Alberta's Prompt Payment and Construction Lien Act passes second reading

November 04, 2020

Bill 37, known as the *Builders' Lien (Prompt Payment) Amendment Act, 2020*, passed second reading on Oct. 28, 2020, following two days of debate. The proposed amendments to Alberta's current *Builders' Lien Act* focus primarily on new prompt payment rules and adjudication of disputes. The debate identified a number of issues that have been left undefined by the proposed amendments.

Details of adjudication process

A number of the members of the Legislative Assembly focused on the fact that much of the detail surrounding the adjudication process is not included in the amendments to the statute and has been left to be addressed in the regulations. The proposed amendments do not, for example, set out who will be responsible for the cost of the adjudication process or how much it will cost. Members fear that those costs may approximate the cost of a private arbitration, which could make the adjudication process prohibitively expensive for some contractors.

Members of the Legislative Assembly raised concerns that by leaving details to be determined by the regulations, the government has shielded the nuts and bolts of the adjudication process from public scrutiny and input. These details will be backfilled later by the Lieutenant Governor in Council, without further consultation.

Testing and commissioning

The prompt payment provisions require owners, contractors and subcontractors to pay the amounts payable under a "proper invoice" no later than 28 days after receiving the invoice. The issuance of a "proper invoice" cannot be conditional on the prior certification or approval of the invoice by an owner or payment certifier. However, the proposed amendments allow the issuance of a "proper invoice" to be conditional on the testing and commissioning of the improvement or of the work done or materials furnished. This appears to allow parties to agree to postpone the issuance of a "proper invoice" until this milestone has been achieved, which has the practical effect of creating an extension of the time to pay. This testing and commissioning exception could, if not limited by regulations, allow for a contractual opt-out of the prompt payment rule.

The adjudicator's jurisdiction

The Minister of Service Alberta indicated that the new adjudication process is aimed at resolving disputes outside of the courts in an efficient and cost-effective way. The process is supposed to be less formal, cost less and take up less time. The decisions made through adjudication are intended to be binding.

However, unlike similar legislation in other jurisdictions, the proposed amendments do not set out the types of matters that are to be addressed through adjudication. It appears this issue will be included in the regulations but, for now, it is not clear what types of disputes will be adjudicated. Regardless of the list of prescribed matters, the proposed amendments give the adjudicators the discretion to refer a dispute to the court if they feel it is the more appropriate forum. As a result, it is not yet clear when the adjudication process will apply.

Cascading payments

Members of the Legislative Assembly also raised the issue of how the prompt payment deadline would function without a cascading extension of time as payment flows down the construction pyramid. Coupled with the proposed prohibition of "pay when paid" clauses, the omnibus 28-day payment deadline could result in contractors being required to pay subcontractors before they are paid by the owner.

For example, where sub-subcontractors or suppliers issue proper invoices that are due in 28 days, but the next tier up on the pyramid takes more time to issue its invoice for the same work that is also due in 28 days, a conflict may arise where the lower-tier invoice becomes due before the money has flowed down from the top. This concern is highlighted by the fact that Ontario's *Construction Act*, RSO 1990, c C.30, s 6.5(1) expressly includes an accommodation of an additional seven days for a contractor to pay subcontractors after receiving payment in order to address this problem. A similar provision has not been included in Alberta's proposed prompt payment provisions.

Other considerations

The proposed amendments contemplate that the minister may designate one or more entities to act as a Nominating Authority. Multiple Nominating Authorities may encourage forum shopping, where parties seek to have their disputes resolved by a particular brand of adjudicators who may be perceived to be more favourable to their position. Of note, there is also no detail with respect to a situation when parties cannot agree on a particular adjudicator.

In addition, in Alberta, no enactment is binding on the Crown unless the enactment expressly states that it binds Her Majesty. The *Builders' Lien Act*, including the proposed amendments, do not expressly bind the Crown, meaning the Crown will not be subject to prompt payment (or the other provisions contained in the new legislation). Therefore, unless the prime contract incorporates these concepts, contractors and subcontractors working on Crown projects could find themselves in a situation where the prompt payment deadline applies to them, but not the owner.

As Bill 37 charges forward through the Legislative Assembly, a number of complexities already appear to be bubbling to the surface. We will continue to monitor the progress of Bill 37 as it receives further consideration by the Alberta Legislature and will provide updates as they become available. If the currently planned schedule is maintained, Bill 37 could receive third reading as early as Nov. 5, 2020. The Alberta government hopes to have the legislation in force by July 2021.

BLG's Construction Group is available to answer questions about how Alberta's Bill 37 may affect those in the industry. Reach out to your lawyer or any of the key contacts below for assistance.

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