

ALBERTA PROMPT PAYMENT AND CONSTRUCTION LIEN ACT FREQUENTLY ASKED QUESTIONS

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



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.

the 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

> D. CONSOLIDATION

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.

- 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.

> 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.

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.

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

FAQ Update March 24, 2022

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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 felt 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 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.

FAQ July 18, 2022

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ALBERTA PROMPT PAYMENT AND CONSTRUCTION LIEN ACT

FREQUENTLY ASKED QUESTIONS - ISSUE N° 3

COMPLIMENTS OF GOWLING WLG CONSTRUCTION LAW GROUP

> A. APPLICATION OF THE PROMPT PAYMENT LEGISLATION

110. Do renovations of existing buildings count as an improvement of land?

Yes, renovations are considered an improvement in land.

111. Does this legislation apply to insurance companies?

As insurance services provided with respect to a project have not been considered to be an improvement in land, it is unlikely that the legislation applies to insurance.

112. Does the new legislation include temporary structures and services such as scaffolding?

Yes, temporary works are included in the new legislation as long as they are part of an improvement to land.

113. Does the new legislation include maintenance and operations?

Not normally, but potentially, if the maintenance work, services, goods or materials constitute an improvement to the land. For example, replacement of a piece of equipment or fixing a structural component may be considered as an improvement, and thus subject to the new legislation. Lubrication of an existing piece of equipment would likely not be considered an improvement and would not be included in the prompt payment legislation.

Most likely, work, services, goods and materials provided strictly with respect to the operations portion of a project would not be considered an improvement and therefore not be subject to the prompt payment legislation.

Note that because P3 projects involving the Alberta Government are expressly excluded from the legislation,

maintenance and operations with respect to a P3 project with the Alberta Government are excluded even if they would otherwise be considered improvements.

114. We have a large customer who has indicated that they will not be participating in the requirements of the prompt payment legislation. If we insist that they comply with the prompt payment legislation we risk the loss of a client. What can or should we do?

You are at risk if your customer does not comply with the prompt payment legislation. It means that your invoices will not get processed in accordance with the legislated requirements and you will not be able to comply with the prompt payment legislation when those parties below you in the construction chain insist that you comply. No matter what your customer is doing, you will be obligated to pay your subcontractors in accordance with the requirements of the legislation, notwithstanding the fact that party above you in the construction chain is not doing so. Your customer's non-compliance will not be a legitimate reason for you not to comply with the legislation, so every reasonable effort should be made to convince your customer to comply with the legislative requirements, otherwise you will be stuck with this risk if you decide to continue to work for the customer. You can advise your customer that the prompt payment legislation will apply regardless of the contractor it chooses.

115. Any thoughts that this legislation will be applied to industries other than construction in the future?

We understand that other jurisdictions – the United Kingdom for instance – have not expanded prompt payment legislation to other industry sectors. We do not foresee the immediate expanded application of this type of legislation in Alberta.

> B. PAYMENT

- 116.** Does the prompt payment legislation address the situation where the owner becomes insolvent?

No, but the existing builders' lien provisions give rights to contractors and subcontractors if the owner becomes unable to pay. Contractors and subcontractors may also have access to labour and material payment bonds. Given that payment is due at specific shortened times throughout the construction chain, ideally the amount owed to a party at the time of the insolvency will be less as accounts should be more up to date.

- 117.** Will owners and contractors be allowed to apply a discount fee for prompt payment?

Prompt payment is a legislated requirement, and will apply whether or not the parties agree to a discount.

- 118.** Does a contract's payment terms override the prompt payment legislation?

No, legislative requirements will take precedence over any contractual provisions that are inconsistent, although you can agree contractually to more favourable terms than the legislation provides. Note that the legislation does allow the parties to agree to certain terms – for example to use electronic means for the posting of a certificate of substantial performance.

- 119.** Do credit terms agreed to by both parties supersede this legislation, i.e. a supplier of permanent material with net sixty or net ninety day payment terms?

The legislated requirement for the contractor to pay subcontractors within seven days of payment by the owner twenty-eight days after the owner's receipt of the proper invoice will supersede whatever else is agreed in the contract or subcontract.

- 120.** If an owner fails to pay within twenty-eight days and the contractor doesn't file for adjudication, are there any consequences to the owner?

The legislation does not levy any penalty against the owner if the owner does not pay a proper invoice within the twenty-eight day period, other than the accrual of interest on the amount that is due and payable. However, if the contractor does not initiate and proceed with an adjudication with the owner, the contractor may face an adjudication for the unpaid amount from a subcontractor even though the contractor has lost the right to claim the corresponding amount from the owner through adjudication.

- 121.** What if the owner refuses to pay for materials delivered but not incorporated?

The owner should pay for materials when they are "furnished". Materials are considered "furnished" when they are delivered to the land on which they are to be used or to such land in the immediate vicinity as may be designated. An owner who does not pay for these materials will risk adjudications and builders' liens.

- 122.** Does the prompt payment legislation place a lot more pressure on contractors to work with the project consultants and their own subcontractors? After all, ordinary practice is for the contractor to determine the status of the progress of the work with input from the subcontractor and seek certification from the consultant before sending its invoice to the owner. If so, how will this impact consultants' performance?

Yes, prompt payment will require additional diligence by all parties, as proper invoices will need to be vetted within the mandated fourteen day period. Properly vetting the invoice beforehand should alleviate the necessity for formal notices and disputes.

- 123.** In a case where a contractor has submitted a proper invoice to the consultant and copied the owner; however, the consultant holds off issuing their certificate of payment, would the trigger for payment of the proper invoice be the date it was sent to the consultant, or the date the certificate of payment was issued by the consultant to the owner for payment?

Certification of payment by the consultant cannot be a pre-condition of the issuance of the proper invoice. Consequently a pre-condition of the timing of payment is only relevant to allow the owner to determine if it is paying all or part of a proper invoice within the twenty-eight day period or disputing all or part of the proper invoice by issuing a Notice of Dispute – Form 1 within fourteen days of receiving the proper invoice.

Copying the owner would constitute the "giving" of the proper invoice to the owner as required under the legislation. If only the consultant is sent the proper invoice, and the owner is not provided with a copy of the invoice, then the proper invoice may not have been "given" to the owner and no payment will need to be made by the owner to the contractor. Thus, unless the prime contract authorizes the consultant to receive proper invoices as the owner's agent, a copy of the proper invoice should be sent directly to the owner.

- 124.** Is it up to the prime consultant, architect, engineer or independent consultant to monitor the invoicing cycles?

It may be a contractual term of the consultant's contract to monitor the invoicing cycles, but it is the statutory responsibility of the contractor to issue a proper invoice every thirty-one days.

125. How do you pay an invoice that's incorrect?

There is no obligation under the legislation to pay an invoice that is incorrect. A party has an opportunity to dispute all or any part of an invoice using the Notice of Dispute and Notice of Non-Payment Dispute Forms 1-5 mandated by the legislation. Any undisputed portions must be paid in full.

126. If the timeline may get extended for payment, does the legislation set out a set interest fee amount for delayed payment? Or is that something set out in contracts if something were to go in the way of a dispute.

The prompt payment legislation expressly provides that interest will be paid on late payments on proper invoices at rates prescribed by the Regulations to the legislation.

127. How will prompt payment apply to non-profit clients like CMHC-funded projects that have to wait for federal funding money before being able to pay?

If the projects are federally funded then they might be considered Federal projects and not be subject to the Provincial prompt payment legislation. Otherwise, prompt payment applies regardless of whether they are for-profit or non-profit, and regardless of whether funding has been advanced.

128. Is the subcontractor's ability to inquire on the status of accounts between an owner and a contractor limited to a specific project only, or if there are multiple projects on multiple lands, can the inquiry include the status of all accounts between the companies in total?

The inquiries must be made on a contract by contract basis.

129. Should a subcontractor miss the deadline for the submission of an invoice for work completed, and therefore is not included in the contractor's proper invoice to the owner, can the subcontractor's invoice be rejected by the contractor until the next month of progressive invoicing?

Depending on the subcontract terms, the invoice would simply be held and included in the subsequent proper invoice submitted by the contractor to the owner and in the interim no monies would be due and payable to the subcontractor from the current proper invoice.

130. If the seven day period by which the contractor is to provide payment to a subcontractor is triggered by the date of payment by the owner, not the date of the proper invoice, does this put subcontractors at risk of pay when paid?

The prompt payment legislation establishes a conditional pay when paid regime by managing the risk of non-payment by mandating specific tight time lines for payment by the owner and contractor, requiring notices of non-payment, payment of undisputed amounts, and requiring the contractor to initiate an adjudication with respect to any disputed payments no later than

twenty-one days after giving a Notice of Non-Payment to the Subcontractor, failing which the contractor will be obligated to pay the subcontractor.

The only situations where the pay when paid regime prejudices the subcontractor's ability to get paid is if the contracting parties do not comply with the legislation or the owner becomes insolvent. If the owner becomes insolvent, one must rely on other remedies like good credit practices including appropriate contractual terms, issuing timely invoices, builders' lien rights and labour and material payment bonds. Given that payment is due at specific shortened times throughout the construction chain, ideally the amount owed to a party at the time of the insolvency will be less as accounts should be more up to date.

131. In Ontario, the date of the proper invoice determines the payment timelines down the construction chain. If the date of the owner's payment to the contractor triggers the seven day timeline for payment to the subcontractors, isn't prompt payment to the subcontractors effectively defeated?

No, as the Alberta legislation addresses the risk of non-payment to subcontractors by mandating specific, tight time lines for payment by the owner and contractor, requiring payment of undisputed amounts and notices of non-payment for any amounts not paid, together, with requiring the contractor to adjudicate any disputed amounts within a short timeframe. Thus payments should either be made, or disputed payments adjudicated, promptly.

132. Based on Ontario's experience with filing proper invoices, has the industry found that subcontractors are asked to generate different invoice formats for different contractors and or projects?

Based on the experience in Ontario, there is no standardized proper invoice. However, given that the basic requirements of a proper invoice are mandated for the most part by the legislation, and are, with minor exceptions, consistent with current industry practices, there may be minor adjustments to invoices rendered by subcontractors but invoicing requirements should remain fairly standardized. As is the case now, a subcontractor becomes familiar with the contractor's invoicing requirements the more projects they become involved in with the contractor.

133. Are pay when paid clauses allowed?

Pay when paid clauses are allowed so long as the parties still comply with the legislation. The strict conditions set out in the prompt payment legislation must be complied with. Payments must be made within specific time periods unless formally disputed by the issuance of the appropriate formal notice again within specific time periods. Pay when paid clauses that are inconsistent with the requirements of the prompt payment legislation are not permitted and will not be enforceable.

Pay when paid clauses will be largely useful to a party who complies with the legislation but still does not receive payment as that party can rely on the provisions of the prompt payment legislation to compel payment once the applicable time periods for payment have expired and a Notice of Non-Payment or Notice of Payment Dispute is not issued by the non-paying party. The party obligated to pay has to either formally dispute the obligation to pay or pay, both within the time periods required by the legislation.

- 134.** Under contracts involving an integrated project delivery model, the invoices need to be approved by the project manager. Will this be allowed?

Yes, but the timelines for issuing and paying a proper invoice, as well as the requirement to issue a Notice of Dispute if there is a dispute, will still apply. Under the legislation, the ability to issue a proper invoice cannot be subject to the approval of the project manager or anyone else.

➤ C. NOTICES OF DISPUTE AND NON-PAYMENT

- 135.** If the owner disagrees with the proper invoice, can the owner simply ask the contractor to resubmit or must the owner issue a Notice of Dispute - Form 1?

The owner may ask the contractor to resubmit a proper invoice if it is within fourteen days of the date of the owner's receipt of the proper invoice and the contractor agrees to do so, otherwise, the owner will be obligated to issue a Notice of Dispute – Form 1 within the fourteen day period. The legislation allows the contractor to revise and resubmit a proper invoice as the parties agree, but the date of the proper invoice cannot change and the proper invoice must continue to meet the requirements of the legislation. This means that a revised proper invoice will not reset the prompt payment time lines.

- 136.** Must we use the Forms required by the Regulations to the legislation to provide notices of non-payment and dispute, or can we use a letter in lieu?

The legislation requires you to use the Forms.

- 137.** In the case of receiving a Notice of Dispute - Form 1 from the owner within the fourteen day period, can the contractor revise the invoice without resetting the twenty eight day payment period?

Yes, the legislation allows a contractor to revise its proper invoice as long as the parties agree to do so, the date of the proper invoice is not changed, and the proper invoice continues to meet the requirements of the legislation.

- 138.** Are owners and contractors required to confirm receipt of a proper invoice triggering the timeline for payment of the issuance of a Notice of Dispute – Form 1?

No, the legislation does not require the owner to either acknowledge or confirm receipt of a proper invoice. However, this can be included as a contract term.

- 139.** If there is a proper invoice issued by the contractor to the owner with one line item that is disputed by the owner, is the owner obligated to promptly pay the remainder of the invoice?

Yes, the owner is obligated to pay that portion of a proper invoice that is not disputed.

- 140.** Do copies of the Notices of Non-Payment or Notices of Non-Payment Dispute to subcontractors have to be provided to the owner?

There is no requirement in the legislation that requires any Notices being provided to subcontractors be also provided to the owner, nor is there a requirement for subcontractors to provide the Notices sent to their sub-subcontractors to the contractor. However, this information may need to be disclosed as part of providing a Statutory Declaration as a pre-condition of payment.

- 141.** Are owners going to require greater detail from contractors in their statutory declarations - i.e. divulging Notices of Non-Payment Disputes - Form 3 issued by contractors to a subcontractor, or adjudications with subcontractors?

Yes, we think that this is likely. Non-payment of a subcontractor would have to be disclosed, so if payment is in dispute as a result of the issuance of a Notice of Non-Payment Dispute, at least the existence of the dispute may have to be disclosed.

- 142.** If a contractor wants to pay a sub-subcontractor directly, with the subcontractor's blessing, does the contractor still need to issue a Notice of Non-Payment Dispute - Form 3 to the subcontractor, as the subcontractor isn't receiving payment from the contractor?

By paying the sub-subcontractor directly, with the consent of the subcontractor, the contractor is in effect paying the subcontractor, so the contractor would not need to issue a Notice of Non-Payment Dispute – Form 3.

- 143.** Do contractors only have fourteen days to dispute an invoice from subcontractors as well?

The fourteen day period does not apply to disputes between a contractor and its subcontractors, only between owners and contractors.

Contractors have seven days from receiving a Notice of Dispute – Form 1 from the owner, provided by the owner within fourteen days of receipt of the proper invoice, to advise its subcontractor that it will not be paying that subcontractor by issuing a Contractor's Notice of

Non-Payment – Form 2, so the period of time the contractor has to dispute a subcontractor's invoice when the owner does not pay is potentially twenty-one days from the date of the owner receiving the contractor's proper invoice.

If the owner pays the contractor within the required twenty-eight days from receiving the proper invoice, and the contractor has a legitimate reason not to pay its subcontractor, the contractor has to provide a Notice of Non-Payment Dispute – Form 3 to its subcontractor within seven days of receiving payment, so the period of time the contractor has to dispute a subcontractor's invoice when the owner pays is potentially thirty-five days from the date the owner receives the proper invoice.

to recover finance charges, the materials submitted to the adjudicator would have to include a claim to recover those financing charges and provide grounds and evidence to support that entitlement.

- 149.** If the owner disputes the last invoice and the project is completed, can this matter be taken to adjudication?

Yes, payment of the last invoice can be taken to adjudication. The legislation refers to the last date that the contract or subcontract is complete – not the last date that the project is complete. Arguably, until the payment issue relating to the last invoice has been addressed, the contract or subcontract is not complete. Note that the owner's dispute would have to be identified in a Notice of Dispute – Form 1 issued within fourteen days of receipt of the contractor's proper invoice, so the adjudication process should be initiated right away as required by the legislation.

- 150.** Will using adjudication result in savings?

Yes, adjudication will unquestionably result in significant savings and time. The adjudication process is designed to provide a determination of an issue in dispute in a very tight time frame and at a cost much less than a Court or arbitral proceeding.

- 151.** Can you adjudicate an unapproved change order?

Yes, a dispute relating to an unapproved change order can be referred to adjudication, as can proposed change orders.

- 152.** When adjudication must be started before completion, what does "completion" mean?

The legislation refers to the last date that the contract or subcontract is complete – not the last date that the project is complete. The definition therefore depends on the terms and conditions of the contract, and may in fact include warranty periods if provided for as an obligation under the contract, although we do not think that this was the intent of the legislation.

- 153.** What constitutes "full particulars" of a dispute?

The submission to the adjudicator needs to provide full particulars of the claim, including the relief being sought, the documentary evidence to support the claim, including the authority by which a party is entitled to the claim, so that the adjudicator can make an informed determination of the issue in dispute based on the party's submission.

- 154.** How is the adjudicator assigned?

The disputing parties can agree to an adjudicator at the time the dispute arises, but not in advance in their contract or subcontract. If they cannot agree to an adjudicator, a Nominating Authority will appoint a suitable adjudicator from their roster of qualified adjudicators.

> D. ADJUDICATION

- 144.** Does the new legislation require adjudication or can a referee be used as an intermediate step?

The new legislation requires the use of adjudication once a Notice of Adjudication has been issued by a party to the contract; however, any other process mandated by the contract can be used in addition to, but not in substitution of, adjudication to address a matter in dispute before or following an adjudication if the parties have agreed in writing to do so.

- 145.** Typically how long does the judicial review take?

Judicial review is not a summary process and could take a considerable period of time given current Court schedule commitments, anywhere from six months to a year.

- 146.** Can a party suspend work before it succeeds in an adjudication?

If a party has a contractual right to suspend work, it can do so whenever the contract allows it to do so. The new legislation allows a party to seek, as part of the adjudicator's order, the right to stop work if it has not been paid in accordance with the adjudicator's determination within the time period specified by the adjudicator.

- 147.** If a dispute is referred to adjudication but then the parties resolve the issue after the fact, how is the Notice of Adjudication dismissed?

It would be a condition of the resolution that the Notice of Adjudication be withdrawn using a formal letter signed by both parties and submitted to both the adjudicator and the Nominating Authority with the payment of any of the adjudicator's fees that are outstanding, if any, as of the date of withdrawal.

- 148.** Can finance charges apply if adjudication happens and it was determined that the owner's reasons for non-payment are not valid?

The legislation allows a successful party to recover interest on unpaid amounts, but does not specifically deal with the recovery of financing charges. To attempt

155. Who are the certified adjudicators?

Adjudicators are individuals with expertise and work experience of at least ten years in the construction industry who have been qualified to act as an adjudicator by a Nominating Authority and agreed to be bound by the code of conduct of the Nominating Authority and comply with the requirements of the prompt payment legislation.

156. Who pays for adjudication?

Typically, the parties share the costs of adjudication. However, the adjudicator can order that the unsuccessful party pay some or all of the other parties' share of the adjudication costs.

157. If a contract establishes arbitration for resolution of disputes, does that prevail over adjudication?

Adjudication is a mandatory process, unless a Court or arbitral process dealing with the same issue is already underway. An arbitration can proceed on the same issue following the adjudication if required by the contract or agreed to in writing by the parties.

Note that the decision of the adjudicator is meant to be interim and binding, not final and binding, leaving open the other dispute process agreed to by the parties to the contract. Pending a decision in those other processes, the determination of the adjudicator must be complied with, subject to judicial review or a resolution of the matter in dispute by the parties following the adjudication. A subsequent determination in a Court or arbitral proceeding will take precedence over the determination of the adjudicator, but may also coincide with the

determination of the adjudicator with respect to the same issue.

158. Will a subcontractor stopping work during a period of non-payment of an adjudicator's determination harm its position during judicial review?

No, it will not be relevant to the judicial review.

159. Does a party waive any rights if it participates in adjudication?

No rights or remedies are waived or forfeited if a party participates in an adjudication.

> E. CONSOLIDATION

160. Are there any time restrictions on when a party must apply to consolidate adjudications?

A consolidation of adjudications will not be allowed if more than five calendar days have passed since all documents and information in support of the parties' submissions have been provided to the adjudicators in the respective adjudications.

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

FAQ July 28, 2022

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