

ALBERTA PROMPT PAYMENT AND CONSTRUCTION LIEN ACT FREQUENTLY ASKED QUESTIONS - ISSUE N° 2

COMPLIMENTS OF GOWLING WLG CONSTRUCTION LAW GROUP

> A. APPLICATION OF THE PROMPT PAYMENT LEGISLATION

59. What prompted these legislative changes?

A majority of the construction industry felt that the industry needed a legal framework that would provide more reliable and consistent payments throughout the construction industry, and a cost-efficient and timely means to address disputes during the completion of the project.

60. Does the Alberta prompt payment legislation apply if one of the parties is not located in Alberta? For example, does a supplier located in the US, supplying product to a contractor in Alberta for a new construction project in Alberta have to comply with the legislation?

The supplier would be subject to the legislation if they are providing goods to an improvement in Alberta, regardless of where the supplier is located.

61. If a party supplies materials, but the contractor doesn't specify a particular project, does Alberta's prompt payment legislation apply?

If the materials are used in an improvement located in Alberta, then Alberta's prompt payment legislation will apply regardless of whether or not it is known which particular project the materials are going to be used on.

62. Does the Alberta prompt payment legislation apply to subcontractors hired from outside of Alberta to do work in Alberta?

Yes, subcontractors working in Alberta will be subject to the prompt payment legislation, regardless of where they come from.

63. Why does the Alberta prompt payment legislation not apply to Government of Alberta projects?

The Government of Alberta believes that the current Public Works Act as well as the payment terms in their standard contract documents provided sufficient assurance of timely payment to participants involved in a Provincial public works project.

64. Does prompt payment still apply between a contractor and the contractor's subcontractors even if the contractor's contract is with the Province of Alberta?

Prompt payment will not apply to any level in the construction chain if the prime contract is with the Provincial Government.

65. For provincial projects, does the exemption from the prompt payment legislation apply to all participants?

Yes, the exemption would apply to all participants in Provincial projects.

66. Does the Alberta prompt payment legislation apply to Federal Government contracts in Alberta?

No, because the Prompt Payment and Construction Lien Act is a Provincial law.

The Federal Government has developed its own prompt payment legislation – Federal Prompt Payment for Construction Work Act – that was passed in 2019 but is not yet in effect. It is supposed to be in force by the end of 2022 and will apply only to projects involving Federal real property, including leases of Federal real property, or a Federal immovable which is relevant only under the laws of the Province of Quebec.

- 67.** Does the Alberta prompt payment legislation apply to schools and universities?

If the construction activity is being undertaken under contract directly with a school board, regional authority or university, and not directly with the Provincial Government, then the project will be subject to the Alberta prompt payment legislation, even if it is being funded by the Provincial Government. If the project is being undertaken pursuant to a contract directly with the Provincial Government then it will be considered a public works and will not be subject to the legislation.

- 68.** Does the Alberta prompt payment legislation apply to the health sector?

Projects undertaken under contract with Alberta Health Services will not be subject to the Alberta prompt payment legislation as Alberta Health Services is a provincial agency providing health services on behalf of and at the direction of the Minister of Health. These projects are governed in part by the Public Works Act.

However, some health related projects undertaken directly with the private sector will be subject to the prompt payment legislation. Long term care facilities that are built and operated by the private sector would be included in the prompt payment legislation because they are not projects contracted with the Provincial Government.

- 69.** Does the Alberta prompt payment legislation apply to public utilities and electrical power companies?

Public utilities and electrical power companies that are not owned by the Province will be bound to comply with Alberta's prompt payment legislation. So, if the public utility or electrical power company is owned by a municipality, the project will be included in the prompt payment legislation.

- 70.** Does this legislation apply to telecommunications companies?

As telecommunications is governed under the exclusive jurisdiction of the Federal Government, projects involving telecommunications will likely not be subject to Alberta's prompt payment legislation.

- 71.** Does the prompt payment legislation apply to work for First Nations on First Nations Land?

No, as First Nations and First Nations lands fall under the jurisdiction of the Federal Government, this Provincial legislation will not apply. The exception will be if work, services, goods or materials are being provided with respect to a lease of a private commercial undertaking on First Nations lands, then it is arguable that the Alberta prompt payment legislation should apply.



B. PAYMENT

- 72.** What is the date of issuance of a proper invoice? Is it the date on the invoice or the date of receiving the invoice?

The triggering date is the date the owner receives the proper invoice, not when the contractor sent it.

- 73.** Is there an obligation directly in the legislation for the contractor to provide the proper invoice dates to its subcontractors?

No there is not, but the subcontractor has a right to inquire of the owner or the contractor as to date of the issuance and receipt of the proper invoice.

- 74.** Do subcontractors have to invoice every thirty-one days also?

No, subcontractors are not required by the legislation to invoice every thirty-one days, just contractors invoicing to the owner. In fact, it would be advisable for subcontractors to have a shorter invoicing period so that there is time for its invoices to be reviewed and revised before they are included in the contractor's invoice to the owner.

- 75.** If you miss the thirty-one day deadline for rendering a proper invoice, can you include the missed billing in your next proper invoice?

Yes.

- 76.** Does the thirty-one day period start from the date the contract is signed or when work starts on site?

The thirty-one day period starts when work is first performed that can be the subject matter of a proper invoice, but it is anticipated that the first proper invoice may be issued for a stub period in order to have the invoicing period start at the beginning of a month and end at the end of the month.

- 77.** What if a party backdates an invoice? Does a party now need to digitally date stamp all invoices received to avoid digging through emails to see when invoices are received, or avoid a claim?

Backdating an invoice is not appropriate or legal. It would be prudent to have a process whereby all invoices that are received are date stamped or recorded on the day received.

This is also important as any party in the construction chain can request to be advised of this date, so easily accessing the date and being assured that it is accurate is important.

- 78.** Should the date of invoicing be set on a specific date?

That would be a prudent practice, but the actual date of receipt will govern payment and dispute obligations.

- 79.** Do you think that the requirement that the owner pay the contractor within twenty-eight days of the receipt by the owner of a proper invoice means the well-known "net 30" payment term should be updated to "net 28"?

Certainly that is one of the impacts of this requirement under the prompt payment legislation.

- 80.** What is the result of not issuing a proper invoice every thirty-one days? For example, what if a nil invoice is not issued on time? Does that impact future invoices for milestone payments?

There is no penalty provided for in the prompt payment legislation for not issuing a proper invoice every thirty-one days.

It is however possible that subcontractors are rendering invoices to the contractor within the thirty-one day period and are expecting payment, and could register liens against the project if not paid by the contractor, so there is a reason to comply with the thirty-one day invoicing requirement.

Under the terms of the legislation, invoices must be rendered every thirty-one days. Practically speaking, however, if a party misses issuing a nil invoice on time, it is not likely that there will be any impact on future invoices or milestone payments.

- 81.** For months when you have no invoicing, do you need to submit a zero value invoice to stay current with the every thirty-one days?

The issuance of a zero value invoice simply provides for compliance with this requirement of the legislation and would allow you to be "current". This would also let the owner know that there are no amounts due and payable during this period.

Note that the legislation does not expressly allow for or mention the use of nil invoices.

- 82.** Some projects have a lull period where no work happens (i.e. spring break up). Does the contractor still have to issue a proper invoice every thirty-one days?

By implication of the legislation, the contractor should still issue an invoice, even if zero, simply to comply with this requirement of the legislation and allow you to be "current". This would let the owner know that there are no amounts due and payable during this period.

That said, the legislation does not expressly mention the use of zero value invoices.

- 83.** Should an owner be concerned about subcontractors not being paid if they are not receiving a contractor's invoice within the thirty-one days?

Certainly it is possible that subcontractors are rendering invoices to the contractor within the thirty-one day period and are expecting payment, and could register liens against

the project if not paid by the contractor, so owners should insist that the contractor comply with the thirty-one day invoicing requirement.

- 84.** Can owners now insist on a draft invoice as a precondition to issuance of a proper invoice?

While the legislation does not require the use of draft invoices, or even mention draft invoices, the use of draft invoices seems to be a common practice in Ontario and can certainly be a contractual requirement negotiated and included in contracts and subcontracts.

- 85.** Are there any time constraints on the issuing or review of draft invoices? Can the various parties involved sit on these and not review them in a timely manner?

While the legislation does not require the use of draft invoices, or even mention draft invoices, the use of draft invoices seems to be a common practice in Ontario and can certainly be a contractual requirement negotiated and included in contracts and subcontracts. Any time constraints on the issuing of draft invoices would be set by the contract. Regardless of the timing of the issuance of draft invoices, and whether or not a party fails to review the draft invoices in a timely manner or at all, the use of draft invoices will not impact the statutory obligation to issue a proper invoice within the thirty-one day period.

- 86.** What is considered a proper invoice? Is this not open to interpretation?

The prompt payment legislation defines a proper invoice as a written bill or other request for payment for the work or materials furnished with respect to an improvement under a contract. A proper invoice must contain certain specified information and "meet any other requirements as may be specified in the contract".

The specified information is consistent in most cases with current invoicing practices, plus one additional requirement: the proper invoice must state that the invoice provided is intended to constitute a proper invoice.

Accordingly, there is room for some interpretation as to what the "other requirements" of a proper invoice might be. Those requirements might relate to commissioning and testing of the work or goods as are permitted as pre-conditions of invoicing, and consequently payment, under the legislation. It is clear however, the requirements of a proper invoice cannot contravene the requirements of the legislation. For instance, prior certification or approval of the owner to render the proper invoice will not be permitted.

- 87.** Is an industry association looking at developing a standard form for a "proper" invoice?

The issue is currently under consideration by the Alberta Construction Association.

88. Does it fall upon the owner to inspect the contractor's proper invoice, and the contractor has no obligation to provide backup?

As the owner has the right to dispute all or a part of the contractor's proper invoice, it is up to the owner to review the contractor's invoice. We expect that the prime contract will require the contractor to provide proper back up for the items included in the proper invoice, or else the contractor will risk non-payment.

89. Does this mean full attestation or certification needs to be completed within fourteen days of receipt of a proper invoice? Or would there be an opportunity to review an item in a subsequent invoice by short-paying the current proper invoice?

All steps to certify the proper invoice will need to be completed within fourteen days of the owner receiving a proper invoice. Short-paying a proper invoice would require the owner to issue a Notice of Dispute for the amount short paid, which will trigger an adjudication. Thus, it is recommended that the contractor submit a draft proper invoice to the owner to address objectionable items before the contractor submits the proper invoice. Once the proper invoice is sent, the contractor can revise the proper invoice, but the original invoice date must remain the same, and it will not restart the applicable prompt payment deadlines.

90. If an owner has additional requirements for a proper invoice and the contractor does not meet the additional requirements, is the invoice not a proper invoice?

The invoice will be a proper invoice if the additional requirements have been agreed to in the contract between the owner and contractor, and these additional requirements are not inconsistent with the applicable requirements of the legislation.

91. With regard to subcontractors submitting their invoices, can the contractor dictate what day they require invoices to be submitted to the contractor through the terms of the subcontract?

Yes, the date of submission of a subcontractor's invoice should be included in the payment terms of the subcontract and allow time for inclusion of that invoice in the contractor's proper invoice.

93. Will the 10% holdback apply similarly to engineering and architectural consultants?

Yes, under the legislation, the owner should withhold 10% holdback from its architectural and engineering consultants. The legislation does not require holdback between prime and sub-consultants. However, we anticipate that the present practice not to withhold holdback from consultants will likely continue, though owners will still be legally responsible for retaining a lien fund even if no holdback is retained.

94. If holdback applies to engineering and architectural consultants, then how does holdback release work - does it get triggered at end of design services or substantial performance of the design or at the end of the performance of the construction administration services?

As engineering and architectural consultants can now issue certificates of substantial performance, the accrued holdback can be released when the consultant contract is substantially performed, with the remaining holdback accrued thereafter released upon completion of the contract.

When the consulting contract is substantially performed will depend upon the nature of the contract. A contract is substantially performed either when a substantial part of it is ready for use, or when it is financially largely complete. If the contract is design-only, it will be substantially performed when the financial value of work remaining is minimal, even if construction is not substantially performed. If the contract includes construction administration, then the contract is likely only substantially complete when either a substantial part of the actual construction is ready for use, or when the financial value of the work remaining under the consultant's contract is minimal.

95. If there are no holdbacks, does it limit the ability for a consultant to lien a project?

If no holdback is retained by the owner, the consultant will still have a lien right, although if the consultant has been paid in full it will have no need to register a lien. Note however that a subconsultant if not paid could register a lien and the owner would be responsible for the full amount of the lien fund, even if it retained no holdback from the prime consultant.

96. When does the sixty day lien period start?

As is the case in the current legislation, a person can register a lien as soon as they provide work, services, goods or materials to the improvement. The sixty-day lien (or in two cases, ninety-day) period starts from the last day the work, services, goods or materials were furnished, or the contract is abandoned. The last day cannot include the correction of deficiencies.

> C. BUILDERS' LIENS AND HOLDBACK

92. The Courts have extended lien rights to services such as snow removal - which is already questionable - do the revisions to the builder's lien portion of the new legislation provide clarification on this?

No, the definition in the legislation of what constitutes and "improvement" remains unchanged. All Court decisions about what work is or is not entitled to lien rights will continue to be relevant.

97. Why do concrete suppliers get a carve-out?
We understand that because of the time it takes for concrete to set up and be tested that a longer lien period was requested by the concrete industry.

98. What lien period applies to a "supply and install" concrete subcontract - would it be subject to both timelines?

The supply of concrete would have a different lien period than its installation. Thus, to avoid disputes, it is recommended that concrete is supplied under a separate subcontract than it is installed, together with separate invoicing for both. If one subcontract includes both the supply and installation of concrete, the longer 90-day lien period will only apply to the supply portion of the subcontract, and not the installation portion. In such cases, it is recommended to register a lien within the shorter 60-day period than the longer 90-day period.

Conversely, we anticipate that owners and contractors will want to retain holdback for the longer 90-day period.

99. Does the prompt payment legislation apply to projects where a lien cannot be registered, such as road projects on public road right of ways where no title exists to register a lien to?

Yes, the prompt payment legislation may in certain instances apply to a projects where a lien cannot be registered. Municipal or country roads or public right of ways, that are not owned by the Provincial or Federal Governments, are good examples. As a matter of public policy, one cannot lien a public highway, irrigation district, or any project that is of critical importance to the public interest, but that project will still be subject the prompt payment legislation.

need to be delivered to the other party at the party's regular place of business or any other method of service permitted by law.

103. If a Notice of Non-Payment - Form 1 has been given by the owner to the contractor, are all of subcontracted parties entitled to receive a Notice of Non-Payment - Form 2? For a complex project, that could be in excess of one hundred subcontracted parties receiving a Form 2.

The contractor's Notice of Non-Payment – Form 2 only needs to be provided to those subcontractors who will be impacted, i.e. not paid in full or in part, as a result of the owner's non-payment.

104. What if the contractor or subcontractor issues a Notice of Non-Payment Dispute using Form 3 or 5 unfairly? Who determines if it is valid?

The Notice of Non-Payment Dispute allows the receiving party to initiate an adjudication with the issuing party. An adjudicator would make a determination upon application of one of the parties if the Notice of Non-Payment Dispute has been issued unfairly. The prompt payment legislation allows an adjudicator to determine if a matter submitted to adjudication is frivolous or vexatious, and potentially refuse to hear the matter, or to hear the matter and award costs against the party issuing the Notice of Non-Payment Dispute.

105. What if an owner chooses to pay on a forty-five day cycle and the contractor and subcontractors choose to adjudicate? Will they have to adjudicate each invoice every month, or will the outcome be that the owner is forced to pay each future invoice per the legislated timelines?

The adjudicator could order that the owner comply with the legislated requirements only with respect to the payment of invoices in dispute, not to future invoices. However, the cost of participating in and repeatedly payment for the adjudication process would incentivize an owner to comply with the legislative timelines.

> D. ADJUDICATION

100. Where can we find copies of the dispute forms?

The Forms can be found as the Prompt Payment and Construction Lien Forms Regulation (AR 22/2022 as an Order in Council 051/2022 amending the current Builders' Lien Forms Amendment Regulation (AR 51/2002)). You can access the Forms through the link on the Alberta Government website or on our GowlingWLG website.

101. For Forms 1 - 5, will these have to be wet signed or will they be able to be executed and sent electronically?

It will be acceptable to have the Forms signed electronically if the parties agree to that in the contract.

102. What is the appropriate means of sending Notices of Dispute or Non-Payment – electronic or mail?

Unless the contract between the parties specifies the manner of service, all notices of dispute and non-payment

> E. TRANSITION PERIOD

106. Is it retroactive to current contracts?

No, however if the duration of the current contract exceeds the date of August 29, 2024 then that contract will need to be amended to include the prompt payment legislation by that date.

107. Where vendors work on multiple jobs, will they have different terms depending upon the date of the prime contract for each project?

Yes, that is correct.

108. If we have a standing agreement preceding August 29, 2022, and subcontractors enter subcontracts after August 29, 2022, then do those subcontracts have to comply with prompt payment?

No, the subcontracts will follow the law applying to the standing agreement, unless and until August 29, 2024 when the standing agreement will have to be revised to include the prompt payment legislation, as well as any subcontracts still in place.

109. If we are under a master services agreement with a client, is the date of the master services agreement, or the date of purchase orders thereunder, the key date for the transition period?

If each purchase order is considered and dealt with by the parties as a separate contract, then the key date for the transition period will be the date of each purchase order. Note that as of August 2024, the master services agreement will be subject to the prompt payment legislation, and so must be amended to comply with the legislation.

Prepared with the input and insights of various industry associations including the Alberta Construction Association.

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