

NEW MASSACHUSETTS RETAINAGE LAW IN EFFECT

Requires Substantial Contract Revisions

The new “Retainage Act” (G.L. c. 149, Section 29F) is in effect for private construction contracts entered into on or after November 6, 2014 for projects where the contract with the owner has an original price of \$3,000,000 or greater, excluding contracts for residential projects of not more than 4 dwelling units. The Act applies to subcontracts of a lesser value if the prime contract has a value of \$3,000,000 or more.

The new Retainage Act contains a host of provisions that go well beyond limiting the amount of retainage that is withheld from a contractor’s or subcontractor’s payments.

- Not more than 5% of any progress payment can be withheld as retainage. Contract terms that result in a blended 5% retainage by withholding 10% retainage at the beginning of the project and then no retainage after 50% complete do not comply with the Act and may not be used.
- The Act imposes a mandatory and quite limited definition of “substantial completion” that may not be suitable for projects with post-completion work requirements or where the contractor’s obligation is met in part by achieving performance standards for installed equipment or systems measured after occupancy. Substantial Completion is defined as the stage in the progress of the project when the work required by the contract is sufficiently complete in accordance with the contract so that the owner may occupy or utilize the work for its intended use. The owner and contractor will want the contract terms to be quite precise regarding what work is required to meet the “sufficiently complete” standard.
- Substantial completion occurs when the contractor, not the architect, determines that substantial completion is met and issues a notice of substantial completion to the owner in the form included in the Act, a radical change from existing practice.
- The owner must accept or reject the contractor’s notice of substantial completion within 14 days, and if the owner does not respond in 14 days the project is “deemed” to be substantially complete. If the notice is rejected by the owner, the contractor shall commence a dispute resolution procedure within 7 days of the owner’s rejection. The Act does define a dispute resolution procedure; therefore the contract can, and should, be revised to define that process; otherwise the contractor may be required to commence litigation to meet the requirement of the Act.
- The owner must produce a punchlist within 14 days after the express or deemed acceptance of the notice of substantial completion, and the contractor must provide a list of incomplete items to its subcontractors within 21 days after the date of the notice of substantial completion, thus allowing the contractor a 7-day period to provide its subcontractor’s with the punchlist item received from the owner.

- Retainage that is withheld must be paid to the contractor not later than 30 days after the contractor's application for payment that may be submitted 60 days after substantial completion. The owner may withhold some amounts from the retainage such as for incomplete or missing deliverables, 150% of the cost to complete work, and the value of claims for performance-based contract default, but may not withhold retainage that was held for work of a subcontractor that is not the subject of the performance-based default.

The contracting parties may not agree to a different amount of retainage and any purported waiver or limitation "shall be void and unenforceable." All of the certifications and submissions of the contractor and owner must be made in in good faith. Some possibly unintended consequences of the Act may be the re-evaluation by owners of other means to secure the contractor's performance, such as bonds or letters of credit; expanded withholding of retainage on the entire progress payment including contractor's general conditions costs and its fee; and the possible increase in the owner's equity requirement, if lenders – who are not subject to the Act - only agree to fund 90% of each progress payment.

In any event, owners and contractors must revise their forms for private construction projects in Massachusetts to comply with the mandatory terms of the Act. New contract terms should be prepared to provide as much clarity as possible to the required procedures and obligations of the owner and contractor especially in the project completion and close-out process, to describe a process for dispute resolution, and address the other issues raised by the terms of this Act.

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