

New York Sets Maximum Construction Contract Retainage at 5% for Private Projects

On November 17, 2023, Governor Kathy Hochul signed Senate Bill 3539, amending Section 756-a and Section 756-c of the New York General Business Law (more commonly referred to as the Prompt Payment Act) to set the maximum construction contract retainage at 5% for construction contracts on certain private commercial projects.

Pursuant to the amended Section 756-c, in private commercial projects entered into on or after November 17, 2023, where the contract sum is in excess of \$150,000, an owner can hold no more than 5% of a project's contract sum as retainage. Further, the amendment limits the retainage that can be held by contractors and subcontractors on a subcontractor to 5% or the actual percentage of retainage held by the owner.

In addition, the amended Section 756-a now permits a contractor to submit its final invoice for payment to the owner upon achieving substantial completion (as such term is defined in the construction contract) rather than final completion. This framework represents a shift from the prior version of the Prompt Payment Act in which a contractor could not submit a final invoice until the contractor had performed all of its obligations under the construction contract.

Section 756-c otherwise remains unchanged by the amendment, still requiring that retainage be released by the owner to the contractor no later than 30 days after the final approval of the work under a construction contract. This means that while a contractor may *submit* its invoice for final payment upon achieving substantial completion, construction contracts can specify that such portion of the requisition shall become due no later than 30 days after the contractor has achieved final completion.

If an owner fails to release retainage, or a contractor or subcontractor fails to release a proportionate amount of retainage to the appropriate party, interest accrues at a rate of 1% per month from the date that such retention was due to be released.

In practice, parties are grappling with how best to incorporate the terms of the amendment into contract negotiations. Section 756-a includes express language that terms and conditions of a construction contract may supersede the provisions of Section 756, except as otherwise provided in the statute. It is uncertain how this will be interpreted by the courts. In addition, contracting parties should anticipate the potential of further changes to New York's retainage law. As a result of the complexities surrounding the recent amendments to Section 756-a and Section 756-c, we recommend that owners and contractors consult with counsel when negotiating construction contract provisions related to retainage and payments, in addition to all corresponding provisions contained within the construction contract.



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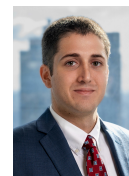
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