Amendments to the Builders' Lien Act and the adoption of new regulations

Introduction

The Builders Lien Act is intended to protect subcontractors and suppliers who perform work or supply materials at a construction project if the person with whom they directly contracted defaults on the contract. This backgrounder provides information on recent changes to the Act, which will come into effect June 30, 2017. The changes were recommended in a March 2013 Nova Scotia Law Reform Commission Report.

Legislative amendments

The amendments can be found at:

http://www.nslegislature.ca/legc/bills/61st_5th/3rd_read/b081.htm and
http://www.nslegislature.ca/legc/bills/62nd_2nd/3rd_read/b015.htm

Amendments are aimed at improving how money flows once certain stages of a construction project are reached and include:

- *Changing the way a finishing holdback is calculated*. The finishing holdback is the amount an owner continues to holdback following substantial performance and payout of the main holdback. The Act had required that the finishing holdback be 2.5 percent of the contract price, which could be out of proportion to the actual work remaining to be done to fully complete the project. The new way of calculating the finishing holdback is 10 percent of the price of remaining services or materials to be supplied.

- *Allowing for early release of holdbacks to sub-contractors who complete their work at an early stage in the construction project*. This is called "progressive release of holdback". Subcontractors who finish their work on a project at an early stage – for example the company pouring the foundation – can get their subcontract certified complete and the owner can pay out a proportionate amount of the holdback amount at that point, instead of waiting for the whole project to be completed.

- *Creating authority to make regulations to require notice be given to parties when a contract is substantially performed and when a sub-contract is certified as complete*, details of which are outlined in new regulations.

New regulations regarding notice (update links with most current)

New regulations will ensure notice is given to parties working on a construction project when a project is substantially performed and when a sub-contract is certified as complete. Without a requirement of notice, contractors, suppliers, subcontractors and employees may not know when these critical stages have been reached, particularly if they are among those who have finished work on a project at an early stage and are no longer present to observe its progress.

Notice of these milestones is important because it starts the clock running on some important time limits in the *Builder's Lien Act*. Notice acts as a trigger, after a period of time with no lien registered, for release of holdbacks. In some cases, notice also starts the clock running on the time to register a lien.The regulations also clarify what should be in the notice and how and when the notice has to be published.

Under the new regulations the requirements are the same for both milestones and will:

- Require owners to post notice in a prominent location at the job site office as well as on the publicly available portion of the Construction Association of Nova Scotia (CANS) website; and
- Require that notice be provided within 10 days of the relevant milestone.

The regulations also:

- Set out details regarding the information that must be included in the notice;
- Specify that CANS cannot charge, directly or indirectly, for owners to post on the website or charge a fee for searching for or viewing notices; and
- Provide an exemption for owners who are having construction done on their own buildings or land for single-family residential purposes where the value of the contract or work done does not exceed $75,000.

A notice of substantial performance must include all of the following information:

a) the name and address of the owner;
b) the name and address of the contractor;
c) a description of the work or improvement to which the contract relates;
d) a description of the land on which the contract was performed;
e) the date on which the contract was substantially performed.

A notice of subcontract completion must include all of the following information:

a) the name and address of the owner;
b) the name and address of the contractor;
c) the name and address of the subcontractor;
d) if the subcontract is certified complete under subsection 13A(1) of the Act, the name and address of the architect, engineer or other person upon whose certificate payments are to be made;
e) a description of the work or services performed under the subcontract or the materials placed or furnished under the subcontract;
f) a description of the land on which the work or services were performed under the subcontract or on which the materials were placed or furnished under the subcontract;
g) the date on which the subcontract was certified complete.

The text of the new regulations will be available at: https://www.novascotia.ca/just/regulations/rxaa-l.htm#build after they are published in the Royal Gazette Part II.

Background information

As noted in the introduction, the Builders' Lien Act is intended to protect subcontractors and suppliers who perform work or supply materials at a construction project if the person with whom they directly contracted defaults on the contract.

The subcontractor or supplier automatically gets a legal right – a lien – in the property that lasts until the services or materials are paid for. Registering a lien is a way for a subcontractor or supplier to try and collect the money that is owed to them.

Once the lien is registered in the Land Registry, it affects the property owner's interest in the property and can interfere with the sale or mortgaging of the property.

The Act also features a holdback system on payments made under construction contracts. The owner is required to maintain a "holdback" from the payment to the general contractor.

In turn, the general contractor is supposed to holdback a portion of payments to subcontractors, and this goes on down the line in what is called the "construction pyramid".

Holdbacks serve a dual role. They create a pool of money that will be available to help pay participants in a construction project. If there is a problem with the project and liens are filed, subcontractors and suppliers who have not been paid by the general contractor would proportionately share that pool of money created by the holdback amount.

Holdbacks also protect owners because they can limit the extent to which an owner can be held liable to the subcontractors and suppliers.

If a certain amount of time has passed after the construction contract is substantially performed and no liens have been claimed, the owner is required to pay the holdback out to the general contractor, and the general contractor pays out the subcontractor and suppliers and the payments again flow down the line of the "construction pyramid."

If there is still work to be done on the contract when the main holdback is released, a smaller holdback – called the "finishing holdback" – is retained until the work is fully completed.

For general information regarding these regulatory changes, please contact:
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