

British Columbia Construction Project Close Out Procedures



British Columbia Construction Association

**Procedures Concerning
Construction Contracts and
Close Out of Projects**

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BCCA Procedures Concerning Construction Contracts and Close Out of Projects

Please read this Document in conjunction with the project contract documents to ensure that the conditions of the contract coincide with your bidding documents.

Short Title: This Document may be referred to as “**BCCA Close Out Procedures**”

INTRODUCTION

The purpose of this Document is to recommend standard procedures to facilitate the closing stages of a construction contract and the close out of the project.

These procedures have been prepared by the BC Construction Association with the support of legal counsel. This Document is meant to be an educational tool for all the stakeholders in the project (including the owner, consultants, contractors and subcontractors).

BCCA also recommends that these procedures form a part of the contract documents from the project outset by reference to BCCA Procedures Concerning Construction Contracts and Close-out of Projects.

Where a contract is in progress which does not provide such procedures, BCCA recommends 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.

BCCA fully supports the use of the industry standard CCDC and CCA contracts, and a number of the definitions and terms in this document are from standard CCDC contracts.

In CCDC contracts, “The law of the *Place of the Work* shall govern the interpretation of the *Contract*.” (CCDC 2 – GC 1.2.1). As such, this document also references the BC Builders Lien Act*, as the requirements of the BC Builders Lien Act also form part of the close out of the project.

Definitions in this Document will be identified as being ***bold and italicized*** to better clarify the procedures and stages in this Document.

*General Notes and Significant Statutory Requirements for the BC Builder’s Lien Act are as addressed in APPENDIX A of this Document.

DEFINITIONS

Definitions from CCDC 2 – 2008

Consultant

The ***Consultant*** is the person or entity engaged by the owner and identified as such in the Agreement. The ***Consultant*** is the Architect, the Engineer or entity licensed to practice in the province or territory of the *Place of the Work*. The term ***Consultant*** means the ***Consultant*** or the ***Consultant's*** authorized representative.

Substantial Performance of the Work

Substantial Performance of the Work is as defined in the lien legislation applicable to the *Place of the Work*. If such legislation is not in force or does not contain such definition, or if the *Work* is governed by the Civil Code of Quebec, ***Substantial Performance of the Work*** shall have been reached when the *Work* is ready for use or is being used for the purpose intended and is so certified by the ***Consultant***.

Definitions from the current BC Builders Lien Act

payment certifier

section 7 (1) - "***payment certifier***" means

(a) an architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or

(b) if there is no person as described in paragraph (a),

(i) the owner acting alone in respect of amounts due to the contractor, or

(ii) the owner and the contractor acting together in respect of amounts due to any subcontractor.

holdback

section 4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a ***holdback*** equal to 10% of the greater of

(a) the value of the work or material as they are actually provided under the contract or subcontract, and

(b) the amount of any payment made on account of the contract or subcontract price.

required holdback

section 1 (1) - "***required holdback***" means, in relation to a contract or subcontract, the amount required under section 4 to be retained from payments under that contract or subcontract, less any payments made under an entitlement to payment arising under section 9;

certificate of completion

section 1 (1) In this Act:

"**certificate of completion**" means a certificate under section 7 stating that work under a contract or subcontract has been completed and includes an order made under section 7 (5);

Definitions unique to this Document

Balance to Complete

- a sum of money defined as the **deficiency holdback** certified and promptly released by the owner following receipt of suitable certificates by the **payment certifier or Consultant**, as applicable pursuant to the terms of the contract. The amount of such sum will be calculated in accordance with the terms of the contract by the **payment certifier or Consultant**, as applicable pursuant to the terms of the contract, to be the amount of money that will be required by the owner to finish all identified **deficiencies** or incomplete work.

Contract Price

- 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, if applicable.

Deficiencies

- a comprehensive list of items to be completed or corrected, as verified by the **Consultant or payment certifier** for the attainment of **Substantial Performance of the Work**

Deficiency Holdback

- the funds to be held back for the identified **deficiencies** and incomplete work, agreed by the parties.

Closeout of Project

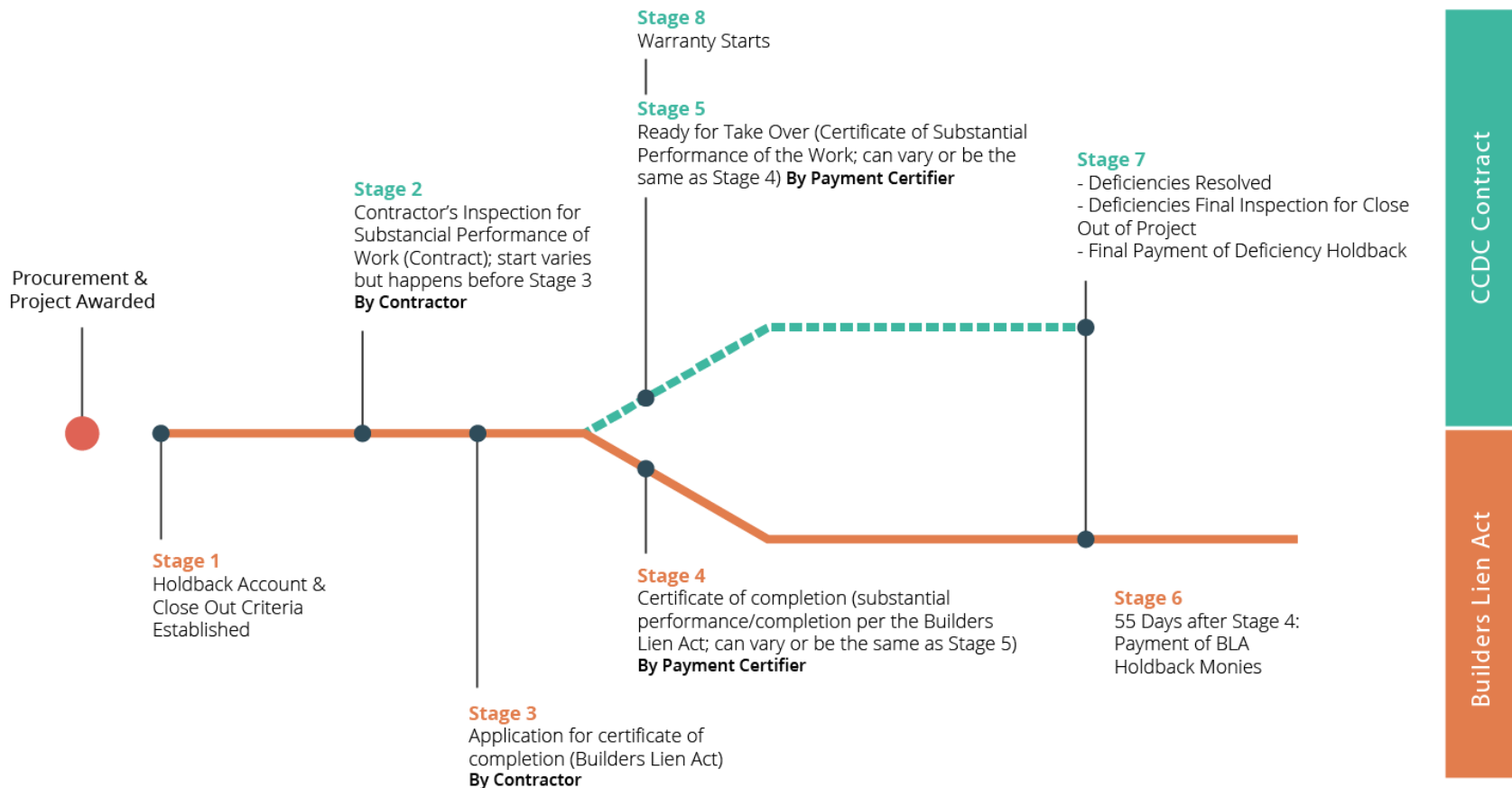
- the **deficiencies** are resolved, final inspections are completed and all certificates and schedules required to be provided by the *Contract* have been submitted.

Ready for Take-Over

- the improvement is ready for use or is being used for the purpose intended.

NOTE: In the following SEQUENCE OF EVENTS GRAHIC, Stages 2, 5, 7 and 8 (i.e. – those Stages above the line in the Graph) refer to the contract and its terms & conditions (which should be a CCDC contract), and Stages 1, 3, 4 and 6 refer to the processes for following the Builders Lien Act (i.e. –those Stages below the line in the Graph).

Sequence of Events Timeline



STAGE 1

HOLDBACK ACCOUNT AND CLOSEOUT CRITERIA

- 1.1. Submit all documentation required for project startup under the contract documents.
- 1.2. Create **holdback** account for the lien **holdback** funds as required by the Builders Lien Act and ensure Builders Lien Act amounts held back from each progress payment are paid into the account.
- 1.3. Establish value of contract completion requirements (if not already in project documents) e.g. **deficiency holdback** values of manuals, commissioning, education, certificates and contractor schedules (design professional services by the contractor), etc.
- 1.4. If possible, identify whether the **Builders Lien Act "3%/2%/1%" formula** (Part 1.2) or "Completion of an Improvement" (Part 1.3) will be the deciding factor for substantial performance under the Builders Lien Act: Stage 3A Option as identified herein.
- 1.5. Establish the warranty start date criteria.

STAGE 2

CONTRACTOR'S INSPECTION FOR ***SUBSTANTIAL PERFORMANCE OF THE WORK***

2.1 When the contractor has determined that the requirements for ***Substantial Performance of the Work*** have been met; the contractor shall then make a written request to the ***payment certifier*** or ***Consultant*** for a certificate of ***Substantial Performance of the Work***.

2.2 The inspection team shall be comprised of:

- (a) The contractor and/or the contractor's representative(s).
- (b) Any other subcontractor and/or subcontractor representative(s) whose participation may be required by the contractor in order to fully determine the work to be completed.
- (c) The ***Consultant*** and the ***payment certifier*** and/or the owner/owner representative(s).

2.3 Upon completion of this inspection, a list of all work needing completion or correction 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 the ***payment certifier***.

2.4 In the event that the contractor's application for ***Substantial Performance of the Work*** is not accepted, the ***Consultant*** or ***payment certifier*** shall advise the contractor in writing why it is not valid. The contractor shall complete the work necessary to achieve ***Substantial Performance of the Work*** as previously defined and the contractor shall submit a subsequent application for ***Substantial Performance of the Work*** thereafter.

STAGE 3

CONTRACTOR'S APPLICATION FOR CERTIFICATE OF COMPLETION

3.1. When the contractor has determined that the requirements for Builders Lien Act have been met regarding contract completion, the contractor shall then make a written request to the **payment certifier** for a **certificate of completion** in Form 3 prescribed by the Builders Lien Act, a copy of which may be found in Appendix B hereto. If there is no **payment certifier** identified in the contract, the owner shall be the **payment certifier** as provided in the Builders Lien Act (in the case of subcontracts, if no **payment certifier** is identified in the subcontract, the owner and contractor acting together are the **payment certifier** as provided in the Builders Lien Act).

3.2. This application shall include:

- (a) A statement to the **payment certifier** to the effect that the contract is complete as per the requirements of the Builders Lien Act; and
- (b) An invoice showing the amount of lien **holdback** monies due for release, and the date the payment is due, following the issuance of the **certificate of completion**.

3.3 The contractor's application for a certificate of completion under the Builders Lien Act and for the release of the lien **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. No lien **holdback** should be retained from payments made after the issuance of the **certificate of completion** (unless a claim of lien is on title, in which case it is unlikely that any payment at all will be made).

STAGE 4

CERTIFICATE OF COMPLETION

If the **payment certifier** determines that the contract is complete as per the Builders Lien Act, the **payment certifier** shall issue a **certificate of completion**. The **payment certifier** shall set out in the **certificate of completion** the date on which the contract was completed. The **payment certifier** shall give a copy of the **certificate of completion** to the owner and to the contractor within 7 days of issuing it.

- 4.1. In the event that the contractor's application for performance **certificate of completion** under the Builders Lien Act is not accepted by the **payment certifier**, the **payment certifier** shall advise the contractor in writing why it is not accepted. The contractor shall complete the work necessary to achieve completion as per the Builders Lien Act and the contractor shall submit a subsequent application for **certificate of completion** thereafter.
- 4.2. Within 7 days of issuance of the **certificate of completion**, the **payment certifier** shall post in a prominent place at the project site a Notice of Certification of Completion in Form 2 prescribed by the Builders Lien Act, a copy of which may be found in Appendix B hereto, and deliver copies of the Notice of Certification of Completion to any persons who requested copies under subsection 7(2) of the Builders Lien Act.

(NOTE: See Appendix C hereto for sample of the recommended form of the **certificate of completion**.)

STAGE 5 READY FOR TAKE OVER

5.1. If the *payment certifier* or *Consultant* determines that the *Contract* has achieved ***Substantial Performance of the Work*** as per the contract, the *payment certifier* or *Consultant* shall prepare and issue a certificate of ***Substantial Performance of the Work***. The *Consultant* or *payment certifier* shall set out in the certificate of ***Substantial Performance of the Work*** the date on which the contract was substantially performed. The *payment certifier* or *Consultant* shall give a copy of the certificate of ***Substantial Performance of the Work*** to the owner and to the contractor.

5.2. In the event that the contractor's application for ***Substantial Performance of the Work*** is not accepted, the *payment certifier* or *Consultant* shall advise the contractor in writing why it is not accepted. The contractor shall complete the work necessary to achieve ***Substantial Performance of the Work*** as defined in the contract and the contractor shall submit a subsequent application for ***Substantial Performance of the Work*** thereafter.

5.3. Upon agreement of the date on which the contract was substantially performed, the "care, custody and control" of the work transfers from the contractor to the owner (unless otherwise agreed). At this time, all direct costs (and risks) related to the work transfer from the contractor to the owner – utility costs (power, water, sewer, phone, cable, etc), security (fencing, watchman, fire protection, etc). In typical CCDC contracts, the "Broad Form" property insurance shall continue for 10 days after the ***Substantial Performance of the Work***, unless the work (or any part) is being used for the purpose intended.

CCDC 2 – GC 11.1.1.4 -

The "Broad Form" property insurance shall be provided from the date of commencement of the *Work* until the earliest of:

- (1) 10 calendar days after the date of ***Substantial Performance of the Work***;
- (2) on the commencement of use or occupancy of any part or section of the *Work* unless such use or occupancy is for construction purposes, habitational, office, banking, convenience store under 465 square metres in area, or parking purposes, or for the installation, testing and commissioning of equipment forming part of the *Work*;
- (3) when left unattended for more than 30 consecutive calendar days or when construction activity has ceased for more than 30 consecutive calendar days.

5.4. 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 *payment certifier*.

STAGE 6 PAYMENT OF LIEN HOLDBACK MONIES

6.1 As at the end of the 55th day of the Lien ***holdback*** period after issuing the ***certificate of completion*** for payment of the ***holdback*** monies, the *payment certifier* shall check to verify that no claims of lien have been filed or proceedings commenced to enforce a lien against the ***holdback***, and advise the owner accordingly.

6.2 When the *payment certifier* notifies the owner that no claims of lien have been filed and no proceedings have been commenced to enforce a lien against the ***holdback***; payment of lien ***holdback*** is due and should be paid one day after the expiry of the prescribed 55 day ***holdback*** period.

The release of any **holdback** monies which are due and payable after the issuance of the **certificate of completion** shall occur in accordance with the terms of the Builders Lien Act and the contract.

STAGE 7

FINAL INSPECTION FOR CLOSE OUT OF PROJECT

- 6.1. When the contractor is satisfied that the entire work is completed, and after making its own inspection, it shall make a written request for a final inspection by the **Consultant or payment certifier**. This inspection shall constitute the inspection prior to the issuance of the final certificate for payment. The contractor should be invited to attend the inspection when appropriate.
- 6.2. If there are any remaining **deficiencies** determined by this inspection, they shall be listed by the **Consultant or payment certifier** and provided to the contractor. This list shall be recognized as the deficiency list for purposes of total completion of the work under the contract.
- 6.3. Such **deficiencies** shall be corrected by a date mutually agreed upon between the contractor and the owner, unless a specific date is required by the contract, and a re-inspection by the **Consultant** shall be called for by the contractor, following their own inspection.
- 6.4. The owner shall make monthly progress payments from the **deficiency holdback** on completed **deficiencies**.
- 6.5. When all work has been completed and all **deficiencies** have been rectified, excepting incomplete work or **deficiencies** not rectified due to reasons beyond the control of the contractor, then all amounts due under the contract shall become payable, and a final certificate for payment shall be issued.

STAGE 8

WARRANTY-GUARANTEE PERIOD(S)

- 7.1. Subject to the terms of the contract, the warranty period(s) for the contract shall commence on the date of the certificate of **Substantial Performance of the Work**. In the event that a certificate of **Substantial Performance of the Work** was not issued and the contract documents do not stipulate otherwise, the warranty period(s) shall commence on the date of completion determined in accordance with sections 1(2) and 1(3) of the Builders Lien Act.
- 7.2. The owner shall give prompt notice in writing to the contractor and **payment certifier or Consultant** of any defects (as defined by the contract) noted during the contractual warranty period.
- 7.3. Prior to the completion of the contractual warranty period, the **payment certifier or Consultant**, and such others that the contract requires, 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. The contractor should be invited to attend the inspection when appropriate.

APPENDIX A

GENERAL NOTES REGARDING THE B.L.A.

- (a) The procedures outlined herein have been prepared in relation to the Builders Lien Act, hereinafter referred to as the B.L.A., and apply to all general (head) construction contracts. These procedures are primarily applicable to lienable projects but they may be readily adapted for use in relation to non-lienable projects.
- (b) The meaning of the terms "substantial performance" and "completed" as used in these procedures are as outlined in the B.L.A. - see extracts in Clauses (c) and (d) below.
- (c) By reference to the B.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 B.L.A. The owner should release the builders lien **holdback** on the day following the expiry of the 55 day **holdback** period (and when it is satisfied that no court actions have been filed), which commences on the date of issuance of a **certificate of completion** for the head (general) contract or on the date of actual completion of the head (general) contract as defined in the B.L.A. or the abandonment or termination of the head (general) contract (if no **certificate of completion** is issued). To compute the period, the first day counted or day one is the day following the day of issuance.
- (d) Progressive Release Of **Holdbacks**

Under section 8 of the B.L.A., a subcontractor is entitled to be paid the builders lien **holdback** applicable to its subcontract 55 days after issuance of a **certificate of completion** with regard to its subcontract. At the same time, the contractor is entitled to receive the corresponding **holdback** from the owner under section 9 of the B.L.A.

It is important to be aware that the claim of lien filing period and **holdback** period with regard to a subcontract or a contract which is not a head contract will not be triggered by actual completion, termination or abandonment of that subcontract or contract. A **certificate of completion** must be issued for the subcontract or contract in question (or one above it in the contractual chain) in order to start the claim of lien filing period and **holdback** period running early for that subcontract or contract. Otherwise, the lien filing period and **holdback** period will be the same as that for the overall project.

As well, it is important to be aware that there is no provision in the B.L.A. for issuance of a **certificate of completion** for a phase of a phased contract or subcontract. The only certificates of completion recognized by the B.L.A. are for entire contracts or subcontracts.

SIGNIFICANT STATUTORY REQUIREMENTS

- (a) The lien filing period is addressed in section 20 of the B.L.A., which reads in part as follows:

20(1) If a **certificate of completion** has been issued with respect to a contract or subcontract, the claims of lien of:

- (a) the contractor or subcontractor, and
- (b) any persons engaged by or under the contractor or subcontractor

may be filed no later than 45 days after the date on which the **certificate of completion** was issued.

- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after:
 - (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.
 - (3) Subsection (1) does not operate to extend or renew the time for filing of a claim of lien if:
 - (a) that time would otherwise be determined with reference to the time an earlier **certificate of completion** was issued, or
 - (b) time had started to run under subsection (2).
- (b) "Head contractor" is defined in subsection 1(1) of the B.L.A., which reads in part as follows:
"head contractor" means a contractor who is engaged to do substantially all of the work respecting an improvement, whether or not others are engaged as subcontractors, material suppliers or workers.
- (c) "Completed" is defined in subsection 1(1) of the B.L.A. which reads in part as follows :
"completed", if used with reference to a contract or subcontract in respect of an improvement, means substantially completed or performed, not necessarily totally completed or performed.
- (d) "Substantial performance" of a contract or subcontract is defined in subsection 1(2) of the B.L.A. which reads as follows:
"For the purposes of this Act, a head contract, contract or subcontract is substantially performed if the work to be done under that contract is capable of completion or correction, at a cost of not more than,
 - (a) 3 % of the first \$500,000 of the **contract price**,
 - (b) 2 % of the next \$500,000 of the **contract price**, and
 - (c) 1 % cent of the balance of the **contract price**."
- (e) "Completion" of an improvement is defined in subsection 1(3) of the B.L.A., which reads as follows:
 - (3) For the purposes of this Act, an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

1(All references are to the Builders Lien Act, R.S.B.C . 1997, c. 45 and the Regulations under BC Reg. 1/98 and 265/98 (as amended)

- (f) **Certificates of completion** are addressed in section 7 of the B.L.A., which reads in part as follows:
 - (1) In this section, "**payment certifier**" means

- (a) An architect, engineer or other person identified in the contract or subcontract as the person responsible for payment certification, or
 - (b) If there is no person as described in paragraph (a),
 - (i) The owner acting alone in respect of amounts due to the contractor, or
 - (ii) The owner and the contractor acting together in respect of amounts due to any subcontractor.
- (2) A lien holder in respect of an improvement may, by making a written request, require that the **payment certifier** for the improvement deliver to the lien holder
- (a) Particulars of any **certificate of completion** issued under this section before and after the request, or
 - (b) Particulars of **certificates of completion** issued, before and after the request, with respect to stipulated contracts or subcontracts.
- (3) On the request of a contractor or subcontractor, the **payment certifier** must, within 10 days after the date of the request, determine whether the contract or subcontract has been completed and, if the **payment certifier** determines that it has been completed, the **payment certifier** must issue a **certificate of completion**.
- (4) If a **certificate of completion** is issued, the **payment certifier** must, within 7 days,
- (a) Deliver a copy of the certificate to the owner, the head contractor, if any, and the person at whose request the certificate was issued,
 - (b) Deliver a notice of **certification of completion** to all persons who submitted a request under subsection (2) in relation to the contract or subcontract, and
 - (c) Post, in a prominent place on the improvement, a notice of **certification of completion**.”
- (g) The lien **holdback** period is addressed in section 8 of the B.L.A., which reads in part as follows:
- 8 (1)** If a **certificate of completion** is issued with respect to a contract or subcontract, the **holdback** period in relation to
- (a) The contract or subcontract, and
 - (b) Any subcontract under the contract or subcontract expires at the end of 55 days after the **certificate of completion** is issued.
- (2) The **holdback** period for a contract or subcontract that is not governed by subsection (1) expires at the end of 55 days after
- (a) The head contract is completed, abandoned or terminated, if the owner engaged a head contractor, or
 - (b) The improvement is completed or abandoned, if paragraph (a) does not apply.
- (h) **Holdback** accounts are addressed in section 5, of the B.L.A., which provides in part as follows:
- 5 (1)** Subject to subsection (8), an owner must
- (a) Establish at a savings institution a **holdback** account for each contract under which a lien may arise,
 - (b) Pay into the **holdback** account the amount the owner is required to retain under section 4, and
 - (c) Administer the **holdback** account together with the contractor from whom the **holdback** was retained.

...

(7) Failure by the owner to comply with subsection (l) (b) constitutes an act of default under the contract and the contractor, on 10 days' notice, may suspend operations for as long as the default continues. The contractor/lien-holder has the right to regularly check to see if the funds are going into the **holdback** account.

(8) This section does not apply to

(a) if it is an owner, the government, a government corporation as defined in the *Financial Administration Act* or any other public body designated, by name or by class, by regulation, or

(b) A contract in respect of an improvement, if the aggregate value of work and material provided is less than \$100 000.

APPENDIX B

Form 2

Builders Lien Act

(Section 7 (4))

Notice of Certification of Completion

NOTICE: Re [Name or popular description of project]

Take notice that on [date] a ***certificate of completion***, or court order to that effect, was issued with respect to a contract (or subcontract) between

..... [owner, contractor or subcontractor]

and

..... [contractor or subcontractor]

in connection with an improvement on land described as follows:

for the provision of [brief, general description of work done under contract or subcontract]:

All persons entitled to claim a lien under the Builders Lien Act and who performed work or supplied material in connection with or under the contract are warned that the time to file a claim of lien may be abridged and section 20 of the Act should be consulted.

APPENDIX C

Form 3

Builders Lien Act

(Section 7 (10))

Certification of Completion

I [name of **payment certifier**], of [address],
British Columbia, certify that, for the purposes of the Builders Lien Act, the following contract or
subcontract was completed on [month, day, year]:

Street address or other description of the land affected by the improvement:

Brief description of the improvement:

Brief description of the contract or subcontract, including the date of the contract and the names of the
parties to it:

Signed: [signature of **payment certifier**]