Are you prepared for the new changes to Ontario's Construction Act?

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Background

Ontario's *Construction Act* is undergoing more changes.

On Nov. 6, 2024, the *Building Ontario for You Act (Budget Measures)* (Bill 216) received Royal Assent. Bill 216 introduces several amendments to Ontario's *Construction Act* that will impact contract administration and dispute resolution in Ontario's construction industry.

The Ontario Government has not announced when the amendments will come into force or released the accompanying draft regulations to the *Construction Act.*

Changes to Ontario's *Construction Act*

Bill 216 will amend the legislation as follows:

1. Definition of "price"

Regulations to the *Construction Act* will be permitted to set out how the "price" of a contract or subcontract is to be determined when not agreed upon by the parties. The definition of "price" affects the operation of various other requirements under the *Construction Act*, such as the mandatory bonding requirements.

2. Deemed "proper invoice"

The list of information required in a "proper invoice" will be amended (s. 6.1). In addition, an invoice that does not meet the requirements for a "proper invoice" will be deemed to be a "proper invoice" unless, within seven days after receiving it, the owner notifies the contractor in writing of a deficiency in the invoice and what is required to address it (s. 6(2)).

3. Mandatory annual release of holdback

The annual release of holdback will become mandatory (s. 26). The owner will be required to publish a notice of annual release of holdback on a prescribed form (s. 26(3)). Any liens arising from the supply of services or materials that are "included in" the notice of annual release of holdback will expire on the 60th day after the notice is published, unless preserved before that time (s. 31(2)).

4. Design professionals

If an owner retains holdback in respect of the supply of a design, plan, drawing or specification for the making of a planned construction improvement this is not commenced, that supply of design services will be lienable unless the owner proves that the value of its interest in the land has not been enhanced (s. 14(4)).

5. Adjudication

The matters that may be adjudicated will be set out in regulations to the *Construction Act*, in addition to any matters agreed by the parties (s. 13.5(1)).

The regulations may provide for adjudication between parties to different contracts or subcontracts for the same construction improvement (s. 13.5(3.2)). Any party to an adjudication will be permitted to require the consolidation of adjudications in accordance with the regulations, with the agreement of the adjudicators of the separate adjudications (s. 13.8(2)).

Parties to an adjudication will have the option to agree to a "registry adjudicator", from the publicly available registry of the authorized nominating authority (presently, ODACC), or a "private adjudicator" (s. 13.1). Both types of adjudicators must be "qualified" by ODACC (s. 13.1). The fee for a registry adjudicator and private adjudicator is to be agreed upon by the adjudicator and the parties (s. 13.10). A registry adjudicator has the option to request that ODACC determine its fee (s. 13.10).

The amendments set out that the adjudicator's power to make "a determination in the adjudication" includes a determination about the adjudicator's jurisdiction or whether a matter may be the subject of an adjudication (s. 13.12(6)).

The deadline for starting any adjudication will be extended. The current deadline of "completion" of the contract will be changed to the 90th day after the contract is completed, abandoned or terminated (s. 13.5(3)). The new deadline for a subcontract will be the above 90-day deadline for the related contract or, if earlier, the 90th day after the date the subcontract is certified complete or the date of last supply of services or materials by the subcontractor (s. 13.5(3.1)). Like under the existing *Construction Act*, the parties may agree to an extension of these deadlines (s. 13.5(3)).

6. Transition period

A number of additional "transition" provisions will be incorporated into the *Construction Act*. The amendments will apply immediately upon coming into force to construction "improvements", "except as otherwise provided" in the transition provisions. There are various exceptions set out in the transition provisions.

Takeaways

The amendments to the *Construction Act* will have significant implications on the administration of construction contracts in Ontario, including holdback and lien regimes.

The *Construction Act* deems every contract or subcontract to be amended in so far as is necessary to conform with the applicable requirements of the *Construction Act* (s. 5(1)). Participants in Ontario's construction industry should speak to a construction law specialist to answer questions about if or how the changes to the *Construction Act* may affect their contracts, and steps to prepare for these new changes.

BLG's Construction Group is continuing to monitor the progress of the *Construction Act* amendments. We are available to answer questions about the amendments and the proactive steps that should be taken to prepare for their coming into force.

This article provides an overview and is not intended to be exhaustive of the subject matter contained therein. Although care has been taken to ensure accuracy, this article should not be relied upon as legal advice.

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