

## 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.