

## Pay Your Bills!

### New Retainage Legislation Impacts Public and Private Construction Work

Subcontractors historically complain about owners and general contractors refusing to release their retainage amounts in a timely manner. Legislation was recently passed in response to these complaints. This new legislation mandates broad changes to how and when retainage must be released. This legislation applies to contracts executed on or after Aug. 1, 2019, on both private and public projects.

There are two statutes that effect the retainage amendments, one affecting public contracts (Minn. Stat. § 15.72, Subd. 2) and the other private projects (Minn. Stat. § 337.10, Subd. 4). The discussion below identifies the changes. All contractors should be aware of these changes, and should fully incorporate the changes into all future contracts and payment practices.

#### Changes Applicable to Public Projects

There were several changes to Minn. Stat. § 15.72, Subdivision 2 applying to public contracting agencies. These changes include:

- The public entity must now release all retainage no later than 60 days after substantial completion. If the public entity reduces the retainage, then the general contractor must reduce the retainage for its subcontractors at the same rate;
- The contractor for a public improvement must pay all remaining retainage to its subcontractors no later than 10 days after receiving payment of retainage from the public entity, unless there is a dispute about the work under a subcontract. If there is a dispute, the contractor must pay out retainage to any subcontractor whose work is not involved in the dispute, and must provide a written statement detailing the amount and reason for the withholding to the affected subcontractor.

After substantial completion, the public entity may continue to withhold no more than:

- 250 percent of the cost to correct or complete work known at the time of substantial completion.
- 1 percent of the value of the contract or \$500, whichever is greater, pending completion and submission of all final paperwork by the contractor or subcontractor.

\*\*\* Any of these amounts withheld must be paid within 60 days after completion of the work.

After establishing these new rules, the legislation also included three additional rules related to public contracting projects. First, the legislation expressly states that withholding retainage for warranty work is prohibited, and also states that the legislation does not waive any rights for warranty claims. Second, for any project funded with federal or state aid, the public entity is not required to pay that portion of the contract until those aid payments have been received. And, third, nothing in the amendment requires payment for a portion of a contract that is not complete or for which an invoice has not been submitted.

### **Changes Applicable to Private Projects**

There were also several changes to Minn. Stat. § 337.10, Subd. 4 applying to private construction projects. These changes are similar to the changes for public projects, and include:

- The owner must release all retainage no later than 60 days after substantial completion. If an owner reduces the amount of retainage, the contractor must reduce retainage for any subcontractor at the same rate.
- Contractors must pay all remaining retainage to subcontractors within 10 days after receipt of retainage, unless there is a dispute about a particular subcontractor's work. Contractor must also provide a written statement detailing the amount and reason for the withholding from the particular subcontractor with which it has a dispute.
- Contractors may not withhold retainage from any subcontractors who were not involved in the contractor's dispute with a particular subcontractor.
- Owners may withhold up to (a) 25 percent may be withheld for final or repair work, and (b) 1 percent of the contract value for final paperwork. Any payments for this work must be made within 60 days of completion.

As with public projects, the legislation also included three additional rules related to public contracting projects. First, for any project funded with federal or state aid, the public entity is not required to pay that portion of the contract until those aid payments have been received. Second, the amendment does not require payment for a portion of a contract for which an invoice has not been submitted. And, third, the legislation expressly states that withholding retainage for warranty work is prohibited, and also states that the legislation does not waive any rights for warranty claims.

### **Need to Incorporate Changes into Contracts**

All contractors should be aware of these legislative changes, and incorporate the changes into all contracts and ongoing payment procedures. If you have any questions about how these changes might impact your business, please contact me directly at [epoeschl@meagher.com](mailto:epoeschl@meagher.com).



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Liz focuses her practice on the prevention and the litigation of business-related disputes — particularly those involving construction, products liability, life sciences and employment. She is Co-chair of the firm's Life Science practice group.

In her construction practice, Liz defends contractors, project owners, land developers, architects, engineers, manufacturers, and suppliers involving private and public construction projects of all types. She also works with these parties to establish the contracts, documentation, and procedures needed to help them avoid conflicts that could give rise to litigation and potential liability. Liz is a member of the MSBA Construction Law Section and the ABA Forum on the Construction Industry. Liz also speaks regularly on a wide range of construction industry topics and seminars hosted by local and national organizations.