

## Non-Statutory Holdbacks - Industry Feedback

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These info-sheets are produced by Saskatchewan's construction industry to provide information to all parts of the construction supply chain. Each info-sheet focuses on one particular contract clause that is often seen as problematic and challenging. This info-sheet is intended to encourage discussion between all parties to construction contracts and to support the implementation of best practices wherever possible.

### Example Clause:

*In addition to the statutory holdbacks required for third party lien claims, and the hold back in Article 11.4 above, the Owner may hold back up to 20% of all amounts payable under the Contract documents off the progress payments until the Contractor has performed all its obligations under the Contract and satisfied all the conditions for final completion of the Contract. In addition to other remedies available at law, the Owner may set off against this holdback amount as compensation: a) for any costs incurred as a consequence to the Contractor's failure to meet the agreed upon schedule, b) any costs incurred in addressing any lien claims and c) any other damages arising out of the Contractor's breaches of contractual commitments.*

### What the clause is intended to do:

Non-statutory holdbacks are typically used by the owner as a mechanism to ensure contractor performance to pre-determined obligations, or to limit the owner's downside risk. The theory behind these holdbacks is that contractor performance, and risk mitigation, can best be delivered through withholding payment.

### Why the clause is problematic for industry:

- Holdbacks cause cashflow issues for contractors. Contractors are still required to pay for 100% of their material and supplies, reducing operating cash and potentially crippling a company's operations.
- Non-statutory holdbacks are asking contractors to finance the project. This additional risk reduces their ability to tender future projects.
- The amount is arbitrary and is not tied to contractor performance so there is no incentive to expedite performance or ensure quality.
- Non-statutory holdbacks may be illegal and there is uncertainty how they fit within prompt payment legislation.
- There may be legal issues as contractors are not being paid but statutory declarations are being requested at every progress claim.

### Better option for the owner:

- Rely on the project team to assess progress billing and pay according to progress.
- Performance bond and labour bond mechanisms are in place to ensure performance.
- Structure your contract to hold contractors accountable for deficient work.
- Place a reasonable value to deficiencies and tasks (i.e. manuals and deficiency lists), not an arbitrary value.



### What Industry can do:

As a contractor, when you face a non-statutory holdback clause, you should consider a few mitigation strategies, including:

- Pushing back during the tender period. Once you submit your tender you're a party to the contract;
- Sending a request for information (RFI) for more details including the why; and/or
- Know your deal, review, and understand your contract and the risks you are agreeing to.

For more information about this issue, or any issue related to procurement and contracts within Saskatchewan's construction industry, please reach out to the Saskatchewan Construction Association at 306-525-0171 or [sca@scaonline.ca](mailto:sca@scaonline.ca).

*Prepared by the Saskatchewan Industry Advisory Council, a committee of the Saskatchewan Construction Association, representing 19 industry and trade associations in the province, as a guideline of recommended industry practice.*