Thompson Hine

Construction Update

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New York Passes Law to Reduce Retainage on Private Construction Projects

On November 17, 2023, New York Governor Kathy Hochul signed Senate Bill S3539/Assembly Bill 4167 into law to reduce the amount of retainage that can be held on private construction projects in the state and accelerate the time in which contractors can bill for final payment on those projects.

The new bill amends N.Y. General Business Law Section 756-c so that no more than 5% of the contract sum can be withheld as retainage from a contractor or subcontractor on a construction project equal to or greater than $150,000. In addition to the 5% cap, lower-tier contracts are limited to "the actual percentage retained by the owner" where the prime contract is lower than 5%. Previously, project owners, contractors, and subcontractors could agree to withhold "a reasonable amount" of retainage on downstream parties.

The new bill also amends N.Y. General Business Law Section 756-a to allow contractors to submit invoices for final payment once the contractor reaches substantial completion (as substantial completion is defined in the contract or contemplated by the terms of the contract). Previously, contractors had to wait until they completed all contract obligations (including final completion of the project) before a final invoice could be submitted.

Even though final invoices may now be submitted at substantial completion, project owners still have until 30 days after the final approval of the work under the construction contract to release the retainage. If the owner fails to release retainage as required, or the contractor or subcontractors fail to release retainage to downstream parties as required, the owner, contractor, or subcontractor (as the case may be) are liable for interest at the rate of 1% per month from the date the retainage was due. The new law takes effect immediately and applies to construction contracts executed on or after November 17, 2023, the effective date of the bill.

The new bill appears to benefit contractors and project owners alike. The 5% retainage limit should provide increased cash flow to contractors and subcontractors on projects. Also, the opportunity to submit final invoices at substantial completion should reduce the time in which contractors and subcontractors are paid. Project owners are still required to approve or disapprove final invoices within 12 days and identify outstanding issues with the contractor's work. Because this obligation may now be triggered at substantial completion (rather than the end of a project), a welcome result may be the earlier resolution of punch-list and warranty work and other disputes. With these changes, the owner may receive its completed project sooner, and contractors and subcontractors may receive final payments earlier. It is unclear how the new bill affects ongoing construction projects where some contracts were executed under the old retainage law and new contracts are being executed after the bill takes effect. Project owners may be impacted in their ability to comply with their existing lending requirements, including minimum retainage requirements.

Project owners, contractors, and subcontractors in New York are advised to review their contracts carefully and consult construction and lending counsel to confirm compliance with the new law.

FOR MORE INFORMATION

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