

August 27, 2019

Change in Illinois Prompt Payment Law Limits Owners' Retainage Amounts



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A recent change in Illinois law will have a significant impact on how much retainage owners are allowed to withhold in the vast majority of new construction contracts in the state. The change to the Illinois Contractors Prompt Payment Act — effective Aug. 20, 2019 — puts a cap on the amount of retainage that may be withheld by owners from payments to general contractors at various stages of completion. These new caps also apply to subcontracts.

The change in the law, previously rejected by former Gov. Bruce Rauner but signed into law last week by Gov. J.B. Pritzker, adds Sec. 20 to the Prompt Payment Act, providing:

*"No construction contract may permit the withholding of retainage from any payment in excess of the amounts permitted in this Section. A construction contract may provide for the withholding of retainage of up to **10% of any payment made prior to the completion of 50% of the contract. When a contract is 50% complete, retainage withheld shall be reduced so that no more than 5% is held. After the contract is 50% complete, no more than 5% of the amount of any subsequent payments made under the contract may be held as retainage.**" (emphasis added)*

In practice, that means that retainage can never reach more than 5 percent of the total contract price even though it can be funded entirely (except for amounts withheld for change orders) through payments made during the first half of performance.

The change to the Prompt Payment Act does not apply to publicly funded projects, single-family residences and multifamily residences of 12 or fewer units, and it does not specify any remedy for non-compliance.

The new provision obviously impacts the negotiation of construction contracts, but it is unclear whether this provision can be waived by agreement of the parties. Additionally, although the new law does not mention lenders, owners will clearly have to raise and negotiate around these provisions with their lenders, who may not be aware of the new caps.

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