

Prompt payment and adjudication come to Alberta

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Overview

On October 21, 2020, the Government of Alberta tabled Bill 37: Builders' Lien (Prompt Payment) Amendment Act, 2020 (Bill 37), which seeks to modernize and make substantial amendments to the *Builders' Lien Act* (Alberta) (the Act) for the first time in nearly two decades to address standing concerns within the construction industry. Bill 37 passed second reading on October 28, 2020, and the proposed changes are expected to come into force by July 2021.

The changes proposed by Bill 37 include the following:

- introducing legislated payment and payment dispute deadlines;
- introducing increased lien registration periods;
- implementing a dedicated adjudication body to deal with payment disputes; and
- renaming the Act the *Prompt Payment and Construction Lien Act*.

The proposed changes reflect legislative amendments in other Canadian jurisdictions aimed at protecting jobs in the construction industry by ensuring timely payment to contractors and subcontractors and adjudication of payment disputes. Any contract or subcontract entered into on or after the coming into force of the legislation must conform to the new requirements, and the legislation will not apply to existing contracts unless the parties agree to amend their contract to conform to the new requirements.

Prompt payment

The Act does not currently prescribe timelines for the payment of invoices and notice of payment disputes. Bill 37 proposes a 28-day deadline for the payment of a "proper invoice" and a 14-day deadline for the dispute of a "proper invoice" from any contractor or subcontractor. To qualify, a "proper invoice" must meet the prescribed requirements, including that it contains a statement that the invoice is intended to constitute a proper invoice. To dispute payment of a proper invoice, an owner, contractor or subcontractor must provide a notice of dispute, in a prescribed form that includes detailed reasons for non-payment of any amount, within 14 days of receipt of the proper invoice.

Bill 37 also prohibits "pay when paid" provisions or provisions that make the issuance of a proper invoice conditional on the prior approval of the owner or certification by a person on behalf of an owner (e.g., a consultant), other than with respect to testing and commissioning of an improvement. However, parties retain the right to determine when proper invoices may be issued.

The implementation of a 28-day payment deadline and 14-day payment dispute deadline will remove ambiguity in contracts with no explicit payment and payment dispute timelines and will provide comfort to contractors and subcontractors that they will receive payment and be notified of payment disputes promptly. Conversely, the prompt payment proposals will reduce flexibility and freedom to set payment and payment dispute timelines contrary to the legislative regime.

Builders' liens registration periods and progressive release of holdbacks

The proposed legislation also increases the time periods for the registration of liens as follows:

- for improvements primarily related to the furnishing of concrete, from 45 days to 90 days; and
- for all other improvements, except for improvements to an oil or gas well or well site, from 45 days to 60 days.

Bill 37 does not propose any modifications to the 90-day lien registration period for improvements to an oil or gas well or well site.

Bill 37 also sanctions the progressive release of statutory holdback amounts. For projects greater than one year, parties can contract for the release of statutory holdback amounts on a "phased basis," provided that there are no liens filed. This provision will provide monetary relief to contractors engaged in multi-year projects who might otherwise be prevented from accessing large holdback amounts that accrue during lengthy projects.

Adjudication

Parties do not have a dedicated dispute resolution or adjudication process to resolve payment disputes under the Act. Bill 37 proposes the establishment of an adjudication body to resolve payment disputes respecting "any prescribed matter." Draft regulations have not yet been published and it is unclear at this time what "prescribed matters" may be referred to adjudication and what detailed procedures will apply under the regime. However, the proposed legislation sets out narrow grounds for judicial review of an adjudicator's decision, including mistake of law, jurisdiction or fraud. Only contracting parties may refer matters to adjudication.

Under Bill 37, the Services Alberta Minister may designate one or more entities to act as a Nominating Authority. The Nominating Authority will be responsible for, among other things, qualifying, appointing and training adjudicators. The creation of a dedicated adjudicating body is intended to provide expedient, contemporaneous and less costly payment dispute resolution while preserving some ability for contracting parties to resolve disputes as they choose.

Other changes

Bill 37 proposes the following additional changes to the Act:

- an increase in the minimum amount owed under a contract that can be subject to a lien from \$300 to \$700; and

- contractors and subcontractors currently working under a contract for an owner, contractor or subcontractor have been added to the list of parties entitled to demand financial information under the Act (such rights currently only apply to lienholders and beneficiaries of trusts).

Key takeaways

- Bill 37 proposes legislated deadlines for payment (28 days from invoicing) and payment disputes (14 days from invoicing) applicable to owners, contractors and subcontractors in the Alberta construction sector.
- A specified adjudication process will be available under the proposed legislative scheme to provide prompt determination of payment disputes.
- Legislation will apply to contracts executed following its coming into force, currently anticipated to be in July 2021.