September 1, 2020

Hydro One Networks Inc.
483 Bay Street, South Tower
8th Floor Reception
Toronto, Ontario
M5G 2P5
Attention: Engineering Procurement Department
Reference: Engineering, Procurement and Construction Agreement
                Article 12 Milestones and Payment
                Compliance with the Construction Act

Dear Sir or Madam:

We have received some concerns by bidders, including subtrades, regarding the language contained in Article 12 of this standard form EPC contract prepared by Hydro One Networks.

In particular, the concern is that the section violates the Construction Act.

Article 12 contemplates Milestone payments following the submission of Proper Invoices. By section 12.2, a Contractor is prevented from issuing a Proper Invoice unless all requirements to meet the applicable Milestone are met.

Those requirements to meet a Milestone include a "Milestone Achievement Application" prepared by the Contractor for the Owner's review, verification and acknowledgment (section 12.4). By section 12.6, the Owner obligates itself to commence a review of the Work no later than 10 Work Days after receipt of the Contractor's Milestone Achievement Application. There is no time limit prescribed, within which that Owner review must be completed.

If the Owner believes the Contractor has completed a Milestone, the Owner is obliged to issue an "Acknowledgement of Milestone Achievement" (section 12.7). The issuance of an Acknowledgement of Milestone Achievement is expressly made a precondition to meeting the requirements of a Milestone (section 12.8).

In short, these provisions provide that the Contractor's ability to issue a Proper Invoice is conditional upon the achievement of a Milestone, which itself is conditional upon the Owner's review and approval of a Milestone application.

We would respectfully direct you to section 6.3 (2) of the Construction Act:

"A provision in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner's prior approval is of no force or effect."

The provisions cited above would appear to clearly violate this prohibition in the Construction Act. Simply put, the giving of a proper invoice under the Act cannot legally be conditioned upon the owner's prior approval.

We recognize that there may be perfectly valid reasons internal to Hydro which justify this review and acknowledgement that a milestone payment application is valid and should be paid. The problem lies in linking this internal review to the proper invoice. By doing so in the manner set out in the present contract form, a Contractor is effectively prevented from issuing any proper invoice at all if Hydro refuses to issue its Acknowledgement of Milestone Achievement, and is thereby prevented, among other things, from any recourse to the adjudication regime prescribed by the Act to decide any disputes concerning whether or not a milestone has in fact been met and should be paid. It is this mischief which section 6.3 (2) was intended to avoid.

We do not believe that this was done intentionally as the entire industry is learning to adapt to the complexities of the new Act. In our view, there is a simple fix which can bring Hydro One Networks' process in line with the law: modify the contract to provide that the Milestone Achievement Application and the Acknowledgement of Milestone Achievement are for the internal purposes of Hydro One Networks only, and shall expressly not be construed as any condition of a Proper Invoice.

We believe making this change, or such alternative one that avoids the contravention of section 6.3 (2), is essential to avoiding unnecessary conflict and the possibility of judicial reprobation going forward.

We trust this expression of concern will be received favourably, and look forward to hearing from you as soon as possible. If necessary, we would be pleased to meet and discuss this further at your convenience.

Yours sincerely
ONTARIO GENERAL CONTRACTORS ASSOCIATION

Giovanni Cautillo
President