

This technical bulletin has been prepared jointly by the Manitoba Association of Architects and the Winnipeg Construction Association, and intended as guidelines to increase awareness of recommended practices

TECHNICAL BULLETIN #8

November 1, 1968, July 15, 1985 and December 24, 2001, Latest Revision: January 2, 2024

SUBJECT: PROPOSED PROCEDURE FOR COMPLETION OF CONSTRUCTION CONTRACTS, READY-FOR-TAKEOVER, RELEASE OF HOLDBACK AND FINAL PAYMENT

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 Builder's Liens Act, C.C.S.M. c.B91 (the "Act"). It is suggested that Architects and Contractors follow the suggested procedure noted below to effect an orderly method of building takeover and completion of the Construction Contract.

Areas of concern:

1. Timely, consistent and coordinated field reviews during construction, and near project close-out;
2. Proper listing and evaluation of incomplete work;
3. Tardy completion of deficient and incomplete work;
4. Release of holdback monies and confusion between statutory holdback and withholding of funds for deficient work;
5. Retention for incomplete work; and
6. Takeover date, one (1) year warranty period, etc.

Definitions:

Ready-For-Takeover:

Is a concept set out in the CCDC 2 (2020) Contract, which is intended to supplement (not replace) Substantial Performance. Under the CCDC 2 (2020) Contract, Ready-For-Takeover occurs when the following pre-requisites have been achieved:

1. The Consultant has certified the Substantial Performance of the Work;
2. Evidence has been provided of compliance with the requirements for occupancy or an occupancy permit as prescribed by the authorities having jurisdiction over the Project;
3. Final Cleaning and Waste Removal has been completed;

4. Operations and Maintenance Manuals have been delivered;
5. A copy of the as-built drawings have been made available;
6. All startup and testing required for immediate occupancy has been completed as required by the Contract Documents;
7. Ability to secure access to the Work has been provided to the Owner if required by the Contract Documents; and
8. Demonstration and training as required by the Contract Documents has been scheduled by the Contractor.

Substantial Performance:

is defined by section 2(1) of the Act as:

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 \$250,000.00 of the contract price,
 - b. 2% of the next \$250,000.00 of the contract price, and
 - c. 1% of the balance of the contract price

Statutory Holdback:

There are two types of statutory holdbacks in Manitoba under the Act. The “regular holdback,” as set out in section 24(1) of the Act and the “substantial performance holdback”, as set out in section 24(2).

Section 24(1) of the Act requires the “person primarily liable for payment under a contract” to hold back 7.5% of the contract price or, if there is no contract price, the value of the work done and materials supplied as the work progresses. This holdback is to be retained for 40 days after a certificate of substantial performance is given, the Work has been completed or the Work has been abandoned (whichever occurs first).

As stated, there is also a separate holdback for finishing work completed after the date of “substantial performance” of the contract. Section 24(2) requires the payer of a contract to maintain a separate holdback for finishing work equal to 7.5% of the amount of the work remaining post-substantial performance. This holdback must be retained for 40 days after the Work has been completed or the Work has been abandoned (whichever occurs first).

The time for the release of holdback is triggered by the issuance of a certificate of substantial performance by the payment certifier or the owner. The holdback shall be released 40 days after a certificate is given by the payment certifier or the owner, if no liens have been registered. The effective date of the certificate is the date the certificate is issued (given) to the contractor and the 40-day period should be calculated from that date.

Designers and Contractors are reminded that section 25 of the Act provides for payout of the statutory holdback on Substantial Completion of the Work of Trade Contractors or General Contractors, upon expiry of the relevant 40-day lien period, provided no liens have been placed.

A sub-contractor is also entitled to apply for the release of their portion of the holdback after the sub-contract work has been substantially performed. Where a sub-contractor believes their work is substantially complete, they may apply to the payment certifier (or to the Contractor where there is no payment certifier) for a certificate of substantial performance of their sub-contract. The sub-contractor should ensure the contractor is aware of this application. Where a certificate of substantial performance has been issued for a sub-contract, an amount equal to 7.5% of the subcontract price may be released by the Owner to the Contractor, and paid by the Contractor to the sub-contractor upon the expiry of a 40 day period from the date the certificate was issued, if no liens have been registered.

Statutory Holdback funds are to be kept for the protection of potential lien claimants, and are not to be used for the completion of the contract, as damages for the non-completion of the contract, in payment of any claim against a defaulting party or to remedy any default of the contract.

Project Completion Procedure:

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 Consultant and their sub-consultants will conduct periodic field reviews, at appropriate intervals, 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 of the Work:

1. If the parties are not using a CCDC2 – 2020 there may be specific administrative procedures concerning submittals and close-out procedures to achieve Substantial Performance of the work that are specified in the Contract Documents.
2. The Contractor will advise the Consultant through a written application when, in its opinion, the project is substantially performed, and will request a preliminary field review at the earliest opportunity. When making the application, the General Contractor will provide the Consultant and the Procurement Authority a comprehensive list of items to be completed or corrected, together with a written application for a review by the Consultant to establish Substantial Performance of the Work.
3. The preliminary field review team will consist of:
 - a. The Consultant and its sub-consultants as required; and
 - b. The General Contractor and such trades as required.
4. The field review team will create a Substantial Performance Field Review Report which lists all outstanding deficiencies.

5. The Consultant will verify the validity of the Contractor's application and in accordance with the timeframes prescribed in the contract:
 - a. advise the Contractor in writing that the Work or designated portion of the Work is not substantially performed and give reasons why; or
 - b. state the date of Substantial Performance of the Work or designated portion of the Work in a certificate (in the form prescribed by the Act) and issue a copy of that certificate to the Owner and Contractor.
6. Immediately following the issuance of the certificate of Substantial Performance, the Contractor, in consultation with the Consultant, will establish a reasonable date for finishing the remaining Work and correcting outstanding deficiencies

Ready-For-Takeover

1. If the parties are using a CCDC 2 (2020) Contract, or any other form which imports the use of the Ready-for-Takeover concept, the contractor must achieve the pre-requisites set out in GC 12.1.1 of the Contract (see definition above) in order to make a written application for Ready-for-Takeover. The written application must be provided to both the Consultant and the Owner. The written application must be delivered together with a comprehensive list of any items left to be completed or corrected.
2. In accordance with the timeframe prescribed in the contract, the Consultant must review the application and advise the Contractor that either the work is not Ready-for-Takeover and advise as to the reasons why; or to confirm the Ready-for-Takeover date and advise both the Contractor and Owner.
3. For the purposes of the CCDC 2 (2020) The Ready-for-Takeover date has replaced the date of Substantial Performance as the date for the calculation of Contract Time (for scheduling purposes), and is the date which triggers warranty obligations, as well as waiver and indemnity provisions under the Contract.

Final Payment:

1. When the General Contractor is satisfied that the Work is completed and all deficiencies have been corrected (excepting those outside their control), the General Contractor shall submit an application for final payment and request a building takeover review by the Consultant.
2. A takeover field review team will be comprised of:
 - a. Consultants and Sub-Consultants;
 - b. The Owner or its agent; and
 - c. The General Contractor.
3. After the receipt of an application for final payment, the Consultant will review the Work to verify the validity of the application and advise, in accordance with the timeframe prescribed in the contract, the Contractor in writing that the application is valid or give reasons why it is not valid.
4. Where the Consultant finds the application is valid, they shall promptly issue a final certificate for payment. This shall occur when ALL deficient and incomplete work of the General Contractor or subcontractor has been satisfactorily corrected.
5. Where the Consultant finds that the application is not valid, a listing of all incomplete items and deficiencies will be

made and the cost to complete the Work (listed by the General Contractor and sub-trades) will be calculated. The cost of each item of incomplete or deficient Work is identified as Deficiency Withholding and is to be agreed upon between the General Contractor, sub-trades and the Consultant.

6. Deficiency Withholding funds are to be released as incomplete or deficient Work is corrected to the Consultant's satisfaction.
7. It is important to note that no payment by the Owner nor partial or entire use or occupancy of the work by the Owner constitutes an acceptance of any portion of the Work which is not in accordance with the requirements of the Contract Documents.

Workmanship Warranty:

1. With the exception of extended warranties, the CCDC and CCA standard form contracts stipulate that any defects or deficiencies in workmanship or materials appearing in the work are covered by a one (1) year warranty period from the date of Substantial Performance or Ready-for-Takeover if using a CCDC 2 (2020) Contract. That is, the Contractor will be obligated to promptly correct any deficiencies, at its expense, which appear prior to and during the one-year warranty period. The Contractor is also obligated to pay for damage resulting from its corrective work.
2. The Owner will promptly give the Contractor notice in writing of observed defects and deficiencies which occur during the one-year warranty period.
3. A field review prior to the completion of the one-year warranty period should be carried out to ensure that any items affected by this warranty have been corrected. In determining deficiencies, the Consultant should fairly judge items that properly fall under the Owner's Maintenance rather than defective or deficient workmanship of the Contractor.