Ontario Sewer and Watermain Construction Association

OSWCA Submission to Standing Committee on Finance and Economic Affairs regarding the Small and Medium Enterprises sector – Eliminate the use of Litigation Exclusion Clauses

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Eliminate the use of Litigation Exclusion Clauses

Issue: A litigation exclusion clause can be used by a public buyer to restrict a company from bidding on future public contracts if that company is currently, or has previously been, involved in litigation with the public buyer, under these conditions it effectively becomes a reprisal clause. In these circumstances these clauses serve to coerce companies into making a choice between 1) exercising their right to access the courts to resolve disputes for legitimate claims; and, 2) bidding on future public contracts. Concerns over such use of these clauses are compounded by the impact of COVID-19, as delays and costs arising from changes in law and necessary additional precautions associated with the virus make meeting contractual obligations increasingly difficult.

Overview

The impact that COVID-19 is having on the design and construction industries is both unique and significant, as operating rules are undergoing significant changes which are disrupting our labour forces and, in turn, resulting in production delays beyond companies' control. Our industries find themselves in the unique position of significantly decreased production, compounded by contractually bound fixed deadlines, legal liabilities and liquidated and other damages concerns.

Compounding these concerns are the threat of reprisal clauses, which exclude, or permit the exclusion of, suppliers from bidding on or being awarded publicly funded projects if the supplier is, was recently, or even in some circumstances, is likely to be engaged in litigation with a public buyer. Many companies are anticipating that they will need to utilize the dispute resolution process in 2020 due to the impact that COVID19 is having on their contracted assignments. Since there are no recognized standard protocols informing/directing firms on how to manage operations with sufficient regards to public health during a global pandemic outbreak, many companies are anticipating the need to access the courts to resolve their disputes regarding delays and cost increases on public contracts as a result of COVID19. However, engaging in this process exposes these companies to the risk of potential restrictions on pursing projects in a post-COVID19 design and construction process. It is also noteworthy that many public buyers have expressed their expectation that projects are to remain active and on schedule through the COVID-19 pandemic, and proponents are expected to take all additional and necessary public health precautions, while also complying with the contractual obligations in respect of the delivery of the Project. It is for this reason that transparent and expeditious access to third party dispute resolution post-COVID-19 is particularly imperative.

Issues

While of equal importance, however, not discussed in detail in this note, reprisal clauses: also 1) unjustifiably infringe on the constitutionally protected rule of law and on the right of reasonable access to the courts; 2) are incompatible with the new procurement obligations imposed on Canadian municipalities by the Canadian Free Trade Agreement and the Comprehensive Economic and Trade Agreement; 3) are at odds with the fundamental aims of the *Construction Act;* and 4) are contrary to public policy.

Perhaps most significantly, these clauses will undoubtedly further complicate the already complex recovery period for the public design and construction market. More specifically, these clauses will place suppliers in the difficult position of weighing whether to exercise their right to involve public buyers in legitimate legal action for inevitable COVID19–related claims, against the possibility of lost future assignment opportunities during the recovery period. Not only does this process create an opportunity for unfairness in the pursuit of assignments but also raises concerns regarding the implications of arbitrarily reducing competition by eliminating potentially qualified suppliers from the pool of potential qualified proponents.

"A more nuanced view of cost" has been proposed by those arguing that reprisal clauses are in the public interest. More specifically, it has been argued that there are important business reasons why a municipality would want to avoid entering contractual arrangements with parties who are involved in, or have previously pursued, litigation against the municipality. In *Cox Bros. Contracting & Assoc. Ltd.* v. *Big Lakes*, the municipality argued it would be prudent to avoid doing business with parties which may be prone to litigation. Similarly, the City, in *Sound Contracting Ltd.* v. *Nanaimo*, argued that accepting bids from suppliers that have an active lawsuit against the City for similar work would result in an increased administrative, legal, personnel and overall project cost to the City. However, many claims occur in the ordinary course of business (such as the enforcement of subcontractor lien rights which may involve the owner), therefore a policy which offers public buyers the ability to restrict contractors, in any litigation with the public buyer, from bidding on future construction projects is a flagrant violation of public policy. This concern is exacerbated by the unique circumstances which will undoubtedly follow the COVID19 pandemic, notably the increased volume of expeditious dispute resolution processes necessary to ensure fairness for all parties, following the significant construction disruption. It is for this reason, that unfettered access to the courts is absolutely necessary.

Key Recommendations:

We offer the following recommendations and suggest there are more reasonable and strategic solutions which are less punitive and will ultimately provide a more advantageous and fair result for public buyers, its suppliers, and taxpayers. If the objective is to avoid costly and time consuming, frivolous litigation and to consider experience and capability of the proponent in determining suitability, then an effective performance evaluation and prequalification process would be more appropriate. Such processes, providing insight and analysis of previous litigation patterns and past performance would allow a municipality to better choose the most appropriate contractor for a given tender. It would also help ensure that the pool of potentially qualified candidates is not reduced by arbitrary penalty or by the cooling effect such intimidation tactics might have. It is also noteworthy that such a process, too, avoids any diminishment of a vendor's fundamental rights to access to the courts.

Furthermore, the provincial government of Manitoba has already adopted this approach by making amendments to its *Municipal Act Procedures Manual* in 2017. Specifically, the province declared a zero-tolerance policy for obstructionist trade practices, including the use of arbitrary reprisal clauses in tendering and procurement. Manitoba's Finance Minister, Cameron Friesen, formally announced that the province, and all its public sector bodies, are committed to a fair and transparent tendering process, denouncing the use of reprisal clauses in procurement criterion. In supporting this position, Friesen further explained that the right to exercise due process within contract law should never become a bar to future bid opportunities.

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