

ALBERTA PROMPT PAYMENT AND CONSTRUCTION LIEN ACT

FREQUENTLY ASKED QUESTIONS - ISSUE N° 1

COMPLIMENTS OF GOWLING WLG CONSTRUCTION LAW GROUP

> A. PAYMENT

1. Will the prompt payment legislation guarantee that a party to a construction contract gets paid?

The legislation does not guarantee payment, but mandates specific requirements with respect to the timing of both invoicing and payment, which requirements the parties cannot contract out of.

2. When does the new legislation take effect?

The legislation will be in force as of August 29, 2022.

3. Who has to comply with the prompt payment legislation?

Anyone who is performing work, providing services, or furnishing goods or materials with respect to an "improvement in land", with some notable exceptions, must comply with the new legislation.

4. What are the exceptions?

The new legislation does not apply to Provincial Government projects that are governed by the Public Works Act. While the legislation is not clear, the legislation is intended to apply to projects using the public-private partnership delivery method, excluding projects governed by the Public Works Act. The legislation does not apply to maintenance and operations portions of any public-private partnership projects.

5. Are owners, developers and consultants included in the legislation?

Yes, owners, developers and certain consultants – architects and professional engineers who are registered as professionals and providing consulting services are included in the legislation.

6. Are municipal, district and country projects included?

Yes, the legislation applies to municipal, district and county projects undertaken in Alberta.

7. Are home builders and oil and gas projects included in the legislation?

Yes, the legislation applies to the home building sector and oil and gas projects.

8. What type of work, services, goods or materials qualify as an "improvement"?

The definition of an improvement has not changed from the definition in the existing Builders' Lien Act. An improvement means anything constructed, erected, built, placed, dug or drilled on or in land that improves the land, except a thing that is neither affixed to the land nor intended to be or become part of the land.

9. Do I have to have a written contract or subcontract to be included in or bound by the prompt payment legislation?

No, your contract could be an oral one, but you have to have an agreement of some type to provide work or services, or furnish goods and materials.

10. How quickly will I have to pay or will I receive payment under the new legislation?

The legislation requires the contractor to issue a proper invoice to the owner within thirty-one days of the work or services being performed or the goods or materials being furnished. The owner must pay undisputed amounts to the contractor within twenty-eight days of receiving the proper invoice from the contractor. The contractor then has seven days from receipt of payment from the owner to pay its subcontractors, and so on down the contractual chain.

11. What is a proper invoice and who is required to issue it?

A proper invoice is defined to include a number of essential requirements including a description of the work or services done or goods or materials furnished and information identifying the authority, whether in a written or verbal contract, under which the work or services were performed or the goods or materials were furnished.

Only the contractor is required to issue a proper invoice to the owner for the work or services they have performed, or have been performed on their behalf by subcontractors, and for the goods or materials they have furnished or have been furnished on their behalf by subcontractors. We anticipate that contractually subcontractors will be required to issue proper invoices to the contractor so that the inclusion of subcontractor's invoices in the contractor's proper invoice to the owner will be easier administratively for the contractor.

12. Are the time periods mandatory or can I agree in my contract to new or different time periods?

The time periods are mandatory and cannot be extended by agreement, or contracted out of by the parties.

13. Can there still be milestone, phased, lump sum or annual payments?

The legislation is silent on this issue.

The legislation requires that a proper invoice must be rendered every thirty-one days, however the invoice could possibly be for a nil or nominal value until milestones are achieved, at which time a proper invoice could be rendered for the amount agreed to and earned for that milestone.

14. Can proper invoices be issued electronically?

Yes, if allowed in the contract.

15. What if our current accounting system does not provide for partial payments or is not set up to make payments within the mandated payment cycle?

You will have to adjust your current accounting system to meet the requirements of the legislation.

16. Can approval and certification be a precondition of payment?

Approval or certification of the work cannot be a condition of the rendering of a proper invoice.

Note however that a contract or subcontract may provide that testing and commissioning the improvement or the work done or materials furnished may need to be performed before any work or materials provided in relation to the improvement can be included in a proper invoice.

17. Is set off still allowed?

Yes, set off is still allowed. A set off will have to be identified in a notice of notice of dispute or non-payment issued by the party claiming the set off.

18. Are pay when paid conditions still permitted?

Pay when paid is permitted as long as it complies with the requirements of the legislation by ensuring that payments are made within the required time periods and upon the conditions mandated by the legislation.

19. What if I am not paid the full amount, or any, of my proper invoice?

If you are not paid the full amount, or any of a proper invoice, a notice must be issued by the party who is not paying all or a part of the proper invoice outlining in detail the reasons for non-payment.

20. What are the obligations of the parties in the event of non-payment?

In the event of non-payment by the owner, the owner must provide a notice of dispute to the contractor within fourteen days of receiving the contractor's proper invoice.

In turn, the contractor must provide a notice of non-payment to its subcontractors within seven days of its receipt of a notice of dispute from the owner, and undertake to refer the dispute with the owner to an adjudication with the owner within twenty-one days of giving a notice of non-payment to its subcontractors.

Similarly, a subcontractor must issue a notice of non-payment to a subcontractor it does not pay in full within seven days of receiving a notice of non-payment from the contractor.

Owners, contractors, and subcontractors must pay amounts included in the proper invoice that are not the subject of a notice of dispute or non-payment.

21. Can I access more information about payments made by others?

Yes, the right to access information has been expanded under the new legislation to include copy of the contract between the owner and the contractor, a statement of accounts that must include information as to whether all or any portion of the amount of a proper invoice has been paid, the percentage that has been paid, and the date upon which the amount was paid.

22. How do I compel a party to comply with the new legislation if they are not complying?

You can commence an adjudication, or alternatively commence legal proceedings, to require compliance with the legislation.

> B. BUILDERS' LIENS AND HOLDBACKS

23. Is my ability to register a builders' lien affected by the prompt payment legislation?

No, your ability to register a builders' lien is not affected.

24. How long is my lien period under the new legislation?

The standard lien period has been extended from forty-five days to sixty days.

25. Is the lien period the same for everyone?

No, the lien period of ninety days with respect to oil and gas well sites has been preserved, and the lien period for furnishing or work in relation to concrete has been extended to ninety days. This extended lien period does not however apply to entities that install or use ready-mix concrete.

26. Has the requirement to retain and pay out holdback changed?

For the most part no, but in some respects yes. Given the longer lien period for the furnishing and work done in relation to concrete, the holdback for concrete suppliers will have to be held longer.

Also, it is mandatory that for projects over \$10M, the holdback must be released by the owner to the contractor annually if the contract does not specify a phased or annual payment of holdback by the owner to the contractor.

27. Is the concept of substantial performance still significant?

Yes, its significance remains unchanged. The date of substantial performance still affects when the major lien fund can be released.

28. Is the posting of the certificate of substantial performance on the project site still required?

Certificates of substantial performance can be posted electronically if the contract provides for it and need not be posted on the project site.

31. When can I bring a matter to adjudication and how?

You can have a dispute determined by an adjudication during the performance of the contract or subcontract by providing a formal notice of adjudication to a Nominating Authority and the other party to the contract or subcontract.

32. How long will an adjudication take? Will it be quicker than a Court or Arbitration proceeding?

Without any agreed upon extensions, an adjudication could take two months from the date a party issues a notice of adjudication to the date that a determination is made and an order is rendered by an adjudicator.

The adjudicator must make a determination of the matter in dispute by issuing an order within thirty days of receipt of the parties' documents submitted to support their respective positions in the dispute.

As there are specific time requirements for the conducting of an adjudication, an adjudication will be quicker than a Court or Arbitration proceeding.

33. Is an adjudication and the determination resulting from the adjudication private and confidential?

The proceedings and the determination are private and confidential until a party seeks to have the determination of the adjudicator registered with the Court, at which time, the result of the adjudication will become public. However, the adjudication does not occur publicly and the documents submitted in the adjudication are not publicly filed.

34. What is a Nominating Authority?

A Nominating Authority is appointed or selected by the Government of Alberta to act as an administrator of the adjudication process.

The role of the Nominating Authority includes educating, qualifying, and appointing adjudicators in situations where the parties cannot agree on an adjudicator.

35. How much will an adjudication cost?

There will be a fee schedule determined and posted by each Nominating Authority. Due to the brevity of the process, it will cost significantly less than a Court or Arbitration proceeding.

36. Do I get to pick who the adjudicator is? Can I name an adjudicator in my contract or subcontract?

The parties can agree on who will be the adjudicator once a notice of dispute is issued, but cannot pre-name an adjudicator in a contract or subcontract. The parties can however name a Nominating Authority in their contract or subcontract.

37. What training does an adjudicator have to have? Who can be an adjudicator?

An adjudicator must have at least ten years of relevant work experience in the construction industry, complete the

C. ADJUDICATION

29. What is adjudication? Is it a mandatory dispute process?

Adjudication is a dispute resolution process, whereby a certified adjudicator is appointed to determine a dispute between parties to a contract or subcontract based on facts submitted in writing by the parties within the short legislated timeframe. Typically, there will be no oral hearing.

The adjudication process is mandatory if one party to the contract or subcontract issues a notice of adjudication to the other contracting party with whom it has a dispute.

30. What can be the subject of an adjudication?

The valuation of work or services and materials furnished under a contract or subcontract can be the subject matter of an adjudication, as can an issue involving non-payment, including major and minor lien funds, and a written change order, whether approved or not, or a proposed change order.

Any other matter in dispute in relation to the contract or subcontract can be adjudicated if the parties agree.

training courses required by the Nominating Authority, and sufficient knowledge of dispute resolution processes, contract law, and other requirements listed in the Regulations to the legislation.

- 38.** Am I protected from an adjudicator being biased or conflicted if they have a relationship with the other party?

Yes, an adjudicator will have to comply with a Code of Conduct issued by the Nominating Authority that will include an adjudicator declaring any conflicts prior to being engaged by the parties. Bias will be a ground for judicial review of the adjudicator's determination.

- 39.** What if my contract requires disputes to be addressed through mediation, arbitration or Court proceedings?

Those proceedings can still proceed, after or at the same time that an adjudication is underway.

- 40.** What if there is an existing Court proceeding relating to the same issue that is referred to adjudication?

If a party has commenced a Court action with respect to a dispute before a notice of adjudication has been issued, a party cannot refer that matter to adjudication.

- 41.** Can an adjudicator refuse to hear an issue in dispute?

Yes, if the adjudicator feels that the matter in dispute is frivolous and vexatious, or is not eligible for adjudication because it does not relate to the issues listed in the legislation.

- 42.** What is the effect of an adjudicator's determination?

The determination of the adjudicator is binding on the parties involved in the adjudication, unless a Court order is made in respect of the dispute, a party applies for judicial review of the adjudicator's determination, the parties agree to appoint an arbitrator following the conclusion of the adjudication process, or have agreed in writing to a resolution of the dispute.

- 43.** Can I stop work if I am not paid following the adjudicator's determination?

An adjudicator may order that a party make a payment due to the other party within a specified time period allowing the other party to stop performing work or services, or providing goods or materials, under the contract or subcontract, if the time for payment specified in the adjudicator's order has expired.

- 44.** What are the grounds for appealing a determination of the adjudicator?

The determination of an adjudicator is subject to judicial review on very specific and narrow grounds including the fact that the adjudication was conducted in a manner that prejudiced a party's right to a fair adjudication.

- 45.** What is judicial review?

Judicial review is like an appeal to a Court to review the adjudicator's decision, but is limited to procedural issues

or the conduct of the adjudicator. An error in law or fact, or disagreeing with the determination of the adjudicator does not allow a party to apply for a judicial review.

- 46.** Is the determination of the adjudicator put on hold or stayed pending the judicial review?

Yes, the determination of the adjudicator is stayed pending the outcome of the judicial review.

- 47.** Can an adjudication be terminated after it has started?

Yes, it can but only by the consent of the parties or the withdrawal of the adjudicator.

- 48.** Can I still bring or be subject to a Court or arbitral proceeding even though the matter in dispute has been determined by adjudication?

Yes, nothing in the legislation restricts the authority of the Court or an arbitrator from considering the merits of a matter determined by the adjudicator.

D. CONSOLIDATION

- 49.** Under what circumstances can an adjudication be consolidated with another adjudication?

If a party is involved in more than one adjudication they can request the adjudicator conducting the first adjudication for a consolidation of all of the adjudications in progress into one adjudication.

- 50.** Who decides if adjudications can be consolidated?

Only the adjudicator can decide to consolidate adjudications upon the request of a party who is involved in more than one adjudication.

- 51.** Who becomes the adjudicator of the consolidated adjudication?

The relevant Nominating Authority will either appoint the adjudicator who ordered the consolidation or appoint a completely new adjudicator.

E. TRANSITION PERIOD

- 52.** Does the legislation affect contracts and subcontracts entered before the legislation takes effect?

No, the existing Builders' Lien Act will apply. The Prompt Payment and Construction Lien Act will not apply.

For contracts entered into before the new legislation comes into effect, prompt payment, the extended lien period and the opportunity to adjudicate disputes will not apply, except if the duration of the contract is scheduled to remain in effect for longer than two years from August 29, 2022. After two years, the new legislation will apply to the contract, and the contract must revise its terms accordingly, allowing for a two year grandfathering period.

53. What if the prime contract is entered into before the legislation becomes effective and a subcontract is entered into after the effective date of the legislation?

The old provisions will apply to contracts entered into prior to the legislation becoming effective, and the new provisions will apply to contracts entered into after the legislation becomes effective on August 29, 2022. Subcontracts will follow the date of the contract between the contractor and the owner, regardless of whether or not the subcontract was entered into after August 29, 2022.

54. Does the transition period relate to both the payment and builders' liens parts of the new legislation, and if so, how?

Yes, both prompt payment requirements and lien rights are subject to the same transitional period, so it will be important to know the date of execution of the contract or subcontract and the date the legislation comes into force in order to determine if your lien rights are the shorter or the longer periods under the new legislation or if the prompt payment and adjudication provisions apply.

Parties will want to ensure that their accounting systems are able to process partially approved proper invoices, since the legislation requires undisputed portions of proper invoices to be paid.

Parties will have to adopt tracking systems to ensure compliance with the mandatory time periods with respect to the issuance and payment of proper invoices, differing lien periods and release of holdbacks, and issuance of notices of non-payment and notices of dispute in the proper forms, when and as required.

As well, in the event of an adjudication, project documents will have to be up to date and accessed in very short time periods to initiate or respond to disputes in very tight time frames.

57. How will the new legislation affect my financing, insurance or bonding facility?

You should check to see if there are gaps between the availability of the financing you need and the timing of your obligations to pay. Payment process under a typical loan agreement are not bound by the timing or processing of invoices or payment, so parties will want to ensure that their financing terms align with the cash flow requirements in order to meet the mandatory obligations under the new legislation.

There will be little if any impact on your insurance other than the fact that determinations made pursuant to the adjudication process may not be binding on a party's insurer given the terms and conditions of the applicable insurance policies.

There will still be a need for bonding to ensure performance and payment in circumstances currently covered by surety bonds like an insolvency.

58. What are some of the lessons learned from Ontario's prompt payment legislation?

Invoicing and payment happens in a more structured, reliable and consistent basis, rendering invoicing and payment a much more formal process.

The ability to have a dispute adjudicated encourages parties to address their differences during the undertaking of the work. In the event that you are required to initiate or participate in an adjudication, it will be critical to have access to project records in order to advance or defend your position.

➤ F. GETTING PREPARED

55. Should I be revising my contracts and subcontracts, and if so, what provisions should I be adjusting?

Parties will need to revise their contracts and subcontracts to reflect the new requirements with respect to invoicing and payment, and the mandated adjudication process.

One should ensure that their contracts and subcontracts include terms and conditions consistent with the new legislation with respect to what needs to be included in a proper invoice, the timing of invoicing and payment, how change orders are to be authorized, an applicable interest rate, where and to whom notices should be provided, and what happens if a notice of dispute or adjudication is issued.

56. What internal administrative processes should I be reviewing and possibly adjusting?

The new payment regime will impact most if not all of your internal team including project managers, accounting and finance.

In particular, a party should be reviewing their internal processes in relation to the issuing, receipt and processing of invoices and payments. As financing terms may not align with payment obligations, more attention may need to be directed to your financing arrangement and cash flow.

For instance, the payment period and the timing of certifying work before payment is much shorter, so administrative processes and contracts with third party consultants will need to be reviewed and revised.

Your internal systems should accommodate the posting of certificates of substantial performance electronically.

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

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