

IT'S TIME YOU GOT PAID – PROMPTLY

By Jason Annibale and Jeremy Rankin,
McMillan LLP

©ISTOCK.COM/KAMELEON007

Starting October 1, 2019, the prompt payment provisions in the *Construction Act* will dramatically change the way contractors are paid and how they pay their subcontractors.

These provisions require those in the construction pyramid to pay for construction services and materials within prescribed deadlines, or face a new statutory adjudication process. What follows is a summary of what contractors need to know about prompt payment.

Deadlines for payments in the construction pyramid are triggered by the contractor's delivery of a "proper invoice" to the owner. A

proper invoice contains the following 5 criteria: (i) the name and address of the contractor; (ii) the services or material supplied; (iii) the period during which they were supplied; (iv) the authority under which they were supplied (i.e. the parties' contract); and (v) the amount sought, the payment terms and the information for where payment is to be sent.

Unless the parties otherwise agree, proper invoices are to be given monthly. Parties are free to stipulate other conditions to the giving of a proper invoice, so long as such conditions are not contrary to the *Act*. For example, satisfaction of certain administrative items, delivery of documentation, or steps may be required prior

to the giving of a proper invoice. However, except for P3 projects, any conditions making a proper invoice subject to owner approval or payment certification are unenforceable.

On receipt of a proper invoice, the owner has 28 days to pay the contractor. Once the contractor receives payment, it then has 7 days to pay its sub-contractors. Any such sub-contractors then have 7 days to pay any of their respective sub-contractors – and so on through the pyramid.

The owner can, however, elect not to pay some or all of the contractor's invoice by delivering a prescribed notice of non-payment within 14 days of receiving the proper invoice. This notice must

Deadlines for payments in the construction pyramid are triggered by the contractor's delivery of a "proper invoice" to the owner.

Any resulting payment disputes through the life of the contract may be resolved through adjudication, a new streamlined and speedy dispute resolution mechanism prescribed by the Act.

October 1, 2019 is coming fast. If they haven't already, contractors will do well to train their

employees and update their accounting systems and standard contracts to prepare for these new payment deadlines and any resulting adjudications. Contractors should also consider a review of their standard invoices to ensure they are "proper" under the Act. ■



WHERE THERE'S CONSTRUCTION RISK **THERE'S OPPORTUNITY.**

Effective risk management is key.

Marsh Canada's Construction and Surety Practice focuses exclusively on construction risk. From all major lines of insurance to project liability wrap-up and builders risk solutions, from surety bonding to contractor default insurance, learn more about the Marsh Solution at www.marsh.ca, or contact:

Patrick Baker: 416 349 4430 • patrick.w.baker@marsh.com
Shane Sinclair: 416 349 6673 • shane.sinclair@marsh.com
Barry Normet: 416 349 4871 • barry.normet@marsh.com

Partnering for impactSM

Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.



specify the amount the owner refuses to pay, and the reasons for non-payment.

Once a contractor receives such a notice, it may (i) refuse to pay its sub-contractors and commit to initiating an adjudication process against the owner within 21 days if payment remains outstanding; or (ii) pay the sub-contractor within 35 days of having given the proper invoice to the owner and proceed with an adjudication if it elects to do so.

Independent of receipt of any such notice from the owner, a contractor may also refuse to pay its sub-contractors and provide a similar notice of non-payment to them within 35 days of having given the proper invoice to the owner.