



Ontario Association of Architects



Lien Holdback is not for Deficiencies or Incomplete Work

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This document is issued jointly by the Ontario Association of Architects and the Ontario General Contractors Association and provides information relative to best practices in regard to the use of Holdbacks under the Construction Lien Act, specifically that the holdback is not intended for deficiencies or incomplete work.

Trades and suppliers for construction projects have large financial risks which stem from the fact that most construction work is carried out by different construction trades people who have no privities of contract with the owner of the project and who work without any form of security.

As a result of these risks, contractors and suppliers of work, services and supplies to real property in Ontario have been granted special protections by the *Construction Lien Act* (the "CLA"). The CLA sets out the rules as to who has a lien (security against the property) and the process by which lien claimants can enforce their various rights.

Section 14(1) of the CLA provides that, "a person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials." The lien creates an interest in the land in favour of those who supply materials or services, thereby creating security. This operates to prevent the owner from receiving improved land without making payment for the improvement. This is especially important to subcontractors who have no direct contract with the owner (and therefore no right to bring an action for payment under a contract)

- The 10% lien holdback is not intended to be retained by an owner as leverage or penalty because of deficiencies not corrected by a contractor or trades.
- For construction projects in Ontario a 10% lien holdback is held by an owner in trust for the benefit of downstream trades and suppliers who have no direct contract with the owner and perhaps not with the general contractor.
- The CLA sets out the rules for the 10% lien holdback including certifying Substantial Performance, required publication in a trade publication and release of the holdback monies.

The standard construction contract, CCDC 2, GC 5.5.3 provides for the holdback to be placed in joint bank account 10 days prior to the expiry of the 45 day holdback period. Note that this is not a requirement of the CLA. However, it is strongly recommended that General

Contractors and Owners accept this practice. If you exercise this provision it is to be done within the legislated 45 day period.

Best Practices:

Contractors

- Discuss with the architect and owner procedures for close out, deficiencies list, Substantial Performance and release of holdback, be clear on a process for early release of holdback on lengthy projects – clear up early any variance in understandings. Notice of these issues should be included in the Tender Documents and reviewed as an Agenda Item at the first Pre-Construction Meeting.
- Don't suggest to consultants or owners that there is no need to cutback monthly draws because the owner already has the 10% holdback.
- Get deficiencies corrected as soon as possible. Get trades on board with a schedule to complete.

Architects

- Include in the project manual specifications clear procedures for holdback, deficiencies and close out. Specify that close out shall be in accordance with *OAA/OGCA Document 100 – Take-over Procedures*
- Review with the owner and contractor the specified procedures for close out, deficiencies list, Substantial Performance and release of holdbacks – clear up early any variance in understandings including that the purpose of the lien holdback is not for incomplete work or deficiencies.
- At the time of Substantial Performance prepare a list with incomplete work and deficiencies with reasonable an appropriate value to substantiate the CLA required 3:2:1 formulae of %'s.
- Once the contractor has requested a review for Substantial Performance in writing, the value of incomplete work is then calculated from the deficiency list – this is the money to be held back for deficiencies. This amount is not to be certified, and may be taken out of any breakdown items.
- Architects should inform their clients of the difference between the two hold-backs and ensure that their clients are comfortable with the amount of the deficiency holdback.
- Architects should consider using the attached template letter.

Owners

- Be knowledgeable of owner's obligations with respect to the Construction Lien Act; consult with your architect and your own legal advisor.
- Be knowledgeable about lien holdback and deficiency holdback.
- Don't suggest to consultants or contractors that the 10% CLA holdback should/will be held because of deficiencies.

Reference Documents:

- *OAA/OGCA Document 100 – Take Over Procedures*
- *OAA/OGCA Guide to Close Out Procedures*
- *Construction Lien Act*
- *OAA Practice Tip PT10 - Certificate of Substantial Performance of the Contract - Certificate of Completion of Subcontract – Statement of Contract Deemed Completed - Construction Lien Act (CLA).*
- *Layman's Guide To Construction Liens in Ontario, 3rd Edition, published by the Toronto Construction Association.*

Enquiries should be directed to:

*Ontario Association of Architects
111 Moatfield Drive
Toronto, Ontario
M3B 3L6
Phone: (416) 449-6898
Fax: (416) 449-5756
www.oaa.on.ca*

*Ontario General Contractors Association
703 – 6299 Airport Road
Mississauga, Ontario
L4V 1N3
Phone: (905) 671-3969
Fax: (905) 671-8212
www.ogca.ca*

Architect's Template Letter

[Date]

[Address Coordinates]

To whom it might concern [or the owner]:

Please find attached Form 6 certifying Substantial Performance of the work in accordance with the *Construction Lien Act*. Please be aware that the date of Substantial Performance is a significant date (milestone) in a project. Not only does it serve to notify the Contractor to publish the certification to commence the 45 day lien period, it is the date you (the owner) assume responsibilities for the project. These would be, but not limited to, maintenance, utility costs, insurance, and legal liabilities.

Upon receipt of the Contractor's invoice for release of statutory holdback, we will issue a certificate of payment which will be due and payable on the day following the expiry date of the 45 day lien period and confirmation from your lawyer that no liens have been registered against the land.

Signed,

[The Architect]

cc. [Contractor]