

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.

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