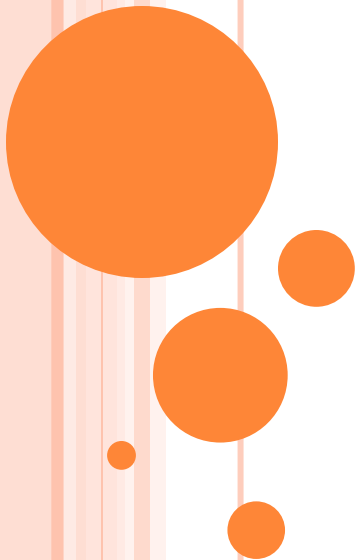


GETTING IT BUILT:

Minimizing Risks in Construction Projects

Presented by Safia J. Lakhani,
Iler Campbell LLP



TYPES OF CONSTRUCTION PROJECTS

- Large-Scale Infrastructure Projects: Transit/Subway Expansion, Roads
- Small-scale renovations or repairs: Re-Roofing, Home Renovations
- Many of the risks (and recommended precautions) are the same



Owner



Contract

Contractor



Owner

Contract

Contractor

Subcontract

Subcontract

Subcontract

Subcontract



SOURCES OF OWNER'S LEGAL RIGHTS AND OBLIGATIONS

- Contract
- Statute: *Construction Lien Act*, R.S.O. 1990, c. C. 30



CONTRACT

- Verbal or Written
- A contract is an agreement between parties as to their rights and obligations that is enforceable by law.
- A construction contract must cover the following three “areas” to be considered valid by the courts:
 - **Price**
 - **Scope of work**
 - **Time**



CONSTRUCTION LIEN ACT, RSO 1990, C. C30

- Different versions of the Act exist in every province
- Legislation that originated with the *Mechanics' Lien Act* of 1873
- The Act was amended to the *Construction Lien Act* of 1983 and 1990
- Purpose of the legislation is to protect contractors and sub-contractors by giving them “lien rights”



CONSTRUCTION LIEN ACT, RSO 1990, C. C30

- “**Construction lien**”: a charge against the interest of an owner in lands and premises which have been improved by the supply of labour, services, or materials.
- Powerful statutory remedy for unpaid contractors and sub-contractors



EXAMPLE: WINDOW REPLACEMENT

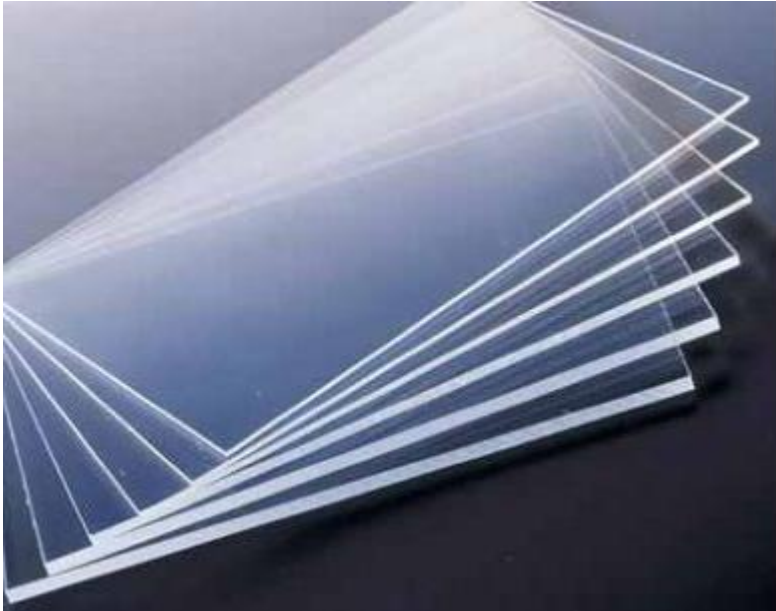
- Window contractor replaces windows throughout a co-op building
- Provides co-op with invoice for \$15K
- Co-op only pays \$5K





**Window contractor can register
a lien against the Co-op lands in
the amount of \$10K**

EXAMPLE



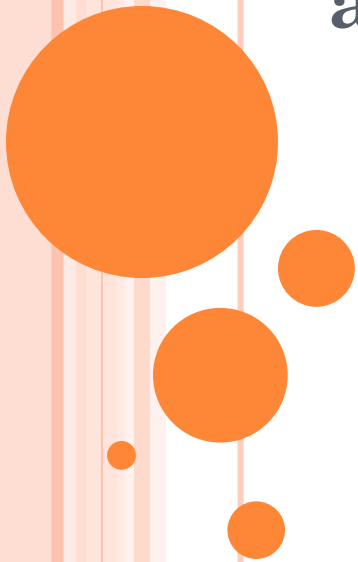
Glass supplier provides window contractor with glass worth \$8K.

Window contractor does not pay him.

As the Co-op, you have no knowledge of where the Window Contractor is obtaining materials.

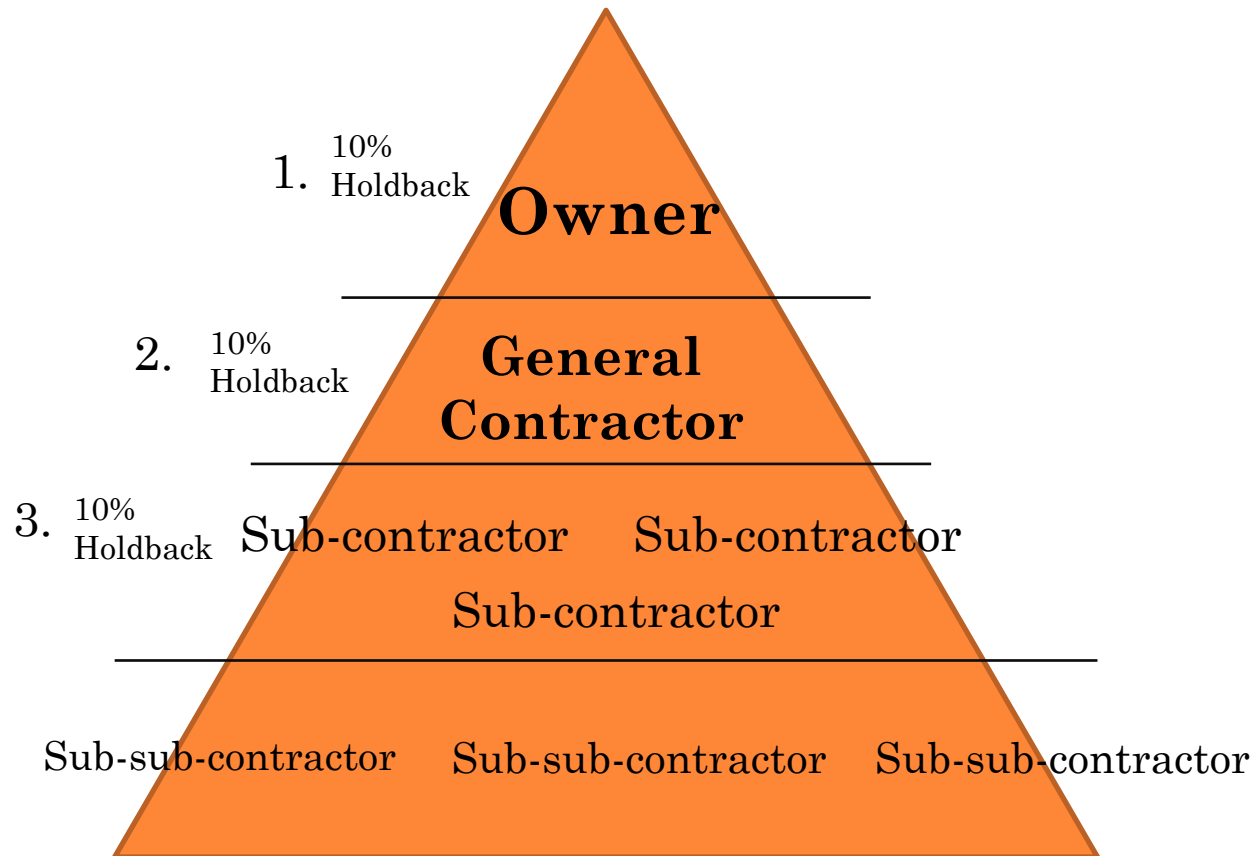
EXAMPLE

Glass supplier can also register a lien against the Co-op lands.



CONSTRUCTION LIEN ACT, RSO 1990, C. C30

- Construction Pyramid: Payment Obligations



OVERVIEW OF COMMON CONSTRUCTION RISKS

- Construction Liens
- Breach of Trust Claims
- Breach of Contract Claims, including claims for extras or delays



RISK #1: CONSTRUCTION LIENS

- The Lien Act grants lien rights to parties supplying materials or services to a construction project
- Two steps for contractor to protect its lien rights:
 1. **preservation**; and
 2. **perfection**
- Contractor has 45 days from earlier of:
 - a. publication of certificate of substantial performance; and
 - b. last day on site to register lien.



RISK #2: BREACH OF TRUST CLAIMS

- Trust Funds: Monies paid, or payable/owing to a contractor or sub-contractor
- An unpaid party can make a “breach of trust” claim against anyone with “effective control” of the corporation
- Beware: this can include a personal claim against your Board of Directors



RISK #3: CLAIMS FOR EXTRAS

- “Extras” are items not contemplated in the original contract price, for which the contractor charges an added price
- May relate to:
 - Unforeseen site conditions (e.g. Soil condition.)
 - Inadequate designs
 - Requests for additions by owners



EXTRAS EXAMPLE

LOVE IT «OR» LIST IT



- Renovations Budget:
\$50,000.00
- Areas of Redesign:
Kitchen, Living Room,
Master Bedroom



EXTRAS EXAMPLE

- **Electrical Issue!**
- Cost of remediation=\$30,000.00.
- This either means adding \$30,000.00 to the budget=\$80,000.00
- Alternately, this might mean sacrificing the remodelling of the kitchen, living room or master bedroom and doing the repair



RISK #4: DELAY CLAIMS

- Claims typically brought by contractor for on-site delays
- Causes:
 - Site Access
 - Changing design requirements
 - Failure to obtain the necessary permits
 - Conflicts in the work (between different trades)



MANAGING RISK:

- **1. Know the parties.**
- **2. Choose the right contract.**
- **3. Ensure your GC is bonded.**
- **4. Follow the payment obligations under the CLA**
- **5. Get D&O Insurance!**



1. KNOW THE PARTIES

- Check Homestars, or another source
- Check for WSIB Coverage
- Ask about past projects, and possibly references



2. CHOOSING A CONSTRUCTION CONTRACT

- Any number of possible contractual arrangements
- Standard Form Contracts (Canadian Construction Documents Committee-CCDC)
- Advantages of CCDC Contracts:
enforceable in court, include standard terms



CONTRACT CLAUSES TO INCLUDE

- Warranties
- Notice & Owner Approval of Extras
 - Require that the owner sign off on any extras, or contractors will not be compensated for their work
- Dispute Resolution
 - Means that there is recourse to alternative dispute resolution mechanisms before going to court
- Liquidated Damages: “Time is of the essence”



CONTRACT CLAUSES TO AVOID

- Limitation of Contractor's Liability



3. ENSURE CONTRACTOR IS BONDED

- 3 parties involved in a performance bond:
 - Owner
 - Surety
 - General Contractor
- Promise by surety to the owner that if the GC defaults in performing the contract, the surety will complete the contract
- Litigation may follow, but work will be completed in time



4. KEEP THE PROJECT ON TRACK

- At the outset, require a Baseline Schedule from the contractor (consider making part of contract)
- Require that contractor given notice of any changes to the Schedule
- Hold on-site meetings to assess progress and compliance with schedule
- Request updates



5. FOLLOW THE CLA

HOLD THE HOLDBACK

- Section 22: owner is required to retain 10% of the contract price for the benefit of sub-contractors until all liens have expired
- Practically, holdback should be retained until 45 days from publication of certificate of substantial performance
- Failure to retain holdback can lead to a personal claim against the owner



KEEP CAREFUL PROJECT ACCOUNTS (TRUST FUNDS)

- Cannot be used to pay owner's overhead & operational expenses
- Should not be co-mingled (prudent practice calls for separate accounts for separate projects)
- Breach of trust can give rise to personal claims against officers and directors (Get D&O Insurance)



MANAGING RISK: SUMMARY

- **1. Know the parties.**
- **2. Choose the right contract.**
- **3. Ensure your GC is bonded.**
- **4. Follow the payment obligations under the CLA**
- **5. Get D&O Insurance!**



RECOURSE/REMEDIES

- Owner can pursue contractor for:
 - Breach of contract,
 - Negligence
 - Negligent Misrepresentation

Damages can include cost to rectify deficiencies, loss of revenue (if a business), etc.

