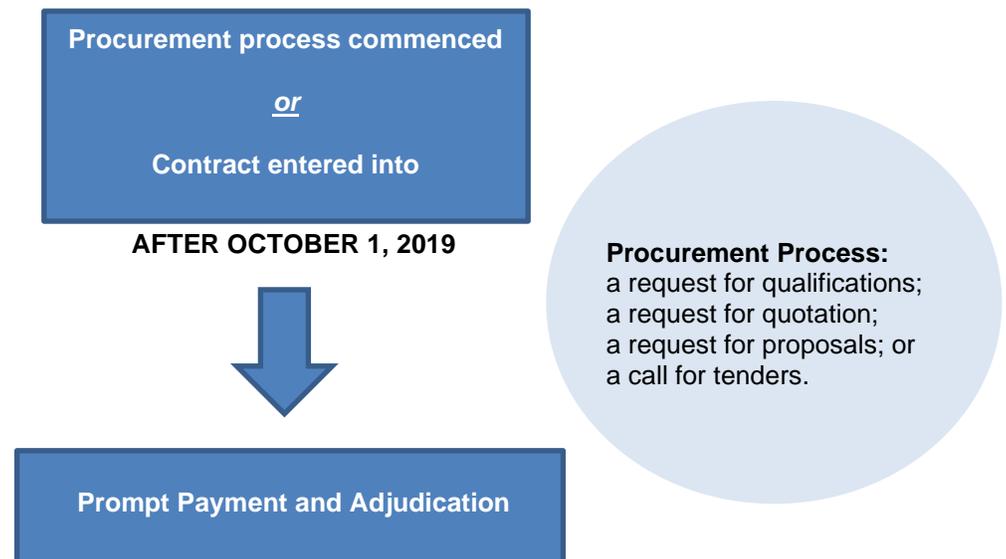


## A Guide to *Construction Act* Changes for Subcontractors

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). As a subcontractor (meaning you have a contract with the general contractor for the project), you likely have no information about the procurement process and/or prime contract date. If you are lucky, this information may be in your contract, or you can try to get the information during contract negotiations. You can also exercise your right to ask the owner for the information directly. You can send a letter asking for the procurement timing and date of the prime contract under section 39 of the *Construction Act*. The owner has 21 days to respond.

**Case Study:** ABC Contractor Inc. entered into a subcontract with XYZ Corp. on October 15, 2019. The subcontract states that ABC Contractor Inc. entered into the prime contract with the owner on October 1, 2019.

*Does prompt payment or adjudication apply?*

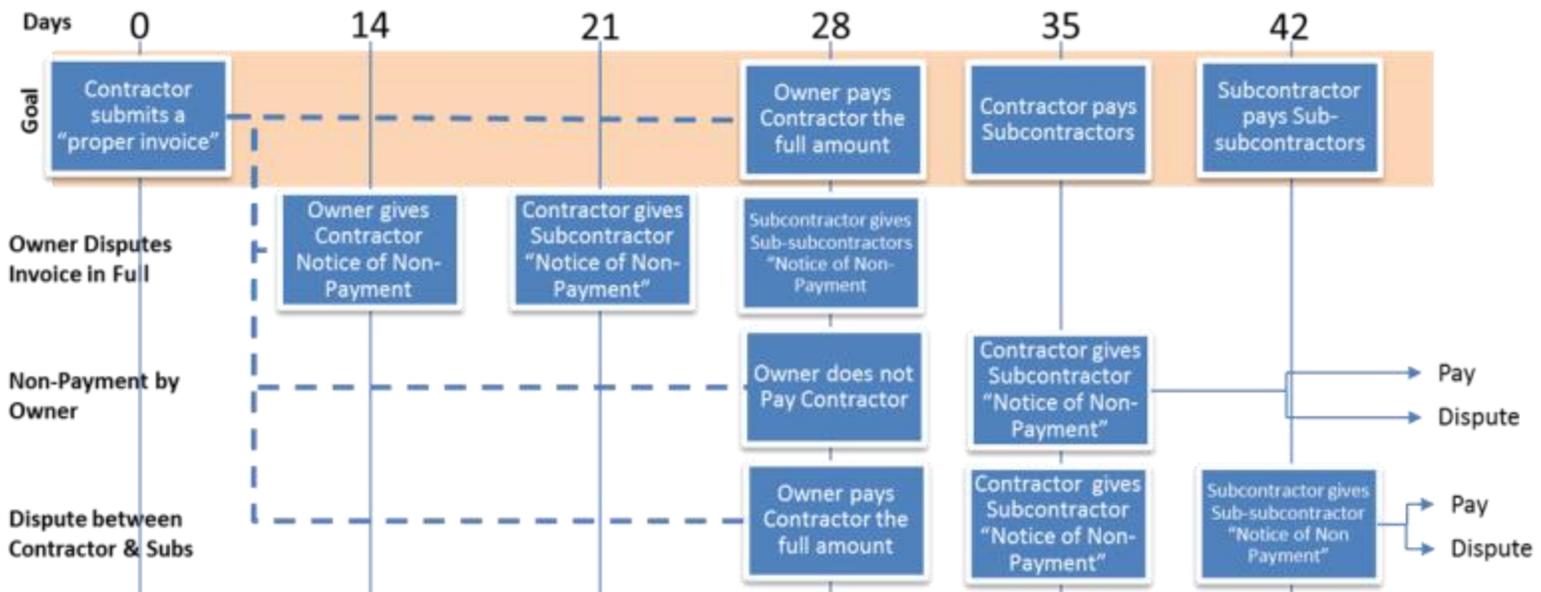
Answer: More information is needed. It is possible that a procurement process commenced before October 1, 2019. XYZ Corp. may want to send a request under section 39 of the *Construction Act* to obtain information about the timing of the procurement process.

## 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.

As a subcontractor, prompt payment **does not directly apply to your subcontract or the invoices you submit to the contractor**. It is very important that you include terms in your

contract that require the contractor to include your invoice in its proper invoices to the owner. It is also important that you require the contractor to notify you of the date the proper invoice was submitted and the date the contractor was paid.

### **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 subcontractor, you can expect that the contractor may add other requirements in your contract

In your subcontracts, you also may want to insist on contractual language requiring the contractor to include (or “carry”) your invoices with every “proper invoice” given to the owner. You may also want to find out more about the timing of payment terms in the prime contract (i.e. is the contractor invoicing the owner monthly, bi monthly or based on milestones).

### **Practical Tips For Prompt Payment for Subcontractors**

- Negotiate reasonable invoicing terms.
- Ensure your subcontracts with the contractor require the contractor to include or carry your invoices and change orders with every “proper invoice” given to the owner. 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 is not a “proper invoice”.
- Ensure your subcontracts require the contractor to notify you of the date the proper invoice was given to the owner and the date that the owner paid the proper invoice.
- Deliver your invoices on time and with the required documentation.

- Keep track of your deadlines to deliver notices of non-payment (and know which form applies).
- If you have sub-subcontractors or suppliers, try to get paid by electronic fund transfer so that funds clear your account with enough time (you have **seven calendar days**) to pay your sub-subcontractors or suppliers.
- Ensure the payment terms in your subcontract with the contractor are passed on to your sub-subcontractors.
- Coordinate your office staff to be able to process payments quickly.

### What is Adjudication?

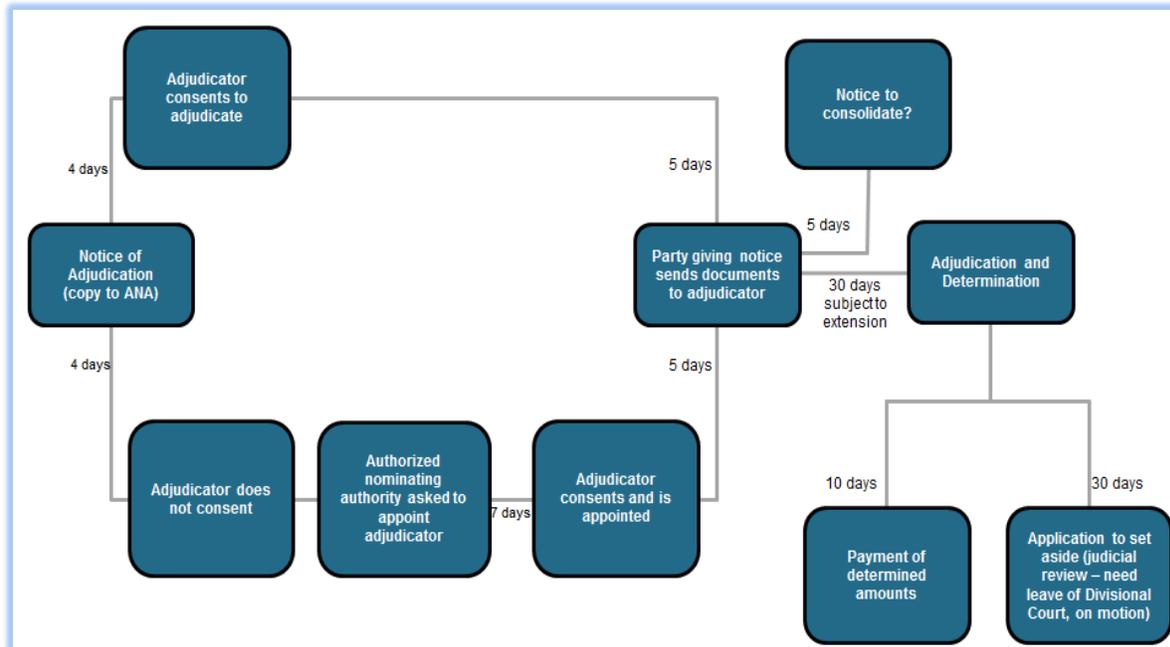
Adjudication is a new dispute resolution process with structured timelines and is intended to swiftly resolve payment disputes during the project. This will force the parties to deal with payment disputes, change orders and payment of holdback disputes quickly. You will also still have your lien rights!

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](http://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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