

Construction Act Changes for Public Projects

If work on public projects, there are specific aspects of the *Construction Act* that apply to you and your work on these projects.

Surety Bonds

Contractors performing work on public projects should be aware of the increased requirements for surety bonds. For most public projects with a contract price of \$500,000 or more, the contractor must obtain a labour and material payment bond and a performance bond that meet the requirements in the *Construction Act*.

The labour and materials payment bond must be in the government form, must be issued by a licensed insurer, must have a coverage limit of at least 50% of the contract price, and must extend protection to subcontractors and persons supplying labour or materials. The performance bond must be in the government form, must be issued by a licensed insurer, and must have a coverage limit of at least 50% of the contract price.

Adjudication

There are limitations to the availability of adjudications for public projects. Adjudication cannot be used to determine whether a public project has been substantially completed, whether an agreement between the owner and a contractor has been substantially performed, or whether a milestone in a contractor or subcontractor's work has been completed where payment is based on completion of the milestone.

Alternative financing and procurement arrangements

There are specific *Construction Act* changes that apply to public projects with alternative financing and procurement arrangements, i.e. where the government or public sector organization enters into an agreement with a special purpose entity (or, "Project Co."). In these circumstances, Project Co. is deemed to be the owner of the project.

Project Co. can require payment certification or approval before accepting a "proper invoice" for prompt payment. The *Construction Act* prohibits this practice for private sector projects. Payment may be delayed or disputed because Project Co. can insist on payment certification or prior approval before the "proper invoice" is submitted. However, the prompt payment timelines will apply once the "proper invoice" is submitted.

The requirement for payment certification or approval must be either in the project agreement between the government and Project Co., or in the prime contract between Project Co. and the contractor. The requirement for payment certification or owner approval cannot be added once the project is underway.

Because the requirement for payment certification can be in either the project agreement or the prime contract, subcontractors will likely want to review both of these agreements to understand their rights for prompt payment.



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