

CHANGES IN ALABAMA'S RETAINAGE LAWS

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Introduction

The Alabama Code was recently amended in a number of important ways affecting the retainage that may be withheld on private construction projects in Alabama. These changes took effect on September 1, 2011, and only contracts executed on or after that date are subject to the new law. Importantly, these changes did not affect the retainage that may be withheld on public projects.

Percent Retainage Allowed on Private Projects

For private projects in Alabama for which contracts were entered into on or after September 1, 2011, the law now caps retainage at 10 percent of the estimated amount of work properly done until the job is 50 percent complete. *See* Ala. Code § 8-29-3. Once the job is halfway complete, no additional retainage may be held. *Id.* 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 over the course of a private project is 5 percent of the contract amount.

Additionally, a contractor may not withhold a higher percentage retainage from its subcontractors than the owner withholds from that contractor. *See* Ala. Code § 8-29-3(f). Similarly, a subcontractor may not withhold a higher percentage retainage from its sub-subcontractors than the contractor withholds from the subcontractor. *See* Ala. Code § 8-29-3(g).

Importantly, these retainage provisions do not apply to contracts with the state or local governments of Alabama, for residential homebuilders, or for contracts for less than \$10,000. *See* Ala. Code § 8-29-7.

Percent Retainage Allowed on Public Projects

In contrast, the law regarding retainage on public projects has not changed. On public projects, only 5 percent of the estimated amount of work properly done may be withheld on the first half of the job, and no further retainage may be withheld after the project is 50 percent complete. Ala. Code § 39-2-12. Accordingly, the effective cap on total retainage over the course of a public project is 2.5 percent of the contract amount. Alternatively, in certain circumstances, the public awarding authority may forego withholding retainage on public projects if it instead requires the

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contractor to either (1) maintain an escrow account, or (2) deposit certain securities. Ala. Code § 39-2-12(e)(f)(g).

Nevertheless, no retainage may be withheld by "on contracts entered into by the Alabama Department of Transportation for the construction or maintenance of public highways, bridges, or roads." Ala. Code § 39-2-12(c).

Definitions of Retainage

Finally, while similar, the definition of "retainage" is slightly different in the statutory provisions for private and public projects. For private projects, "retainage" is "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." See Ala. Code 8-29-3(h). Conversely, for public projects, "retainage" is "That money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor." 39-2-12(a)(3).

Conclusion

Retainage remains an important tool for parties to both private and public construction contracts in Alabama, and owners and contractors of all levels should understand the limitations and alternatives to retainage that may be available on a given project.

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