



**National Trade Contractors
Coalition of Canada**

**Submission of
The National Trade Contractors Coalition of Canada (NTCCC)
to the Expert Review of Prompt Payment and Adjudication
on Federal Construction Contracts**

March 2018

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The Expert Review of Prompt Payment and Adjudication
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1. National Trade Contractors Coalition of Canada (NTCCC)

The National Trade Contractors Coalition of Canada (NTCCC) was established in 2004. The members of the NTCCC are:

- Mechanical Contractors Association of Canada,
- Canadian Electrical Contractors Association,
- Canadian Masonry Contractors Association,
- Canadian Automatic Sprinkler Association,
- Canadian Roofing Contractors Association,
- Ontario Sheet Metal Contractors Association,
- Thermal Insulation Association of Canada,
- Interior Systems Contractors Association of Ontario,
- Canadian Institute of Steel Construction,
- Contractors Division of the Heating, Refrigeration and Air Conditioning Contractors of Canada.

The NTCCC's member associations represent over 12,000 contractors.

Trade contractors account for the preponderance of the approximately 1 million workers who are employed by Canada's construction industry¹. Trade contractors also sponsor the vast majority of construction industry apprentices. Additionally, trade contractors bear the primary responsibility for ensuring that employees on construction sites have the training that they need to work safely. Trade contractors also account for at least 80% of the construction industry's contributions to workers' compensation systems and the EI system.

To cover their payrolls, pay their suppliers, and meet their obligations to governments, trade contractors depend crucially on cash-flow. Interruptions in cash-flow threaten the ability to trade contractors to continue to operate. This, in turn, puts jobs, workers' benefits, apprenticeships, and contributions to workers' compensation systems and the EI system at risk, not to mention the impact of tax revenues. Therefore, it is a key goal of the NTCCC to see that the principles of prompt payment, as embodied in Ontario's recently adopted *Construction Act*, are adopted at the federal level.

The NTCCC welcomes the appointment of the Expert Review. We appreciate the opportunity to make this submission.

¹ Statistics Canada, CANSIM, Table No. 281-0023

2. Pervasiveness of Payment Problems on Federal Projects

Payment interruptions are a systemic problem in the construction industry. In 2015, Prompt Payment Ontario commissioned Ipsos Public Affairs to administer a survey of Ontario trade contractors. The survey generated statistically reliable data on the incidence and consequences of payment delays. A total of 535 trade contractors participated in the survey. Of these, 184 reported that they had undertaken work for the federal government or its agencies within three years of the survey (*i.e.*, between 2013 and 2015).

Figure No. 1 shows the proportion of contractors who undertook work for a particular type of owner and who reported that, excluding statutory holdbacks, the time between certifying or approving a payment and receiving that payment was 'always' or 'often' greater than 30 days. As can be seen from Figure No. 1, *the federal government is not an exception to the problem of payment delay: 25.2% of contractors reported that payment was 'often' more than 30 days after certification or approval while 46.7% reported that payment was always more than 30 days.*

Figure No. 1
Percentage of Contractors by Type of Owner or Developer who reported receiving Payment 'Often' or 'Always' more than 30 days after Certification or Approval
Prompt Payment Ontario Survey, 2015
(Total Sample, n=535) (Federal Projects Sample, n=107)

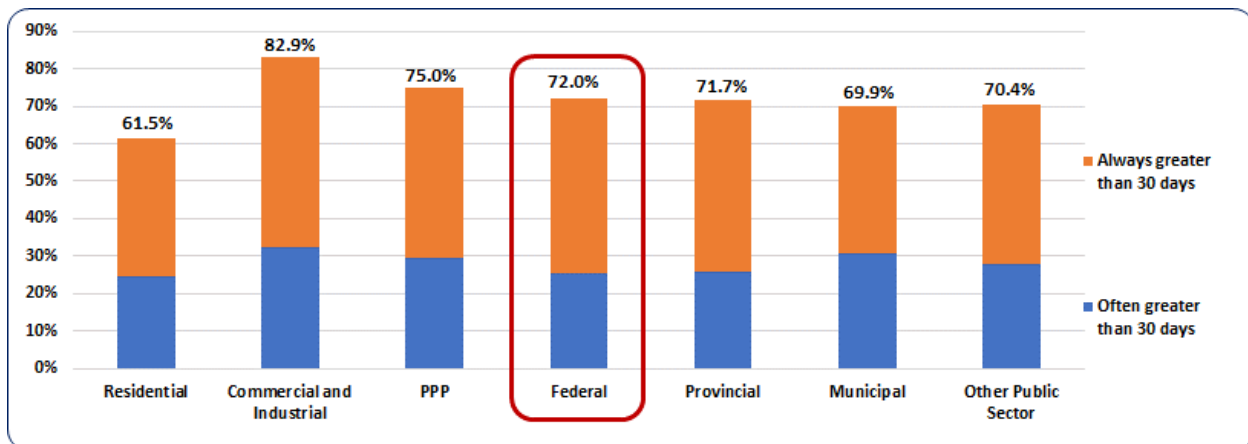
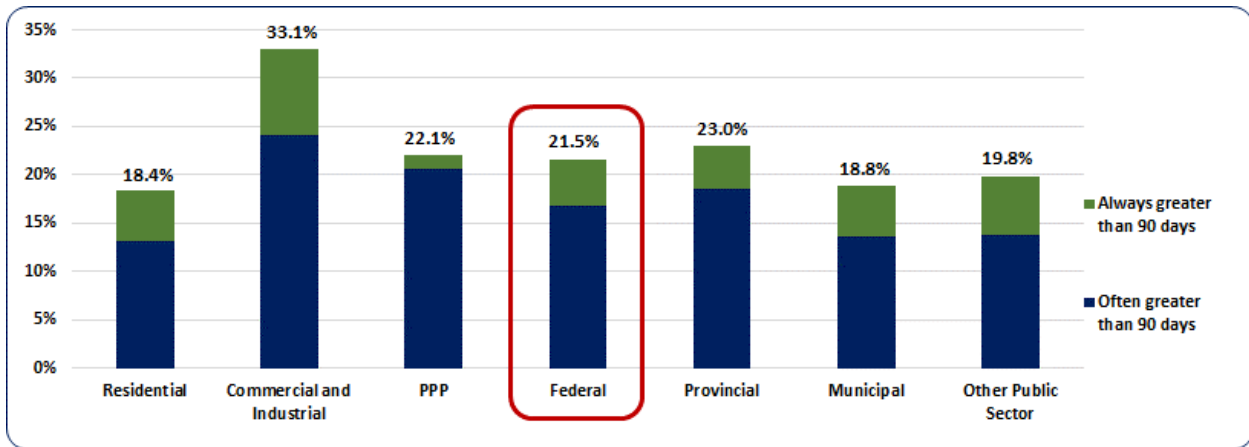


Figure No. 2 reports the proportion of contractors who reported that their receipt of approved or certified payments was 'often' or 'always' taking more than 90 days after the submission of the invoice. As can be seen from Figure No. 2, *more than a fifth of the contractors who undertook federal work reported that, even when statutory holdbacks are excluded, the time between certifying or approving a payment and receiving that payment was 'always' or 'often' greater than 90 days.*

The incidence of payment requiring more than 90 days is particularly important. Most contractors can arrange for bank financing for their operations by pledging their receivables as collateral if the age of those receivables is less than 90 days. However, receivables that are over the 90-day threshold are generally not acceptable to banks as security for demand loans. To finance their continued operations using these over-90-day receivables, contractors are obliged to access credit through non-bank channels. These lenders charge a substantially higher interest rate as well as administration fees.

Figure No. 2
 Percentage of Contractors by Type of Owner or Developer who reported receiving Payment 'Often' or 'Always' more than 90 days after Certification or Approval
 Prompt Payment Ontario Survey, 2015
 (Total Sample, n=535) (Federal Projects Sample, n=107)

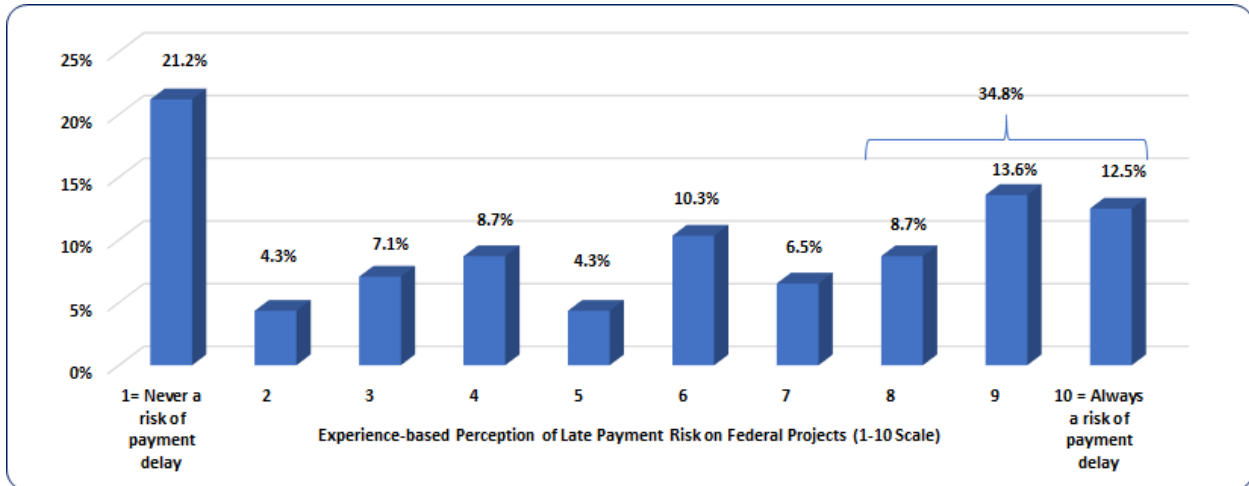


It should be stressed that the payment periods reflected in Figures No. 1 and No. 2 are *not* the period of time required to obtain certification or approval, but the period of time contractors must wait for payment *after* receiving certification or approval. The monies in question are monies that are *indisputably* owed to the contractors for work performed. The contractor has already paid the wages of workers, paid the required contributions to workers compensation and EI, made remittances to benefit plans, and also (usually) paid materials suppliers.

Figure No. 3 summarizes how contractors evaluated the risk of payment delay when working on federal government projects. Late payment risk was assessed on a 10-point scale with '1' representing no risk of payment delay and '10' indicating that there was always a risk of payment delay. Based on their experience of doing federal projects, *over a third of contractors who worked on these projects estimated a high level or late payment risk for federal work (i.e., risk was ranked as '8', '9', or '10')*. More than half of the responding contractors attributed late payment to 'bureaucratic delays'.²

² Contractors were asked to rank the importance of 'bureaucratic delays' as a cause of late payment on a 10-point scale where '1' represented 'not important at all' and '10' represented extremely important. More than half (54.7%) ranked 'bureaucratic delay' as '8', '9' or '10'. This finding applied to work undertaken for all levels of government. However, the survey results do not show markedly different results by levels of government. In

Figure No. 3
 Contractors Perception of the Risk of Late Payment when working on Federal Projects
 (Answered only by 184 Contractors who had worked on Federal Projects)
 Prompt Payment Ontario Survey, 2015 (n=184)



The experience-based perception of late payment risk illustrated in Figure No. 3 has important implications. All of these implications are negative:

First, some contractors decline to bid on federal projects because of the late payment risk. In the Prompt Payment Ontario survey, *a quarter of contractors who worked on federal projects indicated that the risk of late payment had discouraged them from bidding on some federal projects.* Late payment risk diminishes the size of the bidding pool and presumptively increases construction costs.

Second, many contractors who do bid on federal project work factor in the cost of financing payment delays. Survey data indicate that overall (n=535), 61.1% of contractors incorporate an 'additional contingency' into their bid to reflect the risk of late payment. Thus, *the federal government and its agencies often will pay a premium for payment delay, regardless of whether payment is actually delayed.*

Third, faced with late payment risk, contractors avoid taking on additional financial obligations, such as the cost of acquiring or leasing new machinery and equipment. *Survey data show that 57.4% of contractors*

regard to the perception of late payment risk or the incidence of late payment. The 'all levels of government' finding is therefore indicative of the importance of 'bureaucratic delay' at the federal level.

*delayed or avoided investing in new machinery or equipment.
Productivity is reduced as a result.*

Fourth, contractors *take on fewer permanent employees, including apprentices*, so as to reduce the fixed costs that they need to finance by drawing on non-bank lending channels.

Fifth, *late payment has a cascading effect*. Survey data indicate that late payments have forced almost three-quarters (72.1%) of contractors to extend their line of credit. Late payment has forced some contractors to miss paying their hourly employees (5.0%), their salaried employees (11.6%), their remittances for benefits (13.6%), their CRA source deduction remittances (17.8%), their HST remittances (20.0%), their lease or rental obligations (27.9%), their bank requirements (19.1%), their payments to suppliers (60.9%), and their payments to sub-contractors (52.1%).

Almost a quarter (24.7%) of contractors in the Prompt Payment Ontario survey reported that their business faced a risk of insolvency as a result of being forced to wait an unreasonable length of time for payment.

It is the submission of the NTCCC that **late payment in the construction industry is destructive and pervasive. Projects involving the federal government are *not* an exception to this problem.** There needs to be a solution to the problem on federal projects.

Ontario's *Construction Act* sets out the principles and standards that should inform a federal solution.

3. Follow the Money

NTCCC submits that the principle that should govern the design of federal prompt payment regime is 'follow the money.' **Any construction project undertaken with federal monies or for the benefit of the federal government or its agencies should be subject to federal prompt payment obligations.**

- Where the federal government or one of its agencies is directly undertaking a construction project, all contracted work on the project should be subject to federal prompt payment legislation.
- Where the federal government or one of its agencies has engaged a third party to operate as a facility manager and that facility manager enters into construction contracts, federal prompt payment legislation should identify the facility manager as an agent of the federal government who is subject to prompt payment obligations in the same manner as would be the federal government or one of its agencies.
- Where the federal government or one of its agencies is funding a construction project, in whole or in part, but is not a direct party to the construction contract, the requirements set out in federal prompt payment legislation should be incorporated into the grant or transfer agreement such that federal prompt payment obligations bind the entity that receives the federal monies. If the entity receiving the federal monies is also subject to provincial or territorial prompt payment legislation, the provincial or territorial legislation would take precedence if and only if that legislation provides for a higher standard than the federal prompt payment regime. However, if the provincial or territorial legislation establishes a lower standard than the federal prompt payment regime, the federal prompt payment rules would apply.
- On P3 projects, where the federal government or one of its agencies has commissioned a project, but the federal government or one of its agencies is not funding the project during its construction phase, the agreement between the federal government or its agency and the P3 consortium should bind the consortium to apply federal prompt payment rules.
- Federal prompt payment legislation should apply to construction projects on reserve lands where the federal government or one of its agencies is the contracting party or where the band council or one of its entities (e.g., a band development corporation) is the contracting party.

Federal monies should only be used to support construction projects that are covered by federal prompt payment rules.

4. Principles of Prompt Payment on Federal Projects

Ontario's *Construction Act* sets the standard for enacting prompt payment. It is imperative that federal legislation and federal procurement policy reflect these standards. **It is especially important that federal legislation not water down, reduce or diminish in any way the prompt payment standards established by Ontario's *Construction Act*.**

Prompt Payment Obligations

1. The obligations to make timely, prompt payment of construction payables should be enacted in legislation.
2. Prompt payment obligations should be mandatory. The parties to a construction contract should not be free to amend or vary those obligations by contract.
3. Prompt payment obligations should apply to all projects undertaken using federal monies. This includes projects that are undertaken directly by the federal government or a federal agency. It also includes projects that are undertaken by a transfer or grant partner using federal monies. Prompt payment should also apply to P3 projects where the federal government or a federal agency has commissioned the project, but federal monies may not be directly involved. Prompt payment should also apply to all construction undertaken on reserve lands. The applicability of prompt payment obligations should not be contingent on the existence of any prompt payment legislation in the province or territory where the project is undertaken.
4. Prompt payment obligations should extend, without qualification, through all levels of the sub-contracting pyramid.

Prompt Payment Timelines

5. Prompt payment by the federal government, federal agency or transfer/grant partner to the prime contractor should mean payment within 28 days of delivery of a proper invoice.
6. Prompt payment by a prime contractor to a subcontractor, and so on down the sub-contracting pyramid, should mean each payee is paid within 7 days of a payer receiving the corresponding payment from its payer.
7. The parties to a construction contract should be allowed to negotiate the timing for delivery of a proper invoice or payment application³. Contracts may involve performance milestones as

³ This submission follows the terminology in Ontario's *Construction Act*. A 'proper invoice' refers to a statement of the amount owing rendered by a prime contractor to an owner. A 'payment application' refers to a statement of the amount owing rendered by one contractor to another contractor, *e.g.*, by a subcontractor to a prime contractor or by a sub-subcontractor to a subcontractor.

conditions for invoicing. However, payment obligations triggered by such milestones should be subject to the time limits as those set out above.

8. While payers should remain free to require certification as part of the payment process, certification should not be a precondition to a proper invoice and should not affect the triggering date governing the payment period. Any certification should take place during the prescribed payment period. NTCCC accepts that there could be an exception to this principle in the case of P3 projects, as is the case under Ontario's *Construction Act*

Disputes

9. Payment obligations should be subject to dispute, either in whole or in part.
10. In the event of a dispute, the disputing payer should give notice of intention to withhold payment to its payee within 14 days of receipt of a proper invoice if the disputing payer is the owner. If the disputing payer is a prime contractor or subcontractor, the disputing payer should give notice of intention to withhold payment within 7 days of its receipt of a notice of intention on the part of the owner to withhold payment.
11. If the owner does not issue a notice of non-payment, or the dispute is between a prime contractor and a subcontractor, the contractor should give notice of its intention to withhold payment to its payee within 35 days after delivery of a proper invoice to the owner.
12. A notice of intention to withhold payment must set out the detailed reason(s) for withholding payment, including the amount in dispute.
13. If there is a failure to deliver a notice of intention to withhold payment within the time prescribed, the payer should be obliged to pay the invoice in full.
14. If only a portion of an invoice is disputed, the portion not in dispute should be paid within the time prescribed.

Adjudication of Payment Disputes

15. A payee who challenges the reasons set out in the notice of intention to withhold payment should have the right to seek adjudication of the payment dispute.
16. An adjudication should be commenced immediately upon application by the payee. The adjudication process should be concluded within a short period of time following commencement of the adjudication process, *e.g.*, 30 to 40 days.
17. The adjudicator should be independent, impartial and appropriately qualified, and should have the same immunity from suit as pertains to a judge.

18. The decision of the adjudicator should be binding and enforceable on an interim basis. Any payment prescribed by an adjudicator's order should be made within 10 days after the decision has been communicated to the parties. However, both parties to a payment dispute should retain the right to have the disputed matter reviewed at the end of the project, by litigation or arbitration if they have agreed to arbitrate.
19. The qualification and selection of adjudicators, and all ancillary matters necessary to regulate the adjudication process, should be prescribed by regulation.
20. There should be a publicly accessible web portal that lists adjudications that are in process and which contains all adjudication decisions.

Right to Suspend Work

21. In the event of a default in the payment obligation to a payee following upon a decision by an adjudicator, the payee should have the right to suspend work, and this suspension of work should not constitute any breach of contract.
22. In the event that a payee resumes work on a project following a suspension, the payee should be entitled to reasonable remobilization costs.

Payment of Interest

23. Interest at a prescribed rate should be payable on all late payments.

Holdbacks⁴

24. Since provincial lien legislation does not apply to projects where the owner is a federal entity, statutory holdbacks are not an issue. However, where holdbacks are mandated contractually, federal prompt payment legislation should provide:
 - a) that the percentage of the total contract amount which an owner may hold back for warranty purposes should be reasonable in relation to the risk of deficiencies;
 - b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work;
 - c) a prime contractor should be allowed to hold back for warranty purposes an amount that does not exceed in percentage terms the hold back that is allowed in the contract between the owner and the prime contractor;
 - d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the

⁴ See Section 9 for additional discussion on holdbacks and the rationale for these principles.

holdback monies applicable to the work completed by that sub-contractor. The same principle should apply to holdback between a sub-contractor and a sub-sub-contractor.

- e) contractors should have the right to substitute a surety bond for any such holdback.

Surety Bonds

- 25. Performance and labour and material payment bonds should be required on all projects undertaken by the federal government, its agencies, its grant and transfer partners and federally authorized P3 consortia.

5. No Deference to Jurisdictions with Inferior Standards

NTCCC submits that Ontario's *Construction Act* sets the standards for prompt payment and that these standards should apply to all construction in Canada. Those standards should not be watered down or diminished in any way. **Federal legislation should reflect or exceed the standard established by Ontario's *Construction Act*.**

It is NTCCC's hope and expectation that all other provinces and territories will enact prompt payment legislation that aligns with the standards in Ontario's *Construction Act*. However, **should a province or territory enact legislation that establishes inferior protections governing the timelines for payments to contractors, there should be no deference on federal projects to that province or territory's watered-down approach to prompt payment.**

It may be suggested that federal practice should align with the standards enacted by a particular province or territory in which the project is being undertaken. The argument is that it would be confusing to contractors to operate under one set of standards for federal projects and another set of standards for projects that fall under provincial jurisdiction. However, *contractors already operate under different standards for labour relations, employment standards (e.g., statutory holidays), fair wage schedules, occupational health and safety, employment equity and environmental protection. Moreover, federal procurement practices do not defer to the practices of other jurisdictions.* The reality is that all contractors are aware that the rules on federal projects often differ from the rules on other projects. If contractors can adapt to different rules on labour relations, employment standards, fair wage schedules, occupational health and safety, employment equity and environmental protection, they can adapt, if necessary, to different rules on prompt payment. Indeed, different rules are likely to be inherent in federal work since there is no ability to apply a lien to federal projects.

Deferring to provincial or territorial standards would not necessarily simplify compliance. An unintended implication of deferring to provincial standards is that the construction of a project, such as a bridge, that spans two provinces could be subject to two different sets of payment rules, depending on which side of the boundary line the concrete was poured. That would be absurd.

We conclude, therefore, that **the advantages of requiring a federal prompt payment standard for all federally funded or commissioned projects, irrespective of any differing standards that might govern under local provincial or territories legislation, far outweigh any perceived disadvantages, and there should be no deference to such local standards.** If alignment with *equivalent* provincial or territorial standards is deemed to be important, then it is suggested that the federal prompt payment legislation should include a schedule of provinces and territories whose prompt payment standards are judged to be at least equivalent to the federal standards in all key respects.

6. Scope and Application of Prompt Payment

This submission follows the terminology in Ontario's *Construction Act*.

- A 'proper invoice' refers to a statement of the amount owing that is rendered by a prime contractor to an owner.
- A 'payment application' refers to a statement of the amount owing that is rendered by one contractor to another contractor, *e.g.*, by a subcontractor to a prime contractor or by a sub-subcontractor to a subcontractor.

A. What kinds of contractors should prompt payment apply to? What kinds of work should prompt payment apply to?

Application to all construction contractors:

Prompt payment should apply to all contractors, of every tier, as well as suppliers and design consultants involved in construction projects.

Meaning of 'construction':

A 'construction contract' is defined in the *Government Contract Regulations (SOR87-402)* of the *Financial Administration Act* as follows:

"construction contract means a contract entered into for the construction, repair, renovation or restoration of any work except a vessel and includes:

- (a) a contract for the supply and erection of a prefabricated structure,
- (b) a contract for dredging,
- (c) a contract for demolition, or
- (d) a contract for the hire of equipment to be used in or incidentally to the execution of any contract referred to in this definition."

NTCCC believes that this definition of construction is appropriate, except that we would *not* exclude 'vessels'. Trade contractors located in Canada's shipbuilding centres frequently engage in this type of work, and there is no reason why those engaged in the construction, remodelling or repair of a vessel should be excluded from prompt payment protection.

Scope of Coverage:

Prompt payment protection should apply to:

- a) The federal government and its departments when they contract for construction,
- b) Agencies of the federal government established by statute or regulation when they contract for construction,

- c) Entities that receive capital grants from the federal government for the purpose of construction,
- d) Entities that receive transfer payments from the federal government for the purpose of construction,

Prompt payment protection also should apply to any construction contractor who is providing services that *benefit* the federal government, one of its agencies or one of its grant or transfer partners, regardless of whether the federal government, one of its agencies or one of its grant or transfer partners is a direct contracting party. What matters is that the federal government, one of its agencies or one of its grant or transfer partners is the *beneficiary* of the construction services. This point is particularly relevant to P3 projects and to facility management contracts.

P3 Projects:

In some types of P3 projects, the proponents finance the construction. They may be recompensed upon completion of the project or through revenues generated by operating the asset. In these circumstances, the federal government is the beneficiary of the project. Prompt payment obligations should apply.

Facility Management Contracts:

In recent years, the federal government has outsourced the ongoing management of its facilities by entering into 'facilities management' contracts with companies that, in turn, contract with construction contractors for work which includes capital improvements to the property. A significant issue under the current system is that when a construction contractor's payment from the facility manager is delayed, the federal government asserts that it is not responsible since it has paid the facility manager and the payment dispute is thereby effectively isolated to one between the construction contractor and the facility manager, with no effective recourse to the entity receiving the benefit of the unpaid work.

This has become a significant issue within the industry, and **it is essential that the contracting activity of facilities managers be subject to prompt payment obligations**. Otherwise, the objectives of prompt payment are easily lost in this sector.

B. Should there be any exclusions or different treatment for certain types of projects (e.g., P3 projects)?

There should be no exclusions. **When federal funds are used to pay for construction or when the federal government is the beneficiary of a construction project, prompt payment obligations should be automatic.**

P3 projects should be covered by prompt payment obligations. A distinguishing feature of P3 projects is that payment is often tied to milestones. Ontario's *Construction Act* allows for this practice but requires prompt payment when those milestones have been achieved.

C. What levels of contract should prompt payment apply to in the construction pyramid?

For reasons that we believe are obvious, prompt payment should apply at all levels of the construction pyramid. Funds flow from the owner to the prime contractor and thence to the subcontractors and sub-subcontractors. Any interruption in this flow of funds, at any level, forces payment delays on subordinate levels of the construction pyramid, resulting in the problems described earlier in this submission.

D. What should be the trigger for starting the clock running on a payment period?

The clock should start to tick when a prime contractor submits a proper invoice to an owner.

Federal legislation could define “proper invoice” in the same manner as Ontario’s *Construction Act*. Alternatively, federal legislation could model the definition used in the Government of Canada’s “General Conditions of a Service Contract”, which provides as follows:

TP3 Invoice Submission

3.1 Invoices must be submitted in the Contractor's name. The Contractor must submit invoices for each delivery; invoices must only apply to the Contract. Each invoice must indicate whether it covers partial or final delivery.

3.2 Invoices must show:

3.2.1 the date, the name and address of the client department, deliverable and/or description of the Work, contract number;

3.2.2 details of expenditures in accordance with the Basis of Payment, exclusive of Goods and Services Tax (GST) or Harmonized Sales Tax (HST) (such as per diem rate, fixed price and level of effort, subcontracts, as applicable);

3.2.3 deduction for holdback, if applicable;

3.2.4 the extension of the totals, if applicable; and

3.2.5 if applicable, the method of shipment together with date, case numbers and part or reference numbers, shipment charges and any other additional charges.

3.3 If applicable, the GST or HST must be specified on all invoices as a separate item. All items that are zero-rated, exempt or to which the GST or HST does not apply, must be identified as such on all invoices.

3.4 By submitting an invoice, the Contractor certifies that the invoice is consistent with the Work delivered and is in accordance with the Contract.

E. What is a reasonable payment period? Should these periods differ for parties at different levels of the construction pyramid?

- Owner to Prime Contractor: 28 days after submission of proper invoice
- Prime Contractor to Subcontractor(s): a payment application must be paid within 7 days of receiving payment from the Owner
- Subcontractor to Sub-subcontractor(s): a payment application must be paid within 7 days of receiving payment from the Prime Contractor. This time period applies down the construction pyramid to further subcontract relationships.

It is important to maintain symmetry in the payment time periods between the prime and subcontractors and between subcontractors and sub-subcontractors to ensure that funds flow in a predictable and reliable fashion.

F. What, if any, limitations should be placed on the parties to a construction contract in respect of their freedom to contract in relation to invoicing terms?

As per Ontario's *Construction Act*, the parties to a construction contract should be entitled to negotiate the frequency of invoice submissions, including invoicing on a milestone basis. The frequency of invoices should set out in the tender documents, failing which the default should be that invoices may be submitted once per month.

G. Should certification be permitted as a pre-condition to the delivery of a proper invoice? Are there any other pre-conditions that cause concern?

Generally, certification should *not* be a permitted precondition to the delivery of a proper invoice.

It is perfectly legitimate for an owner to require certification as a condition for payment. However, the 28-day period following submission of an invoice to an owner by a prime contractor is sufficient time for the payment certification process to be completed. The payment certification process should not add to the payment period between submission of an invoice and payment.

Payment certifiers are usually third parties engaged by an owner to verify that the basis for payment has been met. It is the common experience of contractors that the firms that supply payment certification services to owners sometimes under-resource their assignments or fail to take adequate account of project scheduling and thereby add unreasonable delay into the payment process. If it is clear from the outset that payment is due within 28 days, then the companies that provide payment certifying services will resource their assignments appropriately. The 28-day payment period is sufficient for verification procedures to be implemented. In the absence of a *bona fide* dispute about the basis for payment, the 28-day payment period should apply.

NTCCC recognizes that certification may be appropriate in the context of P3 projects. The general principle advocated here may be subject to an exception for those undertakings.

H. On what basis can payment be withheld and when? Should there be any limits on a right of set off (e.g., in relation to other projects)?

Withholding Payment because of an Invoice Deficiency

It is legitimate for payment to be withheld when a contractor submits an invoice that is not compliant with the requirements for a proper invoice. In this situation, the payer should advise the contractor immediately that the invoice is deficient and indicate the additional information required to rectify the deficiency.

Withholding Payment because of a Performance Deficiency

It is legitimate for payment to be withheld when a contractor has not met the basis for payment set out in the contract. However, contractors need to be protected from gratuitous assertions of deficient performance which are simply a pretext for payment delay. The procedures set out in Ontario's Construction Act are fair and reasonable. When a payer disputes that the contractor has met the basis for payment, the payer must: (a) provide written notice of intention to withhold payment, (b) identify the deficiencies justifying the withholding, and (c) limit the amount of payment withheld to an amount that is in reasonable proportion to the magnitude of the deficiency. Notice to withhold payment because of a claimed performance deficiency should be given within 14 days of receiving the proper invoice.

Withholding Payment because of a Payment Interruption

If a payee receives from a payer a notice of intention to withhold payment, it is legitimate for that payee to withhold payment from its payees until payment has been received. To exercise this right to withhold payment, a payer must give notice of intent to its payees, and also must take the issue of non-payment from its payer to immediate adjudication. Interest should be payable on the withheld payment.

Set-Off

All construction projects should be treated as stand-alone projects. The financial obligations that arise from one project should have no bearing on the financial obligations arising from another project. It is essential that payment disputes that pertain to one project not affect the flow of funds in another project. NTCCC accepts the one exception to this principle set out in Ontario's *Construction Act*, in the situation where the payer is insolvent.

I. Should payment information be posted? If so, where?

The federal government should establish a website on which every federally-funded construction project should be listed. The website should indicate when a progress payment has been made by the owner to the prime contractor and the amount of that payment. Because all of these projects are public sector projects, it is appropriate to disclose payment information in a timely manner.

J. What should the consequences be of a failure to pay?

Failure to Pay because of an Invoice Deficiency

No consequences should arise from a failure to pay because of an invoice deficiency.

Failure to Pay because of a Claimed Performance Deficiency

If a performance deficiency is properly claimed, the contractor seeking payment can rectify the performance per the information in the notice to withhold payment. If the contractor disputes the claimed performance deficiency, the dispute should be referred to the adjudication process which will determine whether the basis for payment has been met.

Failure to Pay because of a Payment Interruption

Interest should be payable after the payment period. A contractor should have the right to suspend work upon any failure to pay following an adjudication.

Unexplained Failure to Pay

Interest should be payable after the payment period. A contractor should have the right to suspend work upon any failure to pay following an adjudication.

Refusal to Pay Pursuant to an Adjudication Decision directing Payment to be made

Interest should be payable after the payment period. A contractor should have the right to suspend work.

7. Adjudication

A. Who can require adjudication and when?

Any payee whose payment has been withheld should have the right to commence an adjudication.

An adjudicator's affirmation that payment has not been made should be required before a contractor exercises the right to suspend work.

B. Who can adjudicate a dispute?

Akin to the process being implemented in Ontario, the federal government should establish an Authorized Nominating Authority (ANA) governing the appointment, training and other ancillary aspects governing a roster of adjudicators. Adjudicators would be assigned by the ANA to a dispute on the basis of their availability, proficiency in the official language(s) of the parties, and regional access.

In addition, the federal government should consider allowing the use of adjudicators who are already roster members of a provincial ANA, as, for example, will be the case in Ontario.

C. How should an adjudicator be nominated?

An adjudicator should be nominated by the party seeking the adjudication, or alternatively appointed by the ANA.

D. What is the role of an authorized nominating authority?

The role of the ANA should be modelled on the Ontario's *Construction Act*.

E. What types of disputes should be adjudicated? Should there be limits to the quantum of disputes that are subject to adjudication?

The types of disputes subject to adjudication should be those enumerated in section 13.5 of Ontario's *Construction Act* along with any other matter that the Minister of Justice may refer to an adjudicator.

In addition, the scope of adjudication should include any other matter that the Minister of Justice may refer to adjudication.

There should be no limit to the quantum of disputes subject to adjudication.

F. What should an adjudication process look like?

Time is of the essence in an adjudication process. The procedures should reflect this overriding requirement.

An adjudicator should be appointed within seven days of a dispute being referred to adjudication.

Within five days of the appointment of an adjudicator, the party seeking the adjudication should be required to file a written statement of its claim and the rationale for the claim. The party

responding to the claim should be required to file a written response within five days of the statement of claim being filed.

The adjudicator should have wide powers to determine the adjudicative process, including the delivery of written submissions only or the use of oral evidence and submissions. Generally, NTCCC recommends the provisions of section 13.12 of Ontario's *Construction Act* in this respect.

Upon application by any party, an adjudicator should have the authority to consolidate disputes into a single adjudicative process.

An adjudicator should be empowered to recommend mediation of a dispute, provided that such mediation not prejudice the validity of the adjudication process, or absent consent of all parties, the timing of such adjudicative process.

The adjudicator should be required to render a written decision within 30 days of being appointed.

There should be a publicly accessible web portal that lists adjudications that are in process and which contains all adjudication decisions.

G. How should the costs of an adjudication process be addressed?

The costs of adjudication should generally be borne equally by the payer and the payee(s) who are parties to the dispute. There should be an exception in the case of adjudications which are determined to have been frivolous, vexatious, and abuse of process or other than in good faith.

H. What should the process for enforcing adjudication decisions look like?

An adjudicator's decision should be binding. In the event that one party does not comply with the adjudicator's decision, the other party should be able to enforce the decision in the same manner as an order of the court.

The adjudicator's decision should be subject to judicial review in only the limited instances enumerated in section 13.18 (5) of Ontario's *Construction Act*. Otherwise, such decision should be binding upon the parties, subject to their right to have such decision reviewed at the end of the project in such court or arbitration proceedings as may be available.

8. Jurisdictional Issues

A. What kinds of projects would federal legislation implementing prompt payment and adjudication apply to?

The principle should be that federal prompt payment legislation and policy should apply to any project constructed with federal monies or constructed for the benefit of the federal government or any of its agencies. Specifically, prompt payment legislation and policy should apply to:

- a) The federal government and its departments when they contract for construction,
- b) Agencies of the federal government established by statute or regulation when they contract for construction,
- c) Entities that receive capital grants from the federal government for the purpose of construction,
- d) Entities that receive transfer payments from the federal government for the purpose of construction,
- e) P3 projects, and
- f) Facility management contractors operating as agents of the federal government or its agencies.

B. Are there potential conflicts between such federal legislation and provincial legislation?

To the extent federal legislation differs from provincial legislation, there is the potential for conflict. In this case, NTCCC believes that any construction project initiated by the federal government or its agencies for their own benefit should be indisputably subject to federal legislation. While this is fundamentally a legal question, NTCCC believes that there is no constitutional impediment to the enactment of prompt payment legislation governing federal works.

In the case of projects that are funded by the federal government, but where the federal government is not a party to the construction contract, the obligations in federal prompt payment legislation should be contractual terms in the grant or transfer agreement such that the entity receiving the funds is bound to the same prompt payment obligations that are in federal legislation. If provincial or territorial prompt payment legislation establishes higher standards, those higher standards would take precedence over the contractual terms. However, if provincial or territorial prompt payment legislation establishes lower standards, the higher contractual standards would apply.

C. If so, in view of the doctrine of paramountcy, is there any constraint on the federal legislation?

NTCCC does not believe that federal legislation would be constrained as a result of any conflict between it and provincial legislation. Ideally, federal legislation should work in harmony with provincial law, but to the extent there may be conflict between the two, federal legislation should prevail. See above comments.

D. Would some combination of federal legislation and amendments to standard form contracts be appropriate?

While some amendment to the standard contract forms used by the federal government would likely be necessary, these changes should be in response to the requirements of the legislation proposed. The objectives of prompt payment and adjudication should, in any event, be achieved by legislation on all projects that are within federal jurisdiction. Equivalent contractual solutions should be used only where federal legislative jurisdiction does not apply.

E. Are there any operation concerns that federal legislation could be different than provincial/territorial legislation (i.e., would there be different rules applicable to a federal construction site as opposed to a provincial/territorial construction site)?

Contractors already operate under different standards for:

- labour relations (*Canada Labour Code: Part I*)
- employment standards (e.g., statutory holidays) (*Canada Labour Code: Part III*),
- fair wage schedules (former *Federal Fair Wages and Hours of Labour Act*),
- occupational health and safety (*Canada Labour Code: Part II*)
- employment equity (Federal Contractors Program)⁵, and
- environmental protection (*Canada Environmental Protection Act*).

Current federal procurement practices do *not* defer to the practices of other jurisdictions. Nor do federal security clearance requirements, where they apply, defer to the practices of other jurisdictions.

⁵ The Federal Contractors Program (FCP). FCP ensures that contractors who do business with the Government of Canada seek to achieve and maintain a workforce that is representative of the Canadian workforce, including members of the four designated groups under the *Employment Equity Act*: women, Aboriginal peoples, persons with disabilities, and members of visible minorities. The Program applies to provincially regulated contractors that:

- have a combined workforce in Canada of 100 or more permanent full-time and permanent part-time employees; and
- have received an initial federal government goods and services contract valued at \$1 million or more (including applicable taxes).

All contractors are aware that the rules on federal projects often differ from the rules on other projects. **If contractors can adapt to different rules on labour relations, employment standards, fair wage schedules, occupational health and safety, employment equity and environmental protection, they also can adapt, if necessary, to different rules on prompt payment.**

F. From an operational perspective, should the federal government defer to provincial/territorial prompt payment legislation where it exists?

On projects that are covered by federal prompt payment legislation, there should, in general, be no deference to the legislation of any province or territory. On projects which are federally funded, but not federally undertaken, federal prompt payment obligations should be implemented through equivalent contractual requirements. We would propose to use the provincial or territorial adjudication procedures where those apply. In all other respects, on such projects, provincial or territorial legislation would only apply when that legislation establishes standards that exceed the contractual requirements.

9. Other Issues

Construction Projects on Reserve Lands

Jurisdiction over “lands reserved for the Indians” is vested in the federal Crown by virtue of subsection 91(24) of the *Constitution Act, 1867*. There should, therefore, be no ambiguity that federal prompt payment legislation would apply to construction projects on reserve lands where the federal government or one of its agencies is the contracting party. Where the band council or one of its entities (*e.g.*, a band development corporation) is the contracting party, federal legislation could apply, but the legislation should make this explicit.

Holdbacks

In the federal context, there is no need to address issues involving the statutory holdbacks prescribed under provincial lien legislation. However, there is a need to address contractually-mandated holdback practices.

A 12-month warranty period is an industry standard, found, for example, in the Defence Construction Canada’s “Standard Construction Contract Documents” (DCL 250 (R2017-01)). The prescription of a holdback to secure a warranty obligation has become prevalent in public contracts.

Although trade contractors are perfectly prepared to price the financing of these holdbacks into their bids, we suggest that some regulation of holdback practices may be appropriate. An early-completing contractor, such as an excavator or structural steel supplier, should not have to wait what may be years before receiving the return of their holdback, just as the governmental owner should not have to pay the financing costs which will inevitably be incorporated into contractors’ prices for a level of protection which is unnecessary.

Where holdbacks are mandated contractually, federal prompt payment legislation should provide:

- a) that the percentage of the total contract amount which an owner may hold back for warranty purposes should be reasonable in relation to the risk of deficiencies;
- b) for each segment of the construction project undertaken by a particular trade, the holdback period should not exceed 12 months from the completion of that segment of the work;
- c) a prime contractor should be allowed to hold back for warranty purposes an amount that does not exceed in percentage terms the hold back that is allowed in the contract between the owner and the prime contractor;

- d) monies held back for warranty purposes by a prime contractor should be released within 15 days of the prime contractor receiving from the owner the holdback monies applicable to the work completed by that sub-contractor. The same principle should apply to holdback between a sub-contractor and a sub-sub-contractor.
- e) Contractors should have the right to substitute a surety bond for any such holdback.

All of these measures would improve the cash-flow of contractors without significantly weakening the warranty protection of the federal owner.

10. Conclusion

Payment interruptions and payment delays are systemic problems in Canada's construction industry. Federal projects are not an exception to this unfortunate fact.

Payment delay and payment interruption have serious, negative consequences for the companies and workers in the construction industry, for suppliers to the construction industry and for governments as purchasers of construction services. Survey data show that almost a quarter (24.7%) of contractors faced a risk of insolvency as a result of being forced to wait an unreasonable length of time for payment.

Ontario's *Construction Act* sets out the principles and standards that should inform a federal solution.

Any construction project undertaken with federal monies or for the benefit of the federal government or its agencies should be subject to federal prompt payment obligations.