Alberta Builders' Lien Act proposed amendments significantly rewritten

November 11, 2020

Significant changes have been made to the prompt payment sections of Alberta's Bill 37.

The *Builders' Lien (Prompt Payment) Amendment Act, 2020* passed second reading on Oct. 28, 2020. A few days later, on November 4, a motion to amend Bill 37 (known as Amendment A1) was carried, resulting in changes to the bill's prompt payment sections.

The revised prompt payment sections now mirror the prompt payment language contained in Ontario's *Construction Act*, and incorporate a cascading payment process once payment is made by the owner to the general contractor. This is a radical change from the initial proposal, which required all parties to be paid within 28 days of the issuance of a proper invoice, regardless of whether payment was made to the tier above.

As it is currently drafted, Bill 37 includes the following requirements:

- Proper invoices must be given to an owner at least every 31 days, unless the contract includes a provision for the testing and commissioning of the improvement and those conditions remain unsatisfied;
- The owner must pay a contractor within 28 days after receiving a proper invoice, unless the owner issues a notice of dispute for all or part of the invoice;
- Any undisputed portion of a proper invoice remains payable 28 days after receiving the proper invoice;
- If paid in full, the contractor must pay subcontractors within seven days of receiving payment from the owner, the amount payable for the work done that was included in the proper invoice, unless the contractor issues a notice of non-payment;
- If partially paid, the contractor must pay subcontractors within seven days, in accordance with the priority rules set out in the Act, unless the contractor issues a notice of non-payment;
- If the contractor issues a notice of non-payment due to non-payment by the owner, the contractor must undertake to refer the matter to adjudication within 21 days; and,

- If the owner does not pay the contractor some or all of the amounts payable under a proper invoice, the contractor must pay the subcontractors the full amounts owed to them for work included in the proper invoice within 35 days after delivering the proper invoice to the owner, unless the contractor issues a notice of non-payment to the subcontractors.

Another change made to Bill 37 is the removal of the previously proposed prohibition of "pay when paid" clauses. However, assuming that notices of non-payment are delivered as required under the Act, the cascading payment provisions included in the amendment to Bill 37 effectively create a legislated "pay when paid" payment scheme.

Importantly, the revisions to Bill 37 raise the question of how or whether the prompt payment and adjudication requirements will apply to public projects in Alberta. As currently drafted, the Alberta Crown will not be bound by the amendments to the *Builders' Lien Act*, which is different from the legislation in Ontario.

This means the Crown will have no obligation to provide payment within the stipulated timeframes and it will not be required to participate in adjudications to address payment disputes. That puts the entire prompt payment scheme into jeopardy, as contractors must undertake to commence an adjudication with the owner when they deliver a notice of non-payment to a subcontractor (based on non-payment by the owner). Unless the Crown is bound by those requirements of the Act, as it is in Ontario, the Act may not have any practical application to public projects.

A further complication created by the proposed amendments to the Alberta *Builders' Lien Act* is the change to the release of the statutory holdback. Bill 37 will now make it mandatory for the owner to release the statutory holdback on an annual or phased basis, if it is stipulated in the contract and meets the other legislated requirements. This could have a significant impact on the limited statutory trust provisions included in the Act.

Under the current *Builder's Lien Act,* the release of the statutory holdback is generally tied to the issuance of a certificate of substantial performance. In Alberta, the issuance of a certificate of substantial performance also activates the trust provisions in the Act.

Alberta has limited trust provisions compared to other provinces, and a statutory trust is only impressed on money paid by the owner to the contractor after the certificate of substantial performance is issued. This has historically protected the statutory holdback for subcontractors as it is paid to the contractor in trust for their benefit. But with an annual or phased release of the statutory holdback, which presumably will occur prior to substantial performance being achieved, a significant portion of the statutory holdback could be released without this protection.

It remains to be seen whether further amendments will be made to Bill 37 as it is pushed through the Alberta legislature for the anticipated July 2021 deadline. We will continue to monitor the progress of Bill 37 as it receives further consideration and will provide updates as they become available.

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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