

OAA/OGCA Take-Over Procedures

FOR USE ON PROJECTS UNDER THE CONSTRUCTION ACT, R.S.O. 1990, c C.30



Ontario Association of Architects



RECOMMENDED PROCEDURES

CONCERNING SUBSTANTIAL PERFORMANCE

OF CONSTRUCTION CONTRACTS AND COMPLETION TAKE-OVER OF PROJECTS

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RECOMMENDED PROCEDURES CONCERNING SUBSTANTIAL PERFORMANCE OF CONSTRUCTION CONTRACTS AND COMPLETION TAKE-OVER OF PROJECTS

Short Title: This Document may be referred to as "OAA/OGCA TAKE-OVER PROCEDURES (CA)"

APPLICATION

This document covers procedures under the *Construction Act* for projects which *DO NOT* meet the following transition rules:

- a) A contract was entered into before July 1, 2018, regardless of when any subcontract under the contract was entered into;
 - b) A procurement process, if any, was commenced before July 1, 2018 by the owner of the premises; or
 - c) In the case of a premises that is subject to a leasehold interest that was first entered into before July 1, 2018, a contract for the improvement was entered into or a procurement process for the improvement was commenced on or after July 1, 2018 and before the day subsection 19 (1) of Schedule 8 to the *Restoring Trust, Transparency and Accountability Act, 2018* came into force.
- (2) For greater certainty, clauses (1)(a) and (c) apply regardless of when any subcontract under the contract was entered into.

Examples of the commencement of a procurement process includes the making of a request for qualifications, request for proposals, or a call for tenders.

INTRODUCTION

The purpose of this document is to recommend standard procedures to facilitate the closing stages of a construction *contract* and the take-over of the project by the Owner from the Contractor.

These procedures have been prepared jointly by the Ontario Association of Architects and the Ontario General Contractors Association (the "Associations") and have been approved by their governing bodies. This document is meant to be an educational treatise for all the stakeholders in the project (including the Owner, Consultants, Contractors and Subcontractors); however, the Associations recommend the use of these procedures by their respective members and Owners/clients.

The Associations also recommend that these procedures be coordinated with and form a part of the *contract* documents from the outset by reference to Document No. 100-2018.

Where a *contract* is in progress which does not provide such procedures, the Associations recommend that the *contract* be amended by agreement between the contracting parties to include these procedures to facilitate the orderly take-over of the project in the interests of all stakeholders.

GENERAL NOTES

The procedures outlined herein have been prepared in relation to the Construction Act, latest edition, hereinafter referred to as the C.A.¹, and apply to all construction *contracts*. These procedures are therefore primarily applicable to lienable projects but they may be readily adapted for use in relation to non-lienable projects.

¹ All references are to the Construction Act, R.S.O. 1990, c C.30 and the Regulations thereunder as amended by the Restoring Trust, Transparency and Accountability Act, 2018, S.O. 2018, c. 17.

DEFINITIONS

Except for Owner, Consultant, Contractor and Subcontractor which are defined in the *contract* as appropriate, all other terms and concepts used in this document that are defined in the C.A. are italicized for convenience.

Construction Trade Newspaper

The definition of the term "*construction trade newspaper*" appears in Section 1 of O. Reg. 304/18 to the C.A. latest edition, which reads as follows:

""construction trade newspaper" means a newspaper

- (a) that is published either in paper format with circulation generally throughout Ontario or in electronic format in Ontario,
- (b) that is published at least daily on all days other than Saturdays and holidays,
- (c) in which calls for tender on construction contracts are customarily published, and
- (d) that is primarily devoted to the publication of matters of concern to the construction industry."

Contract

The definition of the term "*contract*" appears in Section 1(1) of the C.A. latest edition, which reads as follows:

""contract" means the contract between the owner and the contractor, and includes any amendment to that contract; "

Contract Price

The definition of the term "price" appears in Section 1(1) of the C.A. latest edition, which reads as follows:

""price" means,

- (a) the contract or subcontract price,
 - (i) agreed on between the parties, or
 - (ii) if no specific price has been agreed on between them, the actual market value of the services or materials that have been supplied to the improvement under the contract or subcontract, and
- (b) any direct costs incurred as a result of an extension of the duration of the supply of services or materials to the improvement for which the contractor or subcontractor, as the case may be, is not responsible; "

Payment Certifier

The definition of the term "*payment certifier*" appears in Section 1(1) of the C.A. latest edition, which reads as follows:

""payment certifier" means an architect, engineer or any other person upon whose certificate payments are made under a contract or subcontract."

SIGNIFICANT STATUTORY REQUIREMENTS

- a) The concept of "*basic holdback*" is set out in Section 22(1) of the C.A. latest edition which reads as follows:
 - "22(1) Each payer upon a contract or subcontract under which a lien may arise shall retain a holdback equal to 10 per cent of the price of the services or materials as they are actually supplied under the

contract or subcontract until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act."

- b) The concept of "*substantial performance*" and "*substantially performed*" is set out in subsection (1) of Section 2 of the C.A. latest edition which reads as follows:

"(1) For the purposes of this Act, a contract is substantially performed,

- (a) when the improvement to be made under that contract or a substantial part thereof is ready for use or is being used for the purposes intended; and
- (b) when the improvement to be made under that contract is capable of completion or, where there is a known defect, correction, at a cost of not more than,
 - (i) 3 per cent of the first \$1,000,000 of the contract price,
 - (ii) 2 per cent of the next \$1,000,000 of the contract price, and
 - (iii) 1 per cent of the balance of the contract price."

- c) Attention is drawn to subsection (2) of Section 2 of the C.A. latest edition which reads as follows:

"(2) For the purposes of this Act, where the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and the owner and the contractor agree not to complete the improvement expeditiously, the price of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance."

- d) The concept of "*separate holdback for finishing work*" is set out in Section 22(2) of the C.A. latest edition which reads as follows:

"22(2) Where the contract has been certified or declared to be substantially performed but services or materials remain to be supplied to complete the contract, the payer upon the contract, or a subcontract, under which a lien may arise shall retain, from the date certified or declared to be the date of substantial performance of the contract, a separate holdback equal to 10 per cent of the price of the remaining services or materials as they are actually supplied under the contract or subcontract, until all liens that may be claimed against the holdback have expired or been satisfied, discharged or otherwise provided for under this Act."

- e) The concept of "*completed*" is set out in subsection (3) of Section 2 of the C.A. latest edition which reads as follows:

"(3) For the purposes of this Act, a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of,

- (a) 1 per cent of the contract price; and
- (b) \$5,000."

- f) Multiple improvements under a contract are considered in Section 2 of the C.A. latest edition which reads as follows:

"(4) If more than one improvement is to be made under a contract and each of the improvements is to lands that are not contiguous, then, if the contract so provides, each improvement is deemed for the purposes of this section to be under a separate contract."

STAGE 1 CONTRACT SUBMISSIONS

- 1.1 Submit all documentation required under the *contract*.

SUBSTANTIAL PERFORMANCE

STAGE 2 CONTRACTOR'S INSPECTION FOR *SUBSTANTIAL PERFORMANCE*

- 2.1 When the Contractor is of the opinion that the requirements of substantial performance as defined in the C.A. and as set out above have been met, the Contractor shall make arrangements for an inspection of the Work to be undertaken at the earliest opportunity, giving written notice of this to the Consultant and/or *payment certifier* for information only.
- 2.2 The inspection team shall be comprised of:
 - (a) the Contractor and/or the Contractor's representative(s)
 - (b) the prime mechanical and electrical Subcontractors and/or their representative(s)
 - (c) any other Subcontractors and/or Subcontractors' representative(s) whose participation may be required by the Contractor in order to fully determine the Work to be completed.
- 2.3 Upon completion of this inspection a list of all uncompleted and unsatisfactory work which is identified during the inspection shall be prepared by the Contractor and shall be issued to all members of the inspection team and the Consultant and/or *payment certifier*.
- 2.4 Contractors that elect not to go through Stages 2 and 3 for substantial performance certification and publication of same, and apply for *contract* completion as defined, shall proceed to Stage 6 provided requirements under 3.2(b) have been provided; and in this case there shall be only one lien period for only one certification for *basic holdback* release. Where no certificate for substantial performance is obtained and published, the time for preserving liens will run from the date upon which the *contract* is deemed *completed* by the *payment certifier* or Owner and Contractor and certification for the purpose of the release of the basic and finishing holdback shall occur upon the expiry of the 60 day lien period which commences on the day of completion. This section applies in circumstances where the *contract* has not been abandoned or terminated earlier.

STAGE 3 CONTRACTOR'S APPLICATION FOR CERTIFICATE OF *SUBSTANTIAL PERFORMANCE*

- 3.1 When the Contractor has carried out the steps in Stage 2 and has determined that the requirements for substantial performance of the *contract* have been met, the Contractor shall then make a written application to the Consultant and/or *payment certifier* for a certificate of substantial performance. If there is no *payment certifier*, the Owner and the Contractor shall make the determination jointly and shall both sign the certificate of substantial performance.
- 3.2 This application shall include:
 - (a) A statement to the Owner through the Consultant and/or *payment certifier* to the effect that:
 - (i) the *contract* is *substantially performed*, and
 - (ii) the phase of the performance of the balance of the *contract* is in process and completion is scheduled for the day of, 20..... Where the balance of the *contract*, or a part or parts thereof, cannot be performed forthwith, as has been agreed by Owner and Contractor, the Contractor's statement shall contain a completion date for each phase of the balance of the *contract*.
 - (b) the submission of all documentation required under the *contract*.

- (c) A statement of completion with the cost values of:
 - (i) Work to be completed including correction of unsatisfactory work;
 - (ii) Outstanding items referred to in 3.2(b);
 - (iii) Work which the Owner and the Contractor agree in writing is to be deferred to a later date.
 - (d) An invoice showing the amount of *basic holdback* monies due for release and payment following the issue of the certificate of substantial performance.
 - (e) A Statutory Declaration and Workplace Safety & Insurance Board (WSIB) Certificate of Clearance are required before the payment covering the release of *basic holdback* can be released.
- 3.3
- (a) Within 10 calendar days of the receipt of the Contractor's completed application, the Consultant and/or *payment certifier* shall carry out a review and assessment of the work, to determine whether the *contract* has been *substantially performed*. The Owner may take part in the review but the determination as to whether the *contract* has been *substantially performed* is to be made by the Consultant and/or *payment certifier*.
 - (b) Within 7 calendar days of the Consultant and/or *payment certifier's* review and assessment, the Consultant and/or *payment certifier* shall notify the Contractor of its determination as to whether or not the *contract* has been *substantially performed*. In the event that the Consultant and/or *payment certifier* determines that the *contract* has not been *substantially performed*, the Consultant and/or *payment certifier* shall so notify the Contractor in writing within 7 calendar days of the review and assessment, and shall also provide the Contractor with a detailed explanation as to why such determination has been made.
 - (c) In the event that the Contractor's application for substantial performance is not accepted by the Consultant and/or *payment certifier*, the Contractor shall complete the work necessary to achieve substantial performance of the *contract* as previously defined and the Contractor shall submit a subsequent application for substantial performance thereafter.
- 3.4 The Contractor's application for substantial performance and the Contractor's application for the release of *basic holdback* shall be separate from the applications for regular monthly progress payments and the latter shall continue to be made in the ordinary course throughout the duration of the *contract*.

STAGE 4 CERTIFICATE OF SUBSTANTIAL PERFORMANCE

- 4.1 If the Consultant and/or *payment certifier* determines that the *contract* has been *substantially performed*, the Consultant and/or *payment certifier* (or where there is no *payment certifier*, the Owner and Contractor jointly) shall certify the substantial performance of the *contract* by preparing and signing a certificate in Form 9 prescribed by the C.A., a copy of which may be found in Appendix A hereto. The Consultant and/or *payment certifier* or the Owner and Contractor jointly, as the case may be, shall set out in the certificate the date on which the *contract* was *substantially performed*. The Consultant and/or *payment certifier* shall give a copy of the certificate to the Owner and to the Contractor within 7 days of signing it.
- 4.2 The Contractor shall publish a copy of the certificate of substantial performance once in a *construction trade newspaper* and shall provide the *payment certifier* with proof of the date of publication. The day following the date of publication shall be the date of commencement of the 60 day period prior to release of the *basic holdback* monies.
- 4.3 The Contractor's and Contractor's Subcontractors' forces shall continue to work towards completion during the 60 day period mentioned in Stage 4.2.

(NOTE: See Appendix A hereto for sample of the prescribed form of the certificate of substantial performance.)

STAGE 5 CERTIFICATE FOR PAYMENT OF *BASIC HOLDBACK* MONIES

- 5.1 The Consultant and/or *payment certifier* shall prepare the certificate for payment of the *basic holdback* monies and promptly upon receipt of the application for payment and the documentation as listed in 4.2 and 3.2(d) above, required for release of these monies, issue the certificate to the Owner, with a copy to the Contractor. The certificate shall be dated for payment one day after the date of expiry of the prescribed 60-day period for the preservation of liens.
- 5.2 Upon issuing the certificate for payment of the *basic holdback* monies, the Consultant and/or *payment certifier* shall advise the Owner to verify that no liens have been preserved as at the end of the 60-day period.
- 5.3 The Consultant and/or *payment certifier* shall simultaneously notify the Owner that, provided no liens exist, payment of *basic holdback* shall be due and payable one day after the date of expiry of the prescribed 60-day period for the preservation of liens.
- 5.4 The Consultant and/or *payment certifier's* certificate for the payment of the *basic holdback* monies shall be in the amount shown in the Contractor's application, as approved by the Consultant and/or *payment certifier*, for the certificate of substantial performance.
- 5.5 Before the expiry of the 60-day period, the Consultant and/or *payment certifier* shall advise the Owner and the Contractor to review all forms of insurance to ensure adequate coverage for all parties.
- 5.6 The release of any monies which are due and payable after the release of the *basic holdback* shall occur in accordance with the terms of the *contract* and the provisions of the C.A. In the case of the latest edition of CCDC 2, CCDC 3, and CCDC 5B forms of contract, the Owner may be asked by the Contractor to place the *basic holdback* in a separate bank account in the joint names of the Owner and the Contractor 10 days prior to the expiry of the 60-day period unless previously placed in a separate trust account.

STAGE 6 CONTRACTOR'S COMPLETION OF THE CONTRACT

- 6.1
 - (a) When the Contractor is satisfied that the *contract* is *completed* as defined in subsection (3) of Section 2 of the C.A., and after making an inspection, the Contractor shall forward the inspection report and make a written request to the Consultant and/or *payment certifier* for a review and assessment of the work. The Consultant and/or *payment certifier* shall, in turn, notify the Owner of the Contractor's request. The Contractor's request shall include a statement as to the amount of monies for the *separate holdback for finishing work* due for release and payment upon expiry of the 60-day period from the date the *contract* is *completed*. This review and assessment by the Consultant and/or *payment certifier* shall be carried out within 10 calendar days of the Contractor's request and shall constitute the review and assessment which is a precondition to the issuance of the statement of completion and issuance of the certificate for payment for the work performed to the date of the completion.
 - (b) The Contractor shall submit to the Consultant and/or *payment certifier* for review and approval the balance of the documents required under Stage 1.
 - (c) The Contractor shall submit to the Consultant and/or *payment certifier* an invoice for the finishing holdback.
 - (d) The Contractor shall submit to the Consultant and/or *payment certifier*, a Statutory Declaration listing outstanding accounts and monies paid and Workplace Safety & Insurance Board (WSIB) Certificate of Clearance with the invoice before the payment covering the release of the finishing holdback can be released.
- 6.2 The final review of the work for the purpose of issuing a statement of completion shall be conducted by:
 - (a) the Consultant and/or *payment certifier* and such Consultants as he may require
 - (b) the Contractor, and any Subcontractors deemed necessary by the Contractor
 - (c) the Owner, at his option

- 6.3 Within 7 calendar days of the review and assessment, the Consultant and/or *payment certifier* shall notify the Contractor of approval of the Contractor's application by issuance of a statement of completion which will establish the date of completion. In the event that the Consultant and/or *payment certifier* does not determine the *contract* to be complete, the Consultant and/or *payment certifier* shall so notify the Contractor in writing within 7 calendar days of the review and shall provide to the Contractor in writing the reasons for such determination.
- 6.4 If, as a result of its review and assessment of the work, the Consultant and/or *payment certifier* determines that there are deficiencies in the work performed by the Contractor or its Subcontractors, the Consultant and/or *payment certifier* shall provide to the Contractor a list of such deficiencies. In the event that the Contractor's application for a statement of completion is accepted, such list shall constitute the final deficiency list, for the purpose of acceptance of the work under the *contract*. If the Contractor's application for a statement of completion is not accepted, the Consultant and/or *payment certifier* may issue a final list of deficiencies upon subsequently accepting a further application for a statement of completion.
- 6.5 Deficiencies shall be corrected by a date mutually agreed upon between the Consultant and/or *payment certifier* and the Contractor, unless a specific date is otherwise required by the *contract*. Upon rectification of the deficiencies, a further review and assessment by the Consultant and/or *payment certifier* shall be called for by the Contractor and such review and assessment shall take place within 7 calendar days from the date of the Contractor's request.

(NOTE: See Appendix B hereto for sample of the prescribed form of the Statement of Contract Deemed Completed)

STAGE 7 CERTIFICATE FOR PAYMENT OF MONIES FOR FINISHING HOLDBACK

- 7.1 Upon receipt of documentation under 6.1 above, and issuance of the Consultant and/or *payment certifier's* statement of completion, the Consultant and/or *payment certifier* shall prepare the certificate for payment of the monies retained as a *separate holdback for finishing work*. This certificate shall be dated one day after the expiry of the 60-day period which commences on the day following the date the *contract* is determined to have been *completed*.
- 7.2 Upon issuing the certificate for payment of monies retained as a *separate holdback for finishing work*, the Consultant and/or *payment certifier* shall advise the Owner to verify that no liens have been preserved as at the end of the 60-day period.
- 7.3 The Consultant and/or *payment certifier* shall simultaneously notify the Owner that, provided no liens have been preserved, payment of the monies for the *separate holdback for finishing work* is due and shall be payable one day after termination of the 60-day period.
- 7.4 The Consultant and/or *payment certifier's* certificate for payment of the monies retained as a *separate holdback for finishing work* shall be in the amount requested in the Contractor's application, for a statement of completion, as approved by the Consultant and/or *payment certifier*.

STAGE 8 FINAL PAYMENT CERTIFICATE

- 8.1 At the completion of Stage 6, when the Consultant and/or *payment certifier* is satisfied that all deficiencies and uncompleted work, as established under Stage 6.4, have been corrected, and upon receipt of the Contractor's invoice for final payment, the Consultant and/or *payment certifier* shall issue to the Owner, with a copy to the Contractor, a final certificate for payment for the remaining monies due to the Contractor under the *contract*.
- 8.2 Final payment shall be made to the Contractor as stipulated in the certificate, no later than five days after its issuance or as provided in the *contract*.

STAGE 9 WARRANTY-GUARANTEE PERIOD(S)

- 9.1 The warranty-guarantee period(s) for the *contract* shall commence on the date of substantial performance (i.e. not necessarily the date of publication of the certificate) or as stipulated otherwise in the *contract* documents.
- 9.2 In the event that a certificate of substantial performance was not issued and *contract* documents do not stipulate otherwise, the warranty-guarantee period(s) shall commence on the date of completion.
- 9.3 The Owner shall give prompt notice, in writing to the Contractor and Consultant and/or *payment certifier* of any defects (as defined by the *contract*) noted during the one year warranty-guarantee period.
- 9.4 Prior to the completion of the one year warranty period, the Consultant and/or *payment certifier* and such Consultants as the Consultant and/or *payment certifier* may require will carry out a review of the work for any defects or deficiencies including those that have been observed by the Owner during the warranty period and will notify the Contractor in writing of those items requiring attention by the Contractor to complete the terms of the *contract*.

APPENDIX A

FORM 9

**CERTIFICATE OF SUBSTANTIAL PERFORMANCE OF THE
CONTRACT UNDER SECTION 32 OF THE ACT**

Construction Act

.....
(County/District/Regional Municipality/Town/City in which premises are situated)

.....
(street address and city, town, etc., or, if there is no street address, the location of the premises)

This is to certify that the contract for the following improvement:

.....
(short description of the improvement)

to the above premises was substantially performed on
(date substantially performed)

Date certificate signed:

.....
(payment certifier where there is one)

.....
(owner and contractor, where there is no payment certifier)

Name of owner:

Address for service:

Name of contractor:

Address for service:

Name of payment certifier (where applicable):

Address:
(Use A or B, whichever is appropriate)

A. Identification of premises for preservation of liens:

.....
(if a lien attaches to the premises, a legal description of the premises, including all property identifier numbers and addresses for the premises)

B. Office to which claim for lien must be given to preserve lien:

.....
(if the lien does not attach to the premises, the name and address of the person or body to whom the claim for lien must be given)

APPENDIX B

NOTE User to complete info shown in RED. Change font colour to Black. DELETE THIS NOTE.

Date

Owner's Company Name

Street Address

Suite number

City, Province or State

Postal Code

Country

Attn: **Owner or Owner's Agent**

Re: **Statement of Deemed Completion of a Contract**

For the Purposes of the Construction Act

Project Description

Project Location

Proj No: nn.nnnnn.nn

Building Permit No: XXXXXXXX

Dear **Owner or Owner's Agent**,

Based on our general review of the project, in our opinion, to the best of our knowledge, information and belief, the construction contract for the above referenced project has been deemed complete pursuant to the provisions under Section 2(3) of the Construction Act, R.S.O. 1990.

The date of deemed completion of the contract was determined to be **yyyy mm dd**.

Accordingly, the Construction Act provides that outstanding lien holdback monies may be released to the contractor on the day following the conclusion of the sixty (60) day period next following the date the contract was "deemed completed", provided no liens exist relative to this contract.

A Certificate for Payment and accompanying documentation is being prepared for the outstanding lien holdback monies.

We trust that the above is understood. Should you have any questions with regard to the above, or have any information that would alter our determination please contact the undersigned.

Yours Truly,

Architectural Firm Name

per:

Your Name

Working Title

Officer Status

cc: **Contractor's Rep, Contractor's Company Name**