

Ontario's New Construction Act: Preparing for a New World

**Guides to the July 1, 2018 Changes
- and to -
Prompt Payment and Adjudication**

September, 2019

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Lien Preservation Timeframes under the July 1, 2018 Changes

The July 1, 2018 Threshold

The lien timeline changes apply under contracts procured or entered into after July 1, 2018 (with the exception, due to a legislative quirk, of those procured or entered into before December 6, 2018 where a lease was registered against the Premises). A contract is deemed to have been “procured” when the procurement process commences. Examples of a “procurement” process includes a call for tenders, an RFP, an RFQ or a “request for qualifications”. The date a *subcontract* was procured or entered into is irrelevant: it is the date the contract was procured or entered into that governs.

Lien Timeframes: Contractor

- under the **prior provisions**, the lien of a **Contractor** expires if not preserved **45 days** following the completion or abandonment of the Contract or (as regards the lien against the basic holdback) the publication of a certificate of substantial performance;
- under the **new provisions**, the lien of a **Contractor** expires if not preserved **60 days** following the completion, abandonment **or termination** of the Contract or (as regards the basic holdback) the publication of a certificate of substantial performance. Termination occurs when any person whose lien is subject to expiry publishes a notice of termination in (currently) the *Daily Commercial News*. There is (currently) no requirement under the *Act* for the notice to be sent to any other party (although there may, and should, be such a requirement set out in the contract and subcontracts). The 60 day timeframe for lien expiry on termination is from the date of termination set out in the published notice, and **not from the date of publication**. This makes timely notice of the termination even more important. The validity of the termination can be contested where it was improper (for example where there were insufficient grounds for termination or where a contractual notice provision was not followed).

Lien Timeframes: SubContractor

- under the **prior provisions**, the lien of a **Subcontractor** expired **45 days** following the subcontract’s deemed completion, the Subcontractor’s last supply of services or materials or the publication of a certificate of substantial performance (as regards the lien against the basic holdback). Under the new *Act*, the timeframe is **60 days**.

Lien Timeframes: When an Adjudication has been Commenced

- notwithstanding the above, if a lien has not expired and the subject of the lien is before an adjudicator under the *Act*, the lien expiry will be extended until 45 days after the adjudicator receives the claimant’s documents under s. 13.11 of the *Act*.

Other Considerations: re Lien Expiry

- the time to **perfect** a lien has been extended from 60 to **90 days** under the new *Act*;
- Contractors and Subcontractors may be asked to sign a binding declaration of last supply. Anyone signing such a declaration should be sure their work is complete and insist that any new work be formally done under a new contract or subcontract;
- claimants should be aware that they may effectively lose their lien rights against the land on new home and condominiums improvements on a unit by unit basis as the sale of units close or if the contract provides that liens arise on a lot by lot basis. Claimants should also be aware, at the bid stage, that if the sole ‘Owner’ of an improvement is a mere tenant of the Premises, their liens will most likely not attach to the actual land.

FORM 8
NOTICE OF TERMINATION UNDER SUBSECTION 31(6) OF THE ACT
Construction Act

(name of owner, contractor or other person whose lien is subject to expiry)

Description of the premises:

(Use A or B, whichever is appropriate)

☐ A. Identification of premises for preservation of liens:

(if a lien attaches to the premises, a legal description of the premises,
including all property identifier numbers and addresses for the premises)

☐ B. Office to which claim for lien must be given to preserve lien:

(if the lien does not attach to the premises, the name and address of the person or body to whom the claim for lien must be given)

Termination of contract or subcontract:

The contract or subcontract with ----- dated the
(name of contractor or subcontractor)

-----, 20-----, is terminated on the ----- day of -----, 20-----.

Date: -----

(owner, contractor or other person)

Holdback Provisions under the July 1, 2018 Changes

The July 1, 2018 Threshold

The new holdback provisions apply under contracts procured or entered into after July 1, 2018 (with the exception, due to a legislative quirk, of those procured or entered into before December 6, 2018 where a lease was registered against the Premises). A contract is deemed to have been “procured” when the procurement process commences. Examples of a “procurement” process includes a call for tenders, an RFP, an RFQ or a “request for qualifications”. The date a *subcontract* was procured or entered into is irrelevant: it is the date the contract was procured or entered into that governs.

Retention and Mandatory Payment of Basic Holdback

- the holdback may now be retained through a letter of credit, bond or prescribed form.
- in addition, the payment of the basic holdback is **now mandatory** once all liens that may be claimed against it have expired or been paid, discharged or vacated, **unless** the person having the holdback obligation publishes a **notice of non-payment of holdback** in (currently) the *Daily Commercial News* no later than **20 days** before the basic holdback is due to be released **and provides a notice** in that regard to the person they don’t intend to pay within the next **3 days**. The notice can be provided in electronic or paper format and need not be “given” by service or registered mail (as is the case with many other documents).
- Come October 1, 2019 and where the adjudication provisions of the new *Act* apply, the person providing a notice of non-payment of holdback must also refer the non-payment of the holdback by the person above it to Adjudication.
- on the one hand, the “*holdback-payment-is-mandatory-unless-notice-is-given*” requirement will assist contractors and subcontractors to better assess whether or not to preserve a claim for lien. On the other hand, the provisions effectively eliminate pay-when-paid provisions when it comes to holdback: if you don’t give a notice of non-payment of holdback, 20 days before it is due, you will have to pay it even if you don’t get it and even if the person above you did not give you a notice of non-payment. Searching the *Daily Commercial News* to see if the Owner has published a Notice of Non-Payment of holdback is therefore a good practice to follow.

Payment of Basic Holdback on an Annual or Phased Basis

- so long as statutory conditions are met, the *Act* now allows the basic holdback to be released on an annual or phased basis where the contract calls for the such release and is worth \$10,000.000.00 or more. The conditions precedent to early release are:
 - that the contract provides for the annual or phased holdback release and includes either a schedule that is longer than a year or phases identified for the payment of accrued holdback; and
 - there are no preserved or perfected liens in respect of the contract; or
 - all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the *Act*.
- there is no requirement that the Owner (or anyone) publish or give a Notice that accrued basic holdback is due for early, phased release. Subcontractors may accordingly wish to ask if the contract provides for phased or annual release of holdback pursuant to a s. 39 request under the *Act*.

FORM 6
NOTICE OF NON-PAYMENT OF HOLDBACK UNDER SECTION 27.1 OF THE ACT
Construction Act

Name: _____
(Name of owner, contractor or subcontractor)

Address: _____

Description of the premises:

Name of [contractor/subcontractor (choose one)]: _____

Address: _____

Address for service, if known: _____

The [owner/contractor/subcontractor (choose one)] will not pay the following amount required to be paid under sections 26 and 27 of the *Construction Act*.

(Use A or B, whichever is applicable)

- A. The full amount of the holdback, being \$ _____ .
- B. A portion of the amount of the holdback, being \$ _____ .

[If applicable] A copy of any notice of non-payment of holdback from the [contractor/subcontractor (choose one)] is enclosed.

Date: _____

(Owner)

Performance and Labour and Material Bonds under the *Construction Act*

Under the *Construction Act* every contractor (other than an architect or engineer) must furnish a performance and labour and material payment bond under all “public contracts” with a contract price of \$500,000.00 or more, with the exception that under a P3 project the bonds must be furnished by the special purpose entity (or “ProjectCo”) responsible for the improvement. The bonds will be in a prescribed form, which will set out how claims under the bond are to be processed.

The “Public Contract” and the Bonding Requirement

- a public contract is a contract where the owner is the Crown, a municipality or a “broader public sector organization”. If the project is being funded with public tax dollars, it is most likely the definition will be met. Every hospital, school board, university and college receiving public funds, along with every corporation controlled by such an entity that exists solely or primarily to purchase goods or services on its behalf is caught by the definition. Also included is every authority, board, commission, committee, corporation, council, foundation or organization that received public funds of \$10 million dollars or more in the previous fiscal year;
- the *Act* does not require owners to request or require the mandatory bonding. Accordingly, if the tender documents or terms of a public contract are silent on the issue, the obligation to provide the bond will still fall to the contractor if its price exceeds \$500,000.00. To avoid confusion, owners should consider indicating that such bonding will be required if they meet statutory requirements, should the \$500,000.00 threshold be met. The *Act* does not address what happens if the contract price increases beyond \$500,000.00 through changes.

The Scope of the Public Contract Bonding Requirements

- both the performance and labour and material payment bonds must have a minimum coverage limit of at least 50% of the contract price, except that on alternative financing and procurement or P3 Projects the maximum coverage will be \$50,000,000.00;
- the mandatory performance bond will not respond to liquidated damages under the contract, to damages for delay or for indirect or consequential damages;
- according to section 85.1(4) of the *Act*, the labour and material payment bond must extend protection “to subcontractors and suppliers supplying labour or materials to the improvement”. However, the Surety Association of Canada has negotiated a form of bond which limits its coverage to first and second tier subcontractors. The form further restricts the recovery of second tier subcontractors to such amounts as the contractor “would have been obligated to pay to the Sub-subcontractor” under the *Act*. This will effectively limit the bond recovery of second tier subcontractors to their share of the holdback in most circumstances. Time will tell if the discrepancy between the s.85.1(4) requirements and the form of the bond will be addressed, either with an amendment to the *Act* or in the Courts.

The Terms and Conditions of the Bonds

- the terms and conditions of the mandatory bonds are very different from those traditionally used. Care should accordingly be taken to review them in the event of a possible claim. The bonds contain claims processes which involve additional steps and tight timeframes which should be understood. A copy of the standard forms are available on our website.

Information Available under the *Construction Act*

Well informed is well armed under the *Construction Act*. Without key information, obligations can go unfulfilled and rights can be lost forever. Accordingly, the *Act* makes information available through either mandatory publication in the *Daily Commercial News* or in response to a request made in accordance with its provisions. With the new *Construction Act*, the scope and detail of information that parties must publish in the *Daily Commercial News* or be make available on request has been greatly enhanced. All of the entitlements and obligations set out below are those that apply under contracts procured or entered into after October 1, 2019. These must be read in the context of the portions of the *Act* they relate to. Searches of the *Daily Commercial News* may be conducted on-line.

RE: Lien Rights and the Holdback

- to assist them to determine who plays what role in an improvement, which versions of the *Construction Act* apply and when their lien rights will expire, Contractors and Subcontractors are entitled to request the following information:
 - (from a party to a contract/subcontract) the names of the parties, the contract/subcontract price and the date the contract/subcontract was entered into;
 - (from the Owner or Contractor) the date on which any applicable procurement process was commenced;
 - (from the Owner or Contractor) if the contract provides that liens arise and expire on a lot-by-lot basis;
 - (from a Contractor) the date the certificate of substantial performance was published (although searching the *Daily Commercial News* on-line would be more timely);
 - (from a Contractor or Subcontractor) whether a subcontract is required to be, or has been, certified as complete (which is important information for sub-Subcontractors and cannot be obtained through a search of the *Daily Commercial News* as such certificates are not required to be published); and
 - (from a Contractor or Subcontractor) whether the contract provides that payment shall be based on the completion of specified phases or milestones.
- In addition, publication of the following in the *Daily Commercial News* is mandatory:
 - a certificate of substantial performance of a contract, which will commence lien expiry timeframes in relation to the basic holdback for all liens that have not previously expired;
 - a notice of non-payment of holdback by the Owner, specifying the amount of holdback the Owner refuses to pay; and
 - a notice of termination of a contract setting out the date a contract has been terminated. (Care should be taken as the Owner or any person whose lien is subject to expiry can publish the notice and as the lien timeframes commence to run from the date set out in the notice and *not* from the date of publication).

... cont'd on page 2

RE: the Proper Invoice

- to assist Subcontractors to determine when timeframes for prompt payment are triggered under the Act, Subcontractors may ask the Contractor to confirm the date upon which the Contractor gave a proper invoice to the Owner.

RE: Status of Accounts, Mortgage Advances and Leases

- to assist parties in assessing the quantum of the holdback, potential lien recovery and the potential for a trust claim, Contractors and Subcontractors can request the following:
 - the price of the services or materials supplied, the amounts paid the balance owed and the applicable holdbacks under a contract or subcontract;
 - which amounts paid under the contract or subcontract constitute leasehold improvement payments;
 - any amount a payor is alleging as a set-off or backcharge against amounts owing under a contract or subcontract;
 - the dates and amounts of advances and any arrears owing under a mortgage;
 - whether a mortgage was given to finance the improvement and, if it was also given to purchase the land, the amount advanced under the mortgage for each of purpose; and
 - from a landlord whose interest in a premises is subject to a lien, the names of the parties to the lease, the amount payable under the lease to pay for the improvement and the amounts actually paid in that regard.

RE: Bonds

- from an Owner, Contractor or Subcontractor, as applicable, a copy of any labour and material payment bond posted in relation to the improvement.

RE: New Homes, Subdivision and Condo Improvements

- in addition to requesting if the contract provides that liens will arise on a lot-by-lot basis, and towards determining if lien rights will be lost against the land as new home buyer's take title upon the close of an agreement of purchase and sale:
 - anyone with lien rights may request, from the Owner, the name and address of the purchaser it intends to sell the premises to, the sale price, the amount of the purchase price paid or to be paid by the Owner prior to the conveyance, the scheduled date of the conveyance and the lot and plan number or other legal description of the premises as contained in the agreement of purchase and sale; and
 - an Owner of a premises who intends to register its description as a condominium must publish a notice of that intention in the *Daily Commercial News* at least 5, but no more than 15, days before the description is submitted for condominium approval under the *Condominium Act*.

FORM 1
WRITTEN NOTICE OF LIEN UNDER SUBSECTION 1(1) OF THE ACT
Construction Act

Name of person having a lien:

Address for service:

Name of payer:

Address:

Name of person to whom person having a lien supplied services or materials:

Address:

Time within which services or materials were supplied:

..... to
(date supply commenced) (date of most recent supply)

Short description of services or materials that have been supplied:

.....

Description of premises:

Contract price or subcontract price: \$

Amount claimed as owing in respect of services or materials that have been supplied: \$

Date:

.....
(signature of person having a lien)

FORM 18
WITHDRAWAL OF WRITTEN NOTICE OF LIEN
UNDER SUBSECTION 41(2) OF THE ACT
Construction Act

Name of person having a lien:

Address for service:

Description of premises:

The person having a lien withdraws the written notice of lien dated the day of, 20,
in respect of an improvement to the premises owned by

Date:
.....
(person having a lien)

Landlords and Tenants under the *Construction Act*

A tenant will often retain a Contractor to provide services and materials to its leased premises, in which case liens against the improvement will attach to the tenant's leasehold interest. The liens against a leasehold interest will often not attach to the land itself, which can give rise to limited recovery in the event that the tenant cannot pay. With the *Construction Act* comes changes to how, when and to what extent landlords will be liable to contractors or Subcontractors for their supply of services or materials to tenants.

The Landlord As “Owner” Under the Act

- where a tenant retains a Contractor, the tenant will be an Owner under the *Act* and the lien will attach to the tenant's leasehold interest. There can, however, be more than one “Owner”. The landlord who owns the land, for example, will also be an “Owner” if it meets the *Act's* requirements in that regard. An Owner for the purposes of the *Act* means any person (including the Crown but not including a “home buyer”) upon whose request *and* upon whose credit, or on whose behalf, or with whose privity or consent, or for whose direct benefit, the improvement is made. If these requirements are met, the lien will attach to the land and the landlord-as-Owner will have all the responsibilities and obligations of an Owner under the legislation;
- given the potential for limited recovery in the event that a tenant is the only Owner of an improvement, Contractors and Subcontractors may wish to determine, before entering a contract or subcontract, the extent to which the person retaining the Contractor owns the actual lands or otherwise meets the *Act's* definition of “Owner”. A title search can be undertaken to determine the former, while a formal written acknowledgement from the landlord that the work is being performed at its request and with its consent will confirm that latter.
- where a landlord refuses to confirm that it meets the requirements of an ‘Owner’ for the purposes of the *Act*, and a Contractor or Subcontractor is concerned about the ability of the tenant who retained him to pay, they might wish to look to additional security in that regard, including the requirement that a labour and material payment bond be posted or that a personal guarantee or other collateral security for the construction debt be given.

Landlord Liable (as Landlord) in some Circumstances

- even if it does not meet the definition of “Owner” under the *Act*, the interest of the landlord may also be attached if the lease (or any agreement to which the landlord is a party that is connected to the lease) calls for the landlord to make a payment for all or part of the improvement. If this test is met, the landlord is liable to lien claimants for 10 percent of the amount of that payment. This is a new pool of funds not previously available to lien claimants. Contractors and Subcontractors can make section 39 requests for information from the landlord to determine if the test is met.

Termination or forfeiture of a Lease

- the *Act* provides that no forfeiture or termination of a lease by a landlord, except for non-payment of rent, “deprives any person having a lien against the leasehold of the benefit of the person's lien”. A landlord that intends to enforce forfeiture or termination of a lease for non-payment must, however, give all those who have registered liens against the premises notice of its intention to do so. Any of those lien claimants may then pay to the landlord the amount of the unpaid rent and add that amount to its claim for lien.

The “Proper Invoice” under the *Construction Act*

Prompt payment obligations (applicable to all contracts procured after October 1, 2019) are kickstarted when the Contractor gives a “proper invoice” to the Owner.

Proper Invoice Requirements

- to comply with the *Act*, the proper invoice **must** contain the following information:
 - the date of the invoice, the Contractor’s name/address and the name, title, telephone number and mailing address of the person to whom payment is to be sent;
 - the amount payable and the payment terms applicable;
 - a description (including quantities where appropriate) of the services or materials supplied and the period during which the supply occurred; and
 - the “authority” (in the contract or otherwise) under which the services or materials were supplied. (By this we believe the basis of the approval should be referenced, be it original scope of contract, approved Change Order, Change Directive, Site Instruction, verbal approval, etc.);
- the contract **may** also specify additional requirements for a proper invoice. Contractors are already familiar with such requirements, such as statutory declarations, WSIB clearance certificates, or evidence of insurance, as well as close-out documents for final invoices. The contract, however, cannot make the giving of the proper invoice conditional upon the approval of the Owner or the certification of a payment certifier.

Giving the Proper Invoice

- the *Act* requires that a proper invoice be given to the Owner monthly, unless the contract provides otherwise. Determining how and when it is given is not simple:
 - the *Act* states that documents may be served as one would serve a court document or by certified or registered mail, in which case and “in the absence of evidence to the contrary” the document shall be deemed to have been received on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays; and
 - using registered mail to give a document will require parties to mail the document 5 days before the deadline, which in some cases will be impractical. Hand delivery will suffice, as long as someone can affirm the delivery by Affidavit. Email delivery may be possible if the parties agree to the practice, although an affidavit of personal delivery will be required to prove it was received. See our [Guide to Giving Documents under the *Act*](#) for a discussion of possible options in this regard.

Considerations for Owners and Contractors

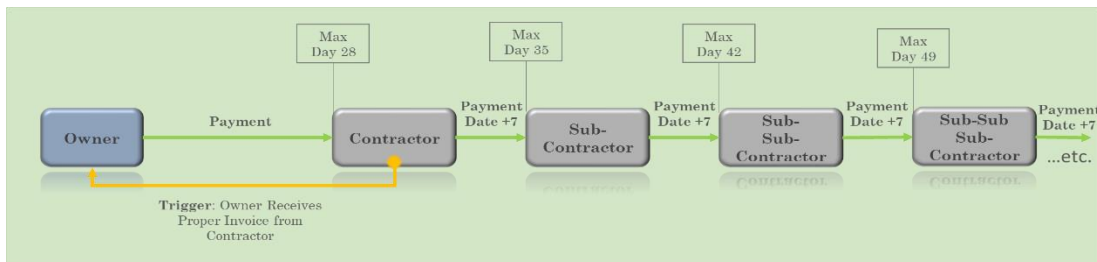
- as the Owner will have only 14 days upon receipt to review a proper invoice and decide if it should be paid, processes which will allow the Owner to better assess the invoice might be considered. These could include allowing the Owner to assess the quality and value of work in a more efficient and timely fashion, through shared access to software databases or interim information or backup, for example. In addition, Owners who use a consultant will have to ensure that he or she will be available, monthly, to review and assess each proper invoice in a very timely fashion. Contractors should also be prepared to address any questions or concerns that an Owner has about an invoice in a timely fashion, to help facilitate the Owner’s review.

Prompt Payment Under the Construction Act for Contracts Procured after October 1, 2019

The payment obligations under the *Act* are kickstarted when the Contractor gives a proper invoice, containing the information set out at s. 6.1 of the *Act*, to the Owner. An Owner must pay the Contractor's proper invoice within 28 days unless it has given a Notice of Non-Payment to the Contractor within the first 14 days. Thereafter, the Contractor and Subcontractors have an obligation to pay those beneath them for their portion of what was included in the proper invoice unless they give a Notice of Non-Payment to those they have a reason not to pay. There is no such thing as a 'Subcontractor's proper invoice'. All payment obligations are triggered by the Contractor giving the Owner a proper invoice. Any Subcontractor can ask the Contractor when this occurred, under s.6.6(10) of the *Act*. Prompt payment does not apply to the maintenance or operations portion of a P3 project.

Where No-One Disputes A Payment Obligation

- where no one disputes a payment obligation, the Owner must pay within 28 days and the payment obligations then arise on a rung by rung basis every 7 days: each payee must pay within 7 days of the day it was or should have been paid (whichever is earlier). There is no obligation to pay amounts not included in the Contractor's proper invoice. The figure below shows the payment obligations where no-one gives a Notice of Non-Payment.



Anyone Can Dispute a Payment Obligation by Giving a Notice of Non-Payment

- any payer in the construction ladder can avoid the obligation to pay if they give a Notice of Non-Payment (in the form prescribed by the *Act*) to the person they have a reason not to pay, within the required timeframes under the *Act*:
 - the Owner must give its Notice of Non-Payment within 14 days of being given a proper invoice by the Contractor. Thereafter, the Contractor and each Subcontractor must give a Notice of Non-Payment before the day that it would otherwise have to make a payment or within 7 days of receiving such a Notice of Non-Payment from the person above them in the ladder or, whichever is earlier;
 - beware that the Notices of Non-Payment must be “given” in accordance with the, *Act*, which can be a difficult process to manage. See our Guide to Giving Documents under the *Act* for more information in that regard;
- if a Contractor or Subcontractor's reason for giving a Notice of Non-Payment is that the person above has not paid, the person giving the Notice must undertake to take the person above them to Adjudication within 21 days. (If another reason for the non-payment is the sole reason given, no undertaking to adjudicate is required);
- there are rules in place to govern how and when partial payments from above must be distributed to those below, which vary depending on the circumstances.

Prompt Payment “Cheat Sheet” for the Owner

Before the Work Begins

- consider whether the Contract should alter the default requirement that Proper Invoices be given monthly and clarify how the Proper Invoice is to be given. Also, consider making the Contract align with the *Act*'s prompt payment requirements;
- consider requiring access to Contractor records or the interim submission of documents where appropriate, to allow for interim point in time assessments to be made;
- consider what additional information and documents should be included with a Proper Invoice, in addition to the statutory requirements, such as:
 - statutory declarations, WSIB clearance certificates, insurance certificates;
 - any other relevant documents, (ie. permits, inspection reports, etc);
 - full and complete backup to any amounts claimed on a T&M or unit prices basis or as an extra or change in the work; or
 - close out documents in relation to a final invoice;
- ensure that any consultants retained and/or internal personnel will understand the processes and be ready and available to respond as required during the 14 day period;
- understand that the *Act* governs over contract terms: The Owner cannot contract out of the requirement to pay within 28 days of the Proper Invoice being given, unless it gives a Notice of Non-Payment as required.

Upon Submission of an Invoice by a Contractor

- consider if it meets the requirements of a “Proper Invoice” under the *Act* and Contract:
 - if so, assess when it was “given” (as this starts the 14 day review periods);
 - if not, advise the contractor of what is missing and request the missing information / documents. (This is not mandatory but in our view would be good practice).
- decide on the accuracy of the Proper Invoice, once it has been given:
 - are the amounts claimed accurate / agreed to?
 - were any changes/extras claimed for approved as per the Contract?
 - do you have any backcharges you would like to apply?
 - seek clarifications/revision on unclear or disputed items before the 14 days expires;
 - remember that a revised invoice does not re-set the clock: the 14 day and 28 day timeframes continue to run from the date the Proper Invoice was first given;
 - **if before the expiry of 14 days you have a reason to not agree**, in whole or in part, **give a Notice of Non-Payment** to the Contractor, in the form required by the *Act*;
 - **pay the Contractor any undisputed amounts** (for which a Notice of Non-Payment was not given within the first 14 days), **within 28 days of the proper invoice having been given**; and
 - **be prepared for the possible adjudication of any disputed items.**

FORM 1.1
OWNER NOTICE OF NON-PAYMENT (SUBSECTION 6.4(2) OF THE ACT)
Construction Act

Name of owner:

Address:

Description of premises:

Name of contractor:

Address:

Address for service, if known

The owner disputes the proper invoice dated, 20, submitted to the owner by the contractor in respect of the improvement. The owner will not pay the following amount payable under the invoice:

(Use A or B, whichever is applicable)

A. The full amount of the proper invoice, being \$

B. A portion of the amount of the proper invoice, being \$

The reasons for non-payment are as follows:

Date:

(owner)

Prompt Payment “Cheat Sheet” for the Contractor

Before the Work Begins

- consider whether the Contract should alter the default requirement that Proper Invoices be given monthly and clarify how the Proper Invoice is to be given. Also, consider making the Contract align with the *Act*'s prompt payment requirements;
- consider allowing access to contractor records or the interim submission of documents where appropriate, to allow for point in time assessment before a Proper Invoice is given and to help the owner approve a proper invoice within the 14 days required.

Giving a Proper Invoice

- ensure it includes the statutory and contractual information and documents required;
- ensure that the “authority” for any amounts claimed are set out, referencing the original contract or PO for original scope, cash allowances, unit rates or T&M work and the how changes were approved (ex. change order, change directive, site instruction);
- consider whether or not you want to include for any subcontractor claimed unapproved changes as doing so may invite a denial (Notice of Non-Payment) and adjudication;
- be ready to discuss and review to see if issues can be addressed before the 14 days expires. A revised invoice, if agreed upon, must be dated the same as the original and does not reset the clock;
- understand that you may refuse to pay those beneath you for amounts included in your Proper Invoice only if you give those persons a Notice of Non-Payment within **7 days** of your getting a Notice of Non-Payment from the Owner or **7 days** from the date the Owner's payment to you was due. If you give a Notice of Non-Payment because the Owner did not pay you, give the appropriate notice form and then, also, bring the Owner to adjudication within **21 days**. If you give the Notice for any other reason, give the (other) appropriate Notice form (no adjudication with the Owner will be required).

Upon Receipt of a Notice of Non-Payment

- consider if it has been given within 14 days of your giving the Proper Invoice. If it was not, consider taking the Owner to Adjudication for full payment on that basis;
- decide whether you want to pay the subtrade/suppliers beneath you in full, notwithstanding the non-payment. Otherwise, give a Notice of Non-Payment as above.

If No Receipt of a Notice of Non-Payment and No Payment

- pay anyone beneath you for amounts included in the Proper Invoice within **7 days** of the date the Owner's payment was due (35 days from the day the Proper Invoice was given), unless you have given them a Notice of Non-Payment as above.

If You Receive Full or Partial Payment

- pay those beneath you (for amounts included in your proper invoice) within **7 days of the payment** unless you have given them a Notice of Non-Payment (as above);
- upon partial payment, pay those you are willing to pay below on the following basis: if an Owner's Notice of Non-Payment allows you to identify subtrade(s) responsible for the Notice, apply the Non-Payment to them and pay the others. If not, pay those beneath you on a *pro-rata* basis;
- consider bringing the Owner to adjudication for any unpaid amounts.

FORM 1.2
CONTRACTOR NOTICE OF NON-PAYMENT WHERE OWNER DOES NOT PAY
(SUBSECTION 6.5(5) OF THE ACT)

Construction Act

Name of contractor:

Address:

Description of the premises:

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

The contractor has not received payment from the owner and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.5(1) of the *Construction Act*.

Amount that will not be paid:

(Use A or B, whichever is applicable)

- A. The full amount of the services or materials supplied by the subcontractor, being \$
- B. A portion of the amount of the services or materials supplied by the subcontractor, being \$

The contractor hereby undertakes to refer the matter to adjudication under Part II.1 of the *Construction Act*, no later than 21 days after giving this notice of non-payment to the subcontractor.

A copy of the Notice of Non-Payment under Subsection 6.4(2) of the Act is enclosed.

Date:

(Contractor)

FORM 1.3
CONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6.5(6) OF
THE ACT)
Construction Act

Name of contractor:

Address:

Description of the premises:

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

The contractor disputes the entitlement of the subcontractor to payment of an amount under the subcontract that was included in the proper invoice. The contractor will not pay the following amount:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being \$

B. A portion of the amount of the services or materials supplied by the subcontractor, being \$

The reasons for non-payment are as follows:

Date:

(Contractor)

Prompt Payment “Cheat Sheet” for the Subcontractors

- find out whether the Contract alters the default requirement that Proper Invoices are to be given to the Owner monthly. There is no statutory obligation for anyone to tell you, but make the inquiries anyway;
- remember that it is the Contractor’s giving of a Proper Invoice to the Owner that starts the clock running on Prompt Payment and that Prompt Payment will only apply to amounts included by the Contractor in its Proper Invoice to the Owner;
- ensure you get your invoice to the Contractor or Subcontractor above you, inclusive with whatever backup and information is required, in time for the value of your work to be included in the Proper Invoice to the Owner. Check your subcontract and make inquiries to ensure you provide what you need to provide, when you need to provide it;
- reference the “authority” for any amounts claimed, referencing the original subcontract or PO for original scope, cash allowances, unit rates or T&M work and the basis approval for any changes (ex. change order, change directive, site instruction);
- consider whether or not you want to include for any of your subcontractors claimed unapproved changes as doing so may invite a denial (Notice of Non-Payment) from above and an adjudication;
- understand that you may refuse to pay those beneath you for amounts the Contractor has included for in its Proper Invoice to the Owner only if you give those persons a Notice of Non-Payment within **7 days** of your getting a Notice of Non-Payment from the person above you or **7 days** from the date the payment from the person above you was due. If you give a Notice of Non-Payment because the person above you did not pay you, give the appropriate notice form and then, also, bring the person above you to adjudication within **21 days, unless the basis for the non-payment is that the Owner did not pay the Contractor**. If you give the Notice for any other reason, give the (other) appropriate Notice form (no adjudication with the Owner will be required).

Upon Receipt of a Notice of Non-Payment

- consider if it has been given on time. If it was not, consider taking the Contractor to Adjudication for full payment on that basis;
- decide whether you want to pay the subtrade/suppliers beneath you in full, notwithstanding the non-payment. Otherwise, give a Notice of Non-Payment as above.

If No Receipt of a Notice of Non-Payment and No Payment

- pay anyone beneath you for amounts included in the Proper Invoice within **7 days** of the date payment to you was due, unless you have given them a Notice of Non-Payment.

If You Receive Full or Partial Payment

- pay those beneath you (for amounts included in your proper invoice) within **7 days of the payment** unless you have given them a Notice of Non-Payment (as above);
- upon partial payment, pay those you are willing to pay below on the following basis: if Notice of Non-Payment received from above allows you to identify which of your subtrade(s) is allegedly responsible for the Notice, apply the Non-Payment to them and pay the others. If not, pay those beneath you on a *pro-rata* basis;
- consider bringing the person above you to adjudication for any unpaid amounts.

FORM 1.4
SUBCONTRACTOR NOTICE OF NON-PAYMENT WHERE CONTRACTOR DOES NOT PAY (SUBSECTION 6.6(6) OF THE ACT)

Construction Act

Name of subcontractor:

Address:

Description of the premises:

Name of contractor:

Address:

(Complete for the subcontractor who supplied services or materials to an improvement in relation to the proper invoice)

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

(Use A or B, whichever is applicable)

- ☐ A. The subcontractor has not received payment from the contractor and will not pay the subcontractor the amount under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the *Construction Act*.
- ☐ B. [Non-payment to a subcontractor who is entitled to payment from a subcontractor in accordance with subsection 6.6(11) of the *Construction Act*]. The subcontractor has not received payment from the subcontractor and will not pay another subcontractor the amount payable under the subcontract that was included in the proper invoice within the time specified in subsection 6.6(1) of the *Construction Act*.

Amount that will not be paid:

(Use A or B, whichever is applicable)

- A. The full amount of the services or materials supplied by the subcontractor, being \$
- B. A portion of the amount of the services or materials supplied by the subcontractor, being \$

(Include the following where applicable)

The subcontractor hereby undertakes to refer the matter to adjudication under Part II.1 of the *Construction Act*, no later than 21 days after giving this notice of non-payment to the subcontractor.

A copy of any notice of non-payment received by the subcontractor is enclosed.

Date:
.....
(Subcontractor)

FORM 1.5
SUBCONTRACTOR NOTICE OF NON-PAYMENT IF DISPUTE (SUBSECTION 6.6(7)
OF THE ACT)
Construction Act

Name of subcontractor:

Address:

Description of the premises:

Name of contractor:

Address:

(Complete for the subcontractor who supplied services or materials to an improvement in relation to the proper invoice)

Name of subcontractor:

Address:

Address for service, if known:

The contractor submitted a proper invoice to the owner in respect of the improvement on, 20

The subcontractor disputes the entitlement of another subcontractor to payment of an amount under the subcontract that was included in the proper invoice in accordance with subsection 6.6(7) of the *Construction Act* or subsection 6.6(11) of the *Construction Act*. The subcontractor will not pay the following amount:

(Use A or B, whichever is applicable)

A. The full amount of the services or materials supplied by the subcontractor, being \$

B. A portion of the amount of the services or materials supplied by the subcontractor, being \$

The reasons for non-payment are as follows:

Date:
.....
(Subcontractor)

Adjudication Under the *Construction Act* for Contracts Procured after October 1, 2019

The Scope of what can be adjudicated is broad and is set out at s. 13.5 of the *Act*. Virtually any dispute over payments, changes, backcharges, or cost of the work can be adjudicated.

- only one matter can be raised per Adjudication unless the parties and the Adjudicator agree otherwise. However, the Contractor can require the consolidation of separate adjudications over the same or related matters;
- unless the parties agree on an adjudicator, one will be appointed from a roster of accountants, architects, engineers, quantity surveyors, project managers, arbitrators, lawyers or others with 10 years relevant working experience in construction. Parties may wish to agree on one to ensure that he or she has the specific expertise required;
- the *Act* allows parties to agree on aspects of the adjudication process – at times only with the consent of the Adjudicator. The Agreements can be made, in advance and both within and outside a contract or subcontract, so long as the *Act* is complied with. (The Adjudicator cannot be named in a contract or subcontract, except under a P3 project);
- absent a valid agreement by the parties, the Adjudicator will have a wide discretion to determine the process to be followed. He or she can hear evidence, retain experts and order site visits of non-residential premises;
- in relation to small claims, the Authority has created four “pre-designed” processes which it has recommended be used:

“pre-designed” process No.	No. 1	No.2	No.3	No.4
recommended for claims of	<\$10,000	<\$25,000	<\$35,000	<\$50,000
written submissions only?	Yes	Yes	Yes	No. (*3)
max no. of pages per submission (*1)	2	5	5	10
no. of pages of allowable backup (*2)	0	0	10	25
reasons for decision	½ page	1 page	2 pages	4 pages

*1 – not including a copy of the contract or subcontract that may be submitted

*2 – ie. supporting documents, witness statements, expert or quantity surveyor reports

*3 – a 30 minute oral presentation is allowed (by phone or video but not in person)

- for claims over \$50,000.00 the Authority recommends the Adjudicator convene a conference call to establish the process, timetable and rules for the adjudication;
- unless the parties and Adjudicator agree otherwise (which the parties may need to consider), an Adjudicator appointed by the Authority will be paid the following fees:

at Issue	Fee	at Issue	Fee	at Issue	Fee	at Issue	Fee
<\$10,000	\$800	<\$35,000	\$2,000	<\$250,000	\$250/hr	<\$1 mill	<\$500/hr
<\$25,000	\$1,000	<\$50,000	\$3,000	<\$500,000	\$400/hr	>\$1 mill	\$750/hr

- adjudication and admin fees are to be split between the parties, unless the Adjudicator decides to award costs against a party that has acted “in respect of the improvement” in a way that is frivolous, vexatious, an abuse of process or not in good faith.

Timelines for Adjudication under the *Construction Act*

An Adjudicator's decision is not a guarantee of payment, so claimants should weigh the risk of letting lien rights or bond claims expire. The timelines for adjudication under the *Act* are tight. All days set out below are calendar days. The Adjudication Authority is ADR Chambers www.adrchambers.com/odacc.

Commencing the Adjudication

- any party to a contract or subcontract may commence an Adjudication by giving the other side and the Authority a Notice of Adjudication (available from the Authority) at any time prior to completion of the contract or subcontract at issue. The Notice must set out the names and addresses of the parties, a brief description of the dispute, the nature of the redress sought and the name of a proposed authorized Adjudicator.
 - the parties can agree to a Notice being given after contract/subcontract completion;
 - how adjudication documents are to be given is complicated. Unless they have agreed otherwise, parties may wish to serve the initial documents as they would serve a Court Document. Once an Adjudicator is appointed, the manner of giving documents can be determined by the Adjudicator;

The Appointment of an Adjudicator

- upon the Notice of Adjudication being given, the parties have **4 days** to appoint an authorized adjudicator who agrees to conduct the adjudication at agreed upon rates.
 - if no agreement is reached, the person who gave the Notice of Adjudication must ask the Authority to appoint an adjudicator. The Authority will then do so (from its roster, at roster rates) within **7 days**;
 - parties might strive to agree on an adjudicator, to ensure the adjudication is before a person whose skill and background is appropriate for the dispute, even if the rates are higher than roster rates. To be clear, where legal (and not merely factual) matters are in dispute, the Adjudicator will make legal assessments and decisions;

The Adjudication Process

- within **5 days** of the Adjudicator's appointment, the claimant shall give the other side and the Adjudicator a copy of the contract or subcontract along with any documents it intends to rely on. The Adjudicator must be given a copy of the Notice of Adjudication;
- the Adjudicator then has **30 days** (unless the parties agree otherwise) to make a decision. In that time, he or she must determine a process, obtain the submissions of both parties, consider and act on any site visit, expert or oral submission requirements, consider the evidence and write a decision. It is not very much time. Parties accordingly need to be prepared to adjudicate a dispute on very short notice. This means having site and office administrative practices geared to adjudication readiness in relation to any potential disputes with those above or below them in the ladder.
- an Adjudicator's decision is as enforceable as a Judgement. If a contractor or subcontractor is entitled to be paid, it may suspend work until payment and collect its (and its subtrades') demobilization, remobilization and work suspension costs as well;
- there is no Appeal from an Adjudicator's decision (although a 'Judicial Review' is possible in very limited circumstances). The Adjudicator's decision is, however, only interim. It is binding until a party successfully obtains a different outcome through traditional litigation processes. It could, however, take years to overcome an unsuccessful adjudication, at substantial risk and cost. Readiness is accordingly key.

Cheat Sheet for Commencing an Adjudication

In the Contract / Subcontract Itself

- consider terms and conditions which detail adjudication processes. See our Guide in that regard.

After the Contract is Signed

- consider whether or not you can agree on a list of agreeable adjudicators with the party you contracted/subcontracted with. These persons will have to be listed in the Registry of Adjudicators to be able to act. You cannot do this in the contract/subcontract itself (other than on P3 projects), but you can *after* the contract/subcontract has been signed;
- manage possible disputes before they arise on site through better record keeping. Remember, the other side can adjudicate virtually any issue at any time;
- upon becoming aware of a possible dispute, alter record keeping to best prove your case should it need to be adjudicated. Consider compiling evidence in that regard, including for example quantity take-offs, costing documentation, industry specifications or manuals, damages assessments or expert reports. Consider retaining experienced counsel to assist in preparing the claim as many will be determined in writing only and cross-examination/oral submissions will, if allowed at all, be extremely limited. Readiness with a persuasive argument on both the law and the facts is key.

Commencing an Adjudication

- consider if you have given a Notice of Non-Payment to those beneath you on the basis that you have not been paid by those above you, in which case you may have to take the person above you to Adjudication within 21 days of giving the Notice of Non-Payment;
- consider whether or not the parties have agreed, or should agree, that more than one matter should proceed together to adjudication, or if a number of adjudications dealing with the same issue (but with different parties) should be consolidated;
- read your contract/subcontract to see what adjudication provisions, beyond those provided for in the *Act*, have been agreed to. Subcontractors need to see if the Prime Contract between the Owner and Contractor has been incorporated and, if so, what the Prime Contract says about adjudication processes;
- as you control the timing, make sure you are ready with your evidence and that you have good availability to participate in the adjudication in the coming weeks. Give the Notice of Adjudication form as required by the *Act*, providing the name of a proposed Adjudicator (who is listed in the Registry of Adjudicators);
- work diligently, if possible, to come to an agreement on an Adjudicator who agrees to act on agreed upon rates. If one cannot be agreed upon within 4 days of your giving the Notice, request that the Adjudication Authority appoint an Adjudicator;
- give the documents you rely on in the Adjudication, along with a copy of the contract/subcontract at issue, to the other side (and the Adjudicator electronically in accordance with the *Act*) within 5 days of the Adjudicator being appointed;
- follow the procedures for the Adjudication as directed by the Adjudicator, as per the processes set out in the *Act* and as per any agreed upon processes that are consistent with the *Act*. Be prepared to make very concise written (and possibly oral) submissions in support of your position. As there is no right of appeal, retain counsel to assist as necessary, particularly where legal issues or substantial dollars are involved.

Cheat Sheet for Responding to an Adjudication

In the Contract / Subcontract Itself

- consider terms and conditions which detail adjudication processes. See our Guide in that regard.

After the Contract is Signed

- consider whether or not you can agree on a list of agreeable adjudicators with the party you contracted/subcontracted with. These persons will have to be listed in the Registry of Adjudicators to be able to act. You cannot do this in the contract/subcontract itself (other than on P3 projects), but you can *after* the contract/subcontract has been signed;
- manage possible disputes before they arise on site through better record keeping. Upon becoming aware of a possible dispute, alter record keeping to best prove your case should the other side decide to adjudicate. Consider compiling evidence in that regard, including quantity take-offs, costing documentation, industry specifications or manuals, damages assessments or expert reports, for example;
- remember that, once commenced, you will have very, very little time to respond. Establishing a relationship with experienced consultants and counsel will enable you to respond to adjudication notices quickly and effectively. Readiness is the key.

Responding to an Adjudication

- consider whether or not settlement discussions or a mediation should be proposed;
- consider if the Notice was properly given in accordance with the *Act*;
- consider whether or not the parties have agreed (or should agree) that more than one matter should proceed together to adjudication or if a number of adjudications should be consolidated;
- read your contract/subcontract to see what adjudication provisions, beyond those provided for in the *Act*, have been agreed to. Subcontractors need to see if Prime Contract terms in that regard have been incorporated into the contract/subcontract;
- work diligently to agree on an Adjudicator who will agree to act on agreed upon rates, and who is well suited to address the matters in dispute. Consider those with legal backgrounds if legal, as opposed to factual, issues are in dispute. If no Adjudicator is selected by agreement, the other side will have to request the appointment of an Adjudicator. Nothing will happen until this request is made;
- 5 days after the Adjudicator's appointment, you are to receive the documents the other side relies on, along with a copy of the contract/subcontract. You will have a chance to respond. Follow the procedures as directed by the Adjudicator, as per the processes set out in the *Act* and as per any agreed upon processes that are consistent with the *Act*;
- unless the parties and the adjudicator agree otherwise, the Adjudicator has 30 days from the date the other side's documents were provided to you, to make a decision. **This is a very tight timeframe.** Rights of cross-examination/oral submissions will, if allowed at all, be extremely limited. Most adjudications will be determined in writing only. Readiness with a persuasive argument on both the law and the facts is key;
- Be prepared to make very concise written (and only possibly oral) submissions in support of your position. As there is no right of appeal, retain counsel to assist as necessary, particularly where legal issues or substantial dollars are involved.

“Giving” Documents under the *Construction Act*

- the *Act* requires many documents to be “given”, including the proper invoice, notices of non-payment, a notice of adjudication, a notice of termination of a contract and, in some circumstances, a claim for lien.
- determining how a document is or should be given in any particular circumstance is not simple:
 - the *Act* states that documents may be served in any manner as one would serve a court document under the Rules of Court or by certified or registered mail to the intended recipient at the recipient’s last known mailing address according to the records of the person sending the document or as stated on a document registered on title identifying the recipient as a person with an interest in the premises;
 - if given by certified or registered mail (and “absent evidence to the contrary”), the document “shall be deemed to have been received by the person on the fifth day following the date on which it was mailed, exclusive of Saturdays and holidays”;
 - accordingly, using registered mail to give a document is not optimal: it will require parties to mail the document 5 days before a deadline, which in some cases will be impractical or impossible;
 - as per the Rules of Court, a document can be served on an individual by leaving a copy with the individual or on a corporation by leaving a copy with “an officer, director or agent of the corporation or with a person at any place of business of the corporation who appears to be in control or management of the place of business.” The latter test also applies to partnerships and sole-proprietorships. Generally, the Rules of Court will require an “Affidavit of Service” of the document be prepared to confirm that the document was left with the individual or corporation as required;
 - under the Rules of Court, parties may consent to service by email, so long as the email message includes the senders name, snail-mail and e-mail address, telephone and fax numbers (if any), the date and time of the transmission and the name and telephone number of a person to contact in the event of a transmission problem;
- documents can accordingly be given by personal delivery, so long as the person delivering it does so in accordance with the Rules of Court and is able to swear an Affidavit to that effect, specifying the time, date and manner of service. Parties may wish to consider consenting, in their contracts and subcontracts, to the delivery of proper invoices, and perhaps notices of non-payment and/or notices of adjudication, by email. For certainty, documents can then also be served personally, to avoid disputes over whether or not an email was received;
- exceptions to the general rules include:
 - the giving of a Written Notice of Lien, which must be served as would an “original process” under the Rules of Court;
 - the giving of a claim for lien to the Crown, which must be given to “the prescribed office, or, where no office has been prescribed, to the ministry or Crown agency for whom the improvement is made”; and
 - the giving of a claim for lien to municipality, which must be given to the Clerk of the municipality or, for contracts procured after October 1, 2019, electronically in accordance with the municipality’s website, if the website so directs.

Contracts and Subcontracts under the *Construction Act*

If there was ever a time to review your contract, that time is now.

- the starting point for any discussion about construction contracts in Ontario should now be the *Construction Act*. Contract terms can and should be used to clarify processes, avoid confusion and manage the risks associated with the new legislation.

Prompt Payment Provisions

- we recommend that existing payment terms be scrapped and replaced with terms and processes that comply with the *Act*. If this is not done, the *Act* will trump the existing clauses, confusion will reign and mistrust is liable to fester;
- owners and contractors can agree that the default requirement that the invoice be given monthly should be amended. They should also consider whether or not additional information/documents should be required with a Proper Invoice. The recommended options will vary depending on the nature of the parties and the project in question;
- as discussed in our *Guide to Giving Documents under the Act*, owners and contractors might consider consenting, in the contract, to the delivery of proper invoices by email;
- depending on their preferred approach, parties may also wish to consent to the giving of notices of non-payment by email, for similar reasons;
- parties should also consider processes to best put the owner and/or its consultant in a position to assess a proper invoice upon receipt. These could include allowing the owner to assess the quality and value of work in a more efficient and timely fashion than traditionally used, through shared access to software databases or the provision of interim information or backup, for example.

Adjudication Provisions

- the *Act* allows parties to agree on many aspects of the adjudication process. Parties cannot agree on an adjudicator (except on P3 projects), but may wish to agree to a list in that regard after the contract or subcontract has been entered into;
- parties may want to agree, in the contract/subcontract, to some or all of the following:
 - allowing a notice of adjudication to be given after the subject contract or subcontract has been completed;
 - allowing more than one matter to proceed to adjudication at a time (which would require the adjudicator's agreement); and
 - agreeing on timelines and processes for the adjudication, in relation to the exchange of documents and introduction of evidence. These will be subject to the discretion of the adjudicator, however may generally be worthwhile. On some projects, extending the tight timeframes may be in the interest of both parties.

Other Contractual Reviews to be Considered

- our Courts have established, in a number of recent cases, that sophisticated parties will generally be expected to abide by the contracts and subcontracts they enter into. This presents both opportunities and concerns. The limits and utility of notice provisions, approval requirements, conditions precedent to payment, claim waivers, insurance requirements, indemnity clauses and clauses that transfer the risk of unforeseen conditions, delay, sequence changes and other impacts should be considered.



STREET (NORTH) ELEVATION
SCALE - 1/4" = 1'-0"

NOT