Show Me the Money: Manitoba to Amend The Builders' Liens Act to Provide for Prompt Payment

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On May 30, 2023, Bill 38: ***The Builders' Liens Amendment Act (Prompt Payment)*** ("Bill 38" or the "Amendments") received Royal Assent in the Legislative Assembly of Manitoba. It will officially come into force at a date yet to be announced.

The aim of Bill 38 is to amend *The Builders' Liens Act* (the "Act") to establish a prompt payment scheme in Manitoba which will facilitate the timely flow of payments on a construction project by establishing deadlines on each payor in the construction contract chain.

Legislation similar to Bill 38 has recently been enacted in other Canadian provinces, including Ontario, Saskatchewan and Alberta. Three previous attempts to legislate prompt payment in Manitoba (2017, 2018 and 2022 – each time as a standalone piece of legislation) had been unsuccessful.

When it ultimately comes into force, Bill 38 will have significant impacts on the construction industry in Manitoba. Owners, contractors and sub-contractors alike will all need to ensure that they are aware of their rights and obligations in this new landscape.

Prompt Payment

The focus of Bill 38 is the introduction of a prompt payment scheme in Manitoba which closely resembles those implemented in other Canadian jurisdictions. It imposes certain deadlines for each party on a construction project to remit payment down the construction chain – many of these deadlines are tied to the date the general contractor gives the owner a "proper invoice".

Proper Invoice

Bill 38 describes a proper invoice as requiring:

- the contractor's name and address;
- the date of the invoice and the time period during which the work, services or materials were

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provided;
- information identifying the contract or other authority under which the work, services or materials were provided;
- a description of the work, services or materials that were provided by the contractor and its sub-contractors, including quantity if appropriate;
- the amount invoiced for the work, services or materials that were provided and the payment terms;
- the name, title, telephone number and mailing address of the person to whom payment is to be sent; and
- any other information required by the regulations.

The Amendments require that the contractor provide the owner with a proper invoice each month unless their contract provides for a different time period.

Payment from owner to contractor

Once a proper invoice has been issued by the contractor to the owner, the owner must then pay the invoiced amount to the contractor within 28 days.

However, if the owner disputes some or all of the amounts included in the proper invoice, they can suspend this payment deadline if they provide notice of non-payment to the contractor within 14 days of receiving the proper invoice.

A notice of non-payment must set out the amount that is not being paid because the owner disputes the proper invoice and details of every reason for the refusal to pay. If the owner only disputes a portion of the invoice, it must still pay the undisputed amount within the 28-day deadline.

If a contractor receives a notice of non-payment from an owner, it must immediately advise its applicable sub-contractors.

Payment from contractor to sub-contractor

After receiving full or partial payment from the owner, the contractor has 7 days to pay its sub-contractors. If the owner does not pay the contractor (at all or in full), the contractor has 35 days from the date it submitted its proper invoice to pay its sub-contractors the entire amount invoiced.

Like an owner, a contractor can suspend the payment obligations it has to its sub-contractors by providing a sub-contractor with a notice of non-payment before the payment deadlines. The contractor can issue this notice to its sub-contractor because either a) the owner has failed to pay the contractor, or b) the contractor disputes the sub-contractor's entitlement to be paid.

If the basis for the notice of non-payment to the sub-contractor is as a result of an owner's failure to pay the contractor, the notice of non-payment provided by the contractor to the

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sub-contractor must: a) set out the amount was not paid to each applicable sub-contractor because the owner disputes the proper invoice, and b) contain an undertaking to refer the dispute with the owner to adjudication within 21 days after giving the notice to the sub-contractor. This notice must be provided by the contractor within 7 days from receiving a notice of non-payment from the owner, or, if a notice of non-payment was not given by the owner, before the expiry of the 35-day payment period.

If the basis for the notice of non-payment to the sub-contractor is owing to the contractor disputing the sub-contractor's invoice, the notice must set out the amount that is not being paid because the contractor disputes the amount claimed by the sub-contractor and details of every reason for the refusal to pay. This notice must be provided by the contractor within 7 days from receiving either payment or a notice of non-payment from the owner, or, if no notice of non-payment was given by the owner, before the expiry of the 35-day payment period.

If a sub-contractor receives a notice of non-payment from a contractor, it must immediately advise its applicable sub-contractors.

Payment from sub-contractor to sub-contractor

After receiving full or partial payment from the contractor, each sub-contractor has 7 days to pay its own sub-contractors. If the contractor does not pay the sub-contractor (at all or in full), the sub-contractor has 42 days from the date the contractor submitted its proper invoice to pay its sub-contractors the entire amount invoiced.

Again, these timelines can be suspended by the sub-contractor providing a notice of non-payment to its sub-contractors before the payment deadlines as a result of a) non-payment by the contractor to the sub-contractor, or b) the sub-contractor disputing its sub-contractor's entitlement to be paid.

The timing and content requirements of the notices of non-payment to be given by a sub-contractor to its sub-contractors are similar to what is required of a contractor to a sub-contractor, the main difference being the extension of the 35-day period to 42 days.

Payments further down the chain

The above outlined process continues to apply to sub-contractors down the payment chain. For each level down the chain, 7 days are added to the ultimate payment deadline from the date of the contractor giving the proper invoice to the owner.

Adjudication

Importantly, Bill 38 also introduces an adjudication process in Manitoba for disputes arising from the prompt payment scheme. The intent of the adjudication process is to resolve

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disputes relating to payment in a more timely manner than otherwise available through traditional court processes.

The Amendments outline that the following issues can be referred to adjudication:

- a dispute related to a notice of non-payment given by the owner, contractor or sub-contractor;
- a failure to submit a proper invoice;
- a failure to make a payment in accordance with the Amendments;
- a dispute in respect of the valuation of work, services or materials provided under a contract or sub-contract;
- a dispute in respect of a payment under a contract or sub-contract, including in respect of a change order, whether approved or not, or a proposed change order;
- a dispute in respect of a set-off claimed by a party in accordance with the Amendments;
- any other matter agreed to by the parties to the adjudication; and
- any other matter set out in the regulations.

The Amendments provide the framework for the adjudication process. Many important details with respect to adjudication remain to be set out in further regulations of the Act.

While use of the adjudication process has initially been relatively limited in provinces such as Ontario, the most recent reporting is that take up is slowly trending upwards as the industry becomes more familiar with it.

Other Changes to the Act

To accommodate the above prompt payment timeline, a further significant amendment to the Act is to replace the 40-day timeline associated with the builders' lien remedy to 60 days.

Further, within two years Bill 38 of coming into force, the government will undertake a comprehensive review of the Act, which must include public representations and result in a report being tabled in the Legislative Assembly.

Conclusion

Bill 38 will have a significant impact on all parties in the construction industry in Manitoba.

We will provide a further update when Bill 38 comes into force. As well, we will provide some "lessons learned" from other jurisdictions that have had a prompt payment regime, including details relating to the adjudication process.

If you want to know if Bill 38 will have significant impacts on your Manitoba business, please contact someone **in the TDS Construction Law group**.

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