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Dear Ministers:

Re: Pandemic Response In the Construction Industry

The Council of Ontario Construction Associations (“COCA”) is a federation of 29 construction associations representing approximately 10,000 general and trade contractors that perform work in the industrial, commercial, institutional (ICI) and heavy civil construction sector in all regions of Ontario. COCA is mandated to serve as the voice of the ICI and heavy civil construction sectors at Queen’s Park.

The COVID 19 pandemic is having disruptive effect on the construction industry. Initially, the pandemic resulted in delays in the supply chain for materials and equipment from overseas. We are now entering a new phase where the pandemic is impacting the workforce.

COCA and its members fully support the government’s pandemic response measures to date, including the measures announced on March 16, 2020, to protect Ontario workers who are unable to work because of the pandemic or the pandemic response. Public health and workplace safety must be the overriding concerns at this time.

The next logical step, we suggest, is for the Provincial Government to pass similar legislation protecting construction employers. We need legislation to protect contractors and subcontractors from liability for project delays to the extent that they are caused directly or indirectly by the pandemic and pandemic response measures.

As you know, the construction industry is already dealing with a shortage of skilled workers. It is entirely foreseeable that additional disruptions in the workforce will result in project delays.

Contractors and subcontractors are typically bound by contract to complete work according to fixed deadlines. Missing a contractual deadline usually results in legal liabilities, with substantial financial damages, for contractors and subcontractors. Owners can claim compensation, for example, for lost rent, the cost of alternative accommodations for tenants, lost profit, increased financing costs, increased insurance and bonding costs, and increased salary expenses, among other damages. Delay claims by owners against contractors and by contractors against subcontractors usually exceed the price of the contract or subcontract in issue. These losses are typically uninsured.

Most contractors and subcontractors are small businesses. They do not have deep pockets. If the government does not take steps to protect construction employers from the consequences of delay resulting from the pandemic, then many of the jobs that the government has moved to protect will disappear anyway.

Although contract language varies, most construction contracts in the ICI sector permit the extension of contract deadlines where contractors or subcontractors are delayed by forces beyond their control. For example, the CCDC 2 – 2008 contract, which is the most widely used standard form contract in Canada, provides as follows:

6.5.3 If the Contractor is delayed in the performance of the Work by:

- .1 labour disputes, strikes, lock-outs ... ,
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or
- .4 any cause beyond the Contractor's control other than one resulting from a default or breach of Contract by the Contractor,**

then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. ...

Most subcontracts in the ICI sector include similar clauses.

Any uncertainty as to whether contractors or subcontractors are entitled to an extension of their contract deadlines will be damaging. Owners may withhold payment to contractors until a Court rules on whether workforce disruptions caused by the pandemic are a 'cause beyond the contractor's control'. That will likely take years. If they do not go insolvent in the meantime, many contractors and subcontractors will need to scale back on their operations pending the outcome of the litigation because their working capital will have been limited by these legal actions.

If the government does not act, in the construction industry the economic impact of the pandemic will fall by default upon the shoulders of Ontario's construction employers. We suggest that this will have a long term negative effect on Ontario's economy and employment. We urge the government to act now to avoid that outcome.

Respectfully,



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