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New York Amends its Prompt Payment Act

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Introduction

On November 17, 2023, New York Governor Kathy Hochul signed into law amendments to the state’s Prompt Payment Act (N.Y. Gen. Bus. Law §756) (the Act). The amendments take immediate effect and apply to all private construction contracts for which the contract sum exceeds \$150,000. The two primary modifications of the Act concern limitations on retainage for private construction contracts and submission of final invoices upon “substantial completion” of a project.

The Amendments to the Act

First, §756-c of the Act has been amended to limit retainage to 5%. Prior to the amendments, owners were permitted to withhold a discretionary “reasonable amount” of the contract sum while contractors and subcontractors could also retain a sum as long as it did not surpass the owner’s percentage of retainage. Now, parties to a private construction contract are restricted to retaining “no more than five per centum” of the contract sum. This adjustment prevents parties from deviating from the 5% limit and largely removes the uncertainty and discretion associated with the prior retainage scheme. This differs from the New Jersey Prompt Payment Act, N.J.S.A. 2A:30A-1, et seq. (NJ PPA), which does not limit the amount of permitted retainage on private contracts.[1]

As a disincentive to non-compliance with the 5% limitation, contractors violating the new retainage scheme will be assessed interest at a rate of 1% per month commencing from the day the retention came due.

Second, the amendments also revised §756-a to provide that contractors may submit a final invoice upon reaching “substantial completion” of a project, as that phrase is defined under the operative contract. Under the prior iteration of the Act, the submission of a final invoice was contingent on fulfillment of all contractual obligations. Once again, this differs from the NJ PPA

which does not differentiate between contractual milestone segments and applies universally across a set period of invoice rejection and payment.

The amendments, however, do not disturb the balance of §756-c, including the provision stipulating that the project owner must release retainage to the contractor within 30 days after final work approval. That provision remains unaltered notwithstanding the contractor's ability to submit a final payment invoice upon "substantial completion."

Conclusion

Understanding the recent amendments to the Act, and how the Act differs from the NJ PPA, is crucial for contractors performing under private construction contracts in New York and New Jersey. Contractors must be knowledgeable regarding the new New York retainage requirements in order to avoid unnecessary and costly interest penalties. It is advised that contractors consult with their attorneys on all New York private construction contracts effective after November 17, 2023, to ensure compliance with the recently amended Act.

For more information about this alert or any other construction issue, please contact Franklin Barbosa, Jr. (fb@spsk.com or 973-539-1013).

[1] Other statutes may limit retainage on public contracts.

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