

STATEMENT BY STUART S. ZISHOLTZ, ESQ.

Almost every contract in the commercial arena contains a clause permitting the general contractor to withhold 10% retainage on behalf of the subcontractor. Sometimes, the retainage may be reduced to 5% once substantial completion is achieved. The question becomes when is the general contractor required to release the retainage to the subcontractor?

From the general contractor's point of view, it holds the retainage as an offset in case the owner assesses back charges or liquidated damages upon closeout of the project that are due to the subcontractor's performance. From the subcontractor's point of view, retainage should be released upon successful completion of its work as opposed to completion of the entire project. Essentially, the contractor performing foundation work or demolition may have to wait for years on a major project until the final retainage is released.

There are two determinative factors which will decide when retainage can be released.

First, the party's contract must be reviewed to determine whether or not the general contractor may hold all of the retainage until the project is completed and its own retainage is released from the owner.

Second, if the project is complete, has the owner or architect alleged any defects in the work of the particular subcontractor who is seeking the release of the retainage from the general contractor?

Recently, two decisions from the Appellate Division have addressed these very issues.

In the first case, the subcontractor sued for the balance due on its subcontract. The general contractor paid the full subcontract price less 10% retainage. As a defense to releasing the retainage, the general contractor claimed that since the owner had not accepted the project as complete, the contractor had no obligation to release the retainage. The contract between the general contractor and the subcontractor provided that the general contractor could withhold 10% retainage until such time as the entire construction project was completed and accepted by the

owner of the project.

In response, the subcontractor argued that this clause was unenforceable and violated the prior decisions of the Court of Appeals which struck the pay if paid clauses. The Appellate Court disagreed and found that since the owner had not yet accepted the work, the general contractor rightfully could continue to hold the retainage.

In a second decision, a mechanical contractor sued to recover a balance due including retainage. The subcontractor was successful against the general contractor because it established that it had completed its work and that no back charges existed which pertained to its contract with the general contractor.

The key issue with respect to retainage is to review your contract to determine when it is appropriate for the retainage to be released. If the contract permits the release of the retainage only after the owner has accepted all of the work, then you are stuck. If, however, you negotiate the contract to permit the release of the retainage once the owner has paid for and accepted the subcontractor's work, then you should be able to receive your retainage upon completion of your work.

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ZISHOLTZ & ZISHOLTZ, LLP
200 Garden City Plaza – Suite 408
Garden City, New York 11530
(516) 741-2200
Stu@zzllp.com