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*Ontario's New Construction Act:
Adapting to the New Prompt Payment
& Adjudication Regimes*

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Ontario's New *Construction Act*

The New Adjudication Regime

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Adjudication – what is it and why do it?

- “The teeth for ensuring compliance with the pending prompt payment requirements”
- Dispute resolution whereby a qualified individual who is not a judge reviews a dispute to make a quick determination on an interim basis
- Aims of adjudication:
 - Remove dispute gridlock
 - Eliminate late payment and non-performance
 - Free up cash flow and resources

Who decides what and when?

- Adjudicators (s. 13.1)
 - qualified by the Authorized Nominating Authority designated under the Act
- Adjudicable Disputes (s.13.5)
 - Any party to a contract or subcontract may refer dispute
 - Only available for disputes relating to matters prescribed by statute – namely, non-payment
 - Adjudication must be commenced before Completion of Contract (unless agreed otherwise)
- Consolidation (s. 13.8)

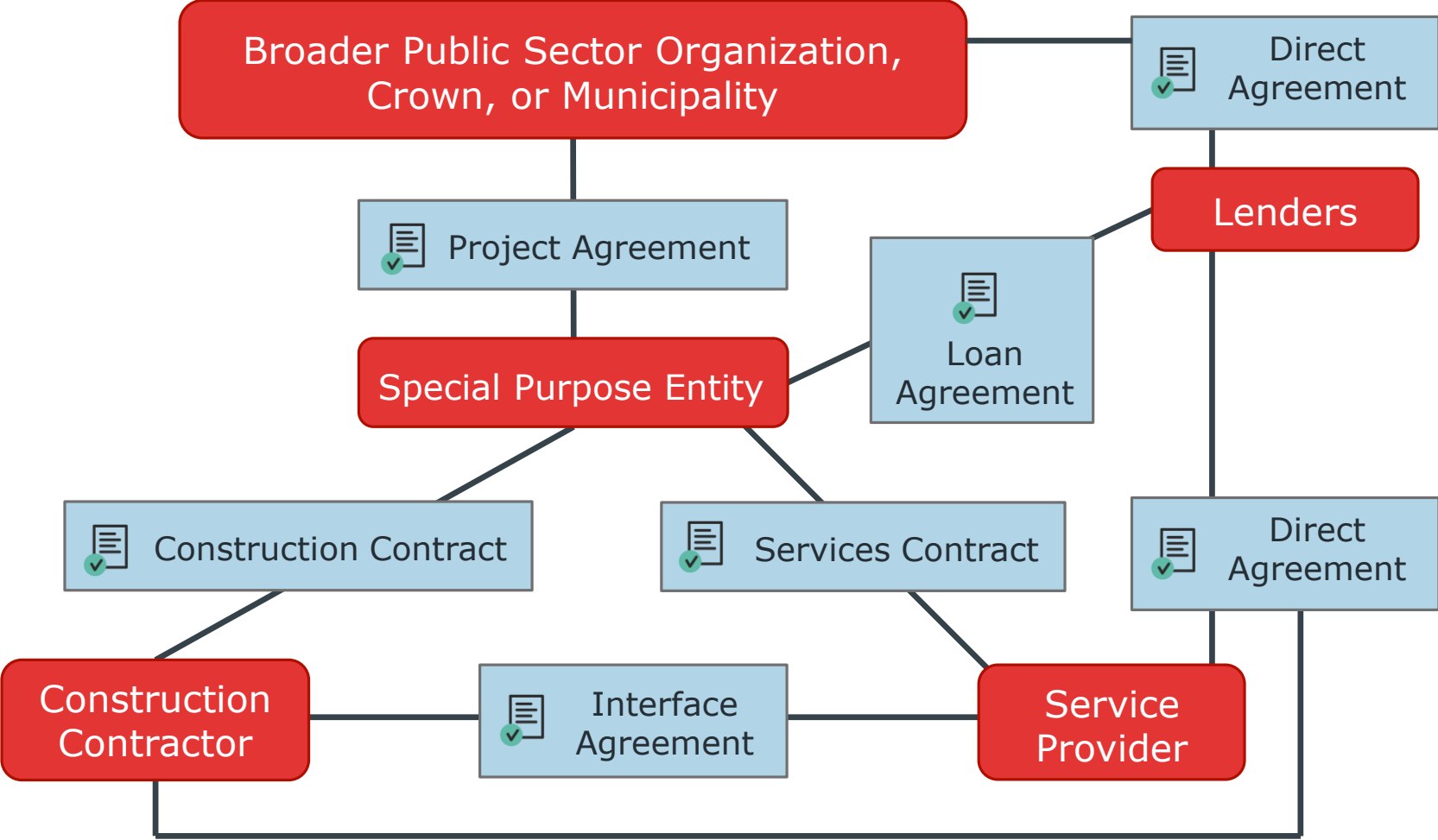
Timelines

Timeline	Step in Adjudication Process
Commencement of Process	Claimant delivers Notice of Adjudication, which includes proposed adjudicator (s. 13.7)
<p>Parties may agree on adjudicator or may have Authority appoint one.</p> <p>If adjudicator does not accept appointment within 4 days following Notice of Adjudication having been given, Claimant is to request that the Authority appoint an adjudicator, which the Authority must do within 7 days of receipt of request for appointment.</p>	Adjudicator appointed (ss. 13.7 and 13.9)
Within 5 days of appointment of adjudicator	Adjudicator receives Claimant's documents (s. 13.11)
-	Respondent may respond in writing, subject to directions of any appointed adjudicator (s. 13.11.1 and Reg. 306/18, s.17)
Within 30 days of receiving Claimant's documents (subject to limited exceptions)	Adjudicator renders decision (s. 13.13)
Within 10 days of receipt adjudicator's decision	Any payments ordered, must be made (s. 13.19(2))

What else do I need to know?

- Interest on late payments (s. 13.19(3))
- Suspension of work (s. 13.19(5))
- Decision enforceable in court (s. 13.20)
- Parties bear their own costs (unless frivolous, vexatious conduct) (ss. 13.16 and 13.17)
- Judicial review (s. 13.18)

Alternative Financing and Procurement Arrangements (P3s) are Different



“Things that make you go hmm?...”

- Does the adjudication regime apply to me?
 - Transition provisions
- What happened to my lien rights?
- Trust claims?
- Breach of contract claims?

“Things that make you go hmm?...”

- Can I provide for adjudication procedure in my contract?
 - appointment of adjudicator, but don't name any specific person
 - timing for exchange of documents
 - oral hearing
- How can I best prepare for my adjudication?

The Road Ahead

- What about my big, private arbitration?
- My complex, lengthy lien action?

Sample Claim Walk Through

- Stellar Owner (“**SO**”) has contracted with Premium Contractor (“**PC**”) for the renovation of its shopping mall premises, Best Bargain Mall (“**BBM**”).
- As part of the renovation project, PC was to install moving walkways on the first floor of BBM. The installation of moving walkways is a contractual milestone, for which PC is entitled to payment once completed. There are many other milestones to be completed under the contract following completion of the moving walkways on the first floor.
- PC has subcontracted out all moving walkway work to Super Mechanical (“**SM**”). SM did not subcontract out any of its work for PC.

Sample Claim Walk Through

- PC delivers a proper invoice for 100% completion of the moving walkways on the first floor on Day 1.
- SO's consultant, Hawkeye Engineering ("**HE**"), reviews the proper invoice, the specified work to be done, and actual work performed in the field.
- HE determines that the moving walkways are only 80% complete.

Sample Claim Walk Through

- Before Day 14, SO accordingly gives PC a Notice of Non-Payment for 20% of the work invoiced and pays PC the remaining 80% of the amount invoiced before Day 28.
- PC disputes that 20% of the work remains outstanding and maintains that 100% of the work was completed as identified in the proper invoice.

Sample Claim Walk Through

- Is this dispute adjudicable?
 - Yes.
- What should PC do?
 - Within 7 days of receipt of SO's Notice of Non-Payment, PC must,
 - provide SM with a Notice of Non-Payment of the 20% due to non-payment of SO; and
 - undertake to SM that PC will commence an adjudication against SO within 21 days of giving SM the Notice of Non-Payment.
 - Within 7 days of receipt of the 80% payment from SO, PC must pay SM for this 80% portion of the work performed.

Sample Claim Walk Through

- What else should PC do?
 - Within 21 days of giving Notice of Non-Payment to SM, deliver Notice of Adjudication to SO
 - Have documents, reasons, and any experts prepared as to why PC is entitled to the additional 20%
 - Consider seeking support from SM
- What should SO do?
 - Have documents, reasons, and any prepared as to why PC is not entitled to the additional 20%
 - Be prepared to permit on-site inspection

Sample Claim Walk Through

- What should SM do?
 - Have documents, reasons, and any experts prepared as to why SM is entitled to the additional 20%
 - Consider supporting PC
 - Consider delivering Notice of Adjudication against PC
 - SO, PC, and SM may then agree to consolidate the adjudication or PC can compel consolidation

Sample Claim Walk Through

- What next?
 - Adjudicator appointed
 - 5 days later PC provides documents
 - 30 days later Adjudicator makes order
 - If SO ordered to pay sums to PC, SO must do so with 10 days of order
 - Same goes for PC, if it is ordered to pay sums to SM

Sample Claim Walk Through

- What if this were a Alternative Financing and Procurement Arrangement (P3)?
 - Special Purpose Entity
 - Construction Contractor
 - Subcontractor
- Is this dispute adjudicable?
 - No
 - Determination of whether a milestone reached where reaching milestone requires an amount to be paid not adjudicable



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