



Client Alert:

On September 7, 2021 at 12:01 am, HB21-1167, “A BILL FOR AN ACT CONCERNING RETAINAGE IN CONSTRUCTION CONTRACTS GOVERNING IMPROVEMENTS TO PRIVATE REAL PROPERTY,” went into full effect. This law contains significant ramifications for retainage withholding on private construction projects in Colorado.

As with similar laws that apply to public works projects (*see* C.R.S. § 24-9-103(1)(a)) HB21-1167 prohibits private construction project participants (*i.e.*, the owner, contractor, subcontractors, and their various respective suppliers and sub-tiers) from withholding more than 5% of the price of the work completed from payment to the corresponding payee. This cap on retainage is required only when the prime contract is valued at \$150,000.00 or more, but, when that is the case, the limitation applies to all lower tier agreements, including those by and between contractors, subcontractors, sub-subcontractors and suppliers. The new law does not state whether the legislature intended that agreements with consulting-service-only contractors are included, leaving the issue open for later court interpretation.

Please note that this limitation on withheld retainage is tied to the value of the work completed under the particular contract between the payee and payor, and not the total value of the project. Additionally, the limitation applies to “price of the work completed” *in the aggregate* and does not necessarily apply to individual invoices. Accordingly, the parties retain flexibility on how and when to apply the 5% withholding. For example, arguably, a contractor could withhold 10% of a subcontract value until the subcontractor has completed 50% of its work, so that the total value of retained funds over the performance of the subcontract is 5%.

Further, the new law does not circumvent contractual preconditions to payment. For example, satisfactory performance of the work is still required, and contract provisions for pay-if-paid, liquidated damages, “for cause,” and other, similar withholding are still effective. Indeed, the new law specifically provides that the payor may require executed lien waivers for any amounts paid, as an additional precondition to further payment allowed under statute. However, it is unclear whether the new law will affect typical punch list holdback provisions, such as those entitling the payor to withhold of 150-200% of the value of punch list work pending completion of the punch list items and satisfaction of other preconditions to final payment. It is possible that the new law could be read as disallowing such provisions.

Additionally, HB21-1167, now codified under C.R.S. § 38-46-101 *et seq.*, **only** applies to private construction contracts executed **on or after September 7, 2021**. Finally, the new law does not apply to contracts for the construction of (i) a single-family dwelling; (ii) a multifamily dwelling with 4 or fewer family dwelling units; or (iii) a contract with a public entity.



For questions regarding this new Colorado statute, or any other questions regarding Colorado construction law, please contact the construction law attorneys at Beltzer, Bangert & Gunnell LLP.