



Winnipeg  
Construction  
Association

# TECHNICAL BULLETIN

Prepared jointly by the Manitoba Association of Architects and the Winnipeg Construction Association, intended as guidelines to increase awareness of recommended industry practices.



## Technical Bulletin #8

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**Subject: Proposed procedure for building takeover and completion of construction contract inspections, specific retention and Builders' Liens holdback.**

The intent of this bulletin is to outline inspection procedures and the handling of monies retained specifically for deficiencies and the release of the 7.5% holdback under The Builders' Lien Act (Manitoba). It is suggested that Architects and Contractors follow the suggested takeover procedures noted below to affect an orderly method of building takeover and completion of Construction Contract.

### Areas of concern are:

- Timely, consistent and coordinated field reviews during construction, and near project close-out.
- Proper listing and evaluation of incomplete work.
- Tardy completion of deficient and incomplete work.
- Release of holdback monies and confusion between holdbacks for lien protection and specific retention for incomplete work.
- Takeover date, one (1) year warranty period, etc.

### Definitions:

**Substantial Performance** (excerpt from Manitoba Builders' Liens Act, R.S.M. 1987 c.B91, Clause 2(1): *For the purpose of this Act, a contract or sub-contract shall be conclusively deemed to be substantially performed when:*

1. The structure to be constructed under the contract or subcontract or a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or sub-contract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended: and
2. the work to be done under the contract or sub-contract is capable of completion or correction at a cost of not more than

- A. 3% of the first \$250,000 of the contract price,
- B. 2% of the next \$250,000 of the contract price, and
- C. 1% of the balance of the contract price

**Holdback Funds:** The amount required by The Builders' Liens Act, currently 7.5%, to be deducted from payments to be made under a contract and retained for a period of 40 days after date of Substantial Performance or completion of work and where the funds are deposited in an interest bearing trust account.

**Specific Retention:** The funds that are identified to be retained specifically for the correction or completion of deficient work or incomplete elements of the project (separate and apart from the Holdback Funds). In order to ensure a well-coordinated takeover, acceptance and completion of building projects and management of contract funds, the following procedure is suggested.

**Quality Control Reviews During Construction:**

1. The Architect and their sub-consultants will conduct regular field reviews, no less than once per month, to review quality of workmanship and materials used.
2. A written report shall be provided for each field review indicating deficiencies, and recommending corrective action in good time to minimize remedial work.

**Substantial Performance Field Reviews:**

1. The General Contractor will advise the Architect in writing when, in his opinion, the project is substantially performed and ready for takeover and will request a preliminary field review at the earliest opportunity.
2. The preliminary field review team will consist of:
  - A. The Architect and his Consultants as required.
  - B. The General Contractor and such trades as required.
3. All consultants shall conduct the preliminary field review, within an agreed time frame (suggested: 10 days) and a list of all deficiencies shall be drawn up with immediate distribution ensured.
4. The General Contractor shall proceed to correct the deficiencies and complete the project in a satisfactory manner within a stipulated time frame (suggested: 7 days).

**Building Takeover Field Review:**

1. When the General Contractor is satisfied that all deficiencies listed in the Substantial Performance Field Review Report have been corrected, (with the exception of those outside their control), they shall formally request a building takeover review by the Architect.

2. A takeover field review team will be comprised of:

A. The Architect and Sub-Consultants

B. The Owner

C. The General Contractor

3. Resulting from this takeover field review, a listing of all incomplete items from the Substantial Performance Report will be made and the cost to complete the work (listed by sub-trades) will be calculated. The cost of each item of incomplete or deficient work is identified as Specific Retention and is to be agreed upon between the General Contractors and the Architect.

4. The Contractors—with the cooperation of the Architect Sub-Contract—will ensure that all Certificates of Completion are obtained and the takeover date will be set.

**Administration of Holdback Amount and Specific Retention Amount:**

1. A payment certificate for 100 percent of the final contract price, (less the statutory holdback and less the specific retention amount for incomplete work) will be issued after receipt and approval of request for payment with specific retention amounts listed by individual trades on this request form. Holdback is money held as per lien legislation. Specific Retention is money held to allow for correction of incomplete or deficient work. The two amounts are not to be used for cross purposes.

2. The final lien period of 40 days begins to run from the earlier of the date of substantial completion of, or abandonment of, the contract or sub contract.

3. Designers and Contractors are reminded that The Builder's Liens Act (Manitoba) Subsection 25 provides for payout of holdback on Substantial Completion of the work of Trade Contractors or General Contractors, upon expiry of the relevant 40-day lien period and provided no liens have been placed.

4. A separate holdback lien period exists for the work done, or remaining to be done after substantial performance has been achieved. This second 40-day final lien period runs from the date of final completion of the contract or sub-contract.

5. Partial Release of Holdbacks: Substantial completion certificates should be issued to a trade contractor even though total project is not completed. Release of holdback can occur when an individual subcontract is substantially performed. Partial release of holdback should occur when any identified project phase of the main contract is substantially performed.

6. In the interests of expediency, notwithstanding the express wording of The Builders' Liens Act (Manitoba), multiple requests for partial release of Holdback should be limited to multi-phased projects and projects of more than one year in duration, and in relation to major project milestones, ie. Foundations, exterior shell etc.

7. Warranty on subcontracts commences from the date of Substantial Performance of the total project and not from date of partial release of individual subcontracts.

8. On expiry of the lien period and cleared title and upon receipt of Statutory Declaration and upon legal acceptance of same, the Builder's Liens holdback amount will be issued.

9. Specific retention amounts will be released as incomplete work is corrected to meet Architect/Owner/Consultant's acceptance. Funds are to be paid in 15 days, with holdback being retained. Subsequent release of holdback will follow 40 days later as per The Builders' Liens Act (Manitoba), Clause 24/2.

**Final Payment Certification:**

1. A subsequent Certificate indicating Final Payment of the contract will be issued when ALL deficient and incomplete work of the General Contractor or subcontractor has been satisfactorily corrected.

2. Seasonal Deficiencies: If the completion of work is delayed due to weather, or other sufficient reasons preventing same, an interim certificate may be issued prior to completion of ALL incomplete work. The Architect should ensure that funds are retained for specific deficiencies by the particular trade.

3. Where incomplete work is not being finished as quickly as possible, the Architect will have the option of giving reasonable notice to the contractors that the Owner will complete the work with other forces and charge the cost of same against the specific retention amount. As a reference guide in handling incomplete work, see Part 7, Default Notice of current version of CCDC-2.

4. Any defects in workmanship or materials appearing in the building after the date of takeover review, will be covered by the one (1) year Warranty Clause of the Contract. The Architect should fairly judge on items that properly fall under Owner's Maintenance rather than defective workmanship or materials.

5. A field review prior to the completion of the one (1) year Warranty period should be carried out to ensure that any items affected by this guarantee have been corrected.