

PUBLICATION

Alabama's New Retainage Law

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A new retainage provision in Alabama's Prompt Pay Act became effective on September 1, 2011. Only contracts executed on or after that date are subject to the new law.

Among other things, the new retainage provision defines the term "retainage" for the first time as "that money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower tier sub-subcontractor, or supplier for work properly performed or materials suitably stored...which has been retained by the owner conditioned on final completion and acceptance of all work in connection with a project."

The law now caps retainage at 10 percent of the estimated amount of work properly done until the job is halfway complete. Once the job is halfway complete, no additional retainage may be held. Thus, for the first half of the job, the paying party may withhold 10 percent of each pay application. For the second half of the job, the paying party may continue to hold the retainage kept from the work performed in the first half, but it cannot withhold any new retainage for the remaining work. Therefore, the effective cap on total retainage is 5 percent of the contract amount. Also, improperly held retainage by any party is subject to interest at a rate of 1 percent per month (12 percent per annum).

The owner must release retainage to the contractor no later than 60 days after substantial completion (or 60 days after the contractor has completed its work as defined by the contract if that is earlier). The definition of substantial completion now includes a requirement for all necessary certificates of occupancy to have been issued so that the owner may occupy or utilize the project for its intended purpose.

Once the contractor receives its retainage, it must pay its subcontractors their retainage under the same time constraints as any other payment received from the owner (i.e., within seven days unless other payment terms are agreed to). The paying party still has the right to withhold retainage for work not properly performed, payment not earned, any of the reasons listed in Alabama Code Section 8-29-4 if there is a bona fide dispute, or on other grounds set forth by the parties' contract. Finally, for contractors, subcontractors and sub-subcontractors, a provision has been added that states they shall have no lien rights in any construction loan, loan proceeds, or the disbursement or use thereof.