommended approach.

The Rationale and Objective:

As the COVID-19 crisis reaches its zenith and the number of community transmitted cases begins to level off, Ontario is now starting preparations for the long, arduous trek toward economic recovery. As the Province's economy slowly begins to re-start, its construction and professional service industries will face a double-barreled crisis. Indeed, the post-COVID project world will be fraught with risks, the nature and magnitude of which could never have been contemplated.

Many if not most construction and professional services operations across Ontario, particularly the small and medium-sized firms (“SME”) will emerge from the shutdown with serious cash-flow and liquidity issues; in some cases, serious enough to threaten their ability to survive. These challenges will be compounded by the uncertainty brought on by that new suite of post-pandemic risks; many of which are unknowable and/or unquantifiable. These include:

- Direct costs of any required upgrades to project safety protocols and facilities, e.g. washrooms, sanitation measures, masks, gloves.
- Time/productivity cost due to requirements for enhanced protocols, e.g. social-distancing requirements
- Losses arising from downtime of equipment due to parts shortages, delays in receiving parts/repairs, etc.
- Productivity losses that could arise from inability to meet required safety protocols, e.g. unavailability of personal protective equipment.
- Interruptions in or failure of the supply chain stemming from vulnerable suppliers, many of whom are SME’s and may be struggling with their own COVID-related financial/operational issues.
- The threat of second and third waves of the pandemic, leading to:
 - Loss of available workers due to quarantine or self-isolation requirements, or the loss of entire teams of workers in the event the disease shows up on a site.
 - The risk of project shutdown/suspension or even cancellation with additional costs for demobilization/remobilization, productivity considerations, etc.
 - The risk of further enhanced health and safety protocols having a compounding impact on productivity, costs, etc.

This list is not exhaustive, however, more to the point, it will be difficult if not impossible to foresee how these risks may manifest themselves, or to quantify their ultimate impact on a project. Whatever that impact may be, the potential for cost escalation along with delay claims, penalties and damages could spell financial distress or insolvency for those vulnerable businesses who are already grappling with liquidity issues.

As the government appreciates, healthy and recovering construction and professional service industries is vital to the economic wellbeing of our province. A strong and robust construction and design sector will again be the backbone of Ontario’s economy. Preparing for its expeditious recovery will ultimately serve the interests of all industry stakeholders and the taxpayers of Ontario.

In that regard, fair and reasonable contractual provisions that provide relief, both in terms of time extensions and costs, are essential to ensuring an orderly and expeditious recovery of the Ontario construction and design sector. We submit that it is equally essential that this relief be mandated through legislation so as to ensure consistency of application. This will level the playing field and inject a sorely needed element of certainty into the project risk management process.

What's more, as we suggest in our letter to the minister, legislated COVID-19 force majeure provisions will prevent the necessity for a contractor or professional services provider to carry a significant risk contingency in its bid or proposal to cover the unknown and unqualifiable risks arising from the pandemic. This will mean more transparent and competitive bids and proposals.

Our recommendation as submitted here draws a distinction between those contracts for which bids were submitted before April 30, 2020; i.e. before the full nature and extent of the COVID-19 emergency and necessary measures became apparent, and those for which bids were submitted after that date.

This distinction attempts to impose a more stringent standard of care and preparedness on contractors and subcontractors; post-April 30, 2020, when they were now cognizant of the existence and magnitude of the risks involved and measures recommended by authorities and required as best practice. The objective is to ensure that claims are advanced only when a contractor is confronted with a COVID-19-related delay or cost that could not have been known at the time of tender or proposal.

Recommendation

CDAO urges the government to enact the following provision as a Special Order under Section 7.1 of the *Emergency Management and Civil Protection Act*. The Special Order would remain in effect until the government determines in the public interest to rescind it:

1. *“COVID-19 pandemic” means the pandemic in respect of which an emergency was declared pursuant to Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 pursuant to section 7.0.1 of the Emergency Management and Civil Protection Act (“the Act”), and other restrictions imposed by the applicable local or municipal government.*

2. *In this [Special Order] the following terms shall have the same meaning as given to such terms in the Construction Act, R.S.O. 1990, CHAPTER C.30 (the “Act”)[Note: definitions included here only for ease of reference]:*
 - a. *“contract” means the contract between the owner and the contractor, and includes any amendment to that contract; (“contrat”);*
 - b. *“contractor” means a person contracting with or employed directly by the owner or an agent of the owner to supply services or materials to an improvement and includes a joint venture entered into for the purposes of an improvement or improvements; (“entrepreneur”);*
 - c. *“improvement” means, in respect of any land, (a) any alteration, addition or capital repair to the land, (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or (c) the complete or partial demolition or removal of any building, structure or works on the land; (“améliorations”);*
 - d. *“owner” means any person, including the Crown, having an interest in a premises at whose request and, (a) upon whose credit, or (b) on whose behalf, or (c) with whose privity or consent, or (d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer; (“propriétaire”);*

- e. “subcontract” means any agreement between the contractor and a subcontractor, or between two or more subcontractors, relating to the supply of services or materials to the improvement and includes any amendment to that agreement; (“contrat de sous-traitance”); and
- f. “subcontractor” means a person not contracting with or employed directly by the owner or an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor and includes a joint venture entered into for the purposes of an improvement or improvements; (“sous-traitant”).

[Note: For certainty, the terms “contractor” and “subcontractor” includes engineers, architects and other persons providing services upon or in respect of an improvement. Likewise, “contract” and “subcontract” include agreements between engineers, architects, and other persons providing services upon or in respect of an improvement and owners and contractors respectively.]

- 3. *The following rules apply to every contract or subcontract related to an improvement under the Act:*
 - a. *If a contractor or subcontractor is delayed in the performance of, or is prevented from performing, any of its obligations under, the contract or subcontract as a result of the COVID-pandemic and/or incurs additional costs in the performance of the contract or subcontract as a result of the COVID-pandemic:*
 - i. *the contractor or subcontractor shall be entitled to:*
 - 1. *an extension of time equal to the delay as a result of the COVID-pandemic; and*
 - 2. *payment of any reasonable costs incurred as a result of the COVID-pandemic including, costs for:*
 - a. *demobilization/remobilization;*
 - b. *administrative costs or overhead, both site and head office;*
 - c. *delays or loss of productivity arising from physical-distancing guidelines or requirements, enhanced safety protocols, downtime of equipment, unavailability of personal protective equipment, loss or failure of supply chain, reduction in labour forces;*
 - d. *reasonable costs incurred to mitigate the effect of the COVID-pandemic on the contract or subcontract work, or mitigation measures as agreed between the parties;*
 - e. *Site and head office overhead at the rate, if any, as provided for in the Project Agreement for claims, changes or delays in the work or, if none, at a reasonable rate.*

There shall be no entitlement nor right to claim markup or profit on the costs set out in Section 3 a. i. above unless otherwise provided for in the contract or subcontract as the case may be.

- 4. *For contracts or subcontracts for which the tender or bid closed, or which were entered into, prior to April 30, 2020, the contractor or subcontractor shall be entitled to extension of time and/or payment of costs as outlined in*

3. a. i 1. or 2. above, based on reasonable evidence and documentation provided by the contractor or subcontractor to substantiate the delay and/or costs incurred.
5. For contracts or subcontracts for which the tender or bid closed, or which were entered into, on or after April 30, 2020, the contractor or subcontractor shall be entitled to extension of time and/or payment of costs as outlined in 3. a. i 1. or 2. above, based on reasonable evidence and documentation provided by the contractor or subcontractor to substantiate the delay and/or costs incurred, and provided that:
- a. The contractor or subcontractor agrees to having its records audited by an independent qualified party if so requested at the owner's or contractor's expense, as the case may be, to verify the evidence and documentation provided; and
- b. There is a change in circumstances, event or occurrence arising from the COVID-19 pandemic that was not known and could not reasonably be identified at the time of tender.
6. Every contract or subcontract is deemed to be amended in so far as is necessary to be in conformity with this Section.

With the collective weight of our membership-based organizations, the CDAO has a keen understanding of the issues facing the design and construction sectors during the COVID-19 pandemic across the province at both the provincial and municipal levels. Our members hold a wealth of knowledge about how legislative, regulatory, and policy issues could impact the actual design and construction of critical infrastructure across the province, especially as the economic recovery begins.

In the meantime, please do not hesitate to contact Saskia Martini-Wong (416-200-2102 or smartiniwong@associationperformance.ca) at the CDAO office if you have any questions.

Sincerely,



Sandro Perruzza
Chair, Construction and Design Alliance of Ontario (CDAO)

CDAO Member Associations

Association of Registered Interior Designers of Ontario
www.arido.ca

Concrete Ontario
www.rmcao.org

Consulting Engineers of Ontario
www.ceo.on.ca

Heavy Construction Association of Toronto
www.hcat.ca

Mechanical Contractors Association of Ontario
www.mcao.org

Ontario Association of Architects
www.oaa.on.ca

Ontario Association of Landscape Architects
www.oala.ca

Ontario Electrical League
www.oel.org

Ontario General Contractors Association
www.ogca.ca

Ontario Home Builders' Association
www.ohba.ca

Ontario Road Builders' Association
www.orba.org

Ontario Sewer & Watermain Construction Association
www.oswca.org

Ontario Society of Professional Engineers
www.ospe.on.ca

Residential Construction Council of Ontario
www.rescon.com

Residential and Civil Construction Alliance of Ontario
www.rccao.com

Surety Association of Canada
www.suretycanada.com