New Retainage Statue

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Retainage is a sum of money held out of a contractor's periodic pay requests until a construction project is completed. From a project owner's perspective, the purpose of withholding these funds is to ensure the completion of the general contractor's work or, alternatively, to provide funds for completing or correcting the general contractor's work in the event the general contractor does not do so. General contractors typically hold retainage on their subcontractors in an amount equal to the amount of retainage held by the project owner. Once a project is completed the owner releases retainage to the general contractor and the general contractor releases its subcontractor's retainage.

North Carolina has adopted a new statute governing the withholding and disposition of retainage on public construction contracts effective January 1, 2008. The new retainage statute is set forth at N.C.G.S. §143-134.1(b1) through (e).

A public owner may hold no more than 5% retainage on a general contractor where the contract value is $100,000.00 or more. N.C.G.S. §143-134.1(b1)(1). No retainage may be held on a public construction contract that is less than $100,000.00. N.C.G.S. §143-134.1(b1). Generally, the owner may not hold any additional retainage from the contractor once the project is 50% complete, provided the contractor is satisfactorily performing its work. N.C.G.S. §143-134.1(b1)(2). The project is 50% complete when the contractor's billings equal 50% of the contract value, excluding the value of material stored off of the project site. Id. The value of material stored on site may not account for more than 20% of the contract value for purposes of determining the percentage of completion. Id. Notwithstanding these provisions of the statute, the project owner may continue to withhold 5% retainage on subsequent pay applications after the project is 50% complete in order to allow the project owner to maintain retainage of 2.5% of the contract value for the remaining duration of the contract. N.C.G.S. §143-134.1(3).

The project owner must release the retainage it is holding within 60 days after taking beneficial occupancy of the project or receiving a certificate of substantial completion from the project engineer. N.C.G.S. §143-134.1(b1)(4). In the event that there remains punchlist or minor incomplete work to perform, the project owner may withhold up to two and a half times the value of such work from the retainage otherwise released to the general contractor. Id. Claims by third parties against the general contractor are not grounds for delaying the release of retainage to the general contractor. N.C.G.S. §143-134.1(b1)(5). The existence of unexecuted additive change orders are also not grounds for delaying the release of retainage to the general contractor. Id. The project owner must pay the general contractor interest at the rate of 1% per month on any improperly withheld retainage. N.C.G.S. §143-134.1(a).

The payment and performance bond surety must consent in writing to the release of retainage to the general contractor. N.C.G.S. §143-134.1(b1)(2) and (4).

Certain subcontractors finish their work before the project is 50% complete. The statute identifies these subcontractors as “early finishing trades” and specifically lists structural steel, piling, caisson and demolition subcontractors. N.C.G.S. §143-134.1(b2). Other early finishing trade subcontractors may be listed in the project owner’s bid documents. Id. The bid documents must also list the inspections required and any financial information required by the project owner to release retainage to the early completing trades. Id. The project owner must reduce retainage otherwise held on the early finishing trades to .5% once the project is 50% complete, provided the project engineer certifies that the specific work is acceptable and in accordance with the contract documents. Retainage must be released within 60 days of the later of the subcontractor's request or the surety's written consent. Id. Release of retainage to the early completing trades shall not affect any warranties issued in connection with the project. Such warranties shall not begin to run until a certificate of substantial completion is issued or the owner receives beneficial occupancy of the project. N.C.G.S. §143-134.1(b4).

The project owner may solicit bids with or without retainage. N.C.G.S. §143-134.1(b5).

The provisions of the statute shall not prevent the project owner from complying with the terms of a federal contract or grant. The bid documents must specify when federal preemption of this section shall apply. N.C.G.S. §143-134.1(b6).

Notwithstanding the provisions of the statue, the project owner may withhold additional sums from payments otherwise owed to the general contractor for unsatisfactory job progress, defective construction not remedied, disputed work, third party claims against the owner or reasonable evidence that such claims will be filed. N.C.G.S. §143-134.1(e).

A general contractor may withhold retainage on its subcontractors under the same terms and conditions as the owner. N.C.G.S. §143-134.1(b1)(3). Usually, a general contractor may only hold retainage on its subcontractors in the same percentage as the project owner is holding and must promptly pay retainage once it is released by the project owner. Id. In the event the owner decides to retain 2.5% retainage on the last half of the project, the general contractor may withhold more than 2.5% retainage on the remaining subcontractors working on the second half of the project. N.C.G.S. §143-134.1(b3). In the event the general contractor improperly holds excess retainage or fails to promptly pay its subcontractors their retainage, the general contractor must pay 1% per month interest on such retainage. N.C.G.S. §143-134.1(b1)(3).

A general contractor may exclude a subcontractor's work from the general contractor's pay applications to the project owner as a result of the subcontractor's unsatisfactory job progress; defective construction not remedied; disputed work; third party claims filed or reasonable evidence that such claims will be filed; failure to pay lower tier subcontractors and suppliers; damage to the general contractor or other subcontractors; reasonable evidence that the subcontract cannot be completed for the unpaid balance of the contract sum; or a reasonable amount of retainage not to exceed the initial percentage retained by the owner. N.C.G.S. §143-134.1(d).