

## Legal update

### **Pilot project to facilitate payment to enterprises party to public construction contracts and allow access to an interim dispute settlement mechanism**

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**August 2018**

**Construction and engineering**

**Alternative dispute resolution (ADR)**

**Dispute resolution and litigation**

On July 3, 2018, the chair of the *Conseil du trésor* authorized, by order, the implementation of a pilot project intended to facilitate payment to enterprises party to public construction contracts and related public subcontracts<sup>1</sup> (Pilot Project).

Through this Pilot Project, the Quebec government follows through on one of the Charbonneau Commission's recommendations as well as on the representations of a number of players in the construction industry who complained about the excessively long payment delays in public projects.

Readers will recognize in this Pilot Project several mechanisms that draw on the new laws recently introduced in Ontario when, on December 5, 2017, the act to amend the *Construction Lien Act* was passed, itself inspired by the framework introduced in Great Britain in 1998.<sup>2</sup>

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#### **Contracts covered by the Pilot Project**

Contracts subject to the Pilot Project will be those determined, on a case by case basis, by the chair of the *Conseil du trésor*. Only public construction contracts granted by a public body within the meaning of the *Act respecting contracting by public bodies*, for example, government departments, institutions in the education network and those in the health and social services network are covered by the Pilot Project.

Municipal contracts are therefore not covered by the Pilot Project.

A public body whose contract is subject to the Pilot Project must state as such in the notice of call for tenders it publishes on the electronic tendering system and include the terms and conditions of the Pilot Project in the tender documents. Any party interested in a public contract or subcontract should thus pay close attention to the tender documents to determine whether the Pilot Project in fact applies to the contract. Every enterprise contracting out all or any portion of the construction work must send, or otherwise make available to the subcontractors, the Pilot Project's terms and conditions.

## Scope of the Pilot Project

### (i) Specific measures to accelerate payment

The purpose of the Pilot Project is to accelerate the payment of the various parties to public construction contracts, from the general contractor to the sub-subcontractors. To do so, the Pilot Project provides a framework governing the payment applications prepared by the general contractor and its subcontractors.

#### Payment calendar

Essentially, the Pilot Project provides that the subcontractor shall submit its payment application to the general contractor on or before the 25<sup>th</sup> day of the month for the work performed in that month. The general contractor must submit its payment application to the public body, for the work performed in that month, no later than the first day of the following month. This application must include the work of the subcontractors for which a payment application was submitted within the prescribed timeline. The payment application is presumed to be approved by the public body on the 21<sup>st</sup> day of the month in which it is received, unless, before the 21<sup>st</sup> day of that month, the public body gives notice to the general contractor that all or a portion of the payment application is refused.

If the general contractor or a subcontractor fails to submit a payment application within the timeline, such application will then be automatically carried over to the following month. It is important to note that the general contractor or the subcontractor who fails to submit its payment application by the date specified in the Pilot Project payment calendar must nonetheless, if it subcontracted all or a portion of the work, pay each subcontractor within the prescribed timeline, for the work performed.

#### Notice of refusal of a payment application

The Pilot Project specifies that the public body has the obligation to provide a notice of refusal in case of its refusal of all or any portion of a payment application. The general contractor should then provide this notice to any subcontractor against whom it intends to invoke a ground for refusal of payment contained in said notice.

Subject to the public body's refusal of all or any portion of the payment application, the payment requested by the general contractor within the prescribed timeline will be made on or before the last day of the month in which the payment application was submitted. The general contractor must then pay the amount owing to the subcontractors having submitted their applications within the prescribed timeline on or before the fifth day of the month following the month in which the general contractor submitted its payment application, subject to its refusal of all or a portion of the payment application.

The Pilot Project contains specific provisions that differ from the usual measures intended to preserve the parties' rights. In particular, it is provided that a general contractor or a subcontractor should first initiate the dispute settlement mechanism implemented by the Pilot Project before publishing a notice of legal hypothec on the immovable covered by the contract. It is also provided that the public body may not withhold the payment of an amount owing to the general contractor for the sole purpose of protecting the claim of subcontractors that have disclosed their subcontract to the public body. Finally, the public body whose contract is subject to the Pilot Project cannot require a discharge from the general contractor in exchange for a payment.

### (ii) The interim dispute settlement mechanism

#### The different steps

The Pilot Project also implements an interim dispute settlement mechanism (Settlement Mechanism), which stems from an agreement with the *Institut de médiation et d'arbitrage du Québec (IMAQ)*. This Mechanism applies to disputes that cannot be settled amicably and arising from a public contract subject to the Pilot Project or a related subcontract,

and that are likely to affect the payment of all or a portion of the contract or subcontract. In particular, this includes disputes regarding (1) a payment application submitted in accordance with the provisions of the contract or the Pilot Project; (2) the value of a contract modification; (3) a withholding or its release; (4) the evaluation of the cost of the work, including valuation of materials and services supplied.

When the Settlement Mechanism applies, the parties may not submit their dispute to an adjudicator or to a court of general jurisdiction before exhausting the alternative dispute settlement measure provided by the Pilot Project, it being understood that the performance of the contract continues uninterrupted during the adjudication process.

This Settlement Mechanism will begin with a party giving a notice of adjudication to the other party to the contract, such notice of adjudication being given any time before the end of the contract (work accepted without reservation). The party giving the notice of adjudication will include the name of three adjudicators listed in the IMAQ registry. Within five days of receipt of the notice of adjudication, the other party must choose an adjudicator from among the three proposed by the party that gave the notice. If the parties cannot agree on the choice of an adjudicator, the IMAQ will make the appointment.

Within the 10 days following the notice of adjudication, the parties must provide the adjudicator with all the documents and information supporting their claims. The adjudicator will then conduct the adjudication, in writing, by conference call or in person. It should be noted that all discussions and all documents and information communicated during the adjudication process remain confidential.

#### Adjudicator's decision

The adjudicator's decision must be sent in writing within 30 days of receipt of the documents and information provided by the parties. This decision is enforceable, regardless of the parties' intention to subsequently refer their dispute to a court of general jurisdiction or to an arbitrator. If the decision sets an amount to be paid, payment must be made within 10 days following receipt of the decision.

Any payment will be considered as being made under protest, namely without prejudice and subject to the payor's right to reimbursement of the amount of money if an arbitrator or a court of general jurisdiction decides otherwise in a subsequent final award or decision. Any party that fails to pay within 10 days is guilty of an offence and is liable to a fine of \$10,000 to \$40,000.

In connection with this process, the parties may be advised by a lawyer whose role is rather limited; the lawyer cannot make representations to the adjudicator on behalf of the client.

The fees and expenses related to the adjudicator's services are apportioned equally between the parties, unless the adjudicator decides to apportion these amounts differently.

Although the same dispute cannot be referred to another adjudicator to obtain a second decision, one of the parties may bring a proceeding before an arbitrator or a court of general jurisdiction upon receipt of an adjudicator's decision. In this context, the decision may be filed as evidence.

## **Conclusion**

The ministerial order authorizing the implementation of the Pilot Project came into force on August 2, 2018. It is for the *Conseil du trésor* to determine which public contracts will be covered by the Pilot Project.

Enterprises interested in a new public tender regarding construction work should pay close attention to the notice of call for tenders in order to determine if the proposed contract is subject to the Pilot Project.

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## Footnotes

- <sup>1</sup> *Pilot Project to facilitate payment to entreprises that are parties to public construction work contracts and related public subcontracts*, (2018) 150 G.O. II, 5063.
- <sup>2</sup> *Housing Grants, Construction and Regeneration Act 1996*.

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