

## Holdback Provisions under the July 1, 2018 Changes

### The July 1, 2018 Threshold

The new holdback provisions apply under contracts procured or entered into after July 1, 2018 (with the exception, due to a legislative quirk, of those procured or entered into before December 6, 2018 where a lease was registered against the Premises). A contract is deemed to have been “procured” when the procurement process commences. Examples of a “procurement” process includes a call for tenders, an RFP, an RFQ or a “request for qualifications”. The date a *subcontract* was procured or entered into is irrelevant: it is the date the contract was procured or entered into that governs.

### Retention and Mandatory Payment of Basic Holdback

- the holdback may now be retained through a letter of credit, bond or prescribed form.
- in addition, the payment of the basic holdback is **now mandatory** once all liens that may be claimed against it have expired or been paid, discharged or vacated, **unless** the person having the holdback obligation publishes a **notice of non-payment of holdback** in (currently) the *Daily Commercial News* no later than **20 days** before the basic holdback is due to be released **and provides a notice** in that regard to the person they don't intend to pay within the next **3 days**. The notice can be provided in electronic or paper format and need not be “given” by service or registered mail (as is the case with many other documents).
- Come October 1, 2019 and where the adjudication provisions of the new *Act* apply, the person providing a notice of non-payment of holdback must also refer the non-payment of the holdback by the person above it to Adjudication.
- on the one hand, the “*holdback-payment-is-mandatory-unless-notice-is-given*” requirement will assist contractors and subcontractors to better assess whether or not to preserve a claim for lien. On the other hand, the provisions effectively eliminate pay-when-paid provisions when it comes to holdback: if you don't give a notice of non-payment of holdback, 20 days before it is due, you will have to pay it even if you don't get it and even if the person above you did not give you a notice of non-payment. Searching the Daily Commercial News to see if the Owner has published a Notice of Non-Payment of holdback is therefore a good practice to follow.

### Payment of Basic Holdback on an Annual or Phased Basis

- so long as statutory conditions are met, the *Act* now allows the basic holdback to be released on an annual or phased basis where the contract calls for the such release and is worth \$10,000,000.00 or more. The conditions precedent to early release are:
  - that the contract provides for the annual or phased holdback release and includes either a schedule that is longer than a year or phases identified for the payment of accrued holdback; and
    - there are no preserved or perfected liens in respect of the contract; or
    - all liens in respect of the contract have been satisfied, discharged or otherwise provided for under the *Act*.
- there is no requirement that the Owner (or anyone) publish or give a Notice that accrued basic holdback is due for early, phased release. Subcontractors may accordingly wish to ask if the contract provides for phased or annual release of holdback pursuant to a s. 39 request under the *Act*.