

March 2015

NEW RETAINAGE LAW TAKES EFFECT IN MASSACHUSETTS

The Commonwealth of Massachusetts has a new retainage law applicable to most private construction projects that took effect on Nov. 6, 2014. The Retainage Law limits retainage to 5 percent of each payment and regulates the ability of owners and contractors to negotiate retainage, punchlist, and substantial completion provisions of certain private construction contracts. It applies to construction contracts with an original contract price of not less than \$3 million provided the project is lienable under the Massachusetts mechanic's lien law (i.e., contracts with prime contractors, all first- and second-tier subcontractors, and all first- and second-tier suppliers). Residential construction projects consisting of four or fewer units are exempt regardless of the contract value. All construction contracts executed after the effective date are subject to the new law.

The Retainage Law limits the amount of retainage withheld from each progress payment to no more than five percent of the payment. The law also specifically defines "substantial completion" as the stage of the project (or phase thereof, if applicable) at which work "is sufficiently complete...so that the project owner may occupy or utilize the work for its intended use." Any contract terms which conflict with this new statutory definition are void and unenforceable.

The Retainage Law also prescribes a timeline and procedure for the release of retainage. In general, retainage cannot be withheld for more than 90 days after substantial completion and seven additional days for each contract tier below the prime contractor. The Retainage Law imposes a new statutory form of notice of substantial completion that the prime contractor must submit to the owner within 14 days after achieving "substantial completion." The owner must accept or reject the substantial completion notice within 14 days of receipt and must send the general contractor a punchlist of deficient or incomplete items within 14 days after the owner's acceptance.

An owner may continue to withhold retainage in limited amounts for incomplete or incorrect work or deliverables and for certain outstanding claims. In such event, the owner must, before the date payment is due, provide the party seeking payment with written notice describing the deficient or missing work items and deliverables, the basis of the outstanding claims, and the value attributable to each. ■

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FOR MORE INFORMATION:

Anatoly M. Darov, P.E.

Partner and Chair, Design & Construction

T: 617.345.3820

E: adarov@burnslev.com

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Because the Retainage Law modifies important terms of the construction contract, owners and contractors should review construction contracts carefully with legal counsel and modify their own internal contracting documents and procedures to conform to the new law. If you have any questions about this change in the law and how it may impact your construction project, please contact Burns & Levinson.