

Construction Act revisions mean prompt payment for Ontario's contractors

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The second round of major revisions to Ontario's Construction Act came into force on Oct. 1, 2019, ushering in statutory prompt payment provisions and mandatory adjudication.

Need for prompt payment

Although industry standard payment terms are 30 to 45 days, actual payment regularly exceeds 70 days. These unsustainable delays mandate a fresh approach.

The new process starts when the contractor gives the owner a prescribed "proper invoice," which includes many of the details contractors already have in their invoices. Contractors must render invoices every 30 days, unless otherwise agreed.

Giving an invoice triggers a 28-day deadline for payment. An owner who disputes an invoice must, within 14 days of receiving the invoice, deliver a prescribed notice setting out all the reasons for non-payment. The owner must also pay the undisputed portion of the invoice.

If the contractor receives payment within 28 days, the contractor has seven days to pay its subcontractors. What follows are cascading seven-day payment obligations down the construction pyramid.

If the contractor has not received payment, the next step depends on whether the contractor received a 14-day notice of non-payment from the owner.

If the contractor receives notice from the owner, the contractor must give its own notice to its subcontractors to avoid payment.

If no notice was received, the contractor must pay the subcontractors – unless the contractor gives the subcontractors notice that payment was not received from the owner. If the contractor chooses this course, it must also provide an undertaking to commence an adjudication to collect the funds within 21 days. Again, similar obligations flow down the construction pyramid.

Enforcement through Adjudication

The new legislation provides for adjudication as a quick and inexpensive system of dispute resolution.

The rules allow contracting parties to refer a matter to adjudication on prescribed issues, including the valuation of services or materials, payment of unapproved change orders, set-offs and non-payment of holdback. As well, parties can refer disputes that are the subject of notices of non-payment to adjudication.

The entire process should last no more than 46 days, and perhaps less. Within that time, the parties must agree on a certified adjudicator or have one appointed, and the adjudicator must establish procedures for the delivery of materials and the conduct of the hearing. Because the procedure is not mandated by legislation, and will be determined by the adjudicator, oral evidence or even oral submissions may not be necessary.

The adjudicator's decision is enforceable through registration with the court. If work remains to be done, the successful but unpaid party will be entitled to demobilize forces and must be paid its mobilization and demobilization costs.

Either party can dispute the result of an adjudication by commencing an action or arbitration (if the contract provides for arbitration). However, an adjudicator's decision is only subject to judicial review in very limited circumstances, including fraud, incapacity and lack of jurisdiction.

The adjudicator's decision can be filed as evidence on review. However, given the probability that not all relevant facts were before the adjudicator, a judge or arbitrator will likely not be required to give the adjudicator the same deference given to a trial judge on appeal — although that is as yet to be determined.

Parties are free to retain counsel, but there is no "loser pays" regime and the default under the legislation is that parties bear their own costs. Similarly, although the parties are at liberty to select an adjudicator and agree on the adjudicator's fees, they must split the costs of the adjudication.

Transition Provisions

These much-anticipated additions to Ontario's Construction Act came into force on Oct. 1, 2019, and do not apply to contracts entered into prior to that date. The provisions will not apply,

however, if the procurement process started before Oct. 1, 2019, even if the contract is dated thereafter.

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