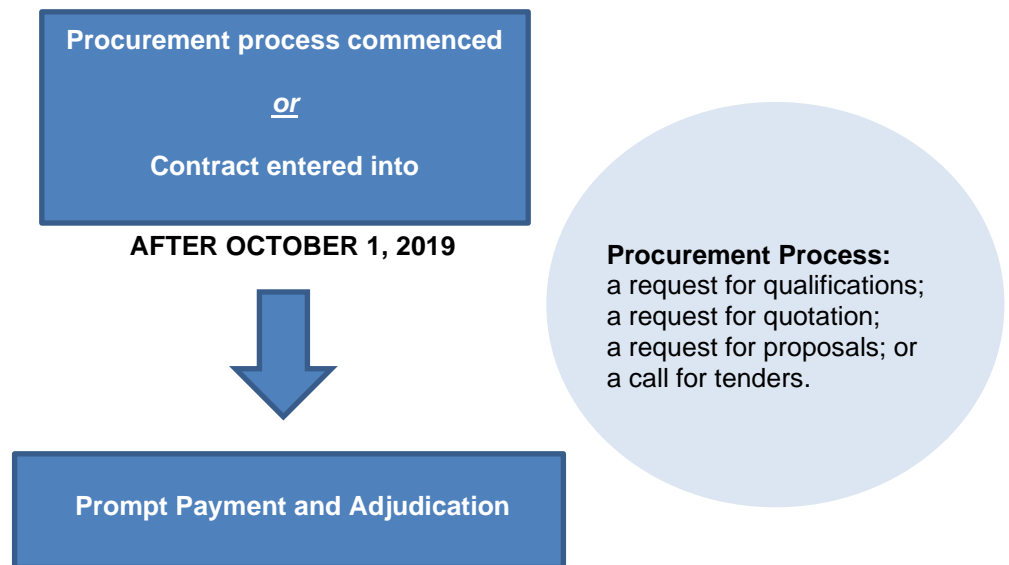


A Guide to *Construction Act* Changes for Contractors

The Construction Act brings significant changes to the construction industry. The biggest changes are coming into force on October 1, 2019: prompt payment and adjudication. These changes apply to **all construction** projects, from home renovations to large infrastructure projects, and everything in between. Once in effect, prompt payment and adjudication will be **mandatory**. There is no need to sign up or opt in. However, there will be a transition period as these changes come into effect, so it is important to know whether these new rules apply to your project.

Does Prompt Payment or Adjudication Apply?



Whether prompt payment and adjudication apply to a project depends on the timing of the commencement of the procurement process or the timing of entering into the prime contract (this means a contract entered into **directly** with an owner). It is **not** dependent on the timing of the procurement or contract with a subcontractor or supplier.

Case Study: On July 1, 2019, the owner issued a request for qualifications for contractors with respect to the construction of a new building. ABC Inc. was awarded the contract on August 29, 2019. ABC Inc. entered into contracts with one of its subcontractors, XYZ Corp. on October 15, 2019.

Does prompt payment or adjudication apply?

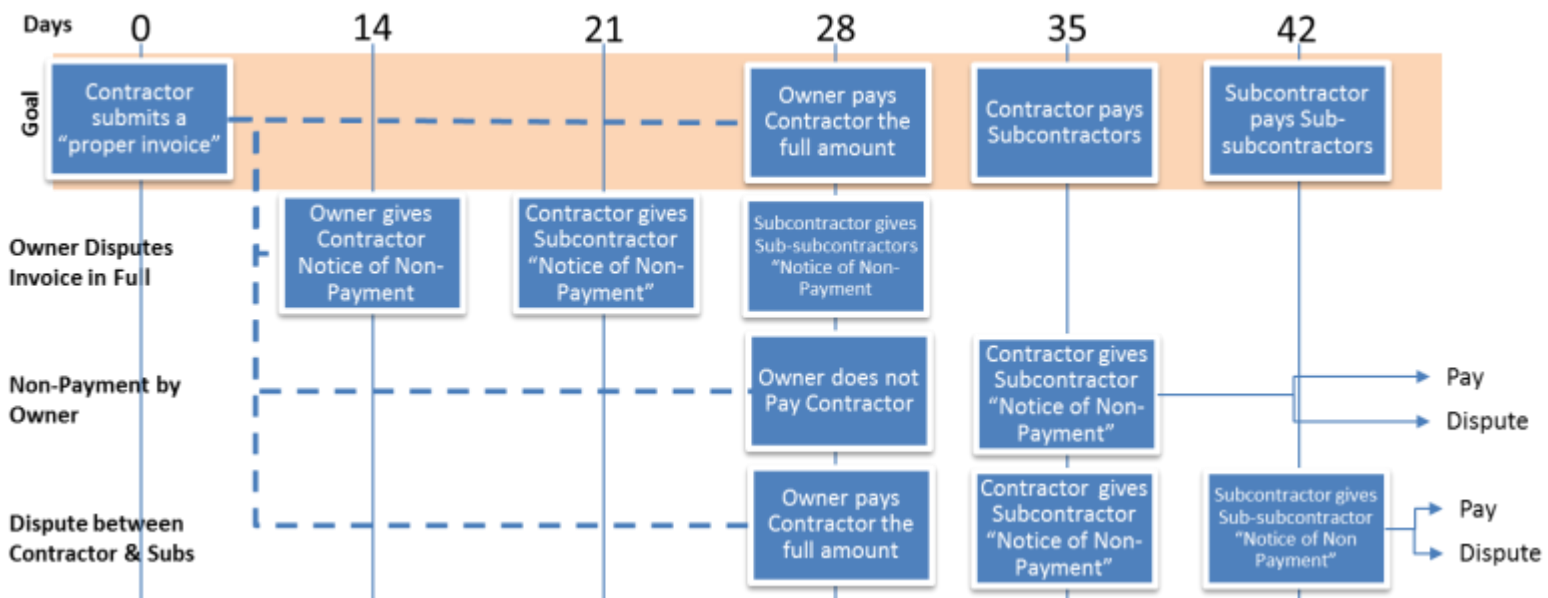
Answer: No. Since the RFQ was commenced before October 1, 2019, prompt payment and adjudication do not apply to the contract between the Owner and ABC Inc. **and** do not apply to the subcontract between ABC Inc. and XYZ Corp.

How does Prompt Payment Work?

Prompt payment operates on a series of rapid timelines for payments to flow down, starting from the owner down to the last supplier.

Prompt payment is designed to address late payment, underpayment and non-payment (for example “pay-if-paid” clauses) to try to force the owner to pay quickly or provide you with a reason that you are not going to be paid. The dates are in **calendar days**, which **include** holidays and weekends.

What are the timelines for Prompt Payment?



The prompt payment clock starts on the delivery of a “proper invoice” from the contractor to the owner. An owner **must** pay the contractor **within 28 calendar days** of receiving a “proper invoice”. Once the contractor receives payment from the owner, the contractor has **7 calendar days** to pay its subcontractors, who then have **7 calendar days** to pay their sub-subcontractors, and the cycle continues.

If an owner does not want to pay all or some of the “proper invoice” it must deliver a “notice of non-payment” to the contractor **within 14 calendar days** of receiving the “proper invoice”. The owner has to provide reasons for the non-payment. The contractor can either pay or dispute the amounts owing to the subcontractor, and can be forced to start an adjudication against the owner.

In situations of non-payment from the owner, contractors will no longer be able to rely on “pay-if-paid” clauses in their subcontracts to avoid paying their subcontractors. Despite not receiving funds from the owner, the contractor will either have to pay its subcontractors or deliver a notice of non-payment to the subcontractors. In some cases, the contractor will also have to undertake to commence an adjudication against the owner within 21 days.

Case Study: The contractor gives the owner a proper invoice on January 2, 2020.

When will the contractor get paid?

Answer: The owner has until January 30, 2020 to pay the contractor (assuming the owner has not delivered a notice of non-payment by January 16, 2020). If the contractor is paid on January 30, 2020, it has until February 6 to pay its subcontractors.

What are the requirements for a “proper invoice”?

A “proper invoice” needs to include the basic requirements set out in the *Construction Act* and can also include terms that the parties agree to in the contract. However, there are two key exceptions: (1) a “proper invoice” **cannot** include the requirement for payment certification; and (2) a “proper invoice” **cannot** be conditional on owner approval. The *Construction Act* requires that a “proper invoice” include:

- the contractor’s name and address;
- the date of the proper invoice and the period during which the services or materials were supplied, information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied;
- a description, including quantity where appropriate, of the services or materials that were supplied;
- the amount payable for the services or materials that were supplied, and the payment terms; and
- the name, title, telephone number and mailing address of the person to whom payment is to be sent.

As a contractor, you should expect major changes to your contracts about the requirements for a “proper” invoice. Some of these changes will likely incorporate standard terms, like the requirement for a statutory declaration and WSIB clearance certificate. However, expect owners to include additional requirements like the requirement to include an updated schedule, a statements of value and or certification of commissioning. The contract can also specify the timing for giving a “proper invoice”, which means that a contractor may have to give the proper invoice on a particular date (for example the 28th of every month) or only after a milestone (for example after certain approvals are obtained).

As a contractor, you will need to make sure you can meet the requirements of a “proper invoice”. Otherwise, if the requirements are too onerous and you are unable to give a “proper invoice” and the clock for payment will not start.

Strategies for Preparing for Prompt Payment:

What to include (and watch out for) in contracts

- Be aware of any clauses in contracts establishing further requirements for “proper invoices” beyond the requirements set out in the *Construction Act*.
- Negotiate reasonable invoicing terms with the owner

- include a provision that requires the owner to notify you if your invoice is not a “proper invoice”. (If the invoice is not a “proper invoice” the owner is not required to advise you or give you a notice of non-payment).
- include a provision to confirm that change orders will be, when applicable, part of the “proper invoice” submission and related payment timelines. The *Construction Act* does not state whether a change order itself is part of prompt payment. It is important to make this clear in the contract so an owner can’t argue that a change order will not need to be paid in accordance with the timelines for prompt payment.
- ask the owner to pay you by electronic fund transfer so you can more easily meet the seven-day prompt payment timeline to pay your subcontractors.
- Revise your subcontract terms
 - ensure the requirements for a “proper invoice” in the prime contract are mirrored in your subcontracts.
 - consider modified “paid when paid” clauses so that you do not have to pay subcontractors while in a dispute with the owner over payment.

Other Strategies

- Give your invoices on time and with the required documentation.
- Familiarize yourself with the new forms.
- Keep track of your deadlines to deliver notices of non-payment.
- Coordinate your office staff to be able to process payments quickly.

What is Adjudication?

Adjudication is a new dispute resolution process with structured timelines and is intended to swiftly resolve payment disputes during the project. This will force the parties to deal with payment disputes, change orders and payment of holdback disputes quickly. You will also still have your lien rights!

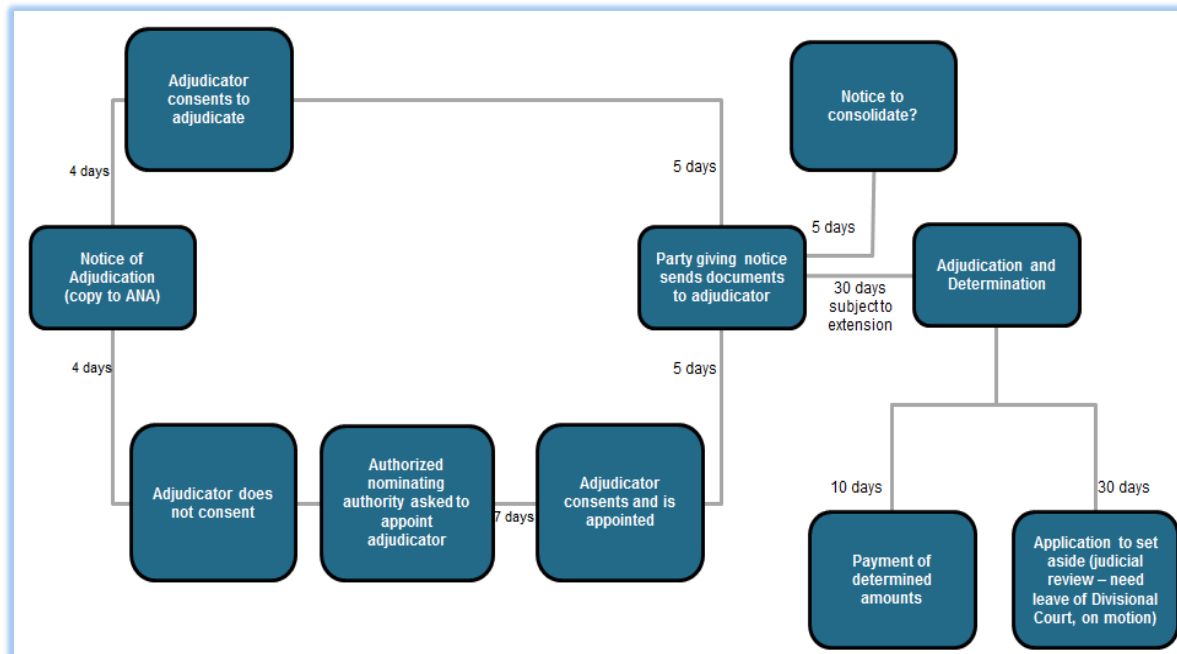
An adjudication can be brought at any time. You will need to be strategic about the timing and subject of your adjudication to best achieve your desired outcome. The following types of disputes can be referred to adjudication:

- the valuation of services or materials provided under the contract;
- payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
- disputes that are the subject of a notice of non-payment under the prompt payment scheme; and

- payment or non-payment of holdback.

Parties can also agree to refer other types of disputes to adjudication.

The timing for an adjudication is as follows:



Once the determination is issued, payment must be made within **10 calendar days** or the successful party can suspend work and be entitled to demobilization and remobilization costs.

While adjudication is an interim step, the adjudicator's determination is *binding* for the life of the contract. In almost all circumstances, the parties share the cost of the adjudicator.

The Authorized Nominating Authority will be called the Ontario Dispute Adjudication for Construction Contracts. More information on the ODACC can be found at www.odacc.ca.

Strategies to Prepare for an Adjudication:

- Parties can create their own rules and procedures for adjudications. Review dispute resolution clauses carefully to see if the owner includes any extra rules. Include any rules that are important to you.
- Parties can agree to refer other matters to adjudication. Make sure to include in your contract any types of disputes that you would like to have referred to adjudication, and be aware of any inclusions by the owner.
- Organize documents so that they are easily accessible. Document the progress of the work through reports, photographs and videos. You may need to prepare for or respond to an adjudication on short notice.

- Plan for vacations and holidays. Another party may strategically start an adjudication during holiday periods or when a key project person is on vacation.



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