

New Mexico Retainage Act

Starting June 15, 2001 almost all commercial construction projects within New Mexico will be subject to the recently enacted Retainage Act. The Retainage Act sets out specific requirements for the handling of funds retained by the project owner or contractor during the course of a construction project. The Retainage Act additionally sets mandatory deadlines for payment of progress payment funds applicable to the owner, contractor and all tiers of subcontractors and suppliers.

Scope

The Act contains a broad definition of construction services and is applicable to both public and private construction projects. The only commercial projects which are exempted from the Act are projects for the federal government, Native American tribes, and the New Mexico State Highway and Transportation Department. Residential construction projects involving four or fewer dwelling units are also exempted from the terms of the Act.

Retention Provisions

The most striking provision of the new Retainage Act is its treatment of monies retained by the project owner or by the prime contractor during construction. A project owner may retain no more than five percent of the cost of estimated work performed and the value of materials stored on the site or suitably stored and insured off-site. Whether or not the project owner withholds retainage the prime contractor may retain funds, but in no case should the total retention exceed five percent. Funds that are withheld must be deposited in an escrow account in accordance with the Act. Within the escrow agreement, however, there is substantial discretion as to where the funds will be deposited. The Act specifically allows for funds to be invested in

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certificates of deposit or other time deposit instruments, treasury bonds, treasury bills, treasury certificates of indebtedness or bonds or notes of the state or political subdivision. All fees of the escrow agent are to be paid by the project owner.

As interest is accrued on the retained funds the escrow agent is to distribute the interest to the prime contractor. The escrow agent must additionally provide monthly reports indicating the value of funds held in escrow and any deposits or withdrawals from escrow during the reporting period. Funds held in an escrow account established pursuant to the Act are not subject to garnishment, attachment, levy or execution. Similarly the escrowed funds are held for the benefit of the project owner and may not be pledged by a contractor or subcontractor other than to its surety.

Withdrawals from escrow are subject to the approval of the project owner. However, the Act sets requirements for disbursement of retained funds. Retention must be released pursuant to the Act on substantial completion of each separately ascertainable item of the prime contractor's schedule of values. Substantial completion is not defined by the Act, so may be subject to contractual definition.

Any contractor or subcontractor may opt to provide securities in lieu of retention being withheld. The Act does not specify the type of security to be offered and it is presumed that the project owner will be entitled to accept or reject offered securities at its discretion.

If retained funds are not deposited into the escrow account or released from the escrow account upon substantial completion, then an additional interest penalty of one and one-half percent per month or fraction thereof accrues until remedied. There is no automatic enforcement mechanism for the deposit or release of retained funds, but the Act does allow for recovery of attorney's fees and costs incurred in enforcing the terms of the Act.

Exceptions to Retention Provisions

There are two exceptions to the retention provisions contained in the Act. Local public bodies may provide in their bid documents how retained funds are to be handled. In all cases, however, the retained funds must at a minimum be deposited in an interest-bearing account. The

provisions for release of retained funds are not subject to the partial exemption for cities and counties. The other exception is for manufacturing plants engaged in at least ten construction projects within New Mexico at the same time. Any manufacturing plant that does qualify under this exception, however, may serve as its own escrow agent, but must follow all of the other rules for retained funds.

Prompt Payment Provisions

The Retainage Act keeps with only slight modifications the prior Prompt Payment Act, but the Act is now applicable on private as well as public projects.

The Act requires that all construction contracts provide for payment of amounts due, except for retainage, within specified time limits. Payment is required from the project owner within twenty-one days after the owner receives an undisputed request for payment. If payment is not received within twenty-one days then an interest penalty of one and one-half percent applies to all amounts due and owing. It is unclear whether an owner may simply declare that an invoice is disputed and withhold payment. The more probable construction is that the Act's reference to an undisputed request for payment refers to an improperly completed request for payment. Upon receipt of an improperly completed request for payment, the owner must notify the prime contractor within seven days of receipt, but the twenty-one day deadline for payment does not begin to run until a properly completed invoice is submitted. Payment may be made only by first-class mail, hand delivery or electronic funds transfer.

Once payment is received the prime contractor has seven days to make payment to its subcontractors and suppliers. The seven day payment requirement is applicable to all tiers of subcontractors and suppliers. If the prime contractor or any subcontractor or supplier fails to make payment to its subcontractors or suppliers within seven days of receipt of payment, then an interest penalty of one and one-half percent per month or fraction thereof will apply to the outstanding amounts due.

Exceptions to Prompt Payment Provisions

As with the retention provisions, there is an exception to the prompt payment provisions of the Act. Local public bodies may specify alternate payment provisions up to, but not to exceed, 45 days after receipt of an undisputed request for payment. In order for a local public body to take advantage of this exception it must meet three requirements. First, at least some portion of the financing for the project must be in the form of grant funds. The second requirement is that the construction contract between the local public body and the prime contractor specifically provide the time given for the local public body to process the request for payment. The final requirement is that every page of the plans contain the following or substantially similar legend:

Notice of Extended Payment Provision

This contract allows the owner to make payment within
days after submission of an undisputed request for payment.

If the local public body cannot comply with all three requirements then the standard payment provisions set forth in the Act will apply.