

Here's the Drill: Prompt Payment – Are your contracts in order?

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In October 2019, the prompt payment rules were introduced to Ontario's construction industry as part of the province's updated *Construction Act*.

The rules mark a significant shift with respect to when payments must be made and how payment disputes get resolved on Ontario construction projects.

At a high level, the rules impose mandatory payment obligations on those involved in construction projects. For most sectors of the industry, the rules represent a significant shortening of payment deadlines. Owners are required to pay contractors within 28 days of receiving a "proper invoice". Contractors must pay subcontractors within 7 days of receiving payment from the owner and subcontractors must pay their sub-subcontractors within 7 days of receiving payment (and so on). If a party does not want to make payment, it must issue certain "notices of non-payment" within defined periods of time. For example, if a contractor does not receive payment from the owner, it must pay its subcontractors out of its own pocket or give them a notice of non-payment and commence an adjudication (a new fast-tracked dispute resolution process) against the owner within a short period of time. A contractor can no longer sit on its hands and rely on a pay-when-paid clause as a means to avoiding paying its subcontractors in cases of non-payment by the owner. The rules introduce many other rights and obligations and impact everyone in the construction pyramid to some degree, including owners, contractors, construction managers, project managers, subcontractors, suppliers, payment certifiers, consultants, subconsultants, design professionals and lenders.

The rules apply to all construction projects (regardless of size) and they apply irrespective of how complex or sophisticated your contract is. Even if you are using a purchase order or simply issuing invoices to your client without any signed contract, it is important to update the terms and conditions on those documents as well.

Since the rules are mandatory, they govern over contractual terms that conflict with them (such as a "net 60 days" term on an invoice or the payment terms in most of the CCDC contracts). However, you should not rely on this as a reason to not update your contracts. Having legally non-compliant payment terms in a contract can lead to confusion amongst the parties at a minimum. Beyond this, there are a host of considerations related to the payment process that are not addressed by the rules that should be spelled out in your contracts. Further, the fact that various issues are not mandated by the rules provides those forward-thinking parties with an opportunity to strategically customize or negotiate the terms of their contracts to secure superior rights than they would have otherwise enjoyed.

Future issues of *Here's the Drill* will spell out in greater detail the issues particular parties should consider in their contracts, but a few examples include:

- For owners: consider stipulating *when* and *how* proper invoices are to be submitted and what additional content a proper

invoice must contain. To facilitate invoice review, consider requesting a draft invoice or schedule of values be submitted in advance. Owners also need to revisit their consultant agreements and update the payment terms (and the scope of services for consultants performing contract administration).

- For contractors: consider negotiating additional terms into your agreement with the owner so they have to notify you immediately if they believe your proper invoice to be non-compliant (non-compliant invoices will not start the 28-day clock on the owner to make payment...). Ensure the proper invoice requirements in the contract are not too onerous and are properly flowed down into your subcontracts.
- For subcontractors: consider negotiating a requirement into your agreement with the contractor to notify you of when they submit their proper invoice to the owner and when they receive payment (otherwise you can be left in the dark as to when you should be expecting payment). Consider also pushing for a requirement that the contractor *must* carry your invoice with its proper invoice (otherwise you can lose the entire benefit of prompt payment).
- For consultants: consider whether prompt payment even applies to your services (which is a topic that will be discussed in future issues). If you are performing contract administration, consider what obligations the owner is trying to impose on you with respect to reviewing proper invoices and preparing notices of non-payment, how quickly you are required to perform those functions, whether those services are in scope or treated as additional services, and whether what is being asked of you is even feasible.

Lastly, it is important to appreciate that standard form contracts will need to be modified as well by supplementary conditions. While some of the industry's standard form contracts have been updated to account for the new rules to some extent, many have not.

Regardless of what role you play on a construction project and what type of contract documents you use, it is important to ensure your contracts are properly and strategically updated to account for prompt payment.

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