



Owner and Developers Beware: Amended Law Reduces Allowable Amount of Retainage and Facilitates Expedited Path to Final Payment

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Attention owners, developers, contractors, design and construction industry professionals: a significant shift to retainage and final payment terms on construction projects require your immediate attention. Effective November 17, 2023, these changes may necessitate updates to your standard contracts.

OVERVIEW OF THE CHANGE IN LAW

Governor Kathy Hochul recently signed legislation that amends New York's Prompt Payment Act (N. Y. Gen. Bus. Law §756) by making two monumental changes:

- Retainage is capped at no more than five percent (5%) of the contract price. Gone are the days of the generic ten percent (10%) retainage. This new limit significantly reduces the amount owners can withhold from contractors.
- Contractors are now permitted to invoice for payment in full, including release of retainage, upon achieving Substantial Completion of the Work. This effectively accelerates final payment compared to the previous law.

WHAT YOU NEED TO KNOW

- These are significant changes that offer clear benefits to contractors, namely reduced retainage and potentially faster path to final payment.
- Compliance with the new requirements went into effect on November 17, 2023 (the Effective Date).
- This applies to all private commercial construction projects valued at \$150,000 or more.
- Failure to make payment in full upon Substantial Completion triggers the payment of interest at the rate of 1% per month from the date that retention was due.
- The impact of these changes propagates downstream, affecting owners, contractors, and subcontractors.

INSIGHT

- While it is not uncommon to reduce a portion of the retainage at the time of Substantial Completion, five percent (5%) may not be adequate to protect the owner's interests.
- Meeting the 30-day target for Final Completion may be difficult on certain projects due to their inherent complexities. The revisions grant contractors a major advantage: the right to submit final payment requests once substantial completion is achieved. This marks a clear shift from the previous requirement of fulfilling all contractual obligations beforehand. However, an opportunity exists to modify the definition of substantial completion. The revised Act explicitly references this term as "such term is defined in the contract or as it is contemplated by the terms of the contract."

Thus, while the Act mandates a five percent (5%) retainage limit, which cannot be bypassed contractually, parties have the flexibility to redefine “substantial completion.”

- Substantial Completion is often defined as beneficial occupancy or the stage in the progress of the Work when the Work is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. Whether it makes sense to consider deviating from the established definition of substantial completion should be evaluated on a case-by-case basis, depending on the specific circumstances of each project and the applicable contractual terms.
- Additionally, establishing a thorough punch list (comprehensive list of items to be completed or corrected prior to final payment) and a clear process for its timely and successful completion within 30 days is critical for ensuring project success. Take action now to implement these strategies.

Proactively address compliance with the new Act by engaging your construction counsel or the article's author, Timothy F. Hegarty, to review and revise prime and subcontracts as necessary.

Additional Resources:

Link to the new legislation: [New York State Senate Bill S3539](#)

ATTORNEYS

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