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Rights and Responsibilities under The Builders' Liens Act

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published 07/31/2017

The construction industry carries a unique set of financial risks arising from the fact that construction projects are generally pyramidal in arrangement, with the owner of a project at the top and contractors, subcontractors and other service providers forming the base of the pyramid in descending order. This means that much of the work is carried out by different subcontractors who have no direct contract with the owner and as a result, have very little security to guarantee payment.

As a result of this unique problem, *The Builders' Liens Act* of Manitoba (the "Act") was created in part to protect persons who are not in a position of having a direct contract with the owner for the value of the work done by them that results in an improvement to the value of land. The Act sets out who is entitled to a lien for security related to the improvement to the value of land and the process by which lien claimants may exercise their rights.

The Act provides that a person who supplies work, services or materials may file a lien for the value of the work, services or materials against the interest of the owner in the land where the work was done, the services were provided or the materials were supplied. This operates to prevent an owner from receiving an improvement to land without making payment for that improvement.

Holdbacks

As a result of the flow of funds through the construction pyramid, a "holdback" fund was created through the Act. This holdback allows lien claimants to attempt to obtain payment through the holdback if they are unable to recover from the person with whom they have a contract.

It is important to keep in mind that there are two kinds of holdbacks in Manitoba under the Act. The "regular holdback," as set out in section 24(1) 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

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done and materials supplied as the work progresses. This amount is kept as a separate fund out of which lien claims may be satisfied, until all liens that may be claimed against the holdback have expired or have been satisfied, discharged or vacated from title by payment into court. The use of the term “person primarily liable for payment” means that the holdback must be retained by the person primarily liable on *each* contract, whether that person is an owner, contractor, or subcontractor, for the benefit of those below that person on the pyramid.

There is also a separate holdback for finishing work completed after the date of “substantial performance” of the contract. This 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.

Where the owner has properly maintained a holdback and complied with all provisions of the Act, the owner’s exposure to a subcontractor or a supplier of materials or services will be limited to the amount of the holdback.

If a holdback has not been properly maintained, the Act provides that the person primarily liable for the payment continues to be liable to the lien claimant for the amount which should have been deducted and retained. This means that where a holdback has been paid out improperly, the person responsible for payment may be forced to pay those amounts again.

The End of Holdback Obligations

The general principle is that holdback obligations come to an end when parties who have done work to improve land can no longer make a lien claim against the land, and when any existing registered liens have been either satisfied or discharged with respect to the owner who has the holdback obligation. Regular holdback obligations come to an end when:

1. a) the period to register new liens has expired pursuant to section 24(1) of the Act (60 days have passed since: the certificate of substantial performance is given; or the work is completed; or the work has been abandoned); and
2. b) existing liens have been satisfied (paid, resolved in court, or finally settled), discharged with respect to the owner, which includes the common practice of the contractor paying security into court sufficient to cover the liens pursuant to section 55 of the Act.

Substantial performance holdback obligations come to an end pursuant to section 24(2) of the Act, under the same conditions as a regular holdback.

Finally, certain holdbacks obligations may be reduced through section 25 of the Act. This provision is for the benefit of subcontractors, who may complete a subcontract far in advance of project completion. If a subcontract is certified complete, the person primarily responsible for payment under that subcontract is no longer obligated to retain that holdback with

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respect to that contract, if the period in which a lien may be filed has passed (60 days), or all liens have been satisfied or discharged.

Once the holdback obligations come to an end, the holdback simply becomes funds owing to the contractor or subcontractor. This is conditional on no liens being registered against the land in question. If any lien has been registered against the land, then the payer must withhold payment of the holdback.

Time Limits for Registering and Enforcing a Lien

Once it is established that lien rights exist, a lien must be registered by a lien claimant within 60 days from substantial completion or the last date that work was done, services provided or materials supplied. Following the registration of a lien, an action must be commenced in the Court of Queen's Bench and a pending litigation order must be filed and registered against the land within two years of the date of the registration of the lien, or it will no longer be valid. If dates are missed, it can be very costly to the lien claimant as lien rights are lost and there will be no security for the value of the improvement to land.

Discharging or Vacating a Lien

If a dispute arises and a lien is registered against an owner's land, there are various ways to have it discharged or vacated, depending on the need for a quick resolution (a lien stops all payments from flowing on a project) and the availability of funds to stand in place of the land.

In cases where a lien has been registered for amounts properly owing and all requirements for payment have been met, the easiest way to discharge the lien is to pay an agreed upon amount to a party in exchange for a registerable discharge of the lien. Once the lien is discharged, payments may flow and the owner may deal with the land.

If it is not possible to fully discharge the lien, the amounts in question can be paid into trust with the court by application or, if the parties agree, held in trust by a lawyer until the matter is resolved. In the interim, the lien can be vacated from the land. If a lien is vacated, it no longer attaches to the land and it will allow the owner to deal with it as required.

Finally, in certain circumstances, it is possible to bring an application in the Court of Queen's Bench to discharge the lien (on the basis that it is invalid) or to vary the amount that must be paid in order to vacate the lien. However, the court is reluctant to discharge a lien, unless there is no dispute as to the factual scenario (for example, filed out of time or against the wrong land). If there is no reason to discharge the lien, the court will require that any amounts owing under the contract, including the holdback, be paid into court to stand as security in place of the land until the matter is resolved.

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The registration of a lien and payment into trust with the court or into trust with a lawyer is not an admission that any funds are owed -- the lien action must still proceed through the court to prove an entitlement to the funds.

Conclusion

The Act provides significant protections for contractors and subcontractors that would not otherwise be available. The Act provides security for subcontractors without any connection to the owner and also ensures that there will be a source of funds available for those with a valid lien. However, the Act also imposes significant responsibilities on owners, contractors and subcontractors (not all of which are covered within this article) and is extremely technical in nature. Do not hesitate to contact a lawyer to discuss your rights and obligations under the Act.

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