



Major Renovation: What Ontario's proposed Construction Act means for projects and how to prepare

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MACFARLANES OSLER

Introduction and Our Panelists



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How We Got Here

- Current version of Ontario's *Construction Lien Act* - 1983
- Prompt payment movement (Internationally and in Ontario: Bill 69 (2013))
- Ontario Government commissions Report on CLA Reform
- Canvassed industry stakeholder views
- Report issued on September 26, 2016: 100 recommendations
- Bill 142: First Reading - May 31, 2017
- Next steps - where do we go from here?

Main Provisions of Bill 142

- Prompt Payment
- Mandatory Interim Adjudication of Construction Disputes
- Adjustments for P3 Projects
- Selected Technical Amendments to the *Construction Lien Act*

Prompt Payment

Richard Wong, Osler

How it Works

- Prompt payment provisions will apply to payments *under* all construction “contracts” in Ontario entered into after the new Act comes into force
- Behind the Bill
- Special Contractual Situations
- Infographic: Following the Cash Waterfall
- Moving Forward: What to Watch For

Behind the Bill: Influences Behind Ontario 2.0

- Grapples with “ordinary course” and “gridlock” issues
- Draws on U.S., U.K., and Bill 69 experiences → “Made in Ontario”
 - U.S.: PP addresses ordinary course issues, but not gridlock (i.e. U.S. cases say bona fide disputes obviate reliance on PP)
 - U.K.: PP + Adjudication; 2011 improvements to 1998 Act - included extending prohibition on pay-when-paid clauses to pay-when-certified clauses, and clarification on payment notices;
 - Bill 69: Helpful by push-back: monthly payments based on “reasonable estimates”; no holdbacks other than Act; no freedom of contract; obligation to pay holdback a day after release deadline; mandatory disclosure of financial information between owner and contractor; and unclear interface with existing Act.

Behind the Bill: Other Elements

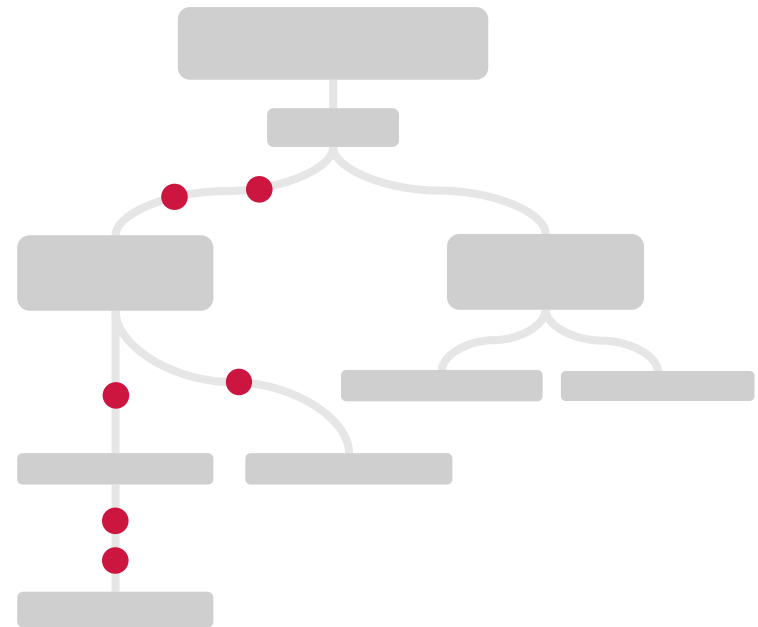
- Triggers:
 - × delivery of materials
 - × approval by payment certifier
 - ✓ **“proper invoice”**
- Set-Off Rights: Payors pushed hard, balanced by short notice/particulars, and curtailed to not relate to other contracts.
- Interest: Greater of the pre-judgment interest rate in the *Courts of Justice Act* (0.8%) and contract rate
- Suspension: No pay by 10th day post adjudication determination; compensation includes reasonable costs incurred
- Financial disclosure: Not covered
- Shaping the balance: define “proper invoice” and payment terms

Special Contractual Situations

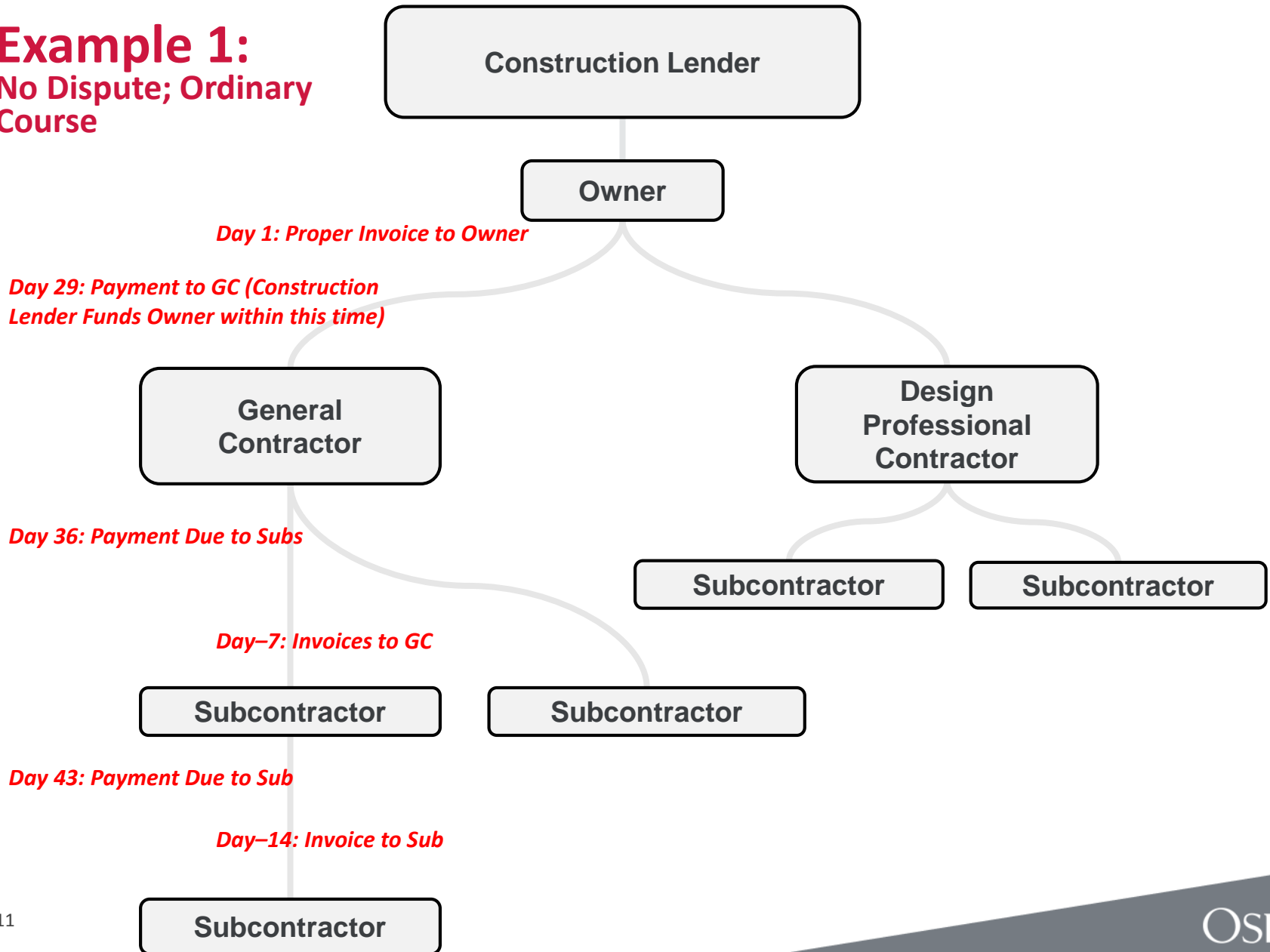
- Design Professional Contracts
 - no mandatory release, but may phase design services
- Transition
 - PP *“applies to payments made under contracts entered into on or after”*
- Multiple “Contracts” by Owner (e.g. CCDC 5A + CCA 17 - 2010)
- Other Special Situations
 - Multi-stage “Contracts”/New Work Authorizations under Pre-Existing Master Agreements e.g. CCDC 2MA - 2016
 - New subcontracts under Pre-Existing Contracts
 - NTP situations
 - Permissible phased, annual, segmented holdback releases

Infographic: Following the Cash Waterfall

- Example 1: No Dispute;
Ordinary Course
Progress Payments
- Example 2: Owner-GC
Gridlock; Subs Paid
Ratably



Example 1: No Dispute; Ordinary Course



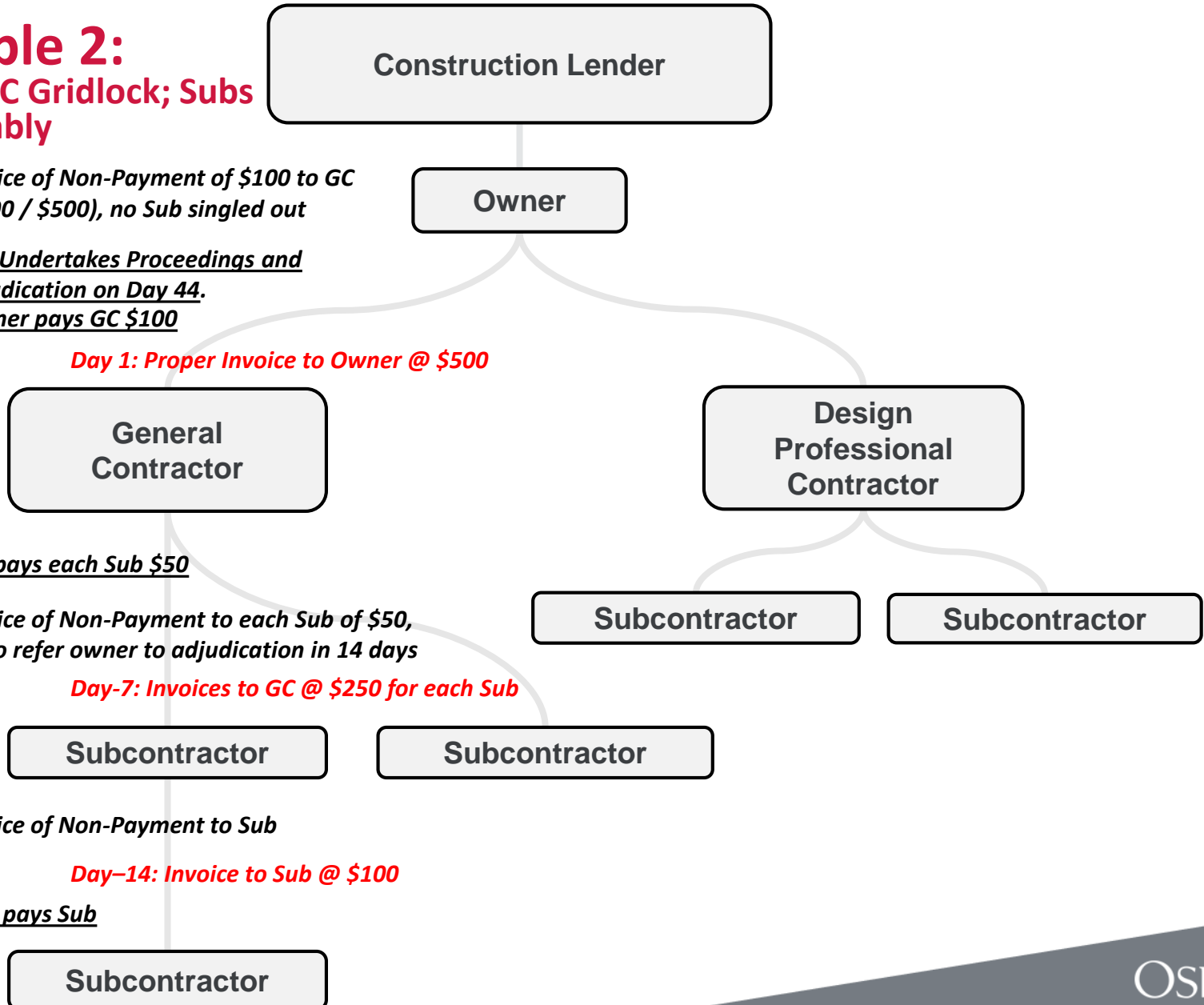
Example 2: Owner-GC Gridlock; Subs Paid Ratably

*Day 15: Notice of Non-Payment of \$100 to GC
(i.e. pay \$400 / \$500), no Sub singled out*

*Day 44: GC Undertakes Proceedings and
wins in Adjudication on Day 44.*

Day 54: Owner pays GC \$100

Day 1: Proper Invoice to Owner @ \$500



Day 61: GC pays each Sub \$50

*Day 22: Notice of Non-Payment to each Sub of \$50,
undertake to refer owner to adjudication in 14 days*

Day-7: Invoices to GC @ \$250 for each Sub

Day 29: Notice of Non-Payment to Sub

Day-14: Invoice to Sub @ \$100

Day 68: Sub pays Sub

Moving Forward: What to Watch For

- Drafting compliant payment terms in contracts and subcontracts:
 - clear alternative payment provisions vs. monthly basis
 - dealing with other contractual payments (e.g. shares of savings, punch list, holdbacks including security or warranty)
 - tightening role and timing of payment certifier in professional services contracts
 - reviewing pay-if-paid/pay-when paid clauses in subcontracts
- Drafting “proper invoice” clauses in the contract:
 - minimum requirements
 - sample additional requirements

Moving Forward: What to Watch For

- Creating new procedures and infrastructure to manage tighter invoice review and payment cycles, including credit agreements
- Forms of notice of non-payment
- Potential phased, annual, or segmented (not contiguous) holdback releases
- Exploring set-offs “related to” the improvement (vs. contract)
- Drafting Disclosure Requests for Payment Terms Using Section 39



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Questions?

Mandatory Interim Adjudication of Construction Disputes

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Mandatory Interim Adjudication

- Mandatory Interim Adjudication is to be read into all construction contracts and subcontracts in Ontario entered into after the new Act comes into force
- Adjudication procedures will be set out by the Parties in their contracts, but only if such provisions are consistent with the Act. If the contract provisions are not consistent with the Act, the procedures under the Act will apply
- Any party to a construction contract or subcontract will have the right to refer disputes to adjudication

The Adjudication Process

- To be determined by the Contract, but in default of contractual determination, a very swift timeline, of:
 - Notice of Adjudication (names of Parties/brief description of dispute, redress sought, and name of proposed Adjudicator);
 - 4 Days to determine Adjudicator/4+7 days if No Agreement;
 - 5 Days to provide to Adjudicator: Notice of Adjudication, Copy of Contract or Subcontract, and any documents referring party intends to rely upon at the Adjudication.

The Adjudication Process

- 30 days after receiving the documents, Adjudicator must render decision.
- Can be extended on consent of the Parties and the Adjudicator, on the initiative of a Party or the Adjudicator
- Any decision rendered after expiry of the 30-day period (as extended) is of no force and effect
- Adjudicator to take active, inquisitorial role: issue directions, ascertain the relevant facts and law, draw inferences based on the conduct of the parties, conduct on-site inspection, retain experts as needed, and render a decision
- Decision: Binding on an interim basis (eg. until finally determined by the Courts or Arbitration). If parties decide not to take matter to Court/Arbitration, decision becomes final

Comments

- No requirement for all relevant documents to be produced; only those the referring party intends to rely upon
- No formal step/opportunity for non-referring party to submit documents or for parties to exchange position papers (must depend on Adjudicator to order or permit same)
- Act allows Regulations to prescribe additional procedures, so more detailed required procedures may be forthcoming
- Idea is one single issue per Adjudication (difficult to determine)
- Same or similar issues: Parties may agree to Consecutive Adjudications by same Adjudicator. If no agreement, General Contractor (but seemingly no other party) may require Consecutive Adjudications. (Presumably, the thought is the GC more likely to be the “meat in the sandwich” and therefore need consecutive Adjudications)

Which Claims Can/Cannot be Submitted to Adjudication

- The valuation of services or materials supplied
- Payment, including Change Orders
- Disputes re: Notice of Non-Payment
- Set-off by Trustees and Lien Set-Off
- Non-payment of Holdback
- Any other matter the Parties agree to

- Issue: What is *excluded*? (eg. Delay claims? – Could be Payment, for example)

Who Will the Adjudicators Be?

- Government may designate an “entity” to act as “Authorized Nominating Authority”, responsible for:
 - Training of Adjudicators
 - Establishing and maintaining Registry of Adjudicators
 - Appoint Adjudicators for disputes, where Parties cannot agree
 - Set fees for Adjudicators, where Parties cannot agree
- Government may designate the Minister of Economic Development, Employment and Infrastructure as Interim Authority
- The *Report* recommended anyone with 7 years’ experience in the Construction industry, including engineer, architect, lawyer, accountant, quantity surveyor, etc. Query what Authority will determine

Who Will the Adjudicators Be?

- Adjudicators will be nominated AFTER the Notice of Adjudication is served (cannot be designated in contract for whole project)
- The Notice of Adjudication will suggest an Adjudicator, and the parties will have 4 days to agree on one, after which the nominating authority will have 7 days to identify one (ie. FAST)



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Implications for P3's

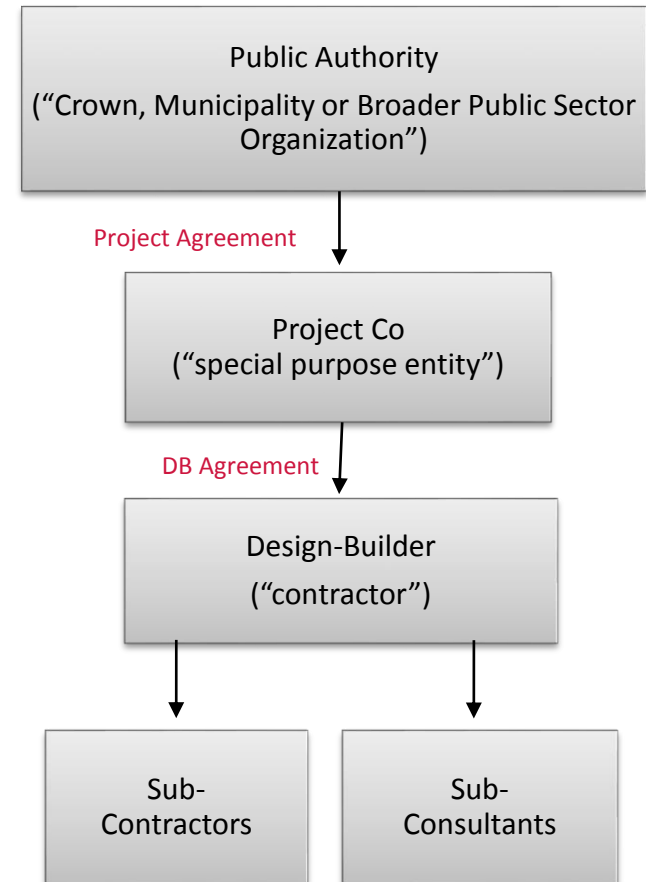
Joel Heard, Osler

P3/Alternative Financing and Procurement (AFP) Projects

- Bill 142 acknowledges (rather than exempts) AFP projects
- Clarifications aimed at reflecting typical AFP practice
- Contracts subject to new prompt payment, adjudication and technical amendments, as applicable
 - some are particularly relevant to AFP projects given large scale and long timelines

AFP Projects

- Modifications applicable to AFP arrangements:
 - PCo deemed to be “owner” in place of Crown/M/BPSO
 - DBA deemed to be the “contract”
 - Holdbacks determined by reference to DBA
 - DBA deemed to be a “public contract” for mandatory surety bonding requirements



AFP Projects

- Provision deeming PCo to be “owner” and DBA to be “contract” limited to the following provisions of the Act:
 - prompt payment
 - mandatory adjudication
 - rules governing certification/declaration of substantial performance
 - right to information
 - holdbacks
 - mandatory surety bonding
 - other provisions prescribed by regulation

Amendments Aimed at Large Projects

- Segmentation of bundled projects
- Phased release of holdback
- Annual release of holdback



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Technical Amendments to the *Construction Lien Act*

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Time Periods for Preserving and Perfecting Liens

- Lien preservation period to be increased from 45 days to 60 days
 - Termination of the contract will “start the clock”
- Lien perfection period to be increased from 45 days to 90 days

Release of Holdback

- Payment of holdback at the end of a contract will be changed from permissive to mandatory
- The early release of holdback to be permitted on an annual basis and a phased basis, provided that certain conditions are met
- Holdback may, instead of being retained in the form of funds, be retained in the form of:
 - a letter of credit;
 - a demand-worded repayment bond; or
 - any other prescribed form

Mandatory Surety Bonding

- Contractors will be required to provide mandatory surety bonds in relation to public contracts
- This requirement would apply to contracts between a contractor and an owner, if the owner is the Crown, a municipality, or a broader public sector entity, and if the contract exceeds a prescribed amount
- If applicable, a contractor would need to provide a:
 - labour and material payment bond; and
 - performance bond,each with coverage equal to at least 50% of the contract price

Questions?

Thank You and Contact Us



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