

**AMENDMENT TO MTO GENERAL CONDITIONS OF CONTRACT, NOVEMBER 2016 -
Construction Act Changes**

Special Provision No. 100S19

April~~January~~ 2022~~20~~

GC 1.07 Definitions

Subsection GC 1.07 of the MTO General Conditions of Contract is amended by the addition of the following definitions:

Basic Holdback means the statutory holdback, equal to 10% of the services or materials as they are supplied under the Contract, required to be retained pursuant to the *Construction Act*.

Bonds means both the Contract Bonds and the Statutory Bonds prescribed in the Tender Documents.

Construction Act means the *Construction Act*, R.S.O. 1990, c.C.30, as amended.

Contract Bonds means the surety bonds executed by the Contractor and its Surety prescribed in the Tender Documents but does not include Statutory Bonds.

Finishing Holdback means the statutory holdback, equal to 10% of the Finishing Work, required to be retained pursuant to the *Construction Act*.

Finishing Work means the Work to be completed after certification of Substantial Performance and prior to and necessary to be supplied or performed to complete the Contract.

Finishing Work Deficiency List means a list of deficiencies and Work yet to be completed identified, independently, by the Contractor and the Contract Administrator.

Proper Invoice means as defined in the *Construction Act*, supported by quantity of Work completed sheets, and that complies with the requirements of the Contract Documents.

Rate of Interest means the prejudgment interest rate determined under subsection 127 (2) of the *Courts of Justice Act*.

Statutory Bonds means the surety bonds executed by the Contractor and its Surety and required to be furnished by Part XI.1 of the *Construction Act*.

Total Bid Price means the price submitted by the Contractor at tender closing.

Written Notice of Lien means a written notice of lien in the prescribed form pursuant to the *Construction Act*, given by a person with a lien that identifies the payer and identifies the premises, and states the amount that the person has not been paid and is owed to the person by the payer.

GC 1.08 Substantial Performance

Paragraph GC 1.08.01 of the MTO General Conditions of Contract is amended by deleting point b) in its entirety and replacing it with the following:

- b) When the Work to be performed under the Contract is capable of completion or, where there is a known defect, correction, at a cost of not more than:
 - i. 3% of the first \$1,000,000 of the Contract price,
 - ii. 2% of the next \$1,000,000 of the Contract price, and
 - iii. 1% of the balance of the Contract price.

Paragraph GC 1.08.02 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .02 For the purposes of this Contract, when the Work or a substantial part thereof is ready for use or is being used for the purposes intended and the Owner and the Contractor agree not to complete the Work expeditiously, the price of the services or Materials remaining to be supplied and required to complete the Work shall be deducted from the Contract price in determining substantial performance.

GC 1.10 Liens

Subsection GC 1.10 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .01 A lien is preserved when the claimant has given the Owner a copy of the claim for lien before the lien has expired pursuant to the *Construction Act*.
- .02 A preserved lien is perfected when the claimant commences an action in the courts to enforce the lien prior to the end of the period specified in Section 36 of the *Construction Act*.
- .03 A preserved lien becomes a perfected lien by sheltering under a perfected lien in accordance with the rules of sheltering specified in Subsection 36(4) of the *Construction Act*.
- .04 The Owner shall retain an amount sufficient to satisfy the amount of a lien set out in a written notice of lien Form 1 of Ontario Regulation 303/18 of the *Construction Act* in accordance with Subsection 24(2) of the *Construction Act*.

GC 4.10 Termination of the Contract

Subsection GC 4.10 of the MTO General Conditions of Contract is amended by the addition of the following paragraph:

- .03 If the Contract is terminated, the Owner shall publish the statutory notice of termination prescribed by Form 8 of Ontario Regulation 303/18 of the *Construction Act*, in the *Daily Commercial News* and the date of the termination of the Contract shall be the date specified in the statutory notice of termination for the Contract.

GC 4.12 Use of Performance Bond

Subsection GC 4.12 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

GC 4.12 Use of Performance Bonds

- .01 If the Contractor is in default of the Contract and the Contractor has provided a performance bond, the Owner may rely upon the performance bond and its conditions along with the Contract Documents.

GC 4.13 Owner Audit

Paragraph GC 4.13.04 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .04 Upon agreement with the results, any monies payable to the Contractor will be payable within 28 Days. Interest back to the time the amount became payable shall not be paid.

Paragraph GC 4.13.05 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .05 Upon agreement with the audit results, any monies due to the Owner shall be payable within 28 Days together with interest due from the time the amount was over paid.

GC 6.02 Indemnification

Paragraph GC 6.02.01 of the MTO General Conditions of Contract is amended by deleting point c) in its entirety and replacing it with the following:

- c) Made in writing within a period of six years from the date of Substantial Performance of the Work as set out in Certificate of Substantial Performance or, where so specified in the Contract, from the date of the Contract Completion Certificate.

GC 6.04 Bonding

Subsection GC 6.04 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

GC 6.04.01 General

- .01 If the Total Bid Price is \$500,000 or more, the Contractor shall furnish the Owner with Statutory Bonds, being a performance bond and labour and material payment bond in accordance with the *Construction Act*.
- .02 Such Statutory Bonds shall be obtained from a surety company or companies that is an insurer licenced under the *Insurance Act* to write surety and fidelity insurance.
- .03 The Contractor shall furnish the Owner with Contract Bonds as prescribed in the Tender Documents and satisfactory to the Owner.
- .04 Such Contract Bonds shall be obtained from a surety company or companies that is an insurer licenced under the *Insurance Act* to write surety and fidelity insurance.

GC 6.04.02 Performance Bond

- .01 With respect to the Statutory Bond for a performance bond, the Contractor shall furnish a performance bond using Form 32 of Ontario Regulation 303/18 of the *Construction Act* that is conditioned on the due performance of the terms of the Contract for the amount of 50% of the Total Bid Price.

GC 6.04.03 Labour and Material Payment Bond

.01 With respect to the Statutory Bond, the Contractor shall furnish a labour and material payment bond using Form 31 of Ontario Regulation 303/18 of the *Construction Act* that extends or guarantees payment protections to the Subcontractor and persons supplying labour and Material to the Contract for the amount of 50% of the Total Bid Price.

GC 7.01.06 Assistance to the Contract Administrator

Clause GC 7.01.06 of the MTO General Conditions of Contract is amended by the addition of the following paragraph:

.02 The Contractor shall submit quantities of Work completed by tender item to the Contract Administrator on a weekly basis to facilitate reconciliation of quantities of Work completed.

GC 7.12 Contractor's Right to Stop the Work or Terminate the Contract

Paragraph GC 7.12.03 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

.03 The Contractor may notify the Owner in writing, with a copy to the Contract Administrator, that the Owner is in default of contractual obligations, if the Owner fails to comply with the requirements of the Contract to a substantial degree.

GC 7.19 Accounts Payable

Paragraph GC 7.19.01 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

.01 The Contractor shall pay the Rate of Interest after 28 Days on accounts payable to the Owner at the Rate of Interest.

GC 8.02.04.01 Progress Payment Certificate

Clause GC 8.02.04.01 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

.01 The Contractor shall submit an application for progress payment monthly after starting the Work on the Contract. The application for progress payment shall be for Work completed at the agreed to monthly cut-off date.

Within seven Days following the agreed to monthly cut-off dates, the Contractor shall submit an updated application to the Contract Administrator.

The updated application shall contain two parts as follows:

Part 1 - A Proper Invoice which shall contain:

- a) Contractor's name and address;
- b) Date of the Proper Invoice and the period for Work performed;

- c) Information identifying the Owner and Contract number for Work performed;
- d) A description, including quantity where appropriate, of Work performed;
- e) The amount payable for the Work performed, and the payment terms;
- f) The name, title, telephone number and mailing address of the person to whom payment is to be sent, and;
- g) Tender item numbers, description, unit of measurement, original tender quantity, agreed upon changes to the tender quantity, total quantity completed to date, quantity completed previous Proper Invoice, quantity completed this period, unit price, dollars this period, and total dollars to date.

Subtotals shall be detailed for tender items, approved Change Orders and payment adjustments as defined elsewhere in the Contract Documents.

The tender item information appearing on the Proper Invoice shall conform exactly with those as shown in the bid tender document.

Part 2 - Quantity of Work Completed Sheets detailing:

- a) Tender item numbers, sub-item numbers, unit of measurement, location description, original tender quantity, agreed upon changes to the quantity, total quantity completed to date, quantity completed previous Proper Invoice, quantity completed this period and supporting reconciliation documentation.

The tender item information appearing on the quantity of Work completed sheets shall conform exactly with those provided in the bid tender document. The quantity of Work completed sheet information shall be sufficient to allow the Contract Administrator to verify and confirm the Work on the Proper Invoice for payment.

Proper Invoices and quantity of Work completed sheets shall be submitted in hard-copy or digital format. For payment purposes, the Contract Administrator shall review the updated application for progress payment within seven Days of receipt for completeness and to verify the quantities of Work have been completed in accordance with the Contract Documents.

Applications for progress payments containing deficiencies, errors, or non-compliance with the Contract Documents shall be deemed to contain an invoice that does not meet the requirements of a Proper Invoice and shall be returned to the Contractor for correction.

The Owner will pay the Proper Invoice no later than 28 Days after receiving the Proper Invoice.

GC 8.02.04.02 Payment Adjustment for Changes in the Fuel Price Index

Paragraph GC 8.02.04.02.01 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .01 The Owner shall adjust the payment to the Contractor based on changes to the Owner's fuel price index. The fuel price index shall be calculated by the Ontario Ministry of Energy, Northern Development and Mines and shall be based on the rack price, including taxes, of diesel fuel. The fuel price index shall be

published monthly in the Owner's Contract Bulletin for each calendar month and shall reflect the previous month's prices. The Contractor shall use this index when calculating flow through to truckers, Subcontractors, and shippers and suppliers.

GC 8.02.04.03 Certification of Subcontract Completion

Paragraph GC 8.02.04.03.02 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .02 The Contract Administrator shall determine if the subcontract has been satisfactorily completed with all required inspections and testing required for the subcontract work and, if the Contract Administrator so determines, shall certify completion using Owner standard form PH-CC-797, Certificate of Completion of Subcontract.

GC 8.02.04.04 Subcontract Statutory Holdback Release Certificate and Payment

Clause GC 8.02.04.04 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .01 At the time of issuance of the Certificate of Completion of Subcontract, the Contract Administrator shall:
 - a) Prepare a subcontract completion payment certificate showing:
 - i. The final prices for items;
 - ii. The amount of holdback monies;
 - iii. The amount due the Contractor.
 - b) Provide to the Contractor, the subcontract completion payment certificate within 10 Days of the date the subcontract was certified complete, for the Contractor to sign and return within five further Days. The Contract Administrator shall release to the Subcontractor through the Contractor the 10% holdback retained by the Owner in respect of the work covered by the said subcontract after being certified completed and providing that all lien claims that may be claimed against the holdback for the subcontract work have been expired or been satisfied or discharged, or otherwise provided for under the *Construction Act*, and providing that the Contractor has furnished to the Contract Administrator a statutory declaration in a form supplied by the Owner that the said Subcontractor has discharged all liabilities incurred by the Subcontractor in carrying out the said subcontract.
- .02 The Contractor shall make payment of the said subcontract to the Subcontractor concerned pursuant to the *Construction Act*.
- .03 Release of holdback monies by the Owner in respect of a subcontract according to the foregoing shall not relieve the Contractor or the Contractor's Surety of any of their responsibilities.
- .04 Payment for subcontracts certified complete pursuant to the Contract and the *Construction Act*, including the payment of the statutory holdback, shall be made no later than 120 Days of the date on which the Work was certified complete, when all the liens have been satisfied in accordance with Section 25 of the *Construction Act*.

GC 8.02.04.05 Certificate of Substantial Performance

Paragraph GC 8.02.04.05.02 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .02 Upon written application by the Contractor for Substantial Performance, the Contract Administrator shall conduct an inspection of the Work to determine if the Work is substantially performed and the date for Substantial Performance. The Contractor's application shall detail non-conformances, defects to be rectified, and Work yet to be completed. After inspection, the Contract Administrator shall provide a list of deficiencies and Work yet to be completed in addition to the Contractor's list. The Contractor's list of non-conformances, defects, and Work yet to be completed together with the Contract Administrator's list of same shall be combined and referred to as Finishing Work. All deficiencies and Work to be completed from the Finishing Work Deficiency List shall be completed prior to Contract Completion. Any additional defects and deficiencies for Work previously accepted as substantially performed shall be completed within 60 Days of Contract Completion, unless prevented by winter weather conditions; in such case, the defects and deficiencies shall be corrected by June 15th of the following year. Defects and deficiencies on Work completed after Substantial Performance shall be completed prior to Contract Completion.

Paragraph GC 8.02.04.05.04 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .04 Upon receipt of a copy of the Certificate of Substantial Performance, the Contractor shall arrange to have the certificate published in ~~thea construction trade newspaper-Daily Commercial News~~ and the Contractor shall provide to the Contract Administrator proof that the certificate was published. Where the Contractor fails to publish a Certificate of Substantial Performance within seven Days of receiving the certificate, the Owner ~~will~~shall publish the certificate in the *Daily Commercial News* and charge the Contractor \$1,000 for the costs of advertising and administration. Subject to the *Construction Act*, the 60-Day lien period shall start on the date the Certificate of Substantial Performance is published ~~in the~~ *Daily Commercial News*.

Paragraph GC 8.02.04.05.05 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .05 Except as otherwise provided for in Section 31 of the *Construction Act*, the 60-Day lien period prior to the payment of statutory holdback shall commence from the date of publication of the Certificate of Substantial Performance as provided for in paragraph GC 8.02.04.05.04.

GC 8.02.04.06 Substantial Performance Payment and Statutory Holdback Release Payment Certificates

Clause GC 8.02.04.06 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

GC 8.02.04.06 Substantial Performance Payment and Statutory Holdback Release Payment

- .01 Upon receipt of the application for payment at Substantial Performance, the Contract Administrator shall check the application and advise the Contractor of any discrepancies. Any of these discrepancies that are unresolved prior to the expiry of the lien period shall be treated as set-offs.

- .02 Subject to any outstanding liens and permissible set-offs, the Owner will issue payment, including the release of the Basic Holdback on the Work completed, within 28 Days, where all the liens have expired or been satisfied, discharged or otherwise provided for pursuant to the *Construction Act*.
- .03 In addition to any permissible set-offs, Finishing Holdback shall be retained at the rate of 10%, on all Work performed after the date of the Certificate of Substantial Performance.
- .04 If the Contract provides for a completion schedule that is longer than one year, Total Bid Price is greater than \$10,000,000 and there are no outstanding liens, the Contractor may request payment of the retained Basic Holdback on an annual basis. When a request is received, the Owner shall issue payment to reduce the holdback on work done from 10% to 2½%, plus the amount of the Owner's set-offs, provided that the Contract had not been substantially performed and the estimated value of the work performed is greater than 60% of the original tender value for a contract having an expected duration of two construction seasons or less, or 40% for a Contract having an expected duration of more than two construction seasons.
- .05 The holdback may not be released to the Contractor within the timeline under GC 8.02.04.06 when Form 6 of Ontario Regulation 303/18 of the *Construction Act* is provided to the Contractor to indicate notice of non-payment of holdback and published by the Owner in the *Daily Commercial News* as provided in Section 27.1 of the *Construction Act*. The Contract Administrator shall notify the Contractor, in writing, of its publication no later than three Days after the publication of the notice of non-payment.
- .06 Within three Days after receiving Form 6 of Ontario Regulation 303/18 of the *Construction Act* from the Contract Administrator, the Contractor shall notify the affected Subcontractor(s) providing a copy of the notice.
- .07 Payments for Work certified as substantially performed, including release of holdback, shall be made no later than 135 Days of the date of publication of substantial performance. The Owner shall release the holdback at the end of the 60-Day lien period providing all liens are expired or been satisfied, discharged or otherwise provided under the *Construction Act*. This payment shall be made within 28 Days of the expiry of the 60-Day lien period and subject to Subsection 26.1 of the *Construction Act*.

GC 8.02.04.07 Certificate of Contract Completion

Paragraph GC 8.02.04.07.03 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .03 If the Contractor has not applied for or received a Certificate of Substantial Performance, upon receipt of a copy of the Certificate of Contract Completion and the Certificate of Substantial Performance, the Contractor shall arrange to have the Certificate of Substantial Performance published in a construction trade newspaper~~the *Daily Commercial News*~~ and the Contractor shall provide to the Contract Administrator proof that the certificate was published. Where the Contractor fails to publish a Certificate of Substantial Performance within seven Days of receiving the certificate, the Owner will~~shall~~ publish the certificate in the *Daily Commercial News* and charge the Contractor \$1,000 for the costs of advertising and administration. Subject to the *Construction Act*, the 60-Day lien period shall start on the date the certificate is published ~~in the *Daily Commercial News*~~.

Paragraph GC 8.02.04.07.05 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .05 Upon receipt of the application for payment at Contract Completion, the Contract Administrator shall check the application and advise the Contractor of any discrepancies. Any of these discrepancies that are unresolved prior to the expiry of the 60-Day lien period shall be treated as a set-off.

Paragraph GC 8.02.04.07.06 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .06 Subject to any outstanding liens and permissible set-offs, the Owner will issue payment, including the release of any Finishing Holdback on the Work completed, within 28 Days, where all the liens have expired or been satisfied, discharged or otherwise provided for pursuant to the *Construction Act*.

GC 8.02.04.09 Interest for Late Payment

Clause GC 8.02.04.09.01 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .01 When the Contractor has complied with the requirements of the Contract and when payment by the Owner to the Contractor for Work performed, monies to be paid upon the determination resulting from an Adjudication, or for release of the statutory holdback is delayed by the Owner, then the Contractor shall be entitled to interest upon the late payment for Work performed or for the release of the statutory holdback at the Rate of Interest.

GC 8.02.04.10 Interest for Clarifications and Claims

Clause GC 8.02.04.10 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

GC 8.02.04.10 Interest for Compensation Requests and Claims

- .01 Where a Compensation Request and any subsequent Claims are submitted according to the time limits and/or procedure described by section GC 3.14, Compensation Request, and GC 3.15, Dispute Resolution, the Owner will pay the Contractor the Rate of Interest on the amount of the agreed upon price for the Work or on the amount of the settled Claim. The Rate of Interest shall commence from a date 28 Days following the established cut-off date which immediately follows the completion of the Work to which the negotiation applies.

GC 8.02.04.11 Owner's Set-Off

Clause GC 8.02.04.11 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .01 Subject to Section 26 and Subsection 27.1 of the *Construction Act* and pursuant to Section 12 of the *Construction Act*, the Owner shall retain from monies owing to the Contractor under the Contract an amount sufficient to cover all debts, claims or damages related to the Contract, any outstanding or disputed liabilities the cost to remedy deficiencies, the reduction in value of substandard portions of the Work, claims for damages by third parties that have not been determined in writing by the Contractor's insurer, undetermined claims by the Owner under paragraph GC 8.01.02, a), and any assessment due the Workplace Safety and Insurance Board.
- .02 Under these circumstances the Owner shall give the Contractor notice.

GC 8.02.04.12 Contract Completion and Statutory Holdback Release Payments

Clause GC 8.02.04.12 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

GC 8.02.04.12 Contract Completion, Statutory Holdback Release and Final Payment

- .01 The Owner shall release the statutory holdback so as to discharge all claims in respect of the statutory holdback where all liens that may be claimed against the Finishing Holdback have expired or been satisfied, discharged or otherwise provided under the *Construction Act*.
- .02 Final payment including payment of statutory holdback shall be made no later than 120 Days from the date of Contract Completion upon the expiry of all liens or upon the liens being satisfied, discharged or otherwise provided for pursuant to the *Construction Act*.

GC 8.02.04.13 Liens Filed Late

Clause GC 8.02.04.13 of the MTO General Conditions of Contract is deleted in its entirety.

GC 8.06 Taxes and Duties

Paragraph GC 8.06.05 of the MTO General Conditions of Contract is deleted in its entirety and replaced with the following:

- .05 The Contractor shall add the HST to all invoices and Proper Invoices.

WARRANT: All contracts.