

Performance and Labour and Material Bonds under the *Construction Act*

Under the *Construction Act* every contractor (other than an architect or engineer) must furnish a performance and labour and material payment bond under all “public contracts” with a contract price of \$500,000.00 or more, with the exception that under a P3 project the bonds must be furnished by the special purpose entity (or “ProjectCo”) responsible for the improvement. The bonds will be in a prescribed form, which will set out how claims under the bond are to be processed.

The “Public Contract” and the Bonding Requirement

- a public contract is a contract where the owner is the Crown, a municipality or a “broader public sector organization”. If the project is being funded with public tax dollars, it is most likely the definition will be met. Every hospital, school board, university and college receiving public funds, along with every corporation controlled by such an entity that exists solely or primarily to purchase goods or services on its behalf is caught by the definition. Also included is every authority, board, commission, committee, corporation, council, foundation or organization that received public funds of \$10 million dollars or more in the previous fiscal year;
- the *Act* does not require owners to request or require the mandatory bonding. Accordingly, if the tender documents or terms of a public contract are silent on the issue, the obligation to provide the bond will still fall to the contractor if its price exceeds \$500,000.00. To avoid confusion, owners should consider indicating that such bonding will be required if they meet statutory requirements, should the \$500,000.00 threshold be met. The *Act* does not address what happens if the contract price increases beyond \$500,000.00 through changes.

The Scope of the Public Contract Bonding Requirements

- both the performance and labour and material payment bonds must have a minimum coverage limit of at least 50% of the contract price, except that on alternative financing and procurement or P3 Projects the maximum coverage will be \$50,000,000.00;
- the mandatory performance bond will not respond to liquidated damages under the contract, to damages for delay or for indirect or consequential damages;
- according to section 85.1(4) of the *Act*, the labour and material payment bond must extend protection “to subcontractors and suppliers supplying labour or materials to the improvement”. However, the Surety Association of Canada has negotiated a form of bond which limits its coverage to first and second tier subcontractors. The form further restricts the recovery of second tier subcontractors to such amounts as the contractor “would have been obligated to pay to the Sub-subcontractor” under the *Act*. This will effectively limit the bond recovery of second tier subcontractors to their share of the holdback in most circumstances. Time will tell if the discrepancy between the s.85.1(4) requirements and the form of the bond will be addressed, either with an amendment to the *Act* or in the Courts.

The Terms and Conditions of the Bonds

- the terms and conditions of the mandatory bonds are very different from those traditionally used. Care should accordingly be taken to review them in the event of a possible claim. The bonds contain claims processes which involve additional steps and tight timeframes which should be understood. A copy of the standard forms are available on our website.