

The Construction Remedies Act

Holdback Trust Funds and Compliance with the Act

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4/19/2022

New Brunswick Construction
Association

MCINNES
COOPER

CRA | Key Changes in Law

- ✓ Date of Proclamation - November 1 , 2021
- ✓ Date of Proclamation – Holdback Trust Accounts – April 1, 2022
- ✓ Holdback
- ✓ Holdback Trust Accounts
- ✓ Payment Certifier
- ✓ Trustees

Statute, Forms and Regulations

- The Act can be found here:
 - [Construction Remedies Act](#)
- The Forms are in the Regulations
 - [Forms](#)

Basic Definitions

- “architect” means a person who is entitled to practise architecture under the *Architects Act*.
- “engineer” means a person who is entitled to practise professional engineering under the *Engineering and Geoscience Professions Act*.

Basic Definitions

- “financial institution” means
 - (a) a bank listed in Schedule I, II or III of the *Bank Act* (Canada),
 - (b) a credit union as defined in the *Credit Unions Act*,
 - (c) a loan or trust company licensed under the *Loan and Trust Companies Act*, and
- **Translation – A Bank or Credit Union**

Payment Certifier

- “payment certifier” means the person on whose certificate payments are made on a contract. (S. 1)
- payment certifier is required to be
 - (a) an architect,
 - (b) an engineer, or
 - (c) if not an architect or engineer, identified in the relevant contract as being the payment certifier. (S. 40)

What is a “Lien” (S. 20(1))

A person who supplies services or materials for an **improvement** for an owner, contractor or subcontractor has a lien for the amount of wages owed to the person or for the contract price or subcontract price of those services or materials, as the case may be, or for as much of those amounts that remain owing to the person, that, subject to sections 22 and 23, attaches to the owner’s estate or interest in

- (a) the land in respect of which the improvement is made, and
- (b) the improvement.

Improvement (S. 1)

- “improvement” means, in respect of any land,
 - (a) any alteration, addition or capital repair to the land,
 - (b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or
 - (c) the complete or partial demolition or removal of any building, structure or works on the land.

“capital repair” (S. 2)

- ... a capital repair to land ... is any repair intended to extend the normal economic life of the land ... or of any building, structure or works on the land ..., or to improve the value or productivity of the land, ..., building, structure or works, but does not include maintenance work performed in order to prevent the normal deterioration of the land, ... , building, structure or works or to maintain the land, ... , building, structure or works in a normal, functional state.

Application of the Construction Remedies Act

- Applies to Crown and Local Government entities
 - Highways (road, road allowance, street, lane, thoroughfare, bridge, subway, pier, ferry, square, and public place, appropriated to the public use)
 - Schools, Hospitals, and government buildings

Substantial Performance (S. 7(1))

7(1) For the purposes of this Act, a contract is substantially performed

(a) when the improvement under the **contract is ready for use or is being used for the purposes intended**, and

(b) when the improvement is capable of completion or, if there is a known defect, of correction, at a cost of not more than

(i) 3% of the first \$250,000 of the contract price,

(ii) 2% of the next \$250,000 of the contract price, and

(iii) 1% of the balance of the contract price.

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- Say \$1M Contract
 - 3% of 250K = \$7,500
 - 2% of 250K = \$5,000
 - 1% of Balance = ...
 - 1% of 500k = \$5,000
- $7500 + 5000 + 5000 =$
- Defect Value of \$17,500 on \$1,000,000

Completion Cost (S. 7(2))

When the improvement is ready for use or is being used for the purposes intended and the owner and the contractor agree not to complete the improvement expeditiously or, due to reasons beyond the control of the contractor, the improvement cannot be completed expeditiously, **the value of the services or materials remaining to be supplied and required to complete the improvement shall be deducted from the contract price in determining substantial performance.**

Completion of contract (S. 8)



A contract is completed when the cost of completing it, correcting a known defect or supplying the services or materials remaining to be supplied for the improvement is not more than 1% of the contract price.

Owner's Trust (s. 11(2))

- Owner's trust fund includes:
 - (a) all amounts received in the financing of the improvement,
 - (b) proceeds of a sale
 - (c) funds in the owner's hands
 - (d) unpaid contract price
 - (e) insurance proceeds
- Owner's Trust does not apply to Crown or Local Government

Liability for a Breach of Trust (s. 13(1) & 17(1))

- If a corporation is a trustee of a trust fund ... any of the following persons who assents to, or acquiesces in, conduct that the person knows or reasonably ought to know amounts to a breach of trust by the corporation is liable for the breach of trust:
 - (a) a director or officer of the corporation; and
 - (b) any person who has effective control of the corporation or its relevant activities, including an employee or agent of the corporation.

Holdback (s. 34(1))

An owner who is liable to pay for the supply of services or materials under a contract under which a lien may arise **shall retain a holdback equal to 10%** of the contract price by retaining an amount equal to 10% of the value of the services or materials supplied under the contract, as they are actually supplied, **until the expiry of the holdback period** in subsection 47(1) or (2), as the case may be.

Holdbacks (S. 34)

- ✓ 10% owner holdback (S. 34(1))
- ✓ 10% completion holdback (S. 34 (2))
- ✓ 5% on Crown (DTI) bonded work (S. 34(4))
- ✓ 10 % on Local Government work
- ✓ Mortgage Holdback by Financial Institution (S. 34(5))

No Set-off Holdbacks (S. 36)

- There is no set-off against the holdback until all liens that may be claimed have been discharged

Holdback Trust Account (S. 37)

- Trust Account Does not apply
 - Crown (Province of New Brunswick)
 - Local Government
 - Where a Financial Institution (Bank or Credit Union) retains the Holdback
 - Contract Price is below \$100,000 - Regulation 4(2)

Holdback Trust Account

- The *Owner* must deduct 10% holdback as the value of services or materials are supplied by the *Contractor* (s. 34(1)).

Contract Value 500K	Owed	Holdback	Payment to Contractor	HST	Payment to Contractor
Progress Draw 1	\$100,000.00	\$10,000.00	\$ 90,000.00	\$ 13,500.00	\$ 103,500.00
Progress Draw 2	\$200,000.00	\$20,000.00	\$ 180,000.00	\$ 27,000.00	\$ 207,000.00
Final Draw 3	\$200,000.00	\$20,000.00	\$ 180,000.00	\$ 27,000.00	\$ 207,000.00
Holdback Payment			\$ 50,000.00	\$ 7,500.00	\$ 57,500.00
Total Payment			\$ 500,000.00	\$ 75,000.00	\$ 575,000.00

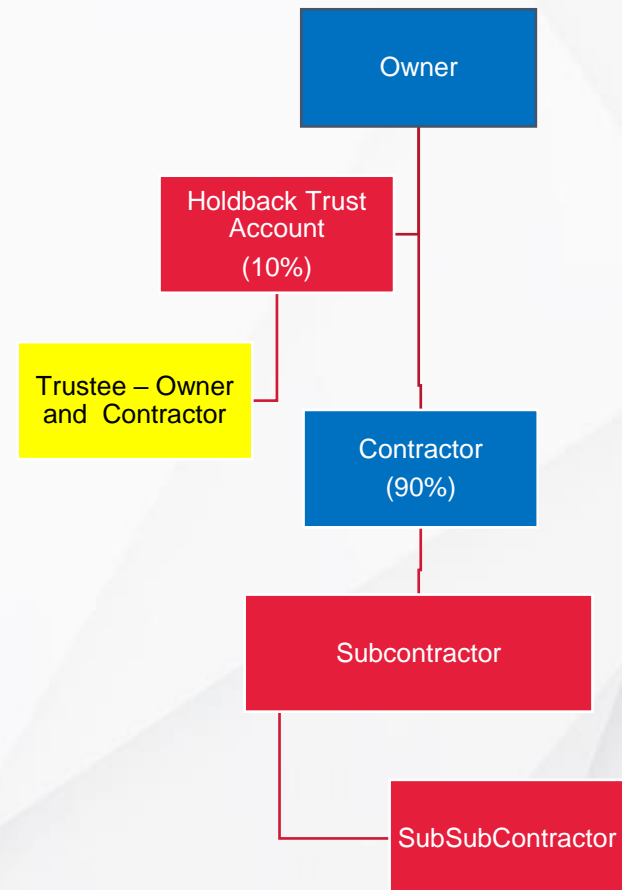
Holdback Trust Account – Completion Cost

- If the Contract is substantially performed, the *Owner* must deduct 10% holdback as the value of services or materials for the completion are supplied by the *Contractor* (s. 34(2)).

Contract Value 500K	Owed	Holdback	Payment to Contractor	HST	Payment to Contractor
Final Draw 3	\$450,000	\$45,000	\$405,000	\$60,750	\$465,750
Holdback Payment			\$45,000	\$6,750	\$51,750
Completion Costs	\$50,000	\$5,000	\$45,000	\$6,750	\$51,750
Completion Holdback			\$5,000	\$750	\$5,750

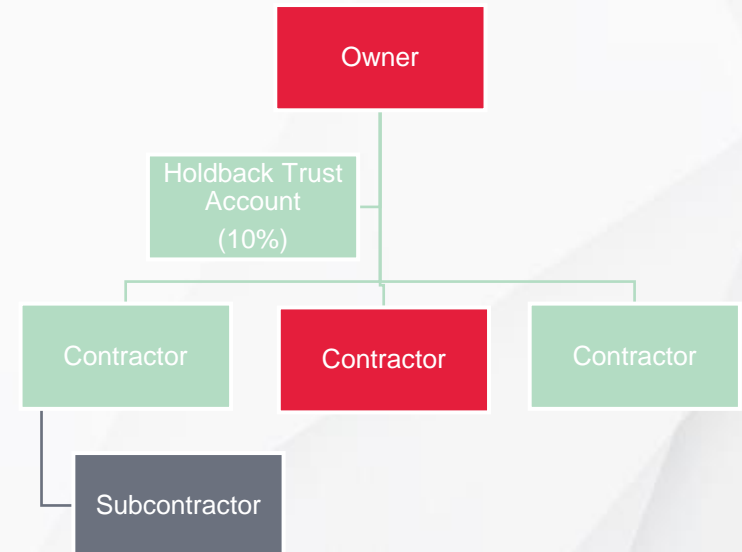
Holdback Trust Account

- Simple Project (S. 37(4))
 - Jointly Administered with two Trustees
 - Owner
 - Contractor
 - 10% of the Contract Price between Owner and Contractor



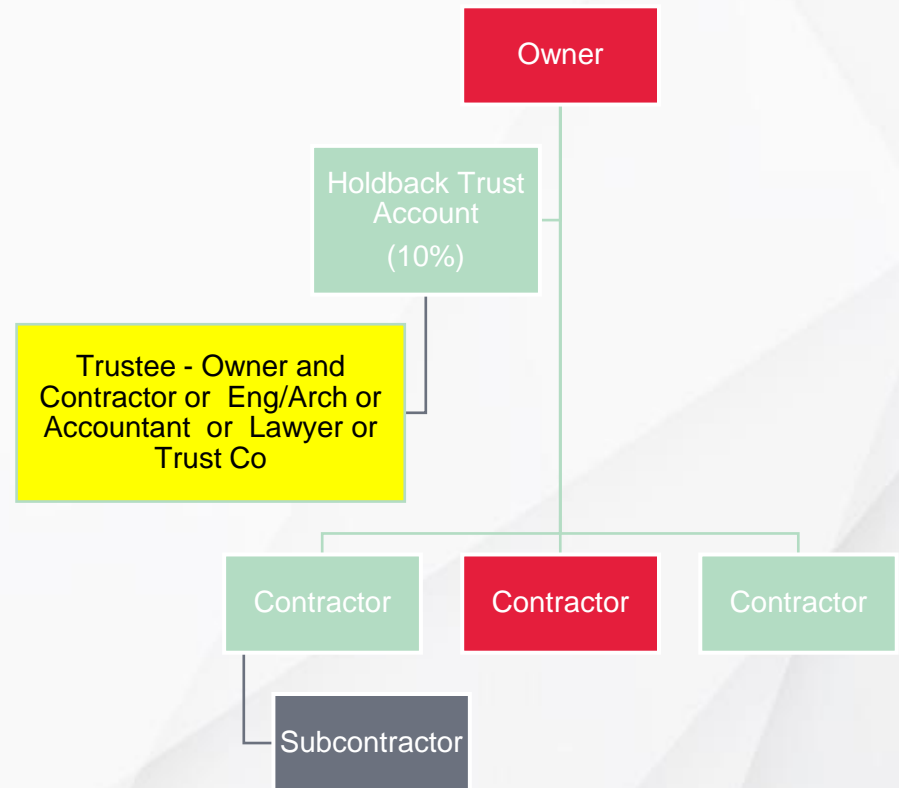
Holdback Trust Account

- Two or more contracts (S. 37(5))
 - Single trust account per improvement
 - Jointly administered with two Trustees
 - 10% of the contract price between Owner and Contractor



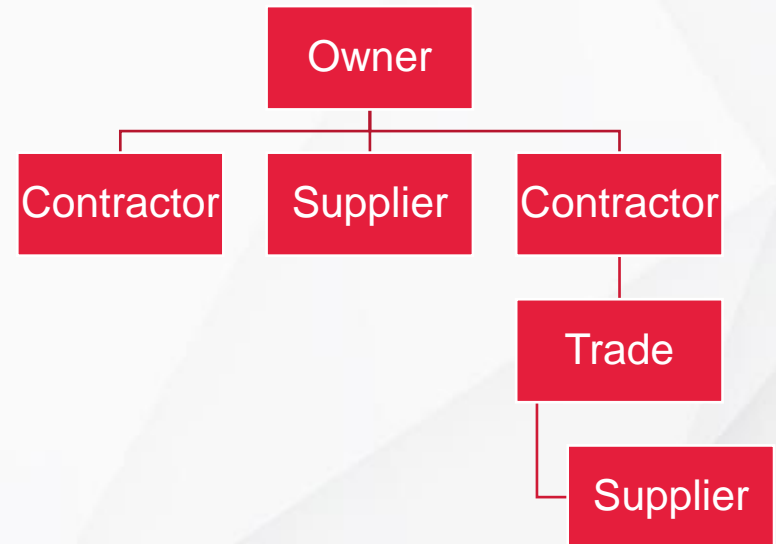
Holdback Trust Account

- Two or more Contracts (S. 37(5))
 - Trustee can be;
 - A contractor (not agent of owner)
 - Lawyer
 - Architect or Engineer (Not- the Payment Certifier)
 - Accountant
 - Trust Company



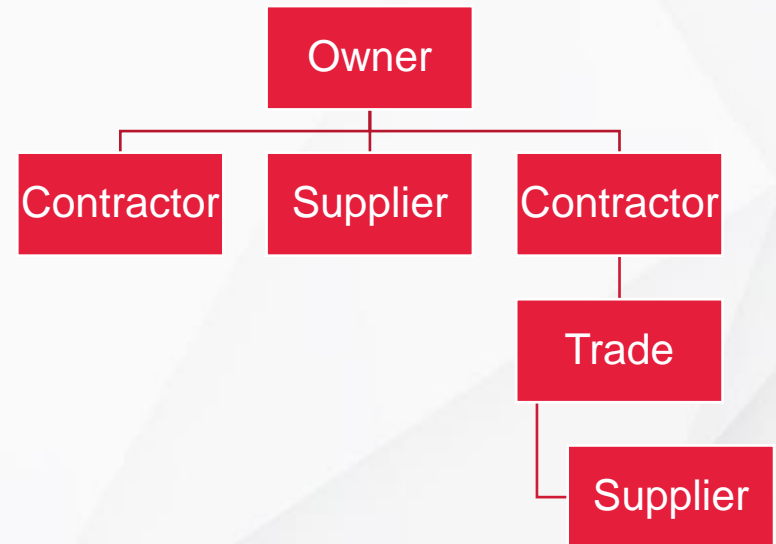
Holdback Trust Account

- Beneficiaries of the Trust
 - Contractor
 - Subcontractor
 - Sub-subcontractor
 - Supplier
 - Worker
 - Any person who contributed



Holdback Trust Account - Trustee

- Obligation of the Trustee
 - Accountable for the funds to the beneficiaries of the trust
 - Funds must be disbursed in accordance with the Act



Holdback Trust Account - Trustee (S. 37(7))

- The trustees of a holdback trust account referred to in shall maintain traceability by keeping written records of the following:
 - (a) the payments that are deposited into and withdrawn from the account;
 - (b) any transfers made for the purpose of the trust;
 - (c) the names of the parties involved in the transactions referred to in paragraphs (a) and (b); and
 - (d) the amount retained as a holdback in the trust account for each contract

Holdback Trust Account

- Trust Account
 - Applies for contracts over \$100,000
 - Owner needs to open a trust account
 - After holdback periods expire (and no liens filed)
 - Requires two “signatures” to release funds
 - 1) Owner Signature
 - 2) Contractor or other Trustee

All payments from a holdback trust account require the signatures of **both** trustees.

Holdback Trust Account – Interest (S. 38(1))

- Owner gets the interest in the Holdback Trust Account during the Holdback Period
- Contractor gets the interest after the Holdback Period.

Holdback Trust Account – Mortgage

If a mortgagee is a financial institution and is authorized by an owner to disburse the money secured by a mortgage, the mortgagee may retain as a holdback the amount required to be retained by the owner under subsection (1) or (2) and the retention by the mortgagee of that amount is deemed to be compliance with this section by the owner.

Holdback Trust Account - Mortgage (S. 34(6))

- A mortgagee that retains or agrees to retain a **holdback**
 - (a) has the same **rights and obligations** in relation to the holdback as if it had been retained by the owner, and
 - (b) **is liable** to the owner or any lienholder who suffers loss or damage as a result of the failure of the mortgagee
 - (i) to retain the holdback as agreed, or
 - (ii) to fulfil the mortgagee's obligations in relation to the holdback.

Holdback Period (S. 47)

- 60 days from Substantial Performance (S. 47(1))
- 60 days from Completion, abandonment or Termination(S. 47.2)
- 60 days, after “Completion” if a completion cost was determined after Substantial Performance
- 60 days after “Completion” if a subcontract has been certified

Holdbacks | Annual release (projects > \$10M)

- Completion date longer than one year
- Contract provides for the annual basis
- Exceeds amount in regulation
- No liens

Holdbacks | Phased release (projects > \$10M)

- Contract
 - ✓ Provides for a phased release
 - ✓ Identifies each release
- Exceeds amount in the regulation
- No liens

Certificate of Substantial Performance (S. 41)

- If there **is a payment certifier** in respect of a contract, at the request of the contractor, **the payment certifier shall determine whether the contract has been substantially performed**, and if so determined the payment certifier shall certify the substantial performance of the contract by signing a certificate of substantial performance.
- If there is **no payment certifier** in respect of a contract, at the request of the contractor, **the owner and contractor shall jointly determine whether the contract has been substantially performed**, and if so determined they shall certify the substantial performance of the contract by signing a certificate of substantial performance.

Certificate of Substantial Performance (S. 41(2))

- [Form 7](#)
- 7 days to determine whether contract has been substantially performed

S. 41(2) B.C. 1990

FORM 7

**CERTIFICATE OF SUBSTANTIAL
PERFORMANCE OF THE CONTRACT**
(Construction Remedies Act, S.N.B. 2020, c.29, s.42)

*(County and Rural Community/Regional Municipality/Town/City/
Village in which land is located)*

(civic address or, if there is no civic address, the location of the land)

Name of owner: _____

Address for service: _____

Name of contractor: _____

Address for service: _____

Certificate of Substantial Performance (S. 41 (9))

- Within 7 days, after receiving a copy, the contractor shall post the certificate
 - ✓ at the office of the improvement or
 - ✓ in a prominent place
 - ✓ And, if provided, publish

Name of payment certifier (if applicable): _____

Address: _____

I/We certify that the contract for the improvement described below to the identified land was substantially performed on: _____
(date the contract was substantially performed)

(short description of the improvement)

Date certificate signed: _____

(payment certifier if there is one)

(owner and contractor, if there is no payment certifier)

Certification of Subcontracts

- If there is a Payment Certifier, the Payment Certifier may agree to certify completion of a subcontract;
- If there is no Payment Certifier, the Owner and Contractor may agree to certify completion
- Holdback can be reduced by the holdback on the Subcontract
- Completion – Not more than 1% of contract price remaining
- Holdback period of 60 days from signing certificate of completion of Subcontract

Notice of Certificate of Completion of Subcontract (S. 47(4))

If a subcontract has been certified or declared to be completed under section 44, the holdback required to be retained under subsection 34(1) with respect to the subcontract and any subcontract under the subcontract shall be retained for 60 days after the date the certificate of completion of subcontract is signed or the declaration of completion of subcontract is made, as the case may be.

Notice of Certificate of Completion of Subcontract

- [Form 8](#)
- Completion

FORM 8
**CERTIFICATE OF COMPLETION OF
SUBCONTRACT**
(Construction Remedies Act, S.N.B. 2020, c.29, s.45)

Name of subcontractor: _____
Address for service: _____

Name of owner: _____
Address for service: _____

Name of contractor: _____
Address for service: _____

Name of payment certifier (if applicable): _____

Certificate of Substantial Performance Posting (S. 41(9))

41(9) Within seven days after receiving a copy of a certificate of substantial performance, or after signing a certificate with an owner, as the case may be, a contractor shall

(a) post a copy of the certificate, or cause a copy to be posted,

(i) at the office at the site of the improvement, if there is one, otherwise, in a prominent place at the site of the improvement, or

(ii) on a website maintained by or on behalf of the owner if the following requirements are met:

(A) all lienholders in respect of the improvement are given the website address and any other information required to view the posted certificate; and

(B) no fees are charged for posting certificates, searching the website or viewing the posted certificates, and

Certificate of completion of Subcontract | Posting (S. 47(4))

- Within seven days after receiving a copy of a certificate of completion of subcontract, or after signing a certificate with an owner, as the case may be, a **contractor shall**
 - (a) post a copy of the certificate, or cause a copy to be posted,
 - (i) at the office at the site of the improvement, if there is one, otherwise, in a prominent place at the site of the improvement, or
 - (ii) on a website maintained by or on behalf of the owner if the following requirements are met:
 - (A) all lienholders in respect of the improvement are given the website address and any other information required to view the posted certificate; and
 - (B) no fees are charged for posting certificates, searching the website or viewing the posted certificates, and

Crown and Local Government Work (S. 83(1))

- Where owner is Crown or Local Government
 - Performance and Labour and Material is required for Contracts over \$500,000
 - Liens against public owner's holdback and, sometimes, owner's land

Labour and Material Payment Bonds

- L&M Bond is Two Tier Bond ([Form 18](#))
 - 50% of Contract Price
 - Extend protection to Sub-Subcontractors (Regs 11 (1))
 - “A labour and material payment bond shall extend protection to a sub-subcontractor up to an amount equal to the amount that the sub-subcontractor would be eligible to recover from a non-Crown owner if the sub-subcontractor were claiming a lien under the Act for the services and material actually supplied by the sub-subcontractor to the subcontractor for the improvement.”
 - Form 18 – Limits the Coverage to the Holdback (S.2)

To Do List



- Start of Contract
 - Determine
 - Trust Account or Mortgage Finance
 - Trustees
 - Accounting for 10%
 - Determine whether progress release
 - Annual
 - Phased
 - Subcontract

To Do List



- Startup
 - Determine certification process
 - Posting/publication of notices
 - Required documents for release of Holdback
- During Contract
 - Complete and Post Form 8 for Subcontractor Releases

To Do List

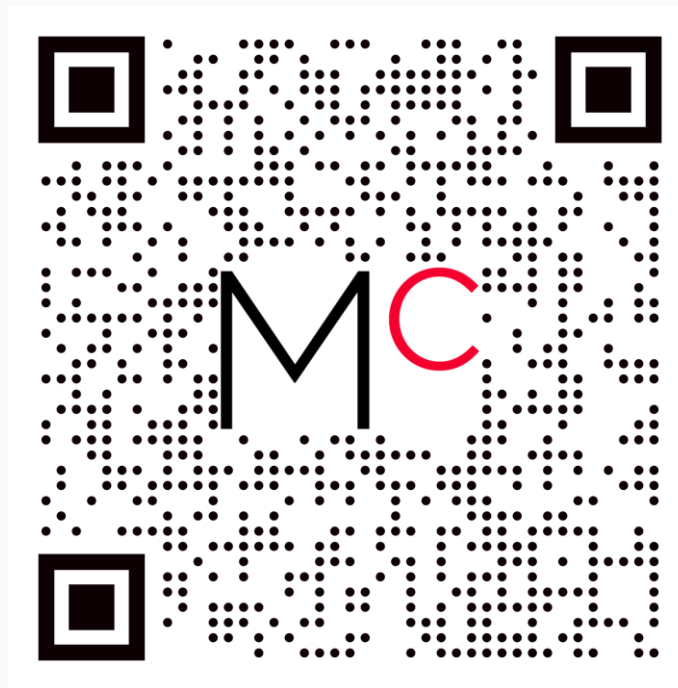
- During Contract (Substantial Performance)
 - Deficiency List (Cost)
 - Cost to Complete
 - 3-2-1 For substantial Performance
 - Request and Prepare Form 7
 - Post Form 7
 - Wait 60 Days
 - Two Signatures to Release Holdback

To Do List



- End of Contract (Completion)
 - Deficiency List (Cost)
 - 1% For Completion
 - Request and Prepare Form 7 (maybe)
 - Post Form 7
 - Wait 60 Days
 - Request Holdback
 - Two Signatures
 - Close Trust Account

Questions?



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