

By Alexander Bjornson & Dirk Laudan



The BC Builders Lien Act: Releasing the holdback

Construction industry members must regularly decide when to release the holdback under the British Columbia Builders Lien Act. When you make a payment on a construction contract or subcontract, then with some exceptions you must retain a holdback on the amount otherwise payable.

The holdback is 10 per cent of the greater of the value of the work or material actually provided and the amount paid on account of the contract price. The holdback period is 55 days. The holdback may be released on the 56th day after “completion,” unless a valid lien is filed on title or a lawsuit commenced claiming a lien against the holdback. The complicating question is what constitutes “completion”:

Where there is a “head contractor,” the holdback period for the project runs from when that head contract is complete.

A contract or subcontract is complete when the work remaining is capable of being done for not more than three per cent of the first \$500,000 of the contract price, two per cent of the next \$500,000, and one per cent of the balance (the “3-2-1 test”). It is also complete when it is validly certified to be complete. The certifier should certify it complete when it is actually complete under the 3-2-1 test, but those involved in the project should be able to rely upon the certificate, without determining whether it is strictly correct.

Where there is no “head contractor,” the project is considered complete when the project (or a substantial part of it) is in use or ready for use for its intended purpose.

Only contracts and subcontracts can be certified complete, not projects or scopes of work. Where there is no “head contractor,” certification can still be done for individual contracts. It is also possible to certify subcon-

tracts complete prior to completion of a general contract. In that case, the subcontract holdback is released early, along with an equal amount of the general contract holdback.

The courts apply the rules for certificates of completion strictly, and mistakes may make them invalid. If the holdback is released upon an invalid certificate of completion, the person relying on that certificate may be liable for lien claims without the holdback as security.

THE SEVEN STEPS TO FOLLOW:

- 1. The request** Certification of completion must be done at the request of the person from whom the holdback was retained.
- 2. The payment certifier** Certification must be done by the payment certifier – the person contractually identified as responsible for certification of payment. In CCDC2, this is the “consultant.”
- 3. The form** Use the official form of certificate of payment, in the BC Builders Lien Form Regulation. If you use the wrong form, it might not be a valid certificate.
- 4. Issuance and publication** The certificate must be issued within 10 days of its request, and published within seven days after that in the following ways:
 - Delivering a copy to the owner, the head contractor (if one exists) and the requester of the certificate;
 - Delivering a notice of certification (a different form!) to anyone who made a prior written request for one; and
 - Posting the notice of certification “in a prominent place on the improvement.”

A payment certifier’s failure to do these things may invalidate the certificate of completion. A payment certifier not in compliance with these publication requirements is liable to anyone suffering resultant loss or damage.

5. The holdback period The holdback period expires after 55 days following the date the certificate of completion is issued. Payment of the holdback can be made on the 56th day, assuming no valid lien is filed on title and no lawsuit is commenced to enforce a lien

Strictly speaking, the holdback period runs from the earlier of actual completion (or abandonment or termination, as the case may be) and the issuance of the certificate of completion.

- 6. Check for liens** Search all applicable land titles for lien claims. Where applicable, consider searching mineral, petroleum, coal and aboriginal title. Conduct a litigation search to see if there is a lien claim against the holdback.
- 7. Actual release** After the holdback period expires, if no liens are filed, and no lawsuit against the holdback is commenced, the holdback is subject to release under the Builders Lien Act, but there still may be impediments. The party retaining the holdback might assert a backcharge against the holdback. Other creditors, including CRA, may try to claim the holdback and their priority may have to be considered.

Please note that in other provinces and territories of Canada, the issues and pitfalls can be quite different, although general principles may be similar.

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