

Preparing for Change: Prompt Payment & Adjudication

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Part 1: Prompt Payment

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What kinds of projects fall under prompt payment rules?

- Prompt payment applies to *all* projects in Ontario, including construction portions of AFP project.
- **s. 1.1(2.1).1**: exception with respect to any operation or maintenance portion of AFP projects.

What is a “proper invoice” under the Act?

s. 6.1: A “proper invoice” means a written bill or other request for payment for services or materials in respect of an improvement under a contract, if it contains the information ***required by the Act*** and, subject to subsection 6.3(2), meets ***any other requirements that the contract specifies***.

s. 6.3(2): prohibits a requirement in a contract that makes the giving of a proper invoice conditional on the prior certification of a payment certifier or on the owner’s prior approval (*AFP and testing and commissioning exceptions*)

Elements of a “proper invoice” under the Act

1. The contractor’s name and address.
2. The date of the proper invoice and the period during which the services or materials were supplied.
3. Information identifying the authority, whether in the contract or otherwise, under which the services or materials were supplied.
4. A description, including quantity where appropriate, of the services or materials that were supplied.
5. The amount payable for the services or materials that were supplied, and the payment terms.
6. The name, title, telephone number and mailing address of the person to whom payment is to be sent.
7. Any other information that may be prescribed (currently none).

Other “proper invoice” considerations

- s. 6.1: “... *meets any other requirements that the contract specifies*”.
Examples:
 - Updated project schedules
 - Statutory declarations
 - Waiver of claims
 - Detailed monthly reports

- s. 6.2: holdback

Checklist for what goes into “proper invoices”

- Contractor’s name and address
- Date of invoice (check timing of invoices per Act / contract)
- Period of supply of services or materials
- Identification of contract / P.O.
- Description of services or materials supplied (quantities if applicable)
- Amount payable
- Payment terms
- Name, title, tel. no. and mailing address of person to whom payment is to be sent
- ADD ALL CONTRACT REQUIREMENTS TO CHECKLIST ...

PROMPT PAYMENT

SAMPLE:

ABC Contracting Ltd.
1 Construction Lane
Toronto ON

INVOICE
Date: March 30, 2019

TO: DEFG Owners Inc.
1 Big Project Road
Toronto ON
Attn: Jane Doe

RE: New Office Building Project

Services and materials supplied under CCDC-2 Contract dated December 1, 2018

Period of supply: February 15 to March 15, 2019

Services and materials supplied this period: Excavation and site grading

Contract price:	\$2,000,000
Change orders to date:	\$0
Amount payable:	\$100,000
Less holdback:	\$10,000
Plus HST:	\$11,700
Total due this invoice:	\$101,700

Interest on late payments at 2.0%.

Please send payment to Shirley Joe, Accounts, 1 Construction Lane, Toronto ON, 416-111-1111

Interest

s. 6.9: Interest begins to accrue on unpaid amount at prejudgment interest rate per s. 127 (2) of the Courts of Justice Act or at interest rate in contract or subcontract, whichever is greater

You've prepared a proper invoice – now what? Timing & giving of proper invoice

- **s. 6.3 (1):** Proper invoices shall be *given* to an owner on a monthly basis, *unless the contract provides otherwise*.
 - Ex: contractual milestones or payment schedule

- **s. 87(1):** “given” = served in any manner permitted under the Rules or sent by certified/registered mail addressed to the intended recipient at the recipient’s last known mailing address.
 - Manner permitted by Rules:
 - Personal service (physically give invoice)
 - By email, if the parties agree
 - By use of an electronic document exchange service

Timing & giving of proper invoice

- Contract should set out how invoices can be given and to whom
- Note that triggering of owner's payment or notice of non-payment timelines is when proper invoice is ***received*** not when ***given***

“Draft” invoices?

- Ex: contract stipulates invoices to be submitted every 45 days, with contractor to provide draft invoice 7 days in advance.
- **s. 5(1):** Every contract or subcontract deemed to be amended in so far as is necessary to be in conformity with Act
- **s. 6.3(2):** A provision in a contract that makes giving of proper invoice conditional on prior certification of payment certifier or owner’s prior approval is of no force or effect
- **s. 1.1(2.1)2:** s. 6.3(2) does not apply to AFP projects, can require certification or approval prior to the giving of a proper invoice

Revisions to invoices?

- Ex: after submission of invoice, contractor receives late invoice from supplier and wishes to include it with invoice given to owner.
- **s. 6.3(5):** A proper invoice may be revised by the contractor after it has been given to the owner if:
 - (a) the owner agrees in advance to the revision;
 - (b) the date of the proper invoice is not changed; and
 - (c) the proper invoice continues to meet the requirements referred to in the definition of “proper invoice” in section 6.1

Invoices submitted early?

- Ex: contract provides invoices are to be submitted on the 1st of each month, but contractor submits its invoice on the 29th of preceding month.
- **s. 6.3 (1):** Proper invoices shall be given to an owner on a monthly basis, *unless the contract provides otherwise.*

Invoices submitted late?

- Ex: contract provides invoices are to be submitted on the 1st of each month, but contractor submits its invoice on the 3rd of that month.
- **s. 6.3 (1):** Proper invoices shall be given to an owner on a monthly basis, *unless the contract provides otherwise.*

Certificates of payment required?

- **s. 6.3(2):** A provision in a contract that makes giving of proper invoice conditional on prior certification of payment certifier or owner's prior approval is of no force or effect

- **EXCEPT:**
 - **s. 1.1(2.1).2** → s. 6.3(2) does not apply to AFP, agreements can include contract provision requiring certification or approval prior to giving of a proper invoice

 - **s. 6.3(4)** → s. 6.3(2) does not apply to a provision in a contract re: testing and commissioning

Pay when Paid Clause?

- Ex: subcontract contains clause which provides that subcontractor shall not be paid if contractor is not paid by owner.
- **s. 4:** An agreement by any person who supplies services or materials to an improvement that this Act does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void.
- **s. 5 (1):** Every contract or subcontract related to an improvement is deemed to be amended in so far as is necessary to be in conformity with this Act.

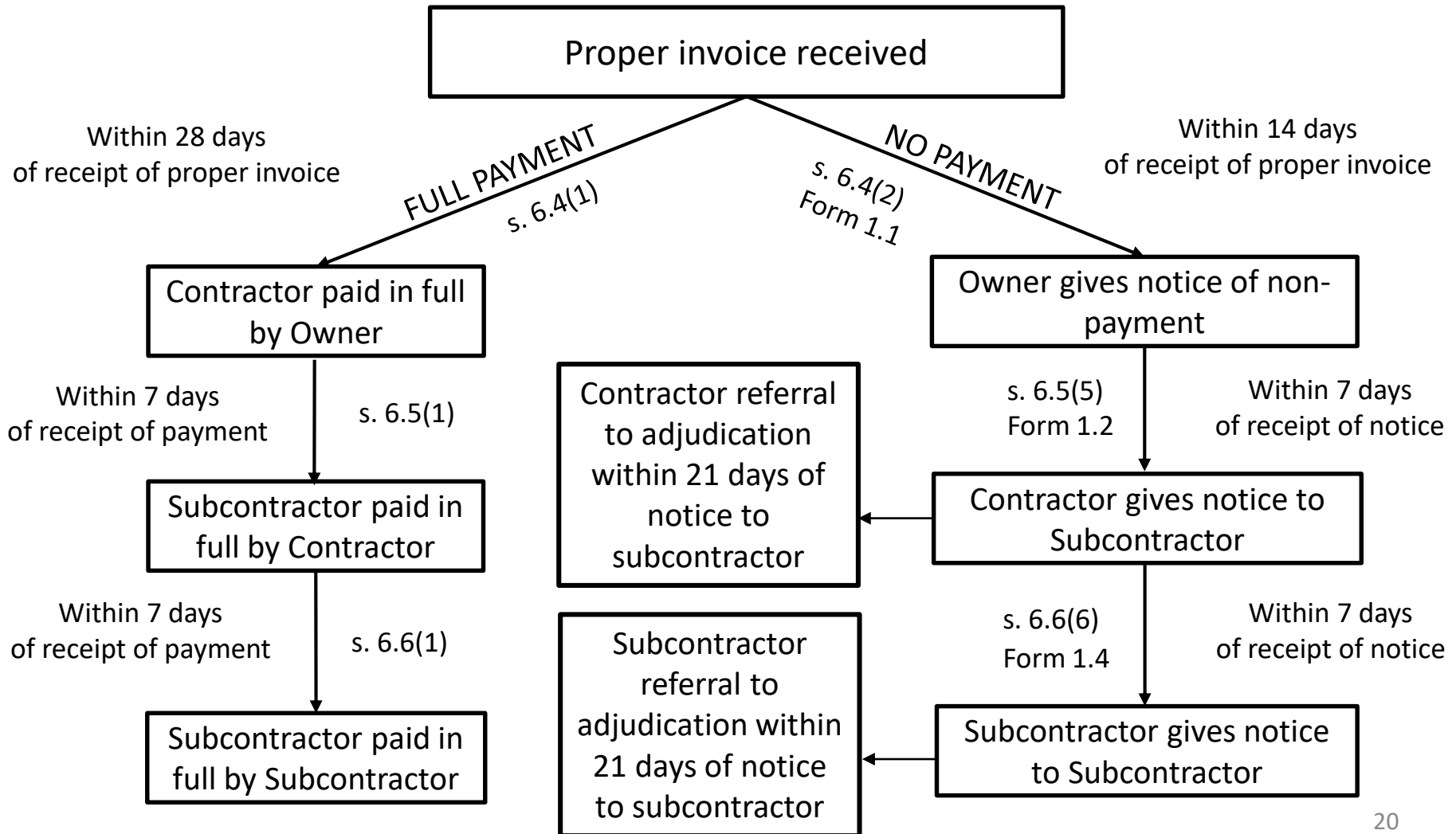
Setting up for invoicing:

- Create “proper invoice” checklist for each contract
- Update invoice template to include elements of “proper invoice” per checklist
- Create reminders to give invoices monthly as set out in Act or in accordance with contract
- Set up advance deadline for project team to collect and prepare all required documents to be included with each invoice
- Set up document management system to collect and store all required documents to be included with each invoice
- Ensure accounting system will permit revisions to invoices without date change
- Set calendar deadlines for receiving owner’s notices of non-payment and payment
- Set calendar deadlines for giving contractor’s notices of non-payment and payment
- After submission, provide subcontractors with confirmation of date on which invoice was given to owner

You've received a "proper invoice" – now what?

- Has invoice been submitted on correct date?
- Set calendar deadlines for owner's notice of non-payment and payment
- Is it a "proper invoice": compliance with Act and contract (checklist)?
- Is the amount of the invoice correct?
 - Deficiencies
 - Incomplete work
 - Changes
 - Holdback
 - Set offs, s. 6.7
- Does contract require a certificate of payment?
- Does notice of non-payment have to be given?

PROMPT PAYMENT, FULL PAYMENT vs. NO PAYMENT



Full Payment

Owner to Contractor

s. 6.4 (1) Subject to giving notice of non-payment, owner shall pay amount payable under proper invoice no later than **28 days after receiving proper invoice**

Contractor to Subcontractor

s. 6.5 (1) Subject to giving notice of non-payment, contractor who receives full payment of a proper invoice within the time specified in subsection 6.4(1) shall, no later than **7 days after receiving payment**, pay each subcontractor who supplied services or materials under a subcontract with the contractor that were included in the proper invoice

Subcontractor to Subcontractor

s. 6.6(1) Subject to giving notice of non-payment, subcontractor who receives full payment of a proper invoice within the time specified in subsection 6.5(1) shall, no later than **7 days after receiving payment**, pay each subcontractor who supplied services or materials under a subcontract between them that were included in the proper invoice

Owner's notice of non-payment

s. 6.4(2) Owner who disputes proper invoice may refuse to pay all or any portion of the amount if, no later than **14 days after receiving proper invoice** from contractor, owner gives contractor notice of non-payment specifying amount not being paid and reasons for non-payment

Contractor's notice of non-payment

s. 6.5(5), (7)(a) if contractor receives notice of non-payment from owner, contractor must give subcontractor, **within 7 days of receiving owner's notice of non-payment**

(a) a notice of non-payment

(i) stating some or all of amount payable to subcontractor is not being paid due to non-payment by owner,

(ii) specifying amount not being paid, and

(iii) providing an undertaking to **refer matter to adjudication no later than 21 days after giving the notice to subcontractor**; and

(b) a copy of owner's notice of non-payment

Subcontractor's notice of non-payment

s. 6.6(6), if subcontractor receives notice of non-payment from contractor, subcontractor must give other subcontractor, **within 7 days of receiving contractor's notice of non-payment**

(a) a notice of non-payment

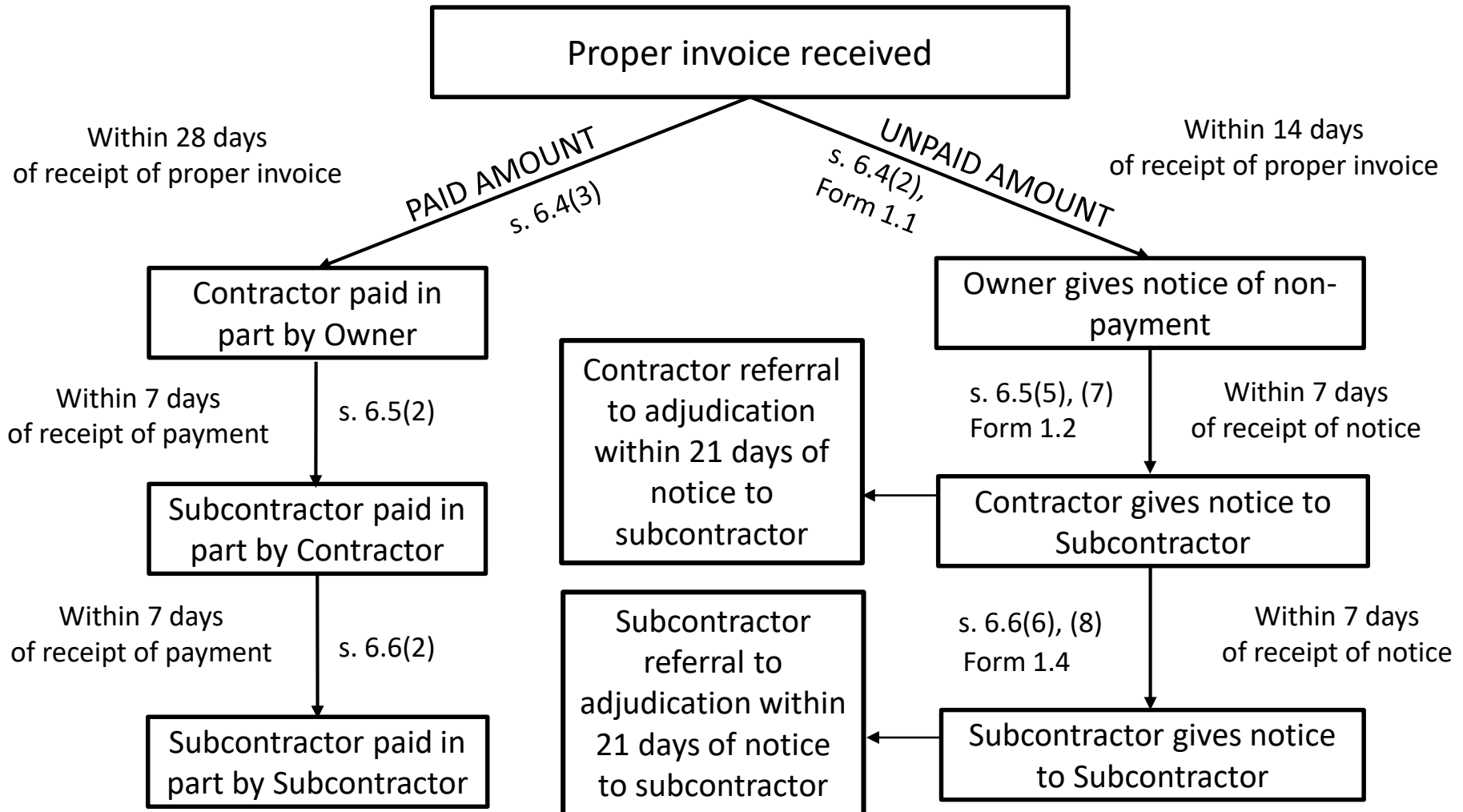
(i) stating some or all of amount payable to sub-subcontractor is not being paid due to non-payment by contractor,

(ii) specifying amount not being paid, and

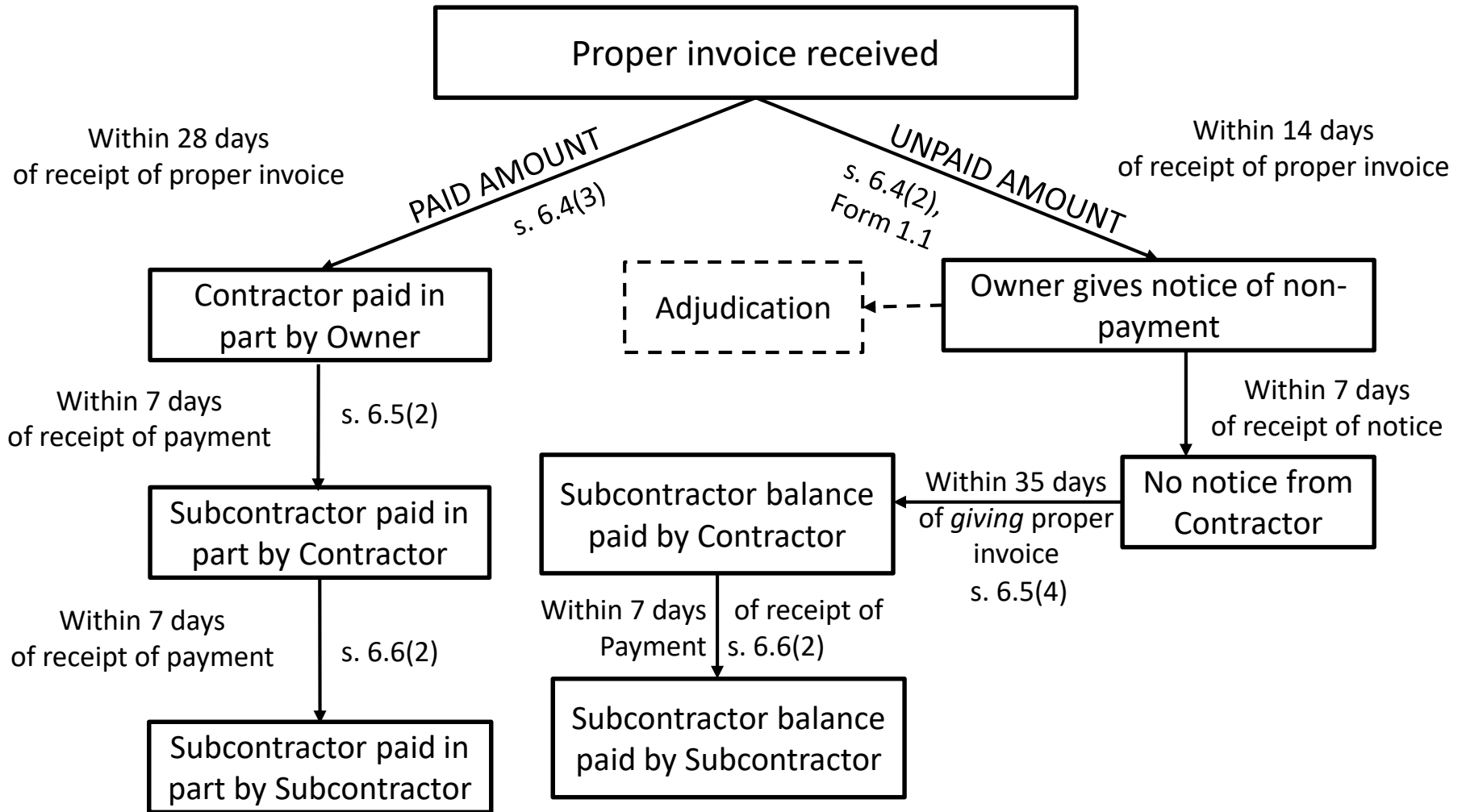
(iii) providing an undertaking to **refer matter to adjudication no later than 21 days after giving the notice to sub-subcontractor**; and

(b) a copy of any notices of non-payment received by the subcontractor

PROMPT PAYMENT, PARTIAL PAYMENT THROUGHOUT

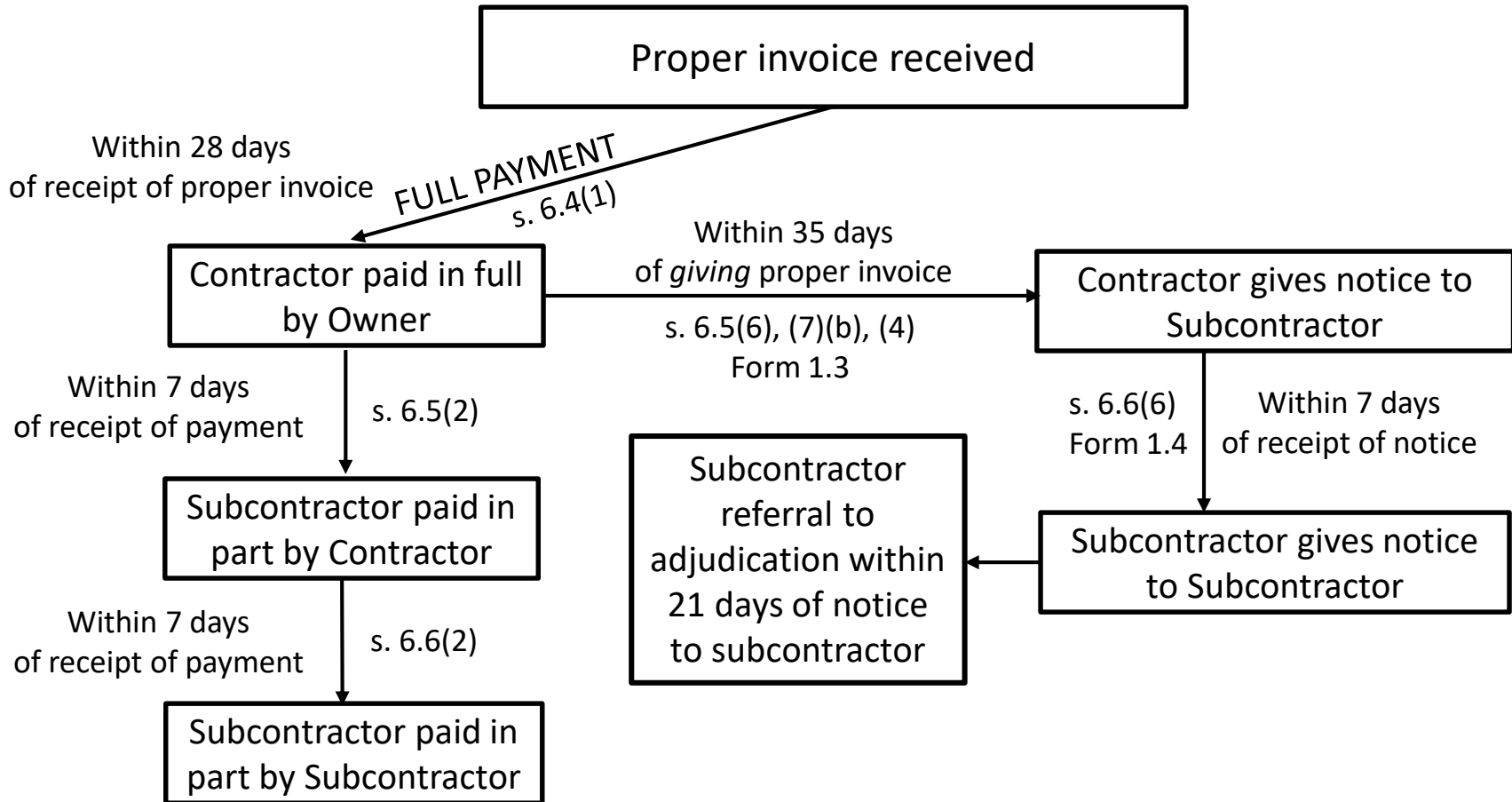


PROMPT PAYMENT, PARTIAL PAYMENT → FULL PAYMENT



* Payments to subcontractors rateably or as specified

PROMPT PAYMENT, FULL PAYMENT → PART PAYMENT

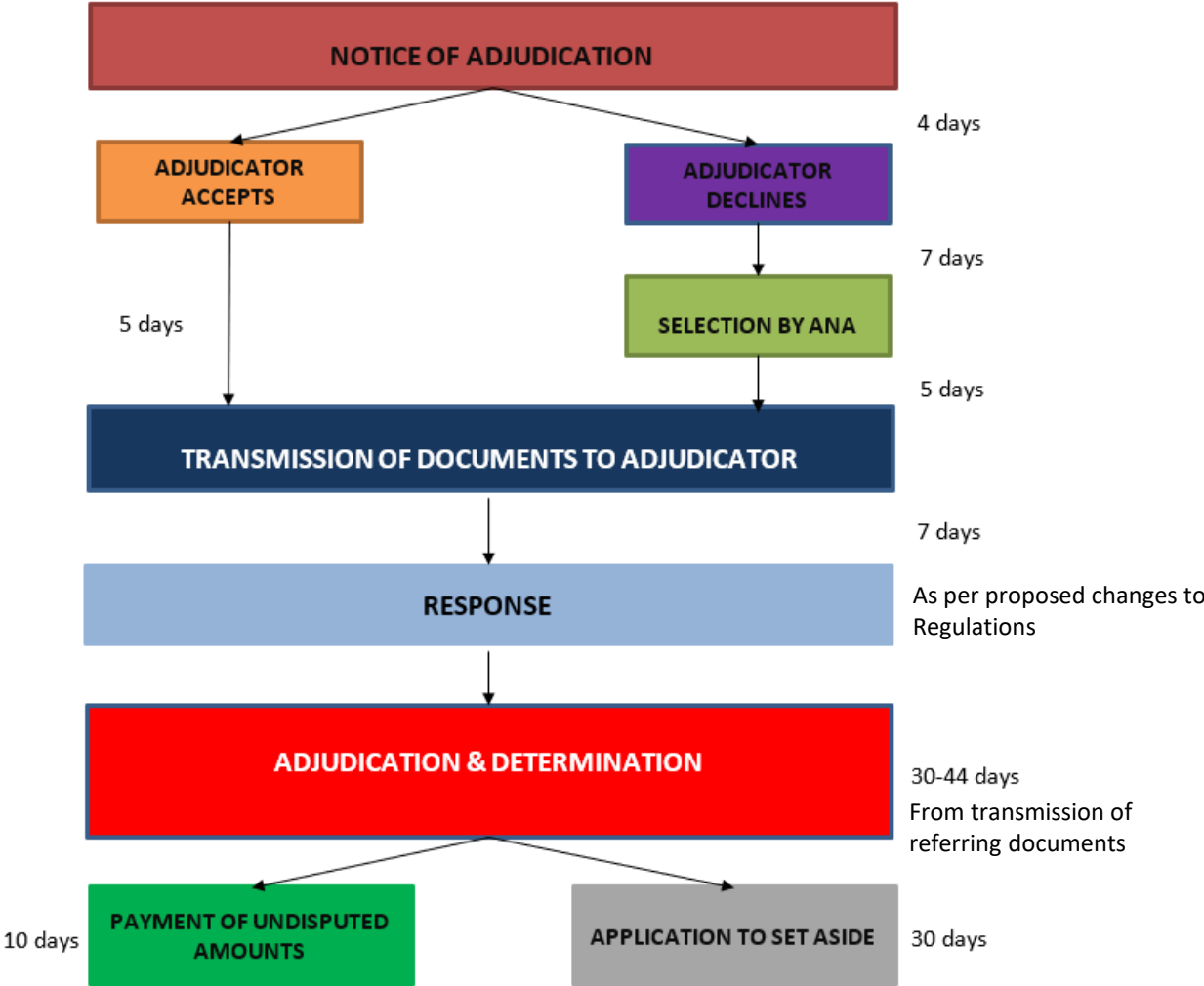


Part 2: Navigating Adjudication

John Margie & Max Gennis

- “Quick and dirty” determination of dispute
- Determination is interim binding
 - Does not preclude a lien or a court action/arbitration
- If unsatisfied with the result, a party may litigate or arbitrate the dispute

TIMELINE



- Refer a “dispute” to adjudication
 - When do you have a “dispute”?
 - Gaming the system?
- Types of disputes that may be adjudicated
 - Value of services or materials provided
 - Payment 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
 - Amounts retained by way of set-off
 - Payment of holdback
 - Non-payment of holdback where notice provided
 - Any other matter that the parties agree to adjudicate

- What is sent to adjudicator?
 - Notice of adjudication
 - Copy of the contract or subcontract
 - Any documents the party intends to rely on during the adjudication – will depend on dispute
 - Written submissions with exhibits
 - Witness statements with exhibits
 - Expert reports with appendices
 - Anything else you need to win the adjudication

- Depends on dispute
- Failure to pay holdback when due
 - Published Certificate of Substantial Performance
 - Abstract of title
 - Documents supporting quantification of holdback (such as a payment application)
- Value of services and materials provided
 - Change documents with back-up invoicing
 - Emails/letters dealing with the issue
 - Expert Reports
 - Meeting Minutes
 - Daily Reports
 - Photographs
 - Witness Statements

- You may be faced with a documents-only adjudication
- And because of tight adjudication timelines, staying organized is crucial!
- Proper storage and organization of records will help companies prepare effective and timely adjudication submissions

- Document management database by project – to avoid commingling of documents from separate projects
 - DMS must be sufficiently robust to permit ease of filing and searching of emails
- Hire personnel to maintain project records and file documents in document management system
- Develop a protocol and follow it:
 - Emails: stop using past email threads and start using meaningful subject lines
 - Maintain a proper photo log with descriptions
 - Maintain proper and meaningful daily reports
 - Develop a protocol for minuting conversations
 - Confirm instructions by emailing the other party

- We are the early adopters of adjudication in Canada
- No “one size fits all” approach. Companies of different sizes will have different capabilities and requirements. Find what works for your company/client and implement it
- Develop a protocol before need to adjudicate arises
- Consult with project personnel about what is possible and what will work best
- Adjudication is six months away

Part 3: Adjudication and Beyond

Brendan Bowles & Lena Wang

Alternative Financing and procurement arrangements (AFP)

- S. 1.1(1) of the Act:

1.1 (1) This section applies if the Crown, a municipality or a broader public sector organization, as the owner of a premises, enters into a project agreement with a special purpose entity that requires the entity to finance and undertake an improvement on behalf of the Crown, municipality or broader public sector organization, as the case may be, and, for the purpose, to enter into an agreement with a contractor in respect of the improvement.

Alternative Financing and procurement arrangements (AFP)

- The Act applies, with modifications, to:
 - (a) a project agreement between the Crown, municipality or a broader public sector organization and a special purpose entity as if the project agreement were a contract and the special purpose entity were the contractor; and
 - (b) to the agreement between the special purpose entity and the contractor as if the agreement were a subcontract made under the contract.

Alternative Financing and procurement arrangements (AFP)

- Adjudication applies with the following modifications:
 - the following matters may not be the subject of an adjudication:
 - A determination of when
 - a project agreement is substantially completed or
 - an agreement between a special purpose entity and contractor is substantially performed as provided under subsection (5)
 - A determination of whether a milestone in relation to the improvement has been reached, if reaching the milestone requires an amount to be paid.
 - Any prescribed matters.

Alternative Financing and procurement arrangements (AFP)

- Appointing adjudicator
 - If the parties to a project agreement are the parties to an adjudication and the project agreement specifies an independent certifier, the parties shall, provided that a representative of the independent certifier is listed as an adjudicator in the registry established under clause 13.3(1)(c), request that the representative conduct the adjudication.

You get a result you don't like – now what?

- Determination by adjudicator is binding on the parties to the adjudication, until a determination by the court or arbitrator or a written agreement respecting the matter.
- Section 13.18 of the *Act* - judicial review
 - Set aside adjudicator's determination on judicial review
 - Leave required
 - No later than 30 days after adjudicator's determination is communicated

You get a result you don't like – now what?

- Adjudicator's decision can only be set aside for specified reasons:
 - The applicant participated in the adjudication while under a legal incapacity.
 - The contract or subcontract is invalid or has ceased to exist.
 - The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication.

You get a result you don't like – now what?

- Adjudicator's decision can only be set aside for specified reasons, continued:
 - The adjudication was conducted by someone other than an adjudicator.
 - The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under this Part, and the failure to accord prejudiced the applicant's right to a fair adjudication.
 - Reasonable apprehension of bias on the part of the adjudicator.
 - Determination was made as a result of fraud.

You get a result you don't like – now what?

- Application to set aside adjudicator's determination does not stay the adjudicator's determination
- If the Divisional Court sets aside the adjudicator's decision, the Court may require return of any or all amounts paid

Adjudication + Other paths

- S. 13.5(5) of the *Act*:
 - A party may refer a matter to adjudication under this Part even if the matter is the subject of a court action or of an arbitration under the *Arbitration Act, 1991*, unless the action or arbitration has been finally determined.
- S. 13.15(2) of the *Act*:
 - (2) Subject to section 13.18, nothing in this Part restricts the authority of a court or of an arbitrator acting under the *Arbitration Act, 1991* to consider the merits of a matter determined by an adjudicator.

Adjudication + Other paths

- Deadline to lien affected by adjudication
 - Section 34(10) of the *Act*:
 - If the matter that is the subject of a lien that has not expired is also a matter that is the subject of an adjudication under Part II.1, the lien is deemed, for the purposes of this section only, to have expired on the later of the date on which the lien would expire under section 31 and the conclusion of the 45-day period next following the receipt by the adjudicator of documents under section 13.11.

Questions?

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