

ALBERTA PROMPT PAYMENT AND CONSTRUCTION LIEN ACT

FREQUENTLY ASKED QUESTIONS - ISSUE N° 4

COMPLIMENTS OF GOWLING WLG CONSTRUCTION LAW GROUP

> A. APPLICATION OF THE PROMPT PAYMENT LEGISLATION

161. Are suppliers subject to prompt payment?

Yes, the definition of subcontractors in the legislation includes suppliers.

162. For projects that have both new and turnaround work, does the Prompt Payment Act apply?

Turnaround work is not subject to the Act, but new improvements are. Parties can avoid confusion by separating the contracts for turnaround work from the new improvements.

> B. PAYMENT

163. How detailed of a description of the work is required for an invoice to be proper?

The legislation does not prescribe the level of detail needed to describe the work performed, so a basic description will likely be minimally compliant. However, practically speaking, sufficient detail will likely ease verification of the invoice for payment.

164. When does the clock start on invoicing? Is it the go ahead from the owner to start the work?

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.

165. What if our suppliers invoice more frequently than every thirty-one days - some invoice daily or weekly?

The prompt payment legislation allows parties to agree

to shorter invoicing periods. Unless the contract between the contractor and the owner shortens the contractor's invoicing period, the contractor will still only need to issue its proper invoice every thirty-one days.

166. What if the contract has milestone payments but the subcontractors want payment every month?

The requirement for the contractor to pay subcontractors within seven days of payment by the owner (which occurs twenty-eight days after the owner's receipt of the proper invoice) will govern. So, if payment under the prime contract is based on milestones, a party should make sure that the payment terms of the subcontracts align with the payment terms of the prime contract. If the prime contract and subcontract terms do not align, and the subcontract specifies monthly payments, the contractor will be contractually obligated to pay subcontractors monthly even though the contractor will only be paid by the owner upon achieving milestones.

167. If you miss a thirty-one day invoice period, does it then roll over to the next thirty-one days?

As far as the contractor and owner are concerned, invoicing would roll over to the next invoicing period; however, if any subcontractors have rendered invoices during the prior period, they would expect payment and not be obligated to wait until the next thirty-one day invoicing period for the contractor's payment if the initial thirty-one day period is missed by the contractor.

168. What is the purpose of a nil invoice being issued every thirty-one days and what are we expecting as a response to a nil invoice?

Since the legislation requires invoicing every thirty-one days, regardless of whether the contract is paid in some other fashion, the issuance of a nil invoice simply provides for compliance with this requirement of the legislation

notwithstanding that no payment may be due under the contract. Note that the legislation does not expressly allow for or mention the use of nil invoices.

- 169.** When submitting the proper invoice to the owner should the contractor obtain a signed form confirming that the client received the invoice, so that the contractor has legal confirmation of the date received?

If there is potential that the date of receipt of a proper invoice will be disputed then it may be prudent to include in the invoicing process an acknowledgment of receipt of the proper invoice by the owner, or some other process which will substantiate the date of receipt.

If the payment process set out in the contract provides for electronic submission of proper invoices then an electronic acknowledgment of the delivery of the proper invoice may constitute sufficient evidence of receipt.

- 170.** What if the contractor doesn't submit invoices but pays the subcontractors anyway?

There is nothing in the prompt payment legislation that precludes this. By paying subcontractors without submitting a proper invoice, the contractor will assume the risk of non-payment by the owner. If the owner does not pay, the contractor cannot later issue a Notice of Non-Payment – Form 2 or Notice of Non-Payment Dispute – Form 3 to the subcontractors to try and recover or dispute the subcontractor's entitlement to the funds paid.

- 171.** Are the days referenced "calendar days" or "business days", and do they exclude weekends or statutory holidays?

The timelines relating to payment are expressed in simply "days" so every day counts when calculating the thirty-one days to issue a proper invoice, the twenty-eight days to pay the contractor, the seven days to pay a subcontractor, and all Notices of Non-Payment and Notices of Non-Payment Dispute. Deadlines that fall on a Sunday or statutory holidays will carry over to the following day, but Saturdays are included in the calculation of "days".

However, certain adjudication timelines are defined as "calendar days", which also omit Saturdays, as well as Sundays and statutory holidays.

- 172.** How does the thirty-one day invoicing period apply to master services agreements or standing agreements with sixty-day terms?

The prompt payment legislation contemplates separate contracts for separate improvements, so purchase orders under a master services agreement or standing agreement will each be considered new "contracts" under the legislation. Regardless of the payment terms of the master services or standing agreements, the thirty-one day period mandated by the prompt payment legislation will govern as well as the twenty-eight day

payment requirement. Sixty-day contractual terms in the master services or standing agreements will have no effect once the prompt payment legislation comes into effect and existing contracts are transitioned into the prompt payment regime after two years.

- 173.** If a proper invoice is issued early on a month (i.e. submit on the 28th due to a holiday), does that mean that the next invoice has to be early as well due to the thirty-one day cycle? Or can you go back to end of month billings?

Practically speaking, the proper invoice will be sent on a monthly basis, rather than strictly on each 31st day, so proper invoices issued early one month will not likely affect the timing of the billing the next month.

- 174.** Do we now need to timestamp invoices, to avoid back-dating or inaccurate dates?

Only the contractor's proper invoice to the owner is subject to a legislative deadline, and that deadline relates to the receipt by the owner. Thus, requiring the owner to confirm the date of time of receiving the proper invoice is advisable.

- 175.** Are there any penalties for not meeting the deadline for rendering proper invoices?

No, the legislation does not provide for a penalty to a contractor for missing the deadline to render a proper invoice. However, delaying the proper invoice delays payment by the owner, which risks causing adjudications and builders' liens from unpaid subcontractors who have issued invoices to the contractor.

- 176.** Is there a grace period for the invoicing deadline?

No. The invoicing deadline of every thirty-one days is a legislative requirement and no grace period is provided for in the legislation.

- 177.** What if the Owner rejects the proper invoice though the subcontractors' invoice and backup were adequate?

The contractor is obligated to issue a notice of non-payment to the relevant subcontractors, pay the subcontractors proportionally from the amount, if any is paid by the owner, and then commence an adjudication against the owner within 21 days. During that time, the parties are free to negotiate a resolution.

- 178.** What happens if a subtrade misses the timeline to be included in the contractor's proper invoice to the owner?

Though the legislation would notionally permit a contractor to submit an additional proper invoice specifically for the missing subcontractor's invoice, the owner could object given that it only has fourteen days to consider and dispute any aspect of the original proper invoice. The issuance of an additional proper invoice would not extend this time period. Thus, the missing subcontractor's invoice would likely be included in the next month's proper invoice, and the subcontractor would have to wait the additional month for payment.

- 179.** Must subcontractors also issue nil invoices every thirty-one days?

No. Only the contractor has the thirty-one day deadline to issue proper invoices, not subcontractors. Subcontractors need only bill for the work they perform based upon the timelines agreed to in the subcontract.

- 180.** How can a subcontractor verify that the contractor has included the subcontractor's invoice in its proper invoice?

The legislation does not give the subcontractor a mechanism to do so, though it will become apparent on the owner's next payment that the subcontractor's invoice was not included in the contractor's proper invoice. The contractor not including the subcontractor's invoice risks the subcontractor starting an adjudication to compel payment of its invoice.

C. FORMS 1-5: NOTICES OF DISPUTE AND NOTICES OF NON-PAYMENT

- 181.** Can a set-off against a proper invoice be claimed from a set off on an unrelated project, even if in a different province?

Yes, if permitted by the contract.

- 182.** Is the contractor obligated to provide the owner's Form 1 if it issues a Form 2 to subcontractors?

Yes, the contractor must also provide the owner's Form 1 to subcontractors as soon as possible.

- 183.** Is the contractor required to stay within the reasons for non-payment in Form 1, or can it add additional reasons for not paying the subcontractor?

The contractor can add reasons for non-payment to those stated by the owner in the Form 1, bearing in mind that at stake will be an invoice which the contractor represented to the owner was "proper" for the owner to pay.

- 184.** How do the Forms operate when payments down the construction chain are frozen due to registration of a builders' lien?

Parties should still issue the required Forms even when a builders' lien freezes payments down the construction chain. The reason for non-payment in those forms could simply be the registration of the lien, together with any other reasons for non-payment.

- 185.** What does it mean that a party failing to issue a proper notice of dispute or notice of non-payment becomes 'obligated to pay'? What are the enforcement mechanisms?

A party is obligated to pay all amounts that are not subject to a notice of dispute or notice of non-payment. If a party misses issuing that notice, it loses the legislative protection to not pay. The party seeking payment can

begin an adjudication for the amount owed.

- 186.** If a change order has not been approved by the contractor, do the Forms apply, and how do the prompt payment timelines work?

The Forms apply to amounts included in a proper invoice. If the contractor has not approved a subcontractor's change order, it will likely not include the change order in its proper invoice. Neither the Forms nor the prompt payment timelines apply until it does.

The subcontractor, however, will be entitled to start an adjudication for the amount of the change order at any time, so a contractor resisting approval of a change order will risk an adjudication being initiated the subcontractor.

- 187.** If the contractor receives a partial payment and a Form 1, but then is subsequently paid by the owner, must the contractor send the subcontractors the additional payment?

Yes, the contractor is obligated to send all subsequent payments received by the owner, unless the contractor sends a Form 3 Notice of Non-Payment Dispute, which must outline the reasons why the contractor will withhold payment from the subcontractor.

- 188.** If the subcontractor issues an invoice that is missing information required by the subcontract, should the contractor still issue a dispute form to protect itself?

No. If the subcontractor's invoice is missing information, it should not be included in the proper invoice. The notices of dispute or non-payment will only be needed if and when the subcontractor's invoice is included in the proper invoice, and either the owner or contractor decline to pay the amount invoiced.

D. TESTING AND COMMISSIONING

- 189.** Will testing and commissioning apply to the whole project as opposed to only a specific scope of work?

The testing and commissioning pre-condition of the issuance of a proper invoice can apply to the entire improvement or just to the specific work done or materials furnished under the contract. The contract will have to specify what must be commissioned or tested.

- 190.** Is the term "Commissioning" defined in the legislation?

No, it will be up to the contract or subcontract to define. Under the legislation, the testing and commissioning can relate to the improvement, the work done or the materials furnished under the contract.

- 191.** Can owners abuse the testing and commissioning pre-condition?

It is possible, but not likely, but it would be prudent to pay particular attention to the testing and commissioning terms and conditions of contracts. For example, terms

requiring successful commissioning and testing of large scopes of work may preclude the contractor from issuing a proper invoice for that work, meaning the contractor will have to complete those large scopes without interim payments by the owner.

- 192.** Regarding commissioning and testing as a precondition to a proper invoice, what happens if you are working in a phased project (i.e., mechanical scope separated into supply, install, fit-out, then commissioning phases). Does the commissioning precondition apply to early phases?

This depends upon the terms of the contract or subcontract as the legislation does not define what and when testing or commissioning apply. The commissioning and testing requirement must be stated in the contract or subcontract. The contract or subcontract should clearly state which scopes of work or phases must be commissioned or tested in order to avoid disagreements.

- 193.** What if testing and commissioning isn't included at the start in the contract, but insisted upon by the owner afterward?

Any commissioning and testing requirements must be explicitly stated in the contract, and cannot be added on afterward without the contractor's or applicable subcontractor's consent, and cannot be used as a means to delay payment obligations.

E. BUILDERS' LIENS AND HOLDBACK

- 194.** Do the changes to the holdback apply only to projects that are subject to the prompt payment legislation?

Yes, only projects that are subject to the new legislation will be affected by the changes to holdback release.

- 195.** Does the new legislation specify who is to provide copies of the contracts and subcontracts if a request is made by a subcontractor?

The party to whom the request is made is required to produce the copies of the contracts or subcontracts, as applicable.

- 196.** With regard to the annual payment of the holdback, is the \$10M value inclusive of later change orders?

The \$10M value is based on contract price at the time that the contract is entered into.

- 197.** Must owners place holdback in an interest bearing separate account?

No, there is no statutory requirement that owners place holdback monies in a separate interest bearing account, nor in any particular account at all. The owner must simply "retain" the holdback in some fashion.

- 198.** Is there any change in the holdback being deemed held in trust prior to the certificate of substantial performance or is it only deemed to be held in trust afterwards as it currently is under the Builders' Lien Act?

There is no change to the trust provisions. Only monies paid by the owner after issuance of the certificate of substantial performance are held in trust, for the benefit of the party entitled to them. If no certificate of substantial performance is issued, no trust arises.

- 199.** Should the certificate of substantial performance be issued by the prime consultant or the contractor?

Certificates of substantial performance can be issued by a contractor or subcontractor, but are not mandatory. Since regulated architects and engineers who contract with the owner are now considered "contractors", they too can issue certificates of substantial performance. There is no penalty if they do not, except that they cannot receive payment of the accrued holdback at substantial performance, only at completion of the improvement.

- 200.** Who initiates the progressive release of holdback – contractor or owner?

It is the contractor who applies for progressive release of holdback, though the owner is not required to release the holdback unless obligated by the contract. Holdback can be progressively released by the contractor to the subcontractor if so agreed in the subcontract, as subcontract holdback is not required by the legislation.

- 201.** If posting an electronic certificate of substantial performance, what does the contractor need to do?

The ability to post a signed certificate of substantial performance electronically needs to be provided for in the contract and have a reasonable opportunity of being seen by the persons working or furnishing materials. We understand the industry is working together to establish a central electronic deposit where parties can check and find electronic posting of certificates of substantial performance on a project by project or contract by contract basis.

- 202.** Does the new legislation allow for progressive release of holdback when major work elements are completed - i.e. if all piling is completed onsite, the holdback on piling contract can be released?

Yes, the new legislation does not change the progressive release of holdback provisions of the current Builders' Lien Act.

- 203.** Is the annual release of holdback on contracts of a value of \$10M based on the holdback retained on all invoices issued in that year?

Yes, the holdback retained over the course of the year is to be released.

204. For holdback, is the 10% the value of the amount invoiced, or the amount paid?

The 10% holdback amount is based on the amount paid.

205. When releasing holdback annually, do you have to release holdback every month after that?

No, it is only annually, and as otherwise required under the legislation, following the issuance of certificate of substantial performance or upon total performance.

206. Can the owner dispute payment of some of the holdback invoice for missing operating and maintenance manuals or redline drawings?

If those items of work are not provided to the owner but invoiced for by the contractor, then the owner can object to paying for them as the work is not completed. One is not allowed to set-off against the holdback for deficient work, but the owner is not obligated to pay holdback until completion of all of the work notwithstanding substantial performance has been achieved. Not providing these items enhances the risk that the owner will retain the holdback to the end of the project instead of releasing the accumulated holdback amount at the time substantial performance has been achieved.

207. Can the demand for information be issued only to parties with whom you are in a contract?

No. The demand for information – specifically, for copies of contracts or subcontracts, and for statements of accounts – may be sent to the owner, contractor, or any subcontractor, by anyone working on the project, no matter their level in the construction chain.

208. What if the party receiving the demand for information refuses to comply?

The legislation makes the party refusing to comply liable for any losses that the requesting party suffers as a result of the refusal. The requesting party can also apply to Court for an Order compelling the refusing party to comply with the demand.

210. Who can be named as a party to an adjudication?

A party can name anyone with whom it has a contract or subcontract. Therefore, for example, the subcontractor can name the contractor and a sub-subcontractor, but cannot directly name the owner.

211. Can the subcontractor bypass the contractor and adjudicate directly with the owner?

No, a party can only start an adjudication with a party with whom it has a contract or subcontract.

212. Since you cannot start an adjudication after the contract or subcontract is complete, can you still adjudicate if the work is complete and your final invoice is not being paid?

No, unless the parties agree. Whether a contract or subcontract is "complete" relates to completion of the work, not payment and invoicing. Once the work is "complete", unless the parties agree, then an adjudication cannot be commenced. The aggrieved party may still file a statement of claim in court for the disputed amount and may be able to register a builders' lien.

213. If you are asked to do additional work after the contract is complete, can you still start an adjudication over that extra work?

If the additional work is brought under the original contract, then the contract is not complete until that additional work is done, so a party can start an adjudication under that contract. If the additional work is brought under a new contract, then an adjudication can be started under the new contract.

214. How will adjudication apply to delay claims?

Adjudication can consider delay claims. However, as delay claims are typically complex and require expert analysis, they will likely be inappropriate for the brevity of the adjudication process. That brevity may impact the thoroughness of the adjudicator's determination which, depending upon the adjudicator's decision, may create a risk either to the party issuing, or to the party resisting, the delay claim.

215. Can the subcontractor adjudicate if the contractor refuses to include a subcontractor's invoice in the contractor's proper invoice to the owner?

Yes.

F. ADJUDICATION

209. If you have multiple work orders pertaining to a disputed change order, are they all dealt with in one adjudication, or separate adjudications?

If the multiple work orders are included in a proper invoice, following which there is a notice of dispute or notice of non-payment, then the resulting adjudication will cover all disputed work orders.

If a party, outside the proper invoicing process, wishes to start an adjudication, it can start an adjudication for each work order, or for all of them. Adjudicating each work order separately will have strategic considerations, including increased cost, and the likelihood of consolidation.

> G. TRANSITION PERIOD

- 216.** With regards to the August 29th, 2024 date for existing contracts to be revised to conform to the new legislation, how is “contract remains in effect” defined?

Contracts “scheduled to remain in effect” are those contracts that are not scheduled to be completed before August 29, 2024.

- 217.** Do projects that are currently totally complete prior to August 29, 2024, but whose warranty period concludes after that date, have to then be revised?

Based on a strict interpretation of the legislative requirement, the answer is yes as the warranty is part of the contractual obligations. Note the legislation uses completion of the contract or subcontract, not completion of the project, as the criteria with respect to the transitional requirement. However, the practical answer is no.

> H. GETTING PREPARED

- 218.** Will this new legislation change any of the language or timeline dates found in the Canadian Construction Document Committee (CCDC) contracts?

Yes, the new legislation will change the payment, liens, and dispute resolution provisions of the industry standard CCDC contract documents.

- 219.** Is the Canadian Construction Documents Committee working on amending CCDC contracts to account for the changes or do we need to draft supplemental conditions?

Not that we are aware of at this time, but like lien legislation, prompt payment legislation differs in each Province across Canada, so supplementary conditions will need to be used. CCDC has previously issued standard supplementary conditions dealing with builders' liens, so eventually we may see from CCDC a set of standard supplementary conditions in relation to prompt payment when they do the next revision to their standard documents.

- 220.** Is Gowling WLG working on a standard set of supplementary conditions?

Yes, in concert with the Alberta Construction Association.

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

FAQ August 23, 2022

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