

RETAINAGE REFORM IN NORTH CAROLINA

By: Eric Biesecker and Saurabh A. Desai

Retainage reform has come to North Carolina. The General Assembly has ratified Senate Bill 1245, entitled "An Act Amending the Laws Related to Retainage Payments on Public Construction Contracts." The Act becomes effective January 1, 2008, and applies to contracts entered on or after that date. This Alert summarizes the key provisions of the Act.

The Act prohibits owners and prime contractors from withholding retainage on any public project in which the total project cost is less than \$100,000. On projects over \$100,000, the owner shall not retain more than 5% of any periodic payment due a prime contractor. Once the project is 50% complete, the owner may not retain any further amount from periodic payments due the prime contractor, if the contractor continues to perform satisfactorily and corrects any nonconforming work. A project is deemed 50% complete when the contractor's gross project invoices, excluding the value of materials stored off-site, equal or exceed 50% of the value of the contract.

If within 60 days after the submission of a pay request (1) the owner receives a certificate of substantial completion from the designer or (2) takes beneficial occupancy of the project, the owner must release all retainage, except that the owner may retain funds to secure completion of the project or correction of any work. If the owner retains such funds, the retainage shall not exceed 2.5 times the estimated value of the work to be completed or corrected.

The Act also offers specific protection for early finishing trades. Generally, the Act provides that full payment, less authorized deductions, shall be made for those trades that have reached 100% completion of their work when the project is 50% complete. The Act requires the owner to reduce retainage for the early finishing trades to one-half of one percent of the contract.

Following 50% completion of the project, an owner may withhold additional retainage from subsequent periodic payments, not to exceed the 5% maximum, so that the owner retains 2.5% total retainage through the completion of the project.

The Act allows a prime contractor on a public project to withhold retainage on periodic payments made to its subcontractors. Generally speaking, the provisions of the Act apply to retainage between a prime contractor and its subcontractors to the same extent that it applies to retainage between the owner and a prime contractor. For example, the percentage retained by a prime contractor on payments to a subcontractor shall not exceed the percentage of retainage on payments made by the owner to the prime contractor. The extent to which the Act is intended to apply to retainage on payments from a subcontractor to its sub-subcontractors and suppliers is not clear.

Nothing in the Act prevents an owner from withholding payment to a prime contractor in addition to the amounts authorized by the Act for unsatisfactory job progress, defective construction not remedied, disputed work, or third-party claims filed against the owner or reasonable evidence that a third-party claim will be filed.



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