

Construction Bits and Bites

This is the fourth in a series of newsletters which we have named, "Construction Bits and Bites". The series addresses topics of interest to the construction industry in a short, 'bite-sized' format. This newsletter describes the types of holdbacks prescribed by Part IV the *Construction Lien Act* (the "Act") and the obligations associated with each of the holdbacks.

"Basic" Holdback

Each payer upon a contract or subcontract under which a lien may arise must retain a holdback until all liens that may be claimed against that holdback have expired or have been satisfied, discharged or otherwise provided for under the *Act*. This "basic" holdback is equal to 10% of the price of the services or materials supplied under a contract or subcontract as they are actually supplied. This obligation applies irrespective of whether the contract or subcontract provides for partial payments or payment on completion.

"Finishing" Holdback

Where the contract has been certified (or declared) to be substantially performed, the payer must retain a separate holdback from the date of substantial performance of the contract. This 'finishing' holdback is equal to 10% of the price of the remaining services or materials as they are actually supplied under the contract or subcontract after the date of substantial performance. This holdback must be retained until all liens that may be claimed against it have expired, or have been satisfied, discharged or provided for under the *Act*.

"Notice" Holdback

Because of the basic and finishing holdback obligations, a payer may only pay without jeopardy 90% of the price of the services or materials as they are supplied under a contract or subcontract. However, if the payer receives a written notice of lien, the payer must retain, in addition to the 10% holdback, an amount sufficient to satisfy the lien for which it received written notice.

Release of Holdbacks

A holdback must be retained until all liens that may claim against it have expired, have been satisfied, discharged or provided for

under the *Act* by payment of security into court. For example, 45 days after publication of a Certificate of Substantial Performance, all liens that may claim against the basic holdback expire. Therefore, on the 46th day from publication, the owner may safely release the basic holdback to the contractor, as long as no liens have been preserved. Similarly, if all preserved liens have been satisfied, discharged or security has been posted in order to vacate the registration of the preserved lien, the basic or finishing holdback, as the case may be, may be released without jeopardy, provided all other claims in respect of that holdback have expired.

While the *Act* permits an owner, contractor or subcontractor to make a payment to a person who supplied services or materials to the improvement and the payment is deemed to be a payment by that owner, contractor or subcontractor to the proper payer of the person having a lien, such a payment does not reduce the amount of the basic and finishing holdback required to be retained under the *Act*, nor does it reduce the amount of the notice holdback that must be retained in response to a written notice of lien.

Holdbacks Are "Sacred"

Where the contractor or a subcontractor defaults in the performance of the contract or subcontract, the basic and finishing holdback cannot be applied toward the cost of completing the contract or subcontract scope of work or remedying deficiencies, until all liens that may be claimed against that holdback have expired, been satisfied, discharged or otherwise provided for under the *Act*.

Personal Liability of the Owner

An owner who fails to maintain the proper holdback, is personally liable for the holdback to those lien claimants who have valid liens against the owner's interest in the premises.

Possible Revisions to the Holdback Provisions

In 2015, the Government of Ontario launched an expert review of the entire *Act*. It will be of interest to see whether this will result in recommended revisions to the holdback provisions under Part IV of the *Act*. Some of the issues which are likely to receive attention and which may be the source of recommended changes include whether the holdback should remain pegged at 10%, whether the

holdback should be released earlier or later than now prescribed, whether a better mechanism is available to enable holdback to be released earlier, or in stages, on phased projects, projects of long duration or in respect of subcontracts completed earlier in the life of the project, whether to make the release of the holdback after lien rights have expired mandatory, whether to eliminate the finishing holdback or alter the notice holdback. The expert review is anticipated to be concluded by the spring of this year.

Pallett Valo LLP Construction Practice

Litigation risk management in the construction industry requires the advice and guidance of experienced construction lawyers. The Pallett Valo LLP Construction Practice has particular expertise in the resolution of all types of construction disputes. Their practical and timely advice assists our construction clients in meeting their day to day challenges.

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This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about Construction Law, contact a member of our **Construction Practice** at 905.273.3300.

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