

# OAA/OGCA Take-Over Procedures



**Ontario Association of Architects**



RECOMMENDED PROCEDURES

CONCERNING SUBSTANTIAL PERFORMANCE

OF CONSTRUCTION CONTRACTS AND COMPLETION TAKE-OVER OF PROJECTS

**OAA/OGCA Document No. 100**

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Enquiries should be directed to:

Ontario Association of Architects  
111 Moatfield Drive  
Don Mills, Ontario  
M3B 3L6  
(416) 449-6898  
Fax: (416) 449-5756  
E-Mail: [oaamail@oaa.on.ca](mailto:oaamail@oaa.on.ca)

Ontario General *Contractors* Association  
6299 Airport Road, Suite 703  
Mississauga, Ontario  
L4V 1N3  
(905) 671-3969  
Fax: (905) 671-8212  
E-Mail: [info@ogca.ca](mailto:info@ogca.ca)

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

**Please read this document in conjunction with the project contract documents to ensure that the conditions of the contract coincide with your tender documents.**

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

## 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 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, these Associations recommend the use of these procedures by their respective members and *Owners/clients*.

The Associations also recommend that these procedures form a part of the *Contract* documents from the outset by reference to Document No. 100.

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.

## DEFINITIONS

### General Note

All terms used in both this document and in the Construction Lien Act (Ontario), latest edition, have the same meaning as those defined in the Construction Lien Act (Ontario) latest edition.

### Consultant

Is the company or person appointed by the *Owner* to provide design, general review and/or contract administration services as required for the construction. Where required by law and/or by the terms of the *Contract*, the *Consultant* will be suitably qualified.

### Payment Certifier

For definition, refer to Construction Lien Act (Ontario) latest edition

### Basic Statutory Holdback

For definition, refer to Construction Lien Act (Ontario) latest edition

### Statutory Holdback for finishing work

Where a *Contract* is certified substantially complete, this is a sum of money in addition to the Basic Statutory Holdback that may be withheld and eventually released by the *Owner* following receipt of suitable certificates by the *Payment Certifier*. Such amount will be calculated by the *Payment Certifier* and administered in accordance with the Construction Lien Act as a "separate holdback for finishing work. The statutory holdback for finishing work is based on the value of work performed and certified for payment after the date of substantial performance.

### Balance to Complete

Is a sum of money in addition to the Basic Statutory Holdback that may not be certified and eventually released by the *Owner* following receipt of suitable certificates by the *Payment Certifier*. The amount of such sum will be calculated in accordance with the terms of the *Contract* by the *Payment Certifier*, to be the amount of money that will be required by the *Owner* to finish all work included in the contract including the correction and/or completion of all identified deficiencies.

### Contract Price

Is the amount stipulated in the *Contract Documents* expressed in Canadian Funds, excluding Value Added Taxes which the *Owner* has agreed to pay the *Contractor* for the completion of the *Contract Work* and Services

## GENERAL NOTES

- (a) The procedures outlined herein have been prepared in relation to the Construction Lien Act, hereinafter referred to as the C.L.A.<sup>1</sup>, 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.
- (b) The meaning of the term substantial performance and "completed" as used in these procedures are as defined in the C.L.A – see extracts in Clauses (a), (b) and (c) below.
- (c) By reference to the C.L.A., Article A-5 of the Agreement in the Stipulated Price Contract between *Owner* and *Contractor* (Standard Construction Document CCDC 2 (latest edition)) is amended in accordance with the provisions of the C.L.A. This would require the *Owner* to release the basic holdback on the day following the expiry of the 45 day lien period which commences on the date of publication of the certificate of substantial performance; and to release the holdback for finishing work on the day following the expiry of the 45 day lien period which commences on the date of completion. To compute the period, the first day counted or day one is the day following publication or completion as the case may be.

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<sup>1</sup>(All references are to the Construction Lien Act, R.S.O. 1990, c C.30 and the Regulation thereunder R.R.O. 1990, Reg. 175 (as amended))

## SIGNIFICANT STATUTORY REQUIREMENTS

- (a) The definition of the term "substantial performance" appears in subsection (1) of Section 2 of the C.L.A. 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 \$500,000 of the *Contract Price*,
  - (ii) 2 per cent of the next \$500,000 of the *Contract Price*, and
  - (iii) 1 per cent of the balance of the *Contract Price*."

- (b) Attention is drawn to subsection (2) of Section 2 of the C.L.A. 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 remainder of the improvement cannot be completed expeditiously for reasons beyond the control of the *Contractor* or, where 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."

- (c) The definition of the term "completed" appears in subsection (3) of Section 2 of the C.L.A. 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) \$1,000."

**STAGE 1  
CONTRACT SUBMISSIONS**

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.L.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 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 (or abandoned) by the *Payment Certifier* or *Owner* and *Contractor* and certification for the purpose of the release of the statutory holdback shall occur upon the expiry of the 45 day lien period which commences on the day of completion.

### 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, but must be deferred for reasons beyond the control of the *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 cannot be performed for reasons beyond the control of the *Contractor*, and where applicable
    - (iv) 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 lien 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 to 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 statutory 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 6 prescribed by the C.L.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 45 day period prior to release of the basic statutory holdback monies.
- 4.3 The *Contractor's* and *Contractor's Subcontractors'* forces shall continue to work towards completion during the 45 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 STATUTORY HOLDBACK MONIES**

- 5.1 The *Consultant* and/or *Payment Certifier* shall prepare the certificate for payment of the basic statutory 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 45 day period for the preservation of liens.

- 5.2 Upon issuing the certificate for payment of the basic statutory 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 45 day period.
- 5.3 The *Consultant* and/or *Payment Certifier* shall simultaneously notify the *Owner* that, provided no liens exist, payment of basic statutory holdback shall be due and payable one day after the date of expiry of the prescribed 45 day period for the preservation of liens.
- 5.4 The *Consultant* and/or *Payment Certifier's* certificate for the payment of the basic statutory 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 45 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 statutory holdback shall occur in accordance with the terms of the *Contract* and the provisions of the C.L.A. In the case of the latest edition of CCDC 2 form of Stipulated Price Contract, the *Owner* may be asked by the *Contractor* to place the basic statutory holdback in a separate bank account in the joint names of the *Owner* and the *Contractor* 10 days prior to the expiry of the 45 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.L.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 holdback for finishing work due for release and payment upon expiry of the 45 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 holdback in connection with the finishing work. This certificate shall be dated one day after the expiry of the 45 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 holdback in connection with the 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 45 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 holdback for finishing work is due and shall be payable one day after termination of the 45 day period.

- 7.4 The *Consultant* and/or *Payment Certifier's* certificate for payment of the monies retained as a holdback in connection with the 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.
- 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.
- 9.2 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.
- 9.3 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*.

Form 6

Construction Lien Act

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

.....  
*(Country; District or Regional Municipality 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 of 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:

.....  
*(where liens attached to premises, reference to lot and plan or instrument registration number)*

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

.....  
*(where liens do not attach to premises)*

*(This is a sample of the Certificate of Substantial Performance, referred to as Appendix "A" in Stage 4 of the "OAA/OGCA Take-Over Procedures", Document No. 100)*

Construction Lien Act, 1990

STATEMENT OF CONTRACT DEEMED COMPLETED  
UNDER SECTION 2(3) OF THE ACT

.....  
*(County, District or Regional Municipality in which premises are situated)*

.....  
*(Street address and city, town, etc., or, 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 **Deemed Completed** on:

.....  
*(date of contract deemed completed)*

Date statement signed: .....

.....  
*(payment certifier)*

.....  
*(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: .....

Address for service: .....

*(Use A or B whichever is appropriate)*

A Identification of premises for preservation of liens:

.....  
*(where liens attach to premises, reference to lot and plan or instrument registration number)*

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

.....  
*(where liens do not attach to premises)*