

Examining Contractor Coverage: How to Avoid Holdbacks in NYC Public Contracts

The standard construction contract with the City of New York contains a number of provisions that allow the city to retain a portion of payments on a project.

The typical retainage “holdback,” where the city retains 5 percent - 10 percent of the value of the work certified for payment in each partial payment voucher until the substantial completion of the work, is unavoidable from a contractor’s standpoint.

However, with careful planning and quick response, the impact of most other of the city’s contractual “holdbacks” can be minimized or even avoided entirely.

Providing Proof of Insurance

For example, the City Standard Construction Contract obligates the contractor to provide proof of insurance, showing the city as an Additional Insured under the contractor’s policies, through the date of completion of all of the contracted work.

If the contractor fails to comply with these requirements, the city has the right to prevent the contractor from commencing work, require the contractor to immediately stop work, or impose a holdback unless and until all required certificates have been submitted.

The simplest way to avoid this problem is to work closely with your insurance broker to ensure that the city is promptly provided with the necessary certificates of insurance.

Also, if your work under the contract will extend from one insurance policy period into a renewal period, be proactive and

remind your insurance broker to provide new certificates of insurance.

‘Unavoidable’ Holdbacks

Unfortunately, through no fault of the contractor’s own, other circumstances may arise where the city imposes a holdback that must be immediately addressed.

For example, the contract permits the city to impose a holdback if the contractor fails to give the insurance company timely notice of any claim or loss. In fact, this is defined as a material breach of the contract.

If this occurs, the city is permitted to retain enough funds due to the contractor as the comptroller deems necessary, to pay for all alleged loss, damage, or injury, of any kind, plus the reasonable costs of defending the city, which in the opinion of the comptroller may not be paid by an insurance company (for any reason whatsoever). Unfortunately, this scenario may occur without any fault of the contractor, as the following hypothetical shows:

Borough Builders is working on the renovation of City Hall. During the course of the work, Tom Jones (an employee of Borough) is injured. The injury appears minor, and Jones returns to

work 2 days later. The incident is reported only to Borough’s workers’ compensation insurer.

Later, Jones hires an attorney who provides notice of Jones’ claim to the city. Although the city should immediately provide notice of this claim to Borough, it does not.

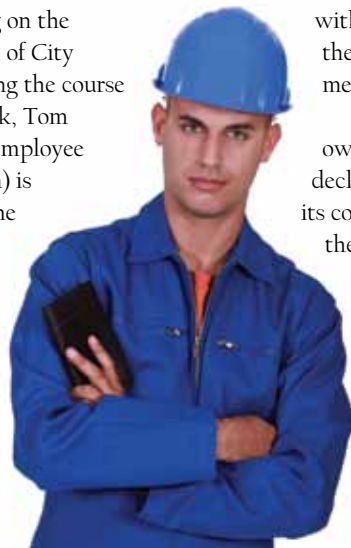
The city rejects Jones’ claim. Several months thereafter, Jones’ attorney files suit against the city. The city tenders the suit to Borough and demands a defense and indemnity. Borough immediately tenders the suit to its insurer on the city’s behalf. However, Borough’s insurer rejects the suit, contending that notice was untimely because the city failed to tender the claim as soon as it was received.

When the city learns that Borough’s insurer has refused to defend it against Jones’ suit, the city declares Borough to be in material breach of its contract with the city and ceases further interim requisition payments.

Through no fault of its own, Borough has now been declared in material breach of its contract and is faced with the holdback of all future payments under the contract. Nonetheless, even though the city is withholding all future payments to Borough,
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Borough is still required to complete the contract on time, or be in default on the contract. What is Borough to do?

Fortunately, the comptroller may permit the contractor to substitute other satisfactory security in lieu of the monies withheld. In our experience, we have been able to satisfy the comptroller's demands by arranging for the contractor to pay for the city's related legal bills.

This allows the contractor to continue being paid by the city for work performed under the contract.

The contractor can then file a declaratory action against its insurance company for their wrongful denial of this claim. In

this suit, the contractor can recover all of the money which it spends in defense of the city in the Jones suit. Additionally, the insurer will be responsible for all future costs incurred in defending the city, and will also be responsible for indemnifying the city against any judgment or settlement with Jones.

By being proactive, and working with your insurance coverage counsel and/or broker to ensure that the city receives full and appropriate documentation of your insurance policies, and timely notice of all claims are provided to the courts, you can avoid some circumstances that may lead to holdbacks under your construction contract

with the city.

However, if, through no fault of your own, the city does impose a holdback under your contract, there may be ways to minimize its impact on your business. In that situation, it is critical that you speak to a knowledgeable insurance policyholder coverage counsel as soon as possible. Don't delay. There are solutions to be found. **■**

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