

Amending Bill 37: Alberta's prompt payment regime

NOVEMBER 23, 2020 5 MIN READ

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On October 21, 2020, the Government of Alberta introduced Bill 37 titled the *Builders' Lien (Prompt Payment) Amendment Act, 2020* (Bill 37). As noted in our [previous post](#), Bill 37 focuses on major reforms to the *Builders' Lien Act* (Alberta) (the Act) which include the introduction of prompt payment requirements; a new dispute resolution mechanism known as adjudication; an extension of lien registration periods; and renaming the Act as the *Prompt Payment and Construction Lien Act*.

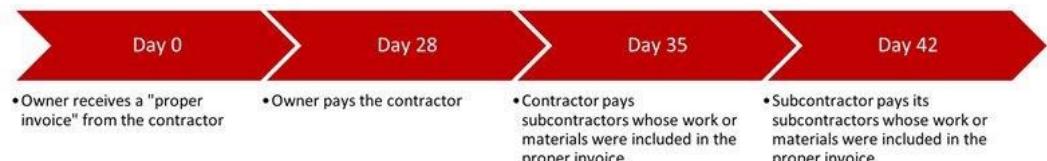
While Bill 37 passed second reading on October 28, 2020, the prompt payment requirements were recently and significantly amended in the Alberta Legislature on November 4, 2020 (collectively, Amended Bill 37). This Update provides an overview of those amendments.

Previously, Bill 37 proposed a 28-day deadline for the payment of a "proper invoice" for work done or materials furnished, whether under a contract or a subcontract, and a 14-day deadline for the dispute of a "proper invoice" from any contractor or subcontractor. This structure would have resulted in multiple "proper invoices" with independently calculated time periods at each level of the construction pyramid.

However, in Amended Bill 37, a "proper invoice" now means a written bill or other request for payment given by the contractor to an owner. Note that, subject to the regulations, monthly billings are mandated through requiring proper invoices issued at least every 31 days unless any contractual requirements for testing and commissioning are not met. It will be interesting to see whether this process permits the use of milestone payments. Owner pre-approval or pre-certification is of no force and effect except for such testing and commissioning provisions.

The payment clock starts ticking once the owner receives a proper invoice from the contractor and, upon receiving payment from an owner, the contractor has seven days to remit payment to its subcontractor whose work was included in the paid invoice. A simplified snapshot of payment timelines is provided below, with the numbers in the graphic representing the maximum number of elapsed days after the proper invoice is received by the owner. The schematic below reflects a scenario where none of the parties dispute entitlement to invoice payment and pays the submitting party in full.

Payment timelines



It is important to note that references to days are calendar days, not business days.

If a party wishes to dispute the entitlement of the other party to receive payment, in whole or in part, it must issue a notice of dispute, in the prescribed form and manner, specifying the amount that is not being paid along with “all the reasons” for non-payment.

Note that an owner must consult, complete and articulate all non-payment reasons within 14 days of receiving the proper invoice, failing which the owner will (consistent with similar provisions in other jurisdictions) be obliged to pay the contractor the full amount within the required 28-day timeframe, despite any objections it may have. To avoid this situation, owners should align their internal payment processes and have their external consultants shorten their traditional invoice review periods. Owners should also consider negotiating appropriate amendments to any credit or funding agreements to minimize any impediments to funding access within these timeframes.

If the contractor receives a “notice of dispute” from an owner, the contractor may either:

- pay each subcontractor the amount that was included for the work done or materials furnished in the proper invoice to the owner, within 35 days after giving the proper invoice to the owner; or
- issue a similar “notice of non-payment” to the subcontractor within seven days after receiving a notice of dispute from the owner, citing non-payment by the owner as a reason for non-payment along with an undertaking to refer the matter with the owner to adjudication within 21 days after giving such notice of non-payment to the subcontractor.

Alternatively, if the contractor receives full payment of a proper invoice from the owner, yet disputes in whole or in part the entitlement of a subcontractor to payment, the contractor must give the subcontractor a notice of non-payment within 35 days after providing its proper invoice to the owner.

If the subcontractor receives full payment from the contractor but disputes the entitlement of its subcontractor, it must give a notice of non-payment within 42 days after proper invoice was given to the owner.

As a result of this cascading mechanism of payments and notices of dispute, Amended Bill 37 removed the prohibition on pay-when-paid clause originally introduced by Bill 37.

Lastly, Amended Bill 37 makes major lien fund and minor lien fund payments to the contractor mandatory if certain conditions set out in the Act are met. These conditions include that the contract (i) has a completion schedule longer than one year and requires payment of the holdback on an annual basis; or (ii) requires payment of the holdback on a phased basis, and in either case that the contract price exceeds an amount to be prescribed under the Act.

We are closely monitoring the progress of Bill 37, and recommend you to stay tuned for further updates. Osler’s breadth and depth of experience and expertise, together with its hands-on approach in understanding the *Construction Act* of Ontario, will be of great value for those seeking to understand the application of Bill 37, realign their internal processes, organize training, create materials for their organization, and revise their contract and procurement documents to comply. If you are interested in receiving a blacklined version comparing the *Construction Act* of Ontario with the changes proposed by Amended Bill 37, please contact the writers directly by e-mail. For more information regarding the changes introduced by Bill 37, please visit our hub [here](#).