

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 *Act*’s drafters want contractors to state whether the amounts claimed are part of the original scope of work or performed as either an approved change in the work or change directive. This, however, is not clear and no clarification in this regard has been forthcoming).
- The contract **may** also specify additional requirements for a proper invoice. Contractors are already familiar with such requirements: invoices must commonly be supplemented with statutory declarations, WSIB clearance certificates, or evidence of insurance, as well as close-out documents for final invoices, for example. 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. Determining how it is to be given, and when it has been received, is not simple:
 - the *Act* states that documents may be formally served as one would serve a court document under the Rules of Court or by certified or registered mail, in which case “the date appearing on the postal registration receipt shall be deemed conclusively to be the date of mailing” and “in the absence of 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”.

Considerations for Owners and Contractors

- if parties wish to avoid the need for a process server or registered mail, they may wish to include in their contracts a requirement that the proper invoice be given electronically or in such other fashion as the owner and contractor may agree;
- 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 be better assess the invoice might be considered. These could include processes allowing the owner to assess the quality and value of work in a more efficient and timely fashion than traditionally used, including shared access to software databases and the provision of interim information or backup, for example. In addition, owners who use a consultant or payment certifier will have to ensure that the consultant/certifier 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 and invoice in a timely fashion, to help facilitate the owner’s review.