

## Holdback

Every party to a construction project has to deal with holdback. There are different forms of holdback that serve different purposes. Some forms of holdback are governed by the *Construction Act*, and other forms are established in contracts. There are different ways for a payer to retain and release holdback.

As contractors and subcontractors, holdback applies to you in both directions – payments made to you are subject to holdback, and you must retain holdback on payments you make:

- If you are a contractor (where you are in a contract directly with the owner), the owner will hold back funds from any payments made to you. You will also retain holdback from any payments you make to your subcontractors and suppliers.
- If you are a subcontractor (where you are in a contract with the general contractor), the general contractor will hold back funds from any payments made to you. You will also retain holdback from any payments you make to your sub-subcontractors and suppliers.

### **Construction Act Holdback**

Every payer in a construction project (such as the owner paying the contractor, or the contractor paying subcontractors) must hold back 10% of every payment made as a form of security for any liens that may be registered against the project. This *Construction Act* holdback applies to every construction project and is mandatory. You cannot opt out or waive this form of holdback.

The most common way that a payer retains holdback is by actually holding back 10% of the amount of any payments made. Under the new changes to the *Construction Act*, payers must now pay out holdback once the timeline to file liens has passed, which is 60 days from one of the triggering dates in the *Act* (the most common is the date of completion, abandonment, or termination of the contract), unless the owner publishes a “notice of non-payment” within 40 days and notifies the contractor. The *Construction Act* also allows for annual or phased released of holdback, which allows funds to be released sooner on large projects.

Payers can retain holdbacks in other ways. A payer may instead obtain a letter of credit, or may opt for a “Demand-Worded Holdback Repayment Bond”. Both must be in the proper government forms. The letter of credit or the bond takes the place of the holdback funds. Both of these methods of retaining holdback provide security for any liens that may be registered while also allowing for the full contract funds to flow.

### **Warranty and Maintenance Holdbacks**

Warranty holdback is an amount held back to secure a contractor or subcontractor’s warranty obligations. The funds can be used if the contractor or subcontractor fails to perform any post-construction repair work under the terms of the contract. Maintenance holdback is similar, but is used to secure a party’s post-construction maintenance obligations under the contract.

These forms of holdback are created in the contracts and are not governed by the *Construction Act*. Generally, the funds are retained for a defined period of time that is set out in the contract. As these are contractual forms of holdback, the amount and terms of the holdback can vary from contract to contract.

The new *Construction Act* rules for holdback release do not apply to maintenance and warranty holdbacks. Release of these forms of holdback is governed by the terms of each contract. For example, if the contract allows, an owner may still be able to retain maintenance holdback even if there are no deficiencies. You should review any holdback clauses in your contracts carefully so you know how holdback that is not in the *Construction Act* will be retained and released.



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