

Construction Act

Procedures for the Release of Statutory Lien Holdbacks

Certificate of Substantial Performance of the Contract - Certificate of Completion of Subcontract – Statement of Contract Deemed Completed – Early Release of Holdback

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Summary

The Construction Act (CA) prescribes mandatory procedures for the release of lien holdbacks under various scenarios. Architects must take care when issuing documentation pertaining to certificates and statements so that they are correct and complete. This PT relates to procedures under construction contracts between owner and contractor.

Note: Where the term “project is used, it has the same meaning throughout as “improvement” in the CA.

According to the transition rules in 87.3 subsection (1), the CA applies with respect to a project which **does not** meet the following,

- (a) a contract for the improvement was entered into before July 1, 2018;
 - (b) a procurement process for the improvement was commenced before July 1, 2018 by the owner of the premises; or
 - (c) in the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the Restoring Trust, Transparency and Accountability Act, 2018 came into force. ^[*]
- (2) For greater certainty, clauses (1) (a) and (c) apply regardless of when any subcontract under the contract was entered into.

For the purposes of this Act, a procurement process is commenced on the earliest of the making of,

- (a) a request for qualifications;
- (b) a request for quotation;
- (c) a request for proposals; or
- (d) a call for tenders.

^[*] The *Restoring Trust, Transparency and Accountability Act*, 2018, S.O. 2018, c. 17 - Bill 57 received Royal Assent on December 6, 2018. Confirm with your lawyer the date that subsection 19 (1) of Bill 57 came into force and that no further amendments to the *Construction Act* have been made.

The CA contains Part 1.1 Prompt Payment and Part 11.1 Construction Dispute Interim Adjudication which are not scheduled to come into force until October 1, 2019. Subsequently PT's will include any information or procedures related to those two parts.

Background

1. The CA provides for the release of lien holdback to a “contractor” under five possible scenarios:
 - a) “Substantial performance” of the contract
 - b) “Total completion of a subcontract”
 - c) “Contract deemed completed”
 - d) Early release of holdback on:
 - I. An annual basis
 - II. A phased basis

While all five of the above potentially apply to construction contracts, only “deemed completed” may always occur in relation to the release of lien holdbacks.

2. There may not be a certificate of substantial performance on a particular project. Someone, usually the contractor, must request this. Sometimes, especially on smaller projects or when the difference in time between “substantial performance” and “deemed completed” is minor, the contractor may prefer not to apply for a release at substantial performance and wait instead for a release at “deemed completed.” Also, if the date of “deemed completed” occurs prior to the date of publication of “substantial performance”, the earlier governs the start of the lien period.
3. The CA refers to two types of holdback (Refer to CA for description):
 - a) Basic holdback, and
 - b) Separate holdback for finishing work (“finishing holdback”).
4. There is no further lien holdback retained after a contract is “deemed to have been completed.”
5. If “substantial performance” is certified, the release of lien holdback that follows is the “basic holdback.” The “separate holdback for finishing work” is then retained, to be released following determination that the project is “deemed completed.” Procedures and waiting periods apply to both. In order to provide such certification, the architect must have been engaged to provide general review of the construction and as a payment certifier to the construction contract for the entire construction phase. The architect must be adequately familiar with the contract details and performance of the work under the contract.
6. The CA provides for the release of holdback in respect of a subcontractor whose work is certified to be totally completed. This provision was created for the benefit of those trades which normally complete their work considerably in advance of the date of substantial performance on major projects, and typically includes trades such as excavation and foundation subcontractors. There is no provision in the CA for substantial performance of a subcontract. Since the subcontract must be totally complete, certain documentation from the contractor and subcontractor is required to verify that a subcontractor’s work has been totally completed since the architect is not privy to the subcontract agreement and since it is unlikely that the agreement would be released in its entirety.
7. If there is no certificate of substantial performance published, then there is no release of lien holdback related to “substantial performance.” In this case, the full amount of lien holdback is released following the procedures and waiting period related to a contract “deemed to have been completed” or “abandoned.”
8. A contract is “deemed to have been completed” when the price of completion, correction of a known defect or last supply is not more than the lesser of,
 - a) one percent (1%) of the contract price, and
 - b) \$5,000.

9. Unlike “substantial performance” or “total completion of a subcontract”, there are no prescribed forms in the CA to complete that attest to the fact that a contract is “deemed to be completed.” At the same time, it is important for the parties to the contract to understand when a contract is “deemed to be completed” as lien periods begin to run from that date and, subsequently, lien holdbacks should be released upon the expiry of those periods. Once the lien period expires, the CA no longer applies with regard to the payment of the holdback.
10. There are printed forms for both “substantial performance” of the contract and “total completion of a subcontract” and it is mandatory that the procedures be followed as prescribed. In some instances, certificates of substantial performance were ruled invalid due to inaccuracies, and had to be corrected and re-issued, causing confusion as well as claims for interest on holdback monies withheld for a further period.
11. It is appropriate for an architect, who is also the payment certifier on a construction contract, to clearly identify to the parties of the contract, when a contract is “deemed to be completed.” In order to provide such a statement, the architect must have been engaged to provide general review of the construction and as a payment certifier to the construction contract for the entire construction phase. The architect must be adequately familiar with the contract details and performance of the work under that contract. There is no requirement to publish in any newspaper a statement of contract deemed completed, as there is for a certificate of substantial performance.
12. The CA states that an early release of the accrued holdback may be applied for, and certified under two conditions, on an annual basis or on a phased basis.

The early release on an annual basis is subject to the following conditions:

- a) the contract provides for a completion schedule that is longer than one year;
- b) the contract provides for the payment of accrued holdback on an annual basis;
- c) the contract price at the time the contract is entered into, exceeds the prescribed amount; and
- d) as of the applicable payment date,
 - I. there are no preserved or perfected liens in respect of the contract, or
 - II. all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the CA.

The early release on a phased basis is subject to the following conditions:

- a) the contract provides for the payment of accrued holdback on a phased basis and identifies each phase;
- b) the contract price at the time the contract is entered into exceeds the prescribed amount; and
- c) as of the applicable payment date,
 - I. there are no preserved or perfected liens in respect of the contract, or
 - II. all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the CA.

The prescribed amount as stated in the Regulation under the CA is \$10,000,000 or more.

Suggested procedure

Substantial Performance of the Contract

1. Review and implement the procedures outlined in OAA/OGCA (Ontario General Contractors Association) Take-Over Procedures (Document No. 100, 2018 version) and as prescribed in the CA.
2. In determining if a project is substantially performed, prepare and retain the following backup calculations:
 - a) total value of known incomplete work and deficiencies (work to be completed or corrected) preferably including a list of specific items;
 - b) if applicable, the total value of incomplete work where the owner and contractor agree and which shall be deducted from the construction price in determining substantial performance; and
 - c) the allowable cost of completing the work according to the formula in Article 2(1) of the CA after reducing the contract price as noted in (b) when applicable.

The value of (a) must be less than the value of (c).

3. If the project is substantially performed:
 - a) obtain and use only the standard CA Form 9 - Certificate of Substantial Performance of the Contract under Section 32 of the Act.
 - b) obtain and confirm all of the information required to properly complete the form well in advance of the date of substantial performance to avoid delays in issuance, including the legal names of the "owner" and "contractor" as defined by the CA and the addresses for service.
 - c) when completing "identification of premises for preservation of liens", obtain from your client the registerable description of the entire property on which the improvement is being made, as verified by their legal counsel.

See Form 9 – *Construction Act*; Certificate of Substantial Performance of the Contract
(PDF) (Word)

On the following page, is an example of Form 9 completed for a fictitious project.

FORM 9

CERTIFICATE OF SUBSTANTIAL PERFORMANCE OF THE CONTRACT UNDER SECTION 32 OF THE ACT

Construction Act

Regional Municipality of Niagara

(County/District/Regional Municipality/Town/City in which premises are situated)

91 Thorold Road, Niagara Falls, Ontario L2X 3X4

(street address and city, town, etc., or, if there is no street address, the location of the premises)

This is to certify that the contract for the following improvement:

Addition and Alterations to offices of Alpha Owner

(short description of the improvement)

To the above premises was substantially performed on

November 17, 2018

(date substantially performed)

Date of certificate signed: November 20, 2018

Charlie Architect Inc.

(payment certifier, where there is one)

(owner and contractor, where there is no payment certifier)

Name of owner

Alpha Owner (1985) Inc.

Address for service

91 Thorold Road, Niagara Falls, Ontario L2X 3X4

Name of contractor

Beta Contractor (1987) Ltd.

Address for service

39 Facer Street, Niagara Falls, Ontario L2X 7X8

Name of payment certifier (where applicable)

Charlie Architect Inc.

Address

46 Long Road, Niagara Falls, Ontario L2X 7X8

(Use A or B whichever is appropriate)

☒ A. Indemnification of premises for preservation of liens:

Part of Lots 7, 8, 15, 16, Reg'd Plan 96, Former TWP of Stamford, now City of Niagara Falls

(a legal description of the premises, including all property identifier numbers and addresses for the premises)

☒ B. Office to which claim for lien and affidavit must be given to preserve lien:

(If the lien does not attach to premises, the name and address of the person or body to whom the claim for lien must be given)

Total Completion of a Subcontract

The recommended procedure for release of construction lien holdback on a completed subcontract is related to the Certificate of Completion of Subcontract (Form 10.) Section 33 of the CA provides for the release of holdback funds after expiry of the 60-day period following the date the subcontract was certified complete.

It should be noted that certification of completion of a subcontract is not mandatory under the CA. If the owner is not prepared to comply with this section, this should be clearly stated in the supplementary conditions to the construction contract.

1. The procedure for release of a subcontractor's construction lien holdback is initiated by the contractor's written request for review to determine the date of completion of the subcontract. Require that this request be complete with the following documentation:
 - a) description of the scope of work included in the subcontract;
 - b) Declaration of Last Supply by the subcontractor as prescribed in subsection 31(5) of the CA (Form 7);
 - c) Workplace Safety and Insurance Board interim release for the contractor;
 - d) contractor's written acknowledgement to the owner that the requirements of the contract documents will not be altered by the early release of the holdback of the completed subcontracts; and
 - e) confirmation that the bonding company has been notified of the intent to claim release of the subcontractor's holdback.

Upon a satisfactory receipt of all documentation required under Item 1 above, review the work along with appropriate consultants. If satisfied that all work under the particular subcontract has been properly completed, issue a certificate to the owner, contractor and subcontractor within seven (7) calendar days of the satisfactory receipt of the documentation noted above.

The date of completion shall be noted and acknowledged in writing by all parties.

2. Require from the contractor, over the signature of one of the signing authorities, a statutory declaration to the owner, stating:
 - a) that no written notices of lien have been received by the contractor;
 - b) subcontractor has been paid in full, except for construction lien holdback;
 - c) the final net amount of the subcontract and the amount owing; and
 - d) that they have received the certificate issued by the architect pursuant to Section 33(1) of the CA on _____ day of _____, 20_____.
3. The subcontractor shall issue, simultaneously, and over the signature of one of their authorized signing officers, a statutory declaration to the contractor stating:
 - a) that they have not received any written notices of lien claim;
 - b) that their own subcontractors and suppliers are listed completely in the declaration;
 - c) that they have received payment in full from the contractor except for construction lien holdback;
 - d) the final net amount of the subcontract and the amount owing; and
 - e) That they have received the certificate issued by the architect pursuant to Section 33(1) of the CA on _____ day of _____, 20_____.
4. The subcontractor must provide releases from the Workplace Safety and Insurance Board on their own behalf of his/her subcontractors and suppliers.
5. Advise the owner to have a construction lien search made at the expiry of sixty (60) calendar days after the date of completion noted on the architect's certificate mentioned above.

6. Provided that:

- a) no liens or certificates of action are preserved;
- b) all documents noted herein have been received; and
- c) no written or oral notices of lien claims or of unpaid subcontractors or suppliers have been received by the owner; the owner may then make payment to a contractor on the basis of the architect's certificate for payment. It is recommended that the owner retain legal counsel to carry out the lien search.

Note: The release of holdback to a subcontractor whose work has been certified as totally completed does not affect the commencement date and warranty requirements of the contract, i.e. the warranty period for the subcontract commences on the date of substantial performance of the prime contract.

See Form 10 – *Construction Act*: Certificate of Completion of Subcontract.

Statement of Contract Deemed Completed

1. While there is no prescribed form in the CA to attest to the fact that a construction project is “deemed completed”, it is prudent for an architect who is the payment certifier to clearly document the fact. The contractor and the owner should be notified of the following information:
 - a) the date that the contract is “deemed completed” as per Section 2 (3) of the CA, R.S.O. 1990;
 - b) when lien rights expire. (At the conclusion of the sixty (60) day period next following the date the contract was deemed completed); and
 - c) when outstanding lien holdback monies will be due to the contractor. (On the day following the conclusion of the sixty (60) day period, provided no liens exist relative to this contract.
2. The above can take the form of a letter or a statement. It should be addressed to the owner and contractor or to the owner with a copy to the contractor. A statement can be formatted as a standard form. The letter or statement should be on the practice's letterhead and be signed by an architect or someone under the personal supervision and direction of an architect. Attached at the end of this document is an example of a standard format for a Statement of Contract “Deemed Completed” with sample wording.
3. As backup for the above, the certifying architect should retain:
 - a) a calculation of the total value of known incomplete work and deficiencies (work to be completed or corrected), preferably including a detailed list of each item; and
 - b) a calculation of the applicable maximum amount in determining “deemed completed” (lesser of \$5,000 and one percent (1%) of contract value.) The value of 3(a) must be less than the value of 3(b). This information may accompany the letter or statement noted in item 2 above.
4. Follow procedures outlined in OAA/OGCA Take-Over Procedures, (Document No. 100, 2018 version).

Early Release of Holdback

Annual Basis

1. Determine if the construction contract meets the prescribed conditions as described above under Background (Section 26.1 (1) and (2) of the CA).
2. Provided only if all of the four criteria (a) to (d)
 - a) construction completion schedule exceeds one year;
 - b) payment of accrued holdback is permitted;
 - c) contract price exceeds the amount prescribed in the Regulation which is currently \$10,000,000 or more; and
 - d) no preserved or perfected liens exist, or any liens have been satisfied or discharged.

Then early release of the current accrual holdback on an annual basis can be certified.

3. Prepare certificate for payment for early release on an annual basis upon receipt and review of application for payment from contractor with all required supporting documents. Check the date of application for compliance with the CA requirements for release on an annual basis. Verify the amount of partial holdback to be released is based on the latest certificate for payment, value of work performed, and product delivered.
4. Subsequent applications and certificates for payment should reflect the amount(s) of total holdback on value of work performed, the total of early release amount(s), and the current amount of holdback retained.

Phased Basis

1. Determine if the construction contract meets the prescribed conditions as described above under Background (Section 26.2 (1) and (2) of the CA.
2. Provided only if all of the three criteria (a) to (c)
 - a) construction contract provides for payment of accrued holdback on a phased basis and identifies each phase;
 - b) construct a contract price at the time the contract is entered into exceeds the amount prescribed by Regulation under the CA, currently \$10,000,000; and
 - c) no preserved or perfected liens exist or any liens have been satisfied or discharged.

Then early release of the accrued holdback on a phased basis can be certified.

3. Prepare certificate for payment for early release on a phased basis upon receipt and review of application for payment from contractor with all required supporting documents. Check date of application for compliance with identified phases of work in contract. Verify the amount of partial holdback to be released is based on the value of work performed, and products delivered previously certified for the specified phase.

Subsequent applications and certificates for payment shall reflect the total holdback of value of work performed, the total of early release amount(s), and the current amount of holdback retained.

References

Construction Act (CA), R.S.O., 1990, Chapter C.30.

OAA/OGCA Take-Over Procedures, Document No. 100, 2018 version
(PDF) (member login required)

Ontario Court Forms – Construction Act

Canadian Handbook of Practice for Architects, (CHOP)

Documents

FORM 9 – Certificate of Substantial Performance of the Contract under Section 32 of the Act (PDF) (Word)

Statement of Contract Deemed Completed (PDF) (Word)

FORM 10 – Certificate of Completion of Subcontract under Subsection 33(1) of the Act (PDF) (Word)

The OAA does not provide legal, insurance or accounting advice. Readers are advised to consult their own legal, accounting or insurance representatives to obtain suitable professional advice in those regards.
