

New York Could Further Limit Retainage on Public and Private Construction Projects

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In this article, the authors discuss recent actions taken by New York legislators to further limit retainage in construction contracts.

Proposed bills in the New York State Assembly and Senate would prohibit the retention of any amount of payment due and owing for materials delivered and accepted for public and private construction projects. The identical bills, Senate Bill 6855¹ and Assembly Bill 1194,² are designed to amend Section 139-f of the State Finance Law (Payment on public works projects),³ Section 106-b of the General Municipal Law (Payment on public works projects)⁴ and Section 756-c of the General Business Law (Retention).⁵ Both Section 139-f of the State Finance Law and Section 106-b of the General Municipal Law concern payment on public work projects, and the proposed amendments would require full payment for delivered and accepted materials that are covered by a manufacturer's warranty and/or graded to meet industry standards pertinent to any public works projects.

The payment-in-full obligation applies to payments due from public owners to contractors and flows down to payments from contractors to subcontractors. Materials falling within

the proposed legislation include materials delivered to a project site and materials delivered off-site that have been suitably stored and secured as required by the owner/contractor. Section 756-c of the General Business Law concerns retention on all construction projects (i.e., it applies to private construction projects) and, if the proposed legislation is passed, retainage would be prohibited for any payment due and owing to a material supplier for materials that have been delivered and accepted and are covered by a manufacturer's warranty and/or graded to meet industry standards.

PROPOSED LEGISLATION

In sum, the proposed legislation removes materialmen from inclusion under current retainage laws. If passed, these amendments require full payment for delivered materials pertaining to public works projects and prohibit the retention of any payment due and owing to a material supplier on any type of construction project.

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The justification behind this proposed change in the law is that once a material supplier has delivered its goods and such goods have been accepted by the owner or contractor, the supplier has completed its portion of the work and should not have retention withheld if the owner or contractor has alternate remedies available to it.

Project owners should be advised, however, that issues with materials often do not come to fruition until after they have been installed and/or are in use. From the owner's perspective, the advantage of retainage is that it affords them funds to immediately address defective materials on account of issues that arise after delivery has taken place and helps owners ensure that they are satisfied with the finished product.

If the proposed amendments are passed, owners, rather than relying on retainage, would instead have to deal with manufacturers directly to address nonconforming or defective materials, which may be more difficult since owners typically are not in privity of contract with the manufacturers. Owners may need to consider implementing more rigorous inspection protocols when critical materials are delivered to ensure that they conform with the contract and have no visual signs of damage before they are deemed accepted.

If passed, this legislation would make provisions relating to the assignment of supplier warranties even more important when construction contracts are drafted.

CONTINUING TREND

This proposed legislation follows a general trend of the state intervening in private construction contracts insofar as payment terms

are concerned - one that began in 2003 with the passing of the Prompt Payment Act (legislation designed to expedite payments and facilitate disputes between owners and contractors and between contractors and subcontractors on certain private construction projects) - and continued last year with passage of Senate Bill S339,⁶ which amended the Prompt Payment Act by restricting the amount of retainage that can be withheld on construction contracts of at least \$150,000 to no more than 5 percent.

IN SUMMARY

- Assembly Bill 1194 and Senate Bill 6855 are the most recent actions taken by New York state to further limit retainage in construction contracts.
- The proposed legislation would amend the New York State Finance Law, General Municipal Law and General Business Law to prohibit the retention of any payment due and owing a material supplier on construction projects.
- These amendments follow a New York state trend of limiting retainage that began in 2023 with the passage of Senate Bill S339, which restricted the amount of retainage to no more than 5 percent on private construction contracts of at least \$150,000.

NOTES:

¹ <https://www.nysenate.gov/legislation/bills/2023/S6855/amendment/A>.

² <https://www.nysenate.gov/legislation/bills/2023/A1194/amendment/A>.

³ <https://www.nysenate.gov/legislation/laws/STF/139-F>.

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⁴ <https://www.nysenate.gov/legislation/laws/GMU/106-B>.

⁵ <https://www.nysenate.gov/legislation/laws/GBS/>

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⁶ <https://www.nysenate.gov/legislation/bills/2023/S3539>.