

## PMM Addendum No. 8 – Revisions to add Default, Termination, Suspension and Debarment resource reference and to align with Prompt Payment

As a result of The Builders' Liens Act (the Act) being amended to include a Prompt Payment Division effective April 1, 2025, sections 9.19 and 9.20.1 have been revised to reflect the amendments.

**Note:** The previous version of these sections still applies to construction contracts that are not subject to Prompt Payment.

The following PMM Sections or pages are impacted by this change:

PMM Page #	PMM Section	Description
9-31	9.9.6	Language added to note resource on City's Purchasing Contract Administration page regarding processes related to default, termination, suspension and debarment
9-41	9.19	Language added to align with amendments to the Act
9-43	9.20.1	Language added to align with amendments to the Act

### † 9.9.6 Default, Termination, Suspension and Debarment

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The City's Purchasing Contract Administration page has a step-by-step escalating process related to Default Termination, Suspension and Debarment that Contract Administrators should be familiar with and follow when any of the above situations are present or being considered.

### † 9.19 Progress Payments

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The Contract Administrator is responsible for progress payments made to the Contractor during the course of the construction contract being administered "Construction Contract". "Progress Payments" are defined as partial payments made to the Contractor based on the terms set out by the Construction Contract, such as units completed, percentage of work completed or milestones reached within the project. Progress Payments are to be made in accordance with the terms of the Construction Contract.

Construction Contracts entered into after April 1, 2025 are subject to the prompt payment provisions of The Builders' Liens Act. The introduction of prompt payment has resulted in changes to Contract Administrator duties, which are now as follows:

If the Construction Contract is pursuant to a progress estimate payment format then, by the seventh (7) calendar day after the end of each month, the Contract Administrator shall issue to the Contractor a progress estimate indicating its opinion of the quantity and value of Work, as that term is defined in the Construction Contract, performed during the previous month. The Contractor may use the progress estimate to form part of its Proper Invoice, as that term is defined in the Construction Contract, as support of the type and quantity of Work performed. In the event the Contractor chooses to produce its own documentation of the type and quantity of Work performed to form part of its Proper Invoice, the content shall be in accordance with the measurement and payment requirements within the Construction Contract and the format of such documentation should follow that of a typical progress estimate, including all evidence and records of measurement

that the Contract Administrator would require to certify payment. In either event the Contractor is required to include such supporting documentation as part of its invoice. If the Construction Contract is pursuant to a percentage completion/detailed prices payment format then, after the end of each month, the Contractor shall submit a Proper Invoice, as that term is defined in the Construction Contract, including documentation that details the type, quantity and value of Work performed during the previous month, in accordance with the measurement and payment requirements within the Construction Contract.

If the Construction Contract is pursuant to a progress estimate payment format, then, if the Contractor agrees with the progress estimate provided by the Contract Administrator the Contractor should indicate that on the Proper Invoice. If the Contractor does not agree with the progress estimate provided by the Contract Administrator, the Contractor Administrator should attempt to reconcile the discrepancy, by issuance of a Request for Invoice Revision in the format included on the City's Contract Administration web page, which could result in a revised invoice by the Contractor, so that the progress estimate and the Proper Invoice align. In the event that the discrepancy is not reconciled then the Contractor is required to detail the items within the Proper Invoice that it disagrees with in order that the value on the Proper Invoice aligns with and is supported by the progress estimate with noted discrepancies. If the Construction Contract is pursuant to a percentage completion/detailed prices payment format then, the Contract Administrator will review the Proper Invoice and produce its Payment Certification accordingly. "Payment Certification" is the documentation the Contract Administrator is to issue to the City's Project Manager and upon which the City relies to issue its payment to the Contractor on the Construction Contract. Payment Certification shall be in the format included on the City's Contract Administration web page.

Regardless whether a progress estimate is utilized by the Contractor or not, after the end of each month, the Contractor is required to submit a Proper Invoice including documentation that details the type, quantity and value of Work performed during the previous month, in accordance with the measurement and payment requirements within the Construction Contract.

Within 7 calendar days of the City's receipt of the Proper Invoice, which is immediately provided to the Contract Administrator, the Contract Administrator shall review the Proper Invoice and produce its Payment Certification accordingly.

The Contract Administrator shall ensure the Proper Invoice is less any holdback required to be made by The Builders' Liens Act, and such holdbacks or other amounts which the City is entitled to withhold pursuant to the Construction Contract.

In this regard, the Contract Administrator shall ensure reasonable amounts are withheld for deficient work. The retention holdbacks and holdback releases must be indicated on the Payment Certification. Retentions that set off deficiency works can be paid out to the Contractor when the corrective measures have been reviewed and accepted by the Contract Administrator. (Holdbacks for uncompleted work may also apply in some cases, however are not normally required since no payment should have been made for uncompleted work). If any amount included in the Proper Invoice is not being certified for payment then the Contract Administrator is required to issue a Notice of Non-Payment with cover letter in the format included on the City's Contract Administration web page, no later than 14 calendar days from the City's receipt of the Proper Invoice.

If in the Contractor's opinion the Work performed during the previous month is minimal or does not warrant an invoice, the Contractor is permitted to not submit an invoice on the condition that the Contractor advises the Contractor Administrator in writing.

All approved Change Orders (Change Work Order (CWO) and/or Change in Scope of Services (CSS)) shall be listed on the progress estimate and Proper Invoice with applicable progress valuation. The Contract Administrator shall attach copies of all CWOs being progressed during the period.

- Once Substantial Performance has been achieved, the Contract Administrator shall prepare a Release of Holdback Progress Estimate identifying the payable date as the end of the 60-day lien expiry period. The Contract Administrator shall also retain Lien Holdbacks on Progress Payments submitted during the period between Substantial Performance and Total Performance. The release of these holdbacks shall be triggered on the Date of Total Performance and paid at the expiry of another 60-day Lien Period.
- Lien Holdbacks, which are the portion of payments that owners, contractors, and subcontractors must retain to protect against potential lien claims, cannot be utilized to set off the cost of deficiency corrective measures should the Contractor abandon the Work.

A requirement to report the value of Manitoba Retail Sales Tax (MRST) included in the Progress Estimate, may apply for manufactured goods within the Province of Manitoba.

The Contract Administrator shall ensure the Contractor identifies applicable MRST on the Proper Invoice. In the case where the Contractor is an Equipment Supplier that is not registered as a Manitoba Vendor, the Contract Administrator shall self-assess the MRST value and indicate same on the Proper Invoice.

More information on MRST is available here: [citynet/finance/tax\\_info.stm](http://citynet/finance/tax_info.stm).

### † 9.20.1 The Builders' Liens Act of Manitoba (the Act)

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The Builders' Lien Act is complex and it is risky summarizing it. The Act is intended to protect the interests of Contractors, subcontractors, workers and suppliers, so that each is paid for their work on a Contract. It lays out the responsibilities of Owners and Contractors and the procedures for making a claim (lien) for payment of money owed. As of April 1, 2025, the Act includes Prompt Payment provisions.

Prompt Payment provisions are applicable to contracts entered into on or after April 1, 2025 for work, service or products related to construction or the improvement to land.

The Act provides for prompt payment and establishes specific requirements for the submission of a 'Proper Invoice' as defined in the Act and sets out related payment provisions. The time for payment for all payors in the payment chain starts to run from the date the Proper Invoice is given to the City.

The definitions of "Substantial Performance" and "Holdbacks" should be obtained from the most recent version of The Builders' Lien Act. The clause that has historically been in place is as follows:

#### **Substantial Performance:**

2(1) For the purposes of this Act, a contract or subcontract shall be conclusively deemed to be substantially performed when:

- a) the structure to be constructed under the contract or subcontract of a substantial part thereof is ready for use or is being used for the purpose intended or, where the contract or subcontract relates solely to improving land, the improved land or a substantial part thereof is ready for use or is being used for the purpose intended; and
- b) the work to be done under the contract or subcontract is capable of completion or correction at a cost of not more than
  - i. 3% of the first \$250,000.00 of the contract price;
  - ii. 2% of the next \$250,000.00 of the contract price; and
  - iii. 1% of the balance of the contract price.

The Act also lays out the deadlines for registering liens, after which, the City need not be concerned about a lien. Under The Builders' Lien Act, as amended April 1, 2025, holdbacks must be retained for 60 days after Substantial Performance (or Total Performance for work after Substantial Performance). This corresponds to the period within which a lien must be registered.

In the event a lien occurs, the City's obligation is to put the holdback account into court, asking that the liens be vacated.

If a lien occurs on a contract that you are working, in all likelihood you will hear about it from the Legal Services Department. The Legal Services Department will instruct that no further progress payments be made until a resolution is made.

If you receive a question from any person working on the job about the Builders' Lien Act or if anyone on the Contract complains that they are not being paid for their work, don't give any advice. Suggest that they contact the Legal Services Department or their own legal counsel.

As a consequence of previously discussed clauses with respect to Builders' Lien or Risk, Liquidated Damages, it is obvious that the Contract Administrator should issue the Certificate if and only if Substantial Performance is achieved. In other words, the Contract Administrator should take the Certificate very seriously.