

## Release of Holdback Bonds During the COVID-19 Crisis

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*April 6, 2020 – Mississauga, ON* – On March 20, 2020, the Ontario Lieutenant Governor in Council made an order under s.7.1 of the Emergency Management and Civil Protection Act suspending limitation periods in any legislation, regulation, order or by-law. This suspension is retroactive to March 16, 2020 and continues for the “duration of the emergency.”

The order was issued with the best of intentions with the objective of protecting the public from the expiry of legal rights in circumstances where the COVID-19 pandemic prevents parties from taking the steps necessary to preserve those rights. However, an unintended consequence of the measure directly impacts the operation of construction contractors who are finding that their holdback monies are being withheld by project owners, including government entities, who are now concerned about liens being filed on projects; even after the statutory lien period has expired.

The impact of not receiving holdback funds can be devastating to contractors, most of whom are small businesses. Holdback funds represent the vast majority, if not the entirety, of many company’s available operating capital. Losing access to these monies will result in many companies becoming illiquid very quickly. With fewer projects expected to come onto the market and with current broader economy stresses, this pool of readily available cash is critical to the ongoing viability of the affected construction businesses.

Steve Ness, the president of the Surety Association of Canada (SAC) shared the industry’s concerns about the impact that this oversight could have on construction firms, particularly the smaller enterprises. “We urge the government of Ontario to amend the order and to provide an exemption for the *Construction Act of Ontario*”, he said.

Ness was asked about the possibility of having contractors provide a *Holdback Repayment Bond* that would protect project owners against liens and allow them to release the holdback money as it became due. He confirmed that these bonds were a tool that could be used to assist contractors on projects where a performance and payment bond was in place. But he emphasized that relying on holdback bonds was a short-sighted approach that would come with its own set of problems. “We’ll do whatever we can to help our contractor clients and holdback bonds will provide relief in some circumstances. But they may not be available or applicable on all projects and to all parties working on projects”, he cautioned.

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More importantly, SAC is concerned that the Holdback Repayment Bond approach could be a risky proposition for general contractors. Ness explained that the “pay-on-demand” nature of the instrument could leave a contractor vulnerable to double jeopardy if an unpaid subtrade or supplier further down the payment chain should file a lien which results in a claim under the bond. “Contractors should be wary of the short-term fix that a holdback bond would provide, and perhaps explore less risky and more sustainable options”, he said. Ness pointed to the federal assistance initiatives such as the Business Credit Availability Program (BCAP) and the Canada Emergency Business Account (CEBA), both of which were created to provide Canadian businesses with emergency operating liquidity during the COVID-19 pandemic. More information on these programs can be found on the website of the Canadian Construction Association [HERE](#).

None of these alternative approaches are ideal and Ness insists that the best and most appropriate solution to the holdback dilemma is to eliminate the problem that created it in the first place. He again called on the premier and attorney general to issue an amendment to the March 20<sup>th</sup> order that would exempt the *Construction Act* and allow holdback money to flow once again.

“We’re here to help wherever we can, and we’ll work with our clients, the government and other stakeholders to find solutions and minimize the impact of COVID-19 on our industry” he said.

More information about Holdback Repayment Bonds and other surety bond products can be accessed on the SAC website at: <https://www.suretycanada.com>.

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## **About the Surety Association of Canada:**

The Surety Association of Canada (SAC) is the national trade advocacy association that represents the interests of the surety industry across Canada. Its members consist of primary surety firms, surety reinsurers, surety/insurance brokers, and other organizations that provide related and complementary services to the surety industry.

While the majority of the surety industry's premium revenue is derived from construction contract bonds, SAC also represents the interests of those organizations that focus on non-contract or commercial surety. SAC does not represent or advocate on behalf of the fidelity bond industry.

Since its formation in 1992, SAC has become a trusted resource for construction purchasers, design professionals, contractors, suppliers and other stakeholders in construction and business communities. SAC has developed its own bond forms in response to industry need and in consultation with the construction industry.

SAC and its members regularly meet with owners, contractors, other associations and related organizations to educate them about surety bonds and the suretyship process. SAC also monitors legislation across the country that will impact its members and works diligently to advance the surety cause with lawmakers and government officials.