

September 13, 2018

Dear EACO Member,

You've probably heard about The Construction Lien Act reform which came into effect July 1<sup>st</sup> and included prompt payment and other reforms. This reform also included mandatory bond requirements in Ontario on public work and changes to numerous features of the Act that will affect the way you manage your business.

Please take a look at the summary and highlights we put together to help you get adjusted to the change. If you have any questions, give us a call, otherwise keep us in mind as a resource going forward.

---

### **Ontario's New Construction Act, Bill 142**

On July 1, 2018 Ontario's new Construction Act (Bill 142, the "Construction Act") came into effect. The Construction Act is the most wide-ranging change of rules in the construction industry in Ontario since 1983.

**One of the immediate changes that will affect contractors across Ontario is the mandatory requirement for performance bonds and labour and material payment bonds on all public projects in excess of \$500,000.**

Other significant changes include the timelines for filing liens, new rules on achieving substantial performance, and changes to the administration of construction trust funds.

The following are highlights of the most important aspects regarding surety bonding within the Construction Act.

#### **Timelines for Changes to the Construction Act**

- July 1, 2018: Modernization of the Act begins, which includes mandatory bonding on all public projects in excess of \$500,000. This is true for all projects procured after this date. Any projects that tendered prior to July 1, 2018 will not be subject to mandatory bonding.
- October 1, 2019: Prompt Payment and Adjudication will take effect.

#### **How Will This Affect EACO Members?**

- Historically, some government bodies such as the MTO and various school boards did not require surety bonds. Under the Construction Act, many public owners that did not use bonds will now be requesting them.
- If you think you will be subject to an uptick in your bond requirements, we would encourage you to have a discussion with us to make sure everything is in order with your bond capacity.
- Other changes are listed below which will affect you depending on the situation.

#### **Changes to Bond Forms**

- The Act now standardizes the form of Performance and L&M Bonds to be used on public projects. The intent of the new forms is to provide greater clarity and standardized forms for the claims process.
- The bond forms can be found on our website under [New Bill 142 Mandatory Ontario Bond Forms](#).

### **Surety's New Responsibilities and Mandatory Response Times**

- **Acknowledgement of performance bond claims:** The surety will have 4 business days to acknowledge a performance bond claim and request documents in the prescribed form.
- **Surety's position on a performance bond claim:** The surety must provide its position to a performance bond claimant within 20 business days from date of claim.
- In order to provide a written position, the contractor will have to immediately provide their written position with supporting materials.
- **Acknowledgement of L&M bond claims:** The surety is required to acknowledge and request information within 3 business days.
- **Surety's position on an L&M claim:** The surety must provide its written notice the earlier of 10 business days after receiving information from the claimant or 25 business days after the initial notice of the claim. The surety and claimant may mutually agree on a longer period.
- **Payment:** Under the L&M Bond, the Surety will have 10 days after providing its written position to pay any undisputed amounts.

### **Broad Form Protection for Second Tier Sub Trades & Suppliers**

- The new L&M Bond includes protection for "second tier" subcontractors, such as subcontractors or suppliers to a subcontractor of the prime contractor.

### **Pre-Notice Meeting and Post-Notice Conference**

- The Performance Bond now prescribes that if the Owner requests a meeting or conference subject to the terms of the bond, the Surety *must* arrange this meeting with the Owner within 7 business days for a Pre-Notice Meeting and 5 business days for a Post-Notice Conference.  
For contractors, strong project management documentation will become even more critical to respond to the requirements of potential surety bond claims and any requests for adjudication.
- Contractors must maintain one or more trust accounts and account for them on a per project basis. We strongly urge all contractors to reach out to their construction lawyers to ensure they are properly informed and advised.
- The one question that frequently arises is "What happens if these deadlines are missed?" At this time, the answer is unknown, as ultimately the courts will make that final determination and establish new precedents. However, it is certainly best for all parties not to be the test case in this unknown arena.

### **Changes to Rules for Liens Under the Construction Act**

- There is a new formula for achieving Substantial Performance which will result in Substantial Performance being achieved earlier in the life cycle of a project.
- **For projects covered under the Construction Act, contractors will now have 60 days after Substantial Performance is published to preserve a lien. The time to perfect a lien by commencing an action will be extended from 45 days to 90 days from the last day the lien could have been preserved.**
- Lien claims under \$25,000 in value will now be referred to the Small Claims Court.
- The timelines apply to all contracts, public and private and for all levels of the construction pyramid.

### **New Holdback Rules**

- Under the Construction Act, holdback does not necessarily have to be retained. If agreed to by all parties it can be released via a Holdback Repayment Bond.
- For projects over \$10,000,000 and an expected duration greater than 1 year, the parties have the option to release the holdback annually.
- If no lien claims exist, holdback is now required to be paid 60 days after publication of Substantial Performance unless a notice of non-payment of holdback is published.

### **Prompt Payment and Adjudication:**

- This will come into effect October 1, 2019.
- Prompt Payment and Adjudication applies to all projects, public and private, and to all levels of the construction pyramid. **Payment terms other than what is legislated will no longer be enforceable.**
- Once a proper invoice is delivered, the Owner must pay the prime contractor within 28 days.
- If the owner does not think payment is warranted, a written notice of non-payment must be provided within 14 days after receipt of the invoice. It must outline reasons why all or a portion of the invoice is not being paid.
- Once the prime contractor has been paid they must pay all subcontractors and suppliers within 7 days. This 7-day period to pay after receipt cascades down to all lower tier sub trades and suppliers within the construction pyramid.

These are some of the most critical changes to the Act that will impact your business. It is important to note that this is a high level summary with more details available within the act. Please do not hesitate to reach out to us if you wish to further discuss the implications of this act or ask questions. We hope we can be a resource for you during the transition.

### **About FCA Insurance Brokers**

FCA Insurance Brokers is a construction focused brokerage, established in 1919. We are proud to be the longest standing insurance member of the Environmental Abatement Council of Ontario (EACO). We have developed specialty insurance and surety programs specifically for environmental contractors and consultants.

Please call us today for a free consultation.

Sincerely,

Jamie Collum  
Surety & Construction Specialist  
[jcollum@fcainsurance.com](mailto:jcollum@fcainsurance.com)  
(647)- 473-7507

Chris Dardarian  
Surety & Construction Specialist  
[cdardarian@fcainsurance.com](mailto:cdardarian@fcainsurance.com)  
(416) 797-6127

Warren Griffiths  
VP & Partner  
[wgriffiths@fcainsurance.com](mailto:wgriffiths@fcainsurance.com)  
(416) 486-1449