

## CONSTRUCTION CONTRACTS: NEW MANDATORY PROMPT PAYMENT REQUIREMENTS AND ADJUDICATION

by Carol Dirks

On October 1, 2019, the second set of amendments to the *Construction Lien Act* came into force. Now called the *Construction Act*, these amendments concern much more than construction liens and have a serious impact on the entire construction industry.

These new amendments are designed to improve the cash flow to contractors and sub-trades working on construction projects so that they "get paid on time" and also to establish a process to resolve payment disputes quickly.

### What Contracts Does it Apply to?

The *Construction Act* applies to any contract entered into by a contractor with a property owner to supply service or materials to an improvement in respect of any land. The term "improvement" includes alterations, additions or capital repairs to the land, any construction or installation on the land (including mechanical and electrical), and complete or partial demolition of any building, structure or works on the land.

It does not just include actual physical work to the lands, but also the supply of a design plan or drawing for a planned improvement and even equipment rentals.

For any contract entered into by a condominium corporation after October 1, 2019 (or for which the procurement process has not commenced by that date), the parties are subject to the **prompt payment** requirements – which is a statutory deadline by which to either issue payment to a contractor or subcontractor, or to provide notice of a payment dispute.

### The Triggering Event – Receiving a "Proper Invoice"?

This statutory payment deadline is triggered by the receipt of a "proper invoice" from the contract. The term "proper invoice" is defined in the *Construction Act* (s. 6.1) as:

*"a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the following information and, subject to subsection 6.3 (2) of the Construction Act, meets any other requirements that the contract specifies:*

*The contractor's name and address.*

1. *The date of the proper invoice and the period during which the services or materials were supplied.*
2. *Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.*
3. *A description, including quantity where appropriate, of the services or materials that were supplied.*



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4. *The amount payable for the services or materials that were supplied, and the payment terms.*
5. *The name, title, telephone number and mailing address of the person to whom payment is to be sent.*
6. *Any other information that may be prescribed.*

Unless the contract specifies another timeframe for the contractor's billing, the contractor is required to issue a proper invoice to the owner on a monthly basis (s. 6.3) for the duration of the contract. The contract documents will often contain language dealing with when a notice or an invoice is deemed to be delivered. Condominium boards and property management should be aware of any such provisions.

### **New Statutory Payment Deadlines**

On receiving a "proper" invoice, a condominium corporation will now have only 28 days to make payment to the contractor. If the condominium corporation disputes all or a portion of the invoice, it will have 14 days, after receiving the invoice, to issue a Notice of Non-Payment (using the prescribed form) specifying the amount not being paid and the reasons for non-payment. The contractor has similar payment obligations and deadlines to its sub-contractors.

In most cases, and certainly for larger construction projects, the Board of Directors will often rely on its consulting engineer to review the invoices and to certify payment. However, with these recent amendments, it is no longer legal for a contract to stipulate that the making of payment by the owner to the contractor is conditional on the certification of payment by a certifier, like an engineer or project consultant. If such a provision is included in the contract, it will be of no effect.

### **What does this mean?**

It means that any payment certifier, like a consulting engineer, will need to review the invoice almost immediately upon receipt and provide any objections to the client before the 14 day deadline. The Corporation should consider including wording to this effect in its consultant contracts. It also means that property management and the Board of Directors will need to ensure that a cheque is cut, signed by the signing officers and delivered to the contractor before the end of 28 days. This no doubt will be a struggle for most condominiums. Condominium corporations should ensure that all approvals and procedures are immediately put into place to be able to process payments in compliance with these the strict statutory deadlines.

If a Condominium Corporation is late in making payment, there is a requirement for it to pay interest to the contractor. The interest rate paid will be based on the applicable prejudgment interest rate under the *Courts of Justice Act* or the interest rate specified in the contract, whichever is higher. The Corporation also runs the risk that the contractor could refer the payment issue to the brand new adjudication process set out below.

### **Adjudication for Contract Payment Disputes**

If the Corporation delivers a Notice of Non-Payment, then the contractor has 35 days to start an adjudication to resolve the payment dispute by issuing a Notice of Adjudication. The Ontario Dispute Adjudication for Construction Contracts ("**ODACC**") is the body now designated by the Ontario government to decide these contract payment issues. The appointed adjudicator is charged to render a decision within 30 days of receiving the parties documents, which decision is binding on the parties for the time being, and least until the dispute is

finally resolved in court or at arbitration. This expedited process is designed to keep the construction project moving along, and not to be held up by payment issues.

The Condominium Corporation would then have 10 days from the receiving the adjudicator's decision to pay the contractor, failing which the contractor has the right to suspend work with compensation for costs.

In conclusion, any new contracts after October 1, 2019 involving the supply of services or materials to improve the condominium lands are now subject to these statutory payment obligations. Basically, a corporation has only 14 days from receiving a contractor's invoice to decide to pay it or alternatively to dispute all or part of it. Both property management and Boards of Directors will need to be on their "construction toes" to be sure that these new requirements are known to all necessary parties and complied with.