



Retainage Law in 50 States (2021)

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Foundation of the American Subcontractors Association, Inc.

1004 Duke Street

Alexandria, VA 22314-3588

Telephone: (703) 684-3450

Email: ASAOoffice@ASA-HQ.com

Web site: www.FASAonline.com

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RETAINAGE: REVISED AND REFORMED^[1]

Richard A. Stockenberg

ASA Midwest Council Chapter Attorney

I. Introduction

“Retainage” is a chameleonic term that changes its hues and shades depending on the context in which it is used and the party interpreting or invoking its use.^[2] In the construction industry retainage is, with good cause, generally considered to be funds held back to protect the owner and to assure completion. Certainly, the subcontracting community would prefer to not have to deal with funds being withheld, but given the reality of its continued existence, subcontractors have a vital interest in the manner in which it is practiced. Hence, it is not surprising that there have been legislative efforts to reduce, if not eliminate, abusive practices. In some cases, as will be discussed below in section I.B, there are examples of subcontractors gaining the upper hand when it comes to claiming entitlement to funds withheld. One key concept in advancing the interest of subcontractors is to have legislatures declare retainage a trust fund for the benefit of the party whose funds are withheld. This provides some protection for subcontractors when they are fighting with secured creditors, sureties, the IRS, and their ilk over who is entitled to retained funds when there are insufficient funds at the end of the project to satisfy all debts.

In an effort to keep its members, and the rest of the industry, abreast with recent changes to the legislative landscape involving retainage, ASA offers this 50-State Summary of retainage statutes for educational purposes. First, however, we offer a few comments on retainage – its historical roots– before summarizing existing laws.

A. What is Retainage?

Retainage is a concept peculiar to the construction industry. Even the most seasoned contractor cannot say with certainty when the practice began. Historically, retainage has been used as an integral component of a contract payment clause allowing the owner to withhold from the contractor's progress payments a portion of the contractor's anticipated profit until the owner is satisfied with the quality of the final product and timely completion.

Over the past several decades, it has been customary for retainage to be withheld at the rate of 10 ten percent of each progress payment. What seems lost on today's industry is that retainage should not exceed the contractor's customary profit. While modern day contractors will tenaciously complain that 10% is far too high for retainage because their profit margins are generally considerably less than that figure, there is evidence to suggest that 10% retainage is not nearly as bad as it once was. For example, an 1838 English case shows a different practice than what has become common In today's climate in the United States. In that case, retainage was withheld at the rate of 25% from progress payments, which were paid every two months instead of every month.^[3] The good news reflected within some of the statutory summaries below, is that there continues a slow but steady movement to actually lower the rate downward from 10%. Notably, retainage has been eliminated by the federal government. In addition, there is a growing number of states that have by law reduced the maximum rate of retainage to 5% or less. But there are some states that mandate retainage be withheld from contractors by governmental bodies even though there are no deficiencies in the contractor's performance, e.g., Maine, North Dakota, South Dakota, Texas, Ohio, Washington, Idaho, Nevada, and others. These mandates raise the question of whether the statutes are constitutional in that they may be a

violate the due process clause of the constitution by requiring earned funds be taken or withheld from contractors and subcontractors without appropriate cause.

The *Dictionary of Architecture and Construction, Second Edition*, edited by Cyril M. Harris, defines “retainage” as, “A sum withheld from progress payments to the contractor in accordance with the terms of the owner-contractor agreement.” The same dictionary defines “retention” as, “1. The withholding of a portion (usually 10%) of a periodic payment to a contractor, by prior agreement, for work completed. The retention is held in escrow for a stipulated time period after the acceptance of the completed work by the architect and owner/payee.” The key concept in this definition is that retention is an escrow account, not necessarily held exclusively for the benefit of the owner.

The Minnesota Court of Appeals cited Justin Sweet, *Legal Aspects of Architecture, Engineering and the Construction Process* (2d Ed. 1977) defining retainage as, “...a contractually created security system under which the owner retains a specified portion of earned progress payments to secure itself against certain risks.”^[4] Though accurate, this definition is not complete in that the case law and statutes, when read as a whole, lead to the conclusion that retainage is not just a security system for the owner, but a fund – trust, escrow, or otherwise – for the benefit of the contractors and subcontractors (and their sureties) performing work for the benefit of the owners who receive and enjoy the fruits of their labor. For example, Missouri’s statute for private projects says all amounts retained shall be held by the owner in trust for the benefit of the general contractor, subcontractors, or suppliers in proportion to their interests.^[5]

The one thing that is clear from these definitions, as well as from custom and practice in the industry, is that retainage does not represent money held back for known damages, or

problems, or liquidated damages. The Minnesota Court, again citing Professor Sweet said, “The purpose of retainage is to provide money out of which claims the owner has against the contractor can be collected without the necessity of a lawsuit. It is not an agreed damage or damage limit.”^[6] Retainage accounts are security funds that have as a recurring legal problem the issue of deciding the party for whose benefit the fund is held. The owner’s interest is of course obvious, but most – not all – litigation over retainage involves the competing interests of others besides the owner.

Even though monthly progress payments and retainage represent evidence, albeit tacit, that the owner is satisfied that the appropriate amount of work has been sufficiently completed to warrant issuing the progress payment, the Seventh Circuit Court of Appeals has made a distinction between who has entitlement to progress payments versus retainage. The Seventh Circuit Court of Appeals described retainage as a fund “intended from the inception of a contract to settle potential claims” and distinguished these from progress payments “which belong to the free flow of commerce from the time they are properly paid over.”^[7] This distinction of course overlooks the fact that progress payments withheld by the owner in accordance with the terms of its contract are also held for the purpose of settling claims – actual claims instead of potential claims.

Subcontractors and general contractors on any given day will have enormous sums of cash withheld from their earned payments for unknown lengths of time. Having earned these funds, contractors and subcontractors are keenly interested in the amount withheld, timely release, and the security of the fund while it is being withheld.

B. Retainage is for Whose Benefit?

Unquestionably, retainage is for the benefit of the owner, but it is equally clear that it is also for the benefit of the surety under a performance bond who uses its own funds to complete its principal's contractual obligations to the owner under their construction contract. That the performance bond surety has an interest in the retainage fund was made clear by the United States Supreme Court when it said:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be the guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties is amply sustained by authority."^[8]

Likewise, let there be no doubt that retainage is also for the benefit of contractors and subcontractors who actually perform the work. In a line of cases dating back more than a century the U.S. Supreme Court has favored on equitable principles contractors' claims to positive contract balances over those who loaned the money for construction of the project. For example, the U.S. Supreme Court said:"

"From *Prairie State Bank v. United States*, 164 U.S. 227 to *American Surety Co. v. Sampsell*, 327 U.S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money."^[9]

In addition, a New York court has ruled that a contractor was a third-party beneficiary to a contract between a municipality and a turnkey developer allowing the municipality to retain 5% of each progress payment. The city had a contractual responsibility to retain 5% of the progress payments it made to the developer. When the contractor who built the garage was not paid by the developer, it brought suit against the city alleging that the city breached its contract

with the developer by failing to withhold retainage and that the contractor, as a third-party beneficiary of that contractual provision, was entitled to a judgment against the city for the missing retainage. The court ruled that the city was liable to the contractor because the retainage account was intended for the benefit of the contractor.^[10] In effect, the court ruled that the owner had more than a contractual right to withhold retainage for its own benefit, but also had a duty to retain funds for the protection of the contractor.

II. **Abusive Practices Give Rise to Fights**^[11]

Just as owners believe that retainage is necessary in order to incentivize their contractors and subcontractors to complete their work, so do contractors and subcontractors believe that they have risks that need to be protected with respect to retainage. Specifically, contractors point to examples of projects where they have timely and properly completed their work only to find that the owner, who supposedly was holding their retainage fund, did not segregate or otherwise protect these funds. Owners may, for example, use retainage as a means of helping finance an otherwise financially unstable project. In this situation, contractors may find that the retainage withheld, supposedly for the purpose of assuring satisfactory completion of the project, has been spent elsewhere and now that the project has ended, the owner has no means of making good on its retainage obligations.

III. **Legislative Responses**

Thus, contractors are becoming increasingly sensitive to protecting their interests in retainage leading to evolutionary legislative reform around the country. There is a trend to lower the rate at which retainage is withheld. We now find states that have enacted legislation allowing stakeholders to substitute securities for cash. While fairly common on public works projects,

Missouri, Kansas, and Tennessee allow for substitute security on private projects. Other states require retainage to be placed in escrow accounts with interest earned paid to the contractor or subcontractor. Vermont in 2018 enacted legislation prohibiting retainage to be withheld from pure material suppliers. Some states allow for line-item release of retainage to benefit the early trades. Failure to comply with statutory requirements may result in imposition of interest and/or attorneys' fees.

In 2007, New Mexico enacted sweeping reform legislation *prohibiting* retainage for most public and private construction projects.^[12] But, as noted below by Sean Calvert in his summary of New Mexico law, the elimination of retainage by statute has not necessarily made things rosy because it has led to the practice of allocating in the schedule of values comparable sums for closeout. This same tactic is also sometimes used in those situations where statutes allow for substitute security as an alternative to cash retainage. These are good examples of the chameleon changing its color. To counter the practice of converting deliverables into retainage, Massachusetts struck back by limiting the amount that can be withheld for missing deliverables to 2.5 percent unless a specific amount has been agreed upon in writing, and then only after prior notice.^[13]

To be sure, the legislative process can work and look like the sausage factory. It can be ugly. Sometimes bad things can happen, like laws mandating retainage be withheld, or validating unreasonably high rates of retainage, or requiring retainage to be held until warranties run out. There are no guarantees that only good will come from legislative proposals. However, without the efforts of subcontractors as forceful advocates working in the halls of legislative bodies, it is highly unlikely that things will improve.

Finally, this 2021 edition of ASA’s updated 50-State Summary reflects new legislation and amendments enacted since the last publication in 2018, among them in Illinois, Vermont, Rhode Island, Delaware, and Minnesota. This publication is not intended as legal advice. New laws take effect every year; others are repealed. Retainage is complex and ever changing; we encourage you to contact legal counsel to address your specific questions and needs. Names of the attorneys contributing statutory summaries are listed in Appendix A.

^[1] Much of these prefatory comments is taken from a paper presented by the author to the American Bar Association’s Forum on the Construction Industry titled “*Fight for the Fund: Who Owns the Retainage*” discussing applicable case law addressing differing ownership interests in retainage; whereas the following summary covers statutes on the subject.

^[2] This is a description given to the term “accident” by the Missouri Court of Appeals to decide the question of insurance coverage in the case of *White v. Smith*, 440 S.W.2d 497, 507-08 (Mo. App. 1969).

^[3] *Calvert v. London Dock Co.*, 2 Keen, 638 (1838).

^[4] *Van Knight Steel Erection, Inc. v. Hous. & Redevelopment Auth. of City of St. Paul*, 430 N.W.2d 1, 3 (Minn. Ct. App. 1988).

^[5] MO. REV. STAT. §436.303

^[6] *Van Knight Steel Erection, Inc. v. Hous. & Redevelopment Auth. of City of St. Paul*, 430 N.W.2d 1, 3 (Minn. Ct. App. 1988).

^[7] *Capitol Idem. Corp. v. US*, 41 F. 3d 320, 325 (7th Cir. 1994).

^[8] *Prairie State Bank v. US*, 164 U.S. 227, 233, 17 S.Ct. 142, 145, 41 L. Ed. 412, 417 (1896).

^[9] *United States v. Munsey Trust Co.*, 332 U.S. 234, 240, 67 S. Ct. 1599, 1602, 91 L.Ed. 2022, 2028 (1947).

^[10] *Murnam Assoc. Inc. v. Harrison Garage Parking Corp.*, 659 N.Y.S.2d 665 (N.Y. App. Div. 1997).

^[11] This article is not intended to treat the abuses of retainage. That subject is covered in Richard A. Stockenberg & Jennifer S. Woodbury, “*Retainage Revised: A Time to Revise and Reform*,” 16 THE CONSTRUCTION LAWYER, No. 1, p.41 (1996).

^[12] N.M.S.A. § 57-28-5. (2007).

^[13] M.G.L.A. 149 § 29F (g). (2014).

ALABAMA

Private

Alabama defines retainage on private projects as “that money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower tier sub-subcontractor, or supplier for work properly performed or materials suitably stored if payment for stored materials is provided for in the contract, which has been retained by the owner conditioned upon final completion and acceptance of all work in connection with a project or projects by the contractor, subcontractor or lower tier sub-subcontractor, or supplier.” ALA. CODE § 8-29-3 (h).

Alabama places restrictions on the percentages of retainage to be withheld on private projects and the stage of construction after which no further retainage may be withheld. Specifically, on contracts for private projects, the Alabama Code caps retainage that can be withheld at ten (10%) percent of the estimated value of conforming work performed until the work reaches fifty percent (50%) completion, after which no retainage may be withheld on further payments to the Contractor. See ALA. CODE § 8-29-3. Thus, the effective cap on the total retainage over the course of a private project is five percent (5%) of the contract amount. The cap on retainage does not apply to contracts of less than \$10,000, to residential homebuilders or to contracts with the state or local governments in Alabama. See ALA. CODE § 8-29-7. Additionally, Alabama Code § 8-29-3(f) prohibits Contractors from holding a higher percentage of retainage from Subcontractors than is withheld from them by the Owner. The same restriction applies to Subcontractors as it relates to retainage withheld from their sub-subcontractors. See ALA. CODE § 8-29-3(g). Interest on late payments accrues at one percent per month (12% per annum) on the unpaid balance due per Alabama Code § 8-29-3.

While retainage normally is paid upon the Contractor or Subcontractor achieving Substantial Completion or final completion of the project, Alabama law does not prohibit the early release of retainage for those trades completing the performance of their portion of the work early in the construction process (e.g., Grading Subcontractors).

Public

Alabama Code § 39-2-12(a)(3) defines retainage on public projects as “that money belonging to the contractor which has been retained by the awarding authority conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor.”

On public projects, five percent (5%) of the estimated amount of work properly performed may be retained up to fifty percent (50%) completion of the project, after which no retainage may be withheld from subsequent payments. See ALA. CODE § 39-2-12. Thus, the effective cap over the course of a public project is 2.5% of the contract amount. Under certain circumstances, the public awarding authority may elect not to withhold retainage if it otherwise requires the Contractor to (1) maintain an escrow account or, (2) deposit certain securities. See ALA. CODE § 39-2-12(e)(f)(g). Likewise, no retainage may be withheld “on contracts entered into by the Alabama Department of Transportation for the construction or maintenance public highways, bridges or roads.” ALA. CODE § 39-2-12(c).

ALASKA

Public

Prime contract agreements on public works projects must include the following provisions: (1) a clause that requires the prime contractor to pay all retainage due under the subcontract within either 8 working days after the public owner makes final payment, or within expiration of a notice period under AS § 36.25.020(b), whichever occurs later; and (2) interest on withheld retainage at the statutory amount set forth in AS § 45.45.010(a) (currently 10.5%). Alaska Stat. § 36.90.210(a).

Subcontractors on public works must include clauses in their subcontractor agreements obligating them to pay all retainage due under the subcontract within 8 working days after the subcontractor receives its share of the retainage from the prime contractor or a different subcontractor, and to pay interest on the retainage withheld at the statutory rate set forth in AS § 45.45.010(a) (currently 10.5%). Alaska Stat. § 36.90.210(b).

Interest on retainage accrues from the date of approval of a pay request until the date of payment to the contractor. Alaska Stat. § 36.90.250(a).

Private

None.

ARIZONA

Public

The rate of retainage is 10 percent of the amount of each pay estimate. When 50 percent of the work is completed, one-half of the retainage is released. Thereafter, if work is deemed satisfactory, no more than 5 percent may be retained. In lieu of retainage, a contractor may deposit securities. Upon final payment, the contractor is entitled to all interest earned on the deposited securities. When a contractor substitutes securities, a subcontractor is also entitled to substitute securities. Upon completion and acceptance of each separate building, public work or division of the contract, payment may be made in full. ARIZ. REV. STAT. § 34-221(C).

For construction-manager-at-risk services, design-build services and job-order construction contracts, the maximum rate of retainage is 10 percent of the amount of each pay estimate. When the contract is 50 percent completed, one-half of the amount retained, including any securities substituted, shall be paid upon the contractor's request, provided the contractor's progress is satisfactory. After the contract is 50 percent complete, no more than 5 percent may be retained, provided the contractor is proceeding acceptably. If, at any time, the owner determines satisfactory progress is not being made, 10 percent shall be retained. A contractor may substitute securities in lieu of retainage. Upon completion and acceptance of each separate building or division of the contract, payment may be made in full. ARIZ. REV. STAT. § 34-609.

Private

Owners may hold a "reasonable amount of retention." ARIZ. REV. STAT. § 32-1182(D). Owners also are permitted to hold an amount sufficient to pay the direct expenses the owner reasonably expects to incur to correct any items set forth in the statute such as defective work, damage, or reasonable evidence that the contract cannot be completed. For a full list of statutory items see ARIZ. REV. STAT. § 32-1182(D)-(E). At a subcontractor's request, owners must notify subcontractors of progress payments and final payment within five days. ARIZ. REV. STAT. § 32-1182(R).

Per ARIZ. REV. STAT. § 32-1182(H), on substantial completion of the work, as that term is defined in § 32-1181, a contractor shall submit a billing or estimate for release of retention. Unless the owner opts out of this requirement, the billing or estimate for release of retention shall be deemed certified and approved within fourteen days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent issues a written statement stating in reasonable detail the owner's reasons for not certifying or approving all or a portion of the billing or estimate. The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for receipt or for certification and approval of the billing or estimate. The owner may withhold from retention to be released only an amount not to exceed one hundred fifty percent of the direct costs and expenses the owner reasonably expects to incur to protect the owner from loss for which the contractor is responsible and that results from the contractor's failure to complete portions of the work at the time of substantial completion or for any reasons set forth in writing pursuant to this subsection. ARIZ. REV. STAT. § 32-1182(H). Refer to ARIZ. REV. STAT. § 32-1182 for more information.

ARKANSAS

Public

Generally, the rate of retainage for a contractor required to provide a performance and payment bond is 5 percent. A public agency may forego retaining from progress payments if: the construction contract is 50-percent complete; the contractor has provided the work in a satisfactory manner; and the design professional and public agency agree with and approve that work is fifty-percent complete and the contractor has performed in a satisfactory manner. However, a public agency may retain throughout the project.

In the case of a construction subcontract entered into between a contractor for a public agency and a subcontractor who is required by the contractor to furnish a performance and payment bond, the subcontractor shall be entitled to payment of ninety-five percent (95 percent) of the earned progress payments when due, with the contractor retaining five percent (5 percent) to assure performance of the subcontract. Upon approval of the contractor, if the subcontractor completes fifty percent (50 percent) of the construction subcontract, the contractor shall not retain any further moneys.

Monies are to be paid to the contractor within 30 days of the contract being completed. Retainage is not deducted from the part of a progress payment that includes the cost of materials or equipment stored on the job site. ARK. CODE ANN. § 22-9-604. A contractor may substitute securities in lieu of retainage. ARK. CODE ANN. § 22-9-501.

Private

None.

CALIFORNIA

Public

Until final completion and acceptance of the project, the rate of retainage shall not be more than 5 percent. Any time after 95 percent of the work is completed, the agency may reduce the funds retained to an amount not less than 125 percent of the estimated value of the unfinished work. CAL. PUB. CONT. CODE §10261. A contractor may substitute securities in lieu of retainage or request that payments be made into an escrow account. CAL. PUB. CONT. CODE §10263. Public Entity shall pay retention within 60 days after completion of work of improvement and may withhold 150% of any disputed amount. Completion means any of the following: 1)The occupation, beneficial use, and enjoyment of a work of improvement, excluding any operation for testing, startup, or commissioning, by the public agency, or its agent, accompanied by cessation of labor on the work of improvement; 2)The acceptance by the Public agency, or its agent, of the work of improvement; 3)After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor; 4)After the commencement of a work of improvement, a cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public agency files for record a notice of cessation or a notice of completion. PUB. CONT. CODE §7107. Retention from original contractor to subcontractor shall be paid within 7 days of receipt from Public Entity and may withhold 150% of amount in dispute with subcontract if bona fide dispute exists with subcontractor. PUB. CONT. CODE §7107.

Private

Retainage must be released within 45 days of the "date of completion," as defined by Civil Code §8180(a) which provides completion of a work of improvement occurs upon the occurrence of any of the following events: 1) Actual Completion; 2) Occupation or use by the owner accompanied by cessation of labor; 3) Cessation of labor for a continuous period of 60 days; or 4) Recordation of a notice of cessation after cessation of labor for a continuous period of 30 days. CAL. CIV. CODE §8812(a). Owner may withhold 150% of good faith dispute with Direct Contractor. CAL. CIV. CODE §8812(c). Direct Contractor shall pay Subcontractor within 7 days of receipt of retention from owner unless otherwise agreed to in writing. If a dispute arises, the Direct Contractor may withhold 150 percent of the amount disputed in good faith. CAL. BUS. & PROF. CODE §7108.5

COLORADO

Public

For contracts exceeding \$150,000, the maximum rate of retainage is 5 percent. Upon written request by the contractor, the public entity may authorize final payment to the contractor or subcontractors who have completed their work, if the entity finds satisfactory progress is being made. COLO. REV. STAT. § 24-91-103.

The contractor is permitted to substitute securities in lieu of retainage and is entitled to all interest that accrues. COLO. REV. STAT. §§ 24-91-105, -108.

Private

Retainage for private construction projects where the prime contract amount is in excess of \$150,000, the maximum rate is 5%. The statutory limit on retainage for private work does not apply to contracts between private owners and contractors for construction of single-family dwellings and a multi-family dwelling of no more than four units. If the statutory limit on retainage for private work is applicable, subcontracts and supply agreements of all tiers are limited to 5% even if they are less than \$150,000. COLO. REV. STAT. § 38-46-103

CONNECTICUT

Public

For contracts requiring payment and performance bonds that are advertised by the Department of Administrative Services or any other state agency, except the Department of Transportation, retainage shall not exceed 7.5% for the first 50% of the project at which point the amount shall be reduced to 5%. General contractors shall withhold from subcontractors no more than 7.5% or the amount withheld by the owner whichever is less, provided when the job is 50% complete the amount shall be reduced to 5%. Payment shall be made not later than 90 days after a pay application has been submitted showing the project to be 50% complete. The owner is obligated to establish an early release program with respect to periodic payments by general contractors to subcontractors. C.G.S. §49-41b(1).

The Department of Transportation shall not withhold more than 2.5% from any payment to a contractor. The contractor shall not withhold more than 2.5% from any payment to a subcontractor. C.G.S. 49-41b(2).

Municipalities shall not withhold more than 5% from any payment to a contractor and the contractor in turn shall not withhold more than 5% from any payment to a subcontractor. C.G.S. § 49-41b(3).

The contractor or subcontractor may substitute securities for retention in any contract with the state or public department or official. C.G.S. § 3-112a(a). The interest or income earned on the securities shall be collected by the Comptroller when earned and paid to the contractor or subcontractor who deposited the securities. C.G.S. §3-112a(b)

Private

No construction contract can provide for a retainage rate greater than 5% for the life of the project. All retainage shall be released by the owner within 30 days after issuance of certificate of final completion or acceptance by the owner. C.G.S. § 42-158k.

An escrow account shall be established for all retainage. C.G.S. § 42-158p. The account shall be terminated, and the contractor paid in full upon substantial or final completion of the project. C.G.S. § 42-158p(d). The owner shall be responsible for all expenses related to the escrow account. C.G.S. § 42-158p(e). Owners and Contractors may accept securities in lieu of retainage. C.G.S. § 42-158p(h). See C.G.S. § 42-158j (dealing with prompt payment).

DELAWARE

Public

Where retainage is withheld it shall be 5% of the value of the work completed by the contractor. Upon completion, the agency may release 60% of the retainage while the balance is held until (1) the contractor submits all required reports, and (2) all subcontractors are paid undisputed amounts in which case the agency may withhold 150% of the amount withheld by the contractor, and (3) the agency authorizes release. Del. Code Ann. Tit. 29, § 6962 (d)(5)(a)(1).

The contractor may, with agency approval, substitute securities in lieu of retainage. DEL. CODE ANN. tit. 29, § 6962(d)(5)(c)(1).

See also DEL. CODE ANN. tit. 29, § 6516(f)(3).

DISTRICT OF COLUMBIA

Public

On all contracts, 10 percent shall be retained. When 50 percent of the work is complete, the mayor has discretion to eliminate or reduce the retention. D.C. CODE § 2-203.01.

Private

None.

FLORIDA

Public

(1) The maximum rate of retainage is 10 percent. After 50-percent completion of the construction services purchased pursuant to the contract, the public entity must reduce to 5 percent the amount of retainage withheld from each subsequent progress payment made to the contractor. For purposes of this section, the term "50-percent completion" has the meaning set forth in the contract between the public entity and the contractor or, if not defined in the contract, the point at which the public entity has expended 50 percent of the total cost of the construction services purchased as identified in the contract together with all costs associated with existing change orders and other additions or modifications to the construction services provided for in the contract. FLA. STAT. ANN. § 255.078.

(2) After 50-percent completion of the construction services purchased pursuant to the contract, the contractor may elect to withhold retainage from payments to its subcontractors at a rate higher than 5 percent. The specific amount to be withheld must be determined on a case-by-case basis and must be based on the contractor's assessment of the subcontractor's past performance, the likelihood that such performance will continue, and the contractor's ability to rely on other safeguards. The contractor shall notify the subcontractor, in writing, of its determination to withhold more than 5 percent of the progress payment and the reasons for making that determination, and the contractor may not request the release of such retained funds from the public entity.

(3) After 50-percent completion of the construction services purchased pursuant to the contract, the contractor may present to the public entity a payment request for up to one-half of the retainage held by the public entity. The public entity shall promptly make payment to the contractor, unless the public entity

has grounds, pursuant to subsection (6), for withholding the payment of retainage. If the public entity makes payment of retainage to the contractor under this subsection which is attributable to the labor, services, or materials supplied by one or more subcontractors or suppliers, the contractor shall timely remit payment of such retainage to those subcontractors and suppliers.

(4) Neither this section nor s. [255.077](#) prohibits a public entity from withholding retainage at a rate less than 10 percent of each progress payment, from incrementally reducing the rate of retainage pursuant to a schedule provided for in the contract, or from releasing at any point all or a portion of any retainage withheld by the public entity which is attributable to the labor, services, or materials supplied by the contractor or by one or more subcontractors or suppliers. If a public entity makes any payment of retainage to the contractor which is attributable to the labor, services, or materials supplied by one or more subcontractors or suppliers, the contractor shall timely remit payment of such retainage to those subcontractors and suppliers.

(5) Neither this section nor s. [255.077](#) requires the public entity to pay or release any amounts that are the subject of a good faith dispute, the subject of a claim brought pursuant to s. [255.05](#), or otherwise the subject of a claim or demand by the public entity or contractor.

With the state's approval, a contractor may substitute securities in lieu of retainage. FLA. STAT. ANN. § 255.052.

For contracts with the Department of Transportation, the department may retain up to 10 percent if the contractor fails to timely complete or falls behind in work progress. See FLA. STAT. ANN. §§ 337.175; 337.015.

Private

None

GEORGIA

Public

The maximum rate of retainage is 10 percent on all progress payments. When 50 percent of the contract is completed, retainage ceases if the work is satisfactory. If the work is unsatisfactory or has fallen behind schedule, retainage may resume at the previous level. GA. CODE ANN. §§13-10-80(b)(2)(A).

At substantial completion, the public entity shall release the retainage within 30 days after receiving the contractor's invoice. The owner may withhold an amount equal to 200 percent of the value of each incomplete item, to be released upon the completion of each item. GA. CODE ANN. §§13-10-80(b)(2)(C).

A subcontractor is entitled to the same percentage of retainage as the contractor. If the contractor's retainage is reduced or if the contractor receives full payment of the retained amount, it must reduce the subcontractor's retention, but only if 50 percent of the subcontractor's work has been completed. GA. CODE ANN. §§13-10-80(b)(2)(C), -81.

The Department of Transportation is permitted to retain if the appropriate clauses are included within the contract. GA. CODE ANN. § 32-2-75.

Private

None.

HAWAII

Public

The state may withhold no more than 5% from the total amount due to the contractor. Once 50% of the contract has been satisfactorily completed, no additional sums may be withheld. However, if progress is not satisfactory, then the state may continue to withhold 5% of the amounts due to contractor as retainage. HAW. REV. STAT. § 103-32.1(c)(1).

Where a subcontractor has provided the contractor evidence of a bond or other acceptable collateral, the retention amount withheld by the contractor from its subcontractor shall be the same percentage of retainage as between the owner and the contractor. These same rules apply to subcontractors who subcontract work to other subcontractors. HAW. REV. STAT. § 103-32.1(d).

Any public contract may provide that the contractor may substitute a general obligation bond having a market value more than the sum to be withdrawn. HAW. REV. STAT. § 103-32.2.

A subcontractor is entitled to receive final payment, including retainage, within 10 days after the contractor receives payment of same from the owner, provided there is no dispute over the subcontractor's performance. Haw. Rev. Stat. § 103-10.5.(b).

Upon (1) evidence of satisfactory performance by a subcontractor, and (2) submission of a proper final payment request, and (3) provision of an acceptable performance and payment bond, then the owner shall pay the contractor who in turn shall pay the subcontractor within 10 days of receipt of same, all sums retained or withheld from the subcontractor. HAW. REV. STAT. § 103-10.5(c)(1) ; or

Upon (1) evidence of satisfactory performance by a subcontractor, and (2) submission of a proper final payment request, and (3) more than 90 days have elapsed since the last labor was performed and material furnished without notice of a claim to the contractor and surety, and (3) provision of an acceptable release of retainage bond or other bond or collateral, then the owner shall pay the contractor who in turn shall pay the subcontractor within 10 days of receipt of same, all sums retained or withheld from the subcontractor. HAW. REV. STAT. § 103-10.5(c)(2)

If the procurement officer or contractor fails to comply, a penalty of 1.5% per month shall be imposed. HAW. REV. STAT. § 103-10.5(c).

A contractor is not entitled to be paid retainage that was withheld from its subcontractor without a certification that the payment does not include any amounts it intends to withhold or retain from its subcontractor or supplier. HAW. REV. STAT. § 103-10.5(e)(2)(C).

IDAHO

Public

If a public body requires a performance or payment bond in excess of 50 percent for the total contract amount, the rate of retainage may not exceed 5 percent of the money owed to the contractor. Retention must be released to the contractor 30 days after the acceptance of the portion of the project on which the funds were retained. Contractors may not retain more than 5 percent from subcontractors and shall release retention to subcontractors within 30 days of the completion of the subcontract. IDAHO CODE § 54-1926.

For the construction of projects involving irrigation and drainage districts, 10 percent retainage is required until 90 days after final completion and all claims have been submitted to the district. IDAHO CODE § 42-2944.

Private

If no performance bond is provided or the project is not residential construction of 1 to four units, retainage from the owner to the contractor and the contractor to subcontractors cannot exceed 5 percent of the payment due.

Within 35 days of substantial completion, retention must be reduced to the greater of 150% of the cost to complete the remaining work, as agreed by the parties, or 5% of the contract price.

Within 35 days from final completion, the owner must pay the remaining retention to the contractor. Except that the owner may require final lien waivers before releasing retention; and, if there is a dispute between the owner and the contractor, the owner may withhold 150% of the value of the dispute.

Once a contractor or subcontractor receives retention, it must pay retention withheld from subcontractors. Except that retention designated for a specific subcontractor must be paid to that contractor. If a contractor has a bona fide dispute with a subcontractor, it may withhold from retention 150% of the estimated value of uncompleted work or the issue in dispute. IDAHO CODE § 29-115.

See also IDAHO CODE § 67-2302 (interest for late payment on retainage).

ILLINOIS

Public

No retainage amounts are specified in the Illinois Highway Code. However, at the request of the contractor and with the Department of Transportation's approval, retention may be held under a trust agreement. Interest belongs to the contractor. 605 ILCS 5/4-103.

Where retainage under a subcontract is expected to equal or exceed \$20,000 and at the subcontractor's request, the contractor may deposit the retainage of the subcontract under a trust agreement and the subcontractor shall be entitled to any interest. The statute specifies minimum requirements for the escrow agreement with a federally insured Illinois financial institution. 605 ILCS 5/4-104.

Private

Effective August 20, 2019, retainage is capped at 10% on private (non-residential) projects for payments made before the completion of 50% of the contract. When a contract is 50% complete, the retainage withheld must be reduced so that no more than 5% is withheld. Thereafter, no more than 5% may be withheld from later payments. 815 ILCS 603/20.

This statute applies to retainage withheld by a general contractor from a subcontractor because the statute applies to a "construction contract" and the term "construction contract" is defined as "a contract or subcontract." 815 ILCS 603/5(b). By extension, sub-subcontractors and material suppliers are also covered by the 5% limitation because the terms "contractor" and "subcontractor" have the same meanings as ascribed by the Illinois mechanic's lien act and cases decided under the Act. The lien Act covers sub-subcontractors and material suppliers. 770 ILCS 60/21 and 22. A.Y. McDonald

Manufacturing Co. v. State Farm Mutual Automobile Insurance Co., 225 Ill.App.3d 851, 587 N.E.2d 623 (4th Dist 1992).

INDIANA

Public

Public works contracts more than \$200,000 (other than roads/bridges) are governed by Ind. Code § 36-1-12-14. A board may require a contractor and subcontractor to include retainage provisions as set forth in the statute in their contracts that are not more than \$200,000. Ind. Code § 36-1-12-14(a).

Contracts between boards and contractors, and subcontracts between contractors and their subcontractors shall include retainage provisions. At the contractor's option, the retainage shall be held either by the board or placed in escrow. Ind. Code § 36-1-12-14(b).

The amount of retainage shall be either (1) no more than 10% nor less than 6% of the value of work completed until the project is 50% completed, or (2) no more than 5% nor less than 3% of the value of all work satisfactorily completed until the job is substantially completed. Ind. Code § 36-1-12-14(c).

If upon substantial completion, there are uncompleted minor items, the owner may withhold an amount equal to 200% of the value of each item as determined by the architect/engineer. Ind. Code § 36-1-12-14(c) and (f).

The Indiana stadium and convention building authority may waive the requirement of a performance bond if the board requires retainage of at least 10% of the contract amount and also determines a bidder is unable to provide a performance bond or the cost of the bond is not in the best interest of the project. Ind. Code § 36-1-12-14(i)(1) and (2).

For most public works projects exceeding \$1,000,000 there are two options: The owner can withhold no more than 6% until the project is 50% complete. IND. CODE § 4-13.6-7-3(a)(1); at that point, no further funds shall be retained. Id. Alternatively, the owner may withhold no more than 3% until the project is substantially complete. IND. CODE § 4-13.6-7-3(a)(2). If there are uncompleted minor items, the owner may withhold an amount equal to 200% of the value of each item as determined by the architect/engineer. IND. CODE § 4-13.6-7-3(b)(1).

The director may apply the retainage provisions to contracts having a value of less than \$1,000,000. IND. CODE § 4-13.6-7-1.

If the estimated cost of a project is more than \$1,000,000, the contract shall require that the division may withhold from the contractor sufficient funds to pay subcontractors and suppliers. IND. CODE § 4-13.6-7-2.

If the division retains funds from a contractor, or if a contractor retains funds from a subcontractor, such funds may be placed in an escrow account. IND. CODE § 4-13.6-7-2.

See also IND. CODE §§ 4-13.6-7-4, 4-13.6-7-9 (dealing with payment).

For other projects, state agencies also have two options for retainage. First, withhold no more than 10% nor less than 6% of its payments to the contractor until the project is 50% complete. IND. CODE § 5-16-5.5-3.5(a)(1). At that point, the agency shall withhold no additional funds. Id. Alternatively, the agency may withhold no more than 5% nor less than 3% of its payments until the work is substantially completed. IND. CODE § 5-16-5.5-3.5(a)(2).

If upon substantial completion there are minor uncompleted items, the division may withhold an amount equal to 200% of the value of the work yet to be completed. IND. CODE §§ 5-16-5.5-3.5(b), 5-16-5.5-6.

If the state retains funds from a contractor, or if a contractor retains funds from a subcontractor, such funds shall be placed in an escrow account. IND. CODE § 5-16-5.5-3.

IOWA

Public

The maximum rate of retainage is 5 percent of the amount due of the estimated labor performed and materials delivered. A contractor may retain from a subcontractor either 5 percent or an amount specified in the parties' contract, whichever is smaller. IOWA CODE § 573.12.

For statutory provisions involving improvements to state Board of Regents institutions see IOWA CODE § 262.34.

Private

None.

KANSAS

Public

Retainage is capped at 5 % for all tiers unless the owner or contractor determines a higher rate, not to exceed 10%, is required to assure performance. K.S.A. 16-1904(a). If there are performance issues, the rate may be increased to 10%. K.S.A. 16-1904(b).

Prior to commencement of work, contractors and subcontractors may request an alternate security. If so, the owner or contractor selects the form of the security, e.g., letter of credit, certificate of deposit, cash bond, or other asset/security (presumably a retainage bond), but not a payment or performance bond K.S.A. 16-1904 (f) and (g) and 16-1902(a).

Owners, contractors, and subcontractors may withhold up to 150 % of the value of incomplete work due to the fault of the contractor or subcontractor. Once remedied, the funds shall be released within 45 days. K.S.A. 16-1904(c), (d), and (e).

Retainage shall be released on any undisputed payment within 30 days after substantial completion of the project; however, retainage attributable to punch list work may be withheld until 30 days after completion of such work. K.S.A. 16-1904(h).

Subcontractors are entitled to receive retainage within 7 business days after the contractor receives it from the owner if the subcontractor has submitted a proper and undisputed pay application. K.S.A. 16-1903(f).

Subcontractors may be entitled to early release of retainage prior to substantial completion of the entire project, if the subcontractor has completed performance satisfactorily and if it is determined that release is without risk or additional cost to the owner or contractor. K.S.A. 16-1904(j).

A failure by the owner, contractor, or subcontractor to timely pay retainage entitles the contractor or subcontractor to receive interest at the rate of 18% per annum starting on the first business day after the due date. K.S.A. 16-1904(i).

In enforcement actions, including arbitrations, between contractors and subcontractors, the prevailing party is entitled to recover its costs and reasonable attorneys' fees. K.S.A.16-1906.

For road/bridge projects, retainage is capped at 10%. K.S.A. 68-411. Note: K.S.A. 16-1904 does NOT apply to road/highway/bridge projects. K.S.A. 16-1902(b).

Contractors that have contracts with owners of more than \$1,000,000 may request their retainage be placed in an interest bearing escrow account or provide substitute security, e.g., U.S. or Kansas notes and bonds, certificates of deposit. K.S.A. 75-6909.

Private

Retainage is capped at 5% for all tiers unless the owner or contractor determines a higher rate, not to exceed 10%, is required to ensure performance. K.S.A. 16-1804(a). If there are performance issues, the rate may be increased to 10%. K.S.A. 16-1804(b).

Prior to commencement of work, contractors and subcontractors may request an alternate security. If so, the owner or contractor selects the form of the security, e.g., letter of credit, certificate of deposit, cash bond, or other asset/security (presumably a retainage bond), but not a payment or performance bond K.S.A. 16-1804 (g) and (h) and 16-1902(a).

Owners, contractors, and subcontractors may withhold up to 150 % of the value of incomplete work due to the fault of the contractor or subcontractor. Once remedied, the funds shall be released within 45 days. K.S.A. 16-1804(d), (e), and (f).

Retainage shall be released by the owner on any undisputed payment within 30 days after substantial completion of the project; however, retainage attributable to punch list work may be withheld until 30 days after completion of such work. K.S.A. 16-1804(c).

Subcontractors are entitled to receive retainage within 7 business days after the contractor receives it from the owner if the subcontractor has submitted a proper and undisputed pay application. K.S.A. 16-1803(f).

Subcontractors may be entitled to early release of retainage prior to substantial completion of the entire project, if the subcontractor has completed performance satisfactorily and if it is determined that release is without risk or additional cost to the owner or contractor. K.S.A. 16-1804(k)

A failure by the owner, contractor, or subcontractor to timely pay retainage entitles the contractor or subcontractor to receive interest at the rate of 18% per annum starting on the first business day after the due date. K.S.A. 16-1804(j).

In enforcement actions, including arbitrations, the prevailing party is entitled to recover its costs and reasonable attorneys' fees. K.S.A.16-1806.

KENTUCKY

Public and Private

Until fifty percent (50%) of the construction project has been completed in accordance with the contract, a contracting entity, contractor, or subcontractor may withhold no more than ten percent (10%) retainage from the amount of any undisputed payment due, and retainage held after fifty-one percent (51%) of the construction project has been completed shall not be more than five percent (5%) of the total contract amount.

KY. REV. STAT. ANN. §§ 371.410(1). KY. REV. STAT. ANN. §§ 371.410(2). See also KY. REV. STAT. ANN. §§ 176.090 et. seq.

LOUISIANA

Public

For projects less than \$500,000, the maximum rate of retainage is 10 percent. For projects exceeding \$500,000, the maximum rate of retainage is 5 percent of the contract price. Retainage may be held until 45 days after recordation of formal acceptance of the work, or notice of default by the contractor or subcontractor. LA. REV. STAT. ANN. § 38:2248. Additionally, as of 2020, notwithstanding any provision of law to the contrary, a public entity letting a public works construction contract for a flood protection project or for an "integrated coastal protection" project as defined in R.S. 49:214.2, as per the terms of the contract, may withhold liquidated damages from any payments or monies otherwise due to the contractor, taking into consideration all granted time extensions, after the expiration of the forty-five day period set forth above. LA. REV. STAT. ANN. § 38:2248(C).

With the written consent of the surety, the contractor may substitute securities in lieu of retention. LA. REV. STAT. ANN. § 38:2249.

For contracts with the Department of Transportation, for projects less than \$500,000, the maximum rate of retainage is 10 percent. For projects exceeding \$500,000, the maximum rate of retainage is 5 percent. Retainage is held until 45 days after formal acceptance of the work. The department shall not retain funds if the contractor furnishes a retainage bond equal to 10 percent of the contract amount for projects less than \$500,000 or 5 percent of a contract exceeding \$500,000. LA. REV. STAT. ANN. § 48:256.1.

Private

For projects over \$50,000, retained funds must be placed in an interest-bearing escrow account by the owner. This provision does not apply to single/double family residences, or for the construction/improvement of various types of industrial facilities involved in the production of, *inter alia*, electric power, wood products, paper or petroleum LA. REV. STAT. ANN. § 9:4857.

MAINE

Public

The mandatory rate of retainage generally is 5% of the amount due to the contractor until acceptance. However, the state may reduce the rate of retainage at substantial completion if it deems it desirable and

prudent. There may be substitute security. Interest or income belongs to the contractor depositing the security. ME. REV. STAT. ANN. tit. 5, § 1746.

Private

Retainage shall be released within 30 days after final acceptance of the work. The contractor is required to pay subcontractors and suppliers the full amount due within seven days after receipt of retainage. Subcontractors likewise shall pay their sub-subcontractors and suppliers within 7 days of receipt of their retainage. The contractor may withhold retainage on subcontractors and suppliers even if retainage is not held by the owner. If acceptance of work is unreasonably withheld by a contractor or subcontractor or if there is a failure to pay retainage as required, the offending party is subject to a penalty of 1%/month and attorneys' fees. ME. REV. STAT. ANN. tit. 10, §§ 1116 and 1118.

MARYLAND

Public

Md. Code Ann. State Fin. & Proc. s. 17-110:

If the prime contractor has furnished a 100% payment and performance bond under the little miller act, the public body may only keep 5% retention. The public body must release the remaining 5% within 120 days of satisfactory project completion.

Nothing in this statute prevents the public body from withholding of funds where it reasonably believes it is necessary to protect its interest.

Neither a prime contractor nor a subcontractor may withhold a higher percentage of retention than the public body withholds. Both a prime contractor and a subcontractor may withhold additional funds if it determines that a lower-tier contractor's performance gives reason to withhold more.

Md. Code Ann. State Fin. & Proc. s. 13-225:

The Maryland Transportation Authority May withhold any amount it believes reasonably necessary to protect the State's interest, but withheld funds must be kept in an interest-bearing escrow account.

Private

Md. Code Ann., Real Prop. s. 9-304:

Only applies for contracts over \$100,000 where no funding comes from the Department of Housing and Community Development.

If the prime contractor provides a 100% payment and performance bond, then retention under the prime contract may not exceed 5%. The owner must pay undisputed retention to the prime contractor within 90 days of substantial completion.

The prime contractor may not withhold a higher percentage of retention than is withheld in the prime contract. A first-tier subcontractor may not withhold a higher percentage of retention than the prime contractor withholds from that first-tier subcontractor.

This statute does not prohibit additional withholding where the withholding party determines that the performance of the lower-tier party provides reasonable grounds for withholding.

MASSACHUSETTS

Public

The rate of retainage may not exceed 5% of the approved amount of the periodic payment. The government also may retain an amount based on its estimate of the fair value of its claims against the contractor. Mass. Gen. Laws c. 30 §39K.

Within 65 days after substantial completion, the contractor is entitled to receive the entire balance less (1) a retention based on the fair value of its claims against the contractor, and the cost of completing incomplete and unsatisfactory work, and (2) direct payments made to subcontractors per the provisions of §39F. Mass. Gen. Laws c. 30 §39K.

If the owner fails to make payments due, then interest is due at the rate of 3% points above the rediscount rate charged by the Federal Reserve Bank of Boston. Mass. Gen. Laws c. 30 §39K.

Within 65 days of its substantial completion, the entire balance due a subcontractor less amounts withheld by the owner to cover incomplete or unsatisfactory work shall be due to the subcontractor. Mass. Gen. Laws c. 30 §39F(1)(b).

The statute defines substantial completion as either (1) the work based on contract price is 99% complete, or (2) substantially all of the work is complete and open to the public except for minor incomplete or unsatisfactory work item that do not materially impair the usefulness of the work. MASS. GEN. LAWS c. 30 §39G.

Private

Retainage is capped at 5% for lienable projects having an original value of at least \$3,000,000, but the law does not apply to projects with between 1 and 4 dwelling units. Mass. Gen. Laws c. 149 § 29F(a) and (b).

To obtain release of retainage the prime contractor is required to submit to the owner within 14 days of the date of substantial completion, a form giving notice of the date of substantial completion. If the owner does not reject the notice within 14 days, it is deemed accepted. If the owner rejects the notice, it must within 14 days of receipt give reasons to the contractor why it is rejected. The rejection will trigger any contractual dispute resolution procedures. If the notice is accepted (or deemed to be accepted) the owner shall within 14 days submit a list describing all incomplete or defective work items and deliverables. The prime contractor shall likewise submit to its subcontractors within 21 days a list of incomplete or defective work items and deliverables. Mass. Gen. Laws c. 149 § 29F(c) and (d).

The same protocol applies after a dispute resolution proceeding has been finalized and becomes binding. Mass. Gen. Laws c. 149 § 29F (c) and (d).

Upon completing statutory obligations of the parties, following 60 days after substantial completion (or sooner per terms of contract), a person may submit its retainage invoice which shall include a list of the incomplete or defective work items and deliverables on its received list that have been completed. With certain limitations the invoice shall be paid within 30 days after its submission. However, 7 days may be added for each lower-tier contractor. Amounts may be withheld from the payment of retainage to cover:

(1) incomplete, incorrect, or missing deliverables (not to exceed 2.5% unless otherwise agreed in the contract; (2) 150% of the reasonable cost to complete or correct incomplete or defective work items; and (3) collection costs as permitted by contract. Mass. Gen. Laws c. 149 § 29F(f) and (g).

Payment of retainage for self-performed work by the prime contractor is treated like payment for a subcontractor's retainage. Mass. Gen. Laws c. 149 §29F(h).

If the prime contractor has not been declared in default, the owner shall not withhold any part of the retainage of a subcontractor for a claim made by the owner against the prime contractor unrelated to the subcontractor. Mass. Gen. Laws c. 149 §29F(i).

MICHIGAN

Public

A public agency is permitted to withhold retainage from a progress payment to assure proper performance of a construction contract. Mich. Comp. Laws §1563. Sec.3 (1).

For purposes of the statute, a "public agency" is defined as the state of Michigan, or a county, city, township, village, assessment district, or other political subdivision, corporation, commission, agency, or authority created by law. But excluded from the definition are Michigan DOT, school districts, junior or community colleges, Michigan state housing development authority, and a municipal electric utility or agency. Mich. Comp. Laws §1561. Sec.1 (h).

The statute applies to most construction contracts signed by public agencies except it does not apply to contracts under \$30,000 or contracts that provide for 3 or fewer payments. Mich. Comp. Laws §1561. Sec.1 (c).

For covered contracts, retainage is limited to no more than 10% of the value of work in place until the work is 50% complete at which point no further retainage shall be withheld unless the public agency determines the contractor is not making satisfactory progress, or for other specific cause related to the contractor. In such case, the agency may not retain more than 10% of the value of work more than 50% in place. Mich. Comp. Laws §1563. Sec.3 (2).

Retained funds shall not exceed the pro rata share of the agency's matching requirement under the contract and shall not be commingled with its other funds. Retainage shall be deposited in an interest-bearing account except in cases where the funds are to be provided under a state or federal grant and the retained funds have not been paid to the agency. Mich. Comp. Laws §1563. Sec.3 (3).

Except when there are disputes, retainage and interest shall be released to the contractor together with the final progress payment. Mich. Comp. Laws §1563. Sec.3 (4).

When 94% of the work is in place, the contractor is entitled to have its retainage and interest released by providing to the public agency an irrevocable letter of credit in the amount of the retainage plus interest. Mich. Comp. Laws §1563. Sec.3 (5).

If it is decided in a dispute resolution proceeding that there was a delay caused by reasons within the contractor's control, then all interest earned on the retained funds during the period of delay belong to the public agency. Mich. Comp. Laws §1564. Sec.4 (7).

MINNESOTA

Public

The statutes do not apply to public contracts in which receipt of federal financing is conditioned on adherence to terms inconsistent with the statutes. MINN. STAT. § 15.72-1.

Retainage may not exceed 5%. Agency may release or eliminate retainage if the work is progressing satisfactorily. MINN. STAT. § 15.72-2(a).

Retainage must be released by the agency no later than 60 days after substantial completion. If retainage by the owner to the prime contractor is reduced, the contractor must reduce retainage to its subcontractors at the same rate. MINN. STAT. § 15.72-2(b).

A prime contractor must pay retainage to its subcontractors within 10 days after receiving retainage from the prime contractor unless there is a dispute in which case the prime must pay other subcontractors whose work is not involved in the dispute. A detailed written explanation must be given to the affected subcontractor stating the amount withheld and the reason. MINN. STAT. § 15.72-2(c).

Upon written request, the agency shall notify a subcontractor that a progress, retainage, or final payment has been made. MINN. STAT. § 15.72-2(d).

After substantial completion, an agency may withhold no more than (1) 250% of the value of punch list work, and; (2) 1% of the value of the contract or \$500 whichever is greater pending completion of final paperwork as defined in the statute. A written explanation for withholding must be given to the contractor and subcontractors. Any amounts so withheld must be released within 60 days of completion or submission of the paperwork as the case may be. MINN. STAT. § 15.72-2(e).

Withholding retainage for warranty work is prohibited. MINN. STAT. § 15.72-2(g).

The agency is not required to pay any portion of a contract funded by federal or state aid until the funds have been received. MINN. STAT. § 15.72-2(h).

A contractor may substitute approved bonds or securities in lieu of cash retainage. Interest earned shall be paid as accrued to the contractor. MINN. STAT. § 15.73-2 and -3.

Costs incurred by the agency as a result of the substitution of bonds or securities shall be recoverable by the agency from the contractor at the time of final payment. Upon demand from the contractor the agency shall inform the contractor of all accrued costs. MINN. STAT. § 15.73-4.

Private

An owner can retain no more than 5% of any progress payment. MINN. STAT. § 337.10(4)(b). Moreover, the owner may reduce or eliminate the retainage if the work is progressing satisfactorily. Id. If the owner reduces the amount of retainage, the contractor must reduce retainage for any subcontractor the same rate. MINN. STAT. § 337.10.4.(b).

Retainage must be released by the owner no later than 60 days after substantial completion. MINN. STAT. § 337.10.4.(c).

A prime contractor must pay retainage to its subcontractors within 10 days after receiving retainage from the prime contractor unless there is a dispute in which case the prime must pay other subcontractors whose work is not involved in the dispute. A detailed written explanation must be given to the affected subcontractor stating the amount withheld and the reason. MINN. STAT. § 337.10.4.(d).

After substantial completion, the owner may withhold no more than (1) 250% of the value of punch list work, and; (2) 1% of the value of the contract or \$500 whichever is greater pending completion of final paperwork as defined in the statute. A written explanation for withholding must be given to the contractor and subcontractors. Any amounts so withheld must be released within 60 days of completion or submission of the paperwork as the case may be. MINN. STAT. § 337.10.4.(e).

Withholding retainage for warranty work is prohibited. MINN. STAT. § 337.10.4.(g).

The retainage subdivisions do not apply to contracts for specific professional services (including architects, engineers, land surveyors, landscape architects, geoscientists, and interior designers). MINN. STAT. § 337.10.4.(h).

MISSISSIPPI

Public

Retainage may not exceed 5 percent. MISS.CODE ANN.§31-5-33(1). On contracts valued in excess of \$250,000, retainage is 5 percent until the job is 50 percent complete. At that point, if the work is satisfactory, the rate reduces to 2.5 percent and half of the retained funds are to be returned to the contractor to be disbursed to the appropriate subcontractors and suppliers. The contractor may not retain more from a subcontractor than the state retains from the contractor. MISS.CODE ANN.§31-5-33(1). The contractor may substitute securities in lieu of retention. MISS.CODE ANN.§31-5-15.

Section §31-5-33 is not applicable to contracts held by the Mississippi Transportation Commission. MISS.CODE ANN.§31-5-33(2).

For county contracts exceeding \$1,000, the county board of supervisors must retain between 2.5 percent and 10 percent. MISS.CODE ANN.§19-13-15(1). For contracts exceeding \$750,000, except for bridge or public road contracts, 10 percent shall be retained until the work is 50 percent complete. Thereafter, 50 percent of the retainage shall be returned to the contractor and 5 percent shall be retained. MISS.CODE ANN.§19-13-15(3).

Note: MISS.CODE ANN.§31-5-33 and MISS.CODE ANN.§19-13-15 appear to be in conflict since §31-5-33 applies to any public contract with “any political subdivision” which would include county boards of supervisors.

Private

None.

MISSOURI

Public

The rate of retainage shall not exceed 5% of the value of the contract except for projects under \$50,000 without a bond where the rate cannot exceed 10 %. MO. REV. STAT. § 34.057.1.(1).

The rate of retainage by a general contractor to its subcontractors shall not exceed 5%. MO. REV. STAT. § 34.057.1.(6).

Before substantial completion and at the owner's discretion and the contractor's request, retained funds may be released to subcontractors who have completed performance. MO. REV. STAT. § 34.057.1.(3)

The owner may reduce or eliminate retainage if work is satisfactory. If retainage is released, the owner shall continue to withhold 150% of the value of remaining punch list work until such items are completed. MO. REV. STAT. § 34.057.1.(3)

The owner must pay the contractor within 30 days (presumably of substantial completion or acceptance) at least 98 % of the retainage, less authorized offsets or deductions MO. REV. STAT. § 34.057.1.(4).

The contractor shall pay the subcontractor/supplier after substantial completion and acceptance by the owner or as provided by the contract specifications for state highway projects. Such payment shall be made within 30 days after acceptance and providing proper closeout documentation. If the owner disputes whether there has been substantial completion, then notice must be given with an explanation within 14 days to the contractor who shall provide such notice to the appropriate subcontractor. If no such notice is provided by the owner, then the owner shall pay at least 98% of retainage within 30 days holding back 150% of the value of remaining punch list work. MO. REV. STAT. § 34.057.1.(4).

Final payment of retainage (and all other moneys owed), less authorized offsets and deductions, shall be made within 30 days of the due date defined as the earliest of (a) completion of the project and filing of all required documentation and certifications per contract terms; (b) certification of project completion by the A/E and filing of all required documentation and certifications; or (c) certification of project completion by the contracting authority and filing of all required documentation and certifications. MO. REV. STAT. § 34.057.1.(8).

Private

Retainage is capped at 10% unless the contractor's performance is not in accordance with the terms of the contract. All amounts retained shall be held by the owner in trust for the benefit of the general contractor, subcontractors or suppliers in proportion to their interests. Mo. Rev. Stat. § 436.303.

A contractor may not withhold from a subcontractor more retainage than the owner is withholding unless the subcontractor is not properly performing. Mo. Rev. Stat. § 436.315.

Contractors and subcontractors at any tier may before or after the job begins substitute security in lieu of cash. Mo. Rev. Stat. § 436.306. Mo. Rev. Stat. § 436.309.

Substitute security may take the form of either a certificate of deposit, retainage bond, or letter of credit. Interest and income earned belong to the party providing the substitute security. Mo. Rev. Stat. § 436.312.

Upon release of retainage (other than substitute security) to the contractor, the contractor shall pay each subcontractor its ratable share. Mo. Rev. Stat. § 436.318

There may be line-item release of retainage. Mo. Rev. Stat. § 436.321.

Within 30 days of substantial completion, all retainage (including substitute security) shall be released by the owner to the contractor less 150% of the value of punch list work. Within 7 days of receipt of retainage, the general contractor shall release each subcontractor's retainage. Mo. Rev. Stat. § 436.324.

Substantial completion is defined as the earlier of the A/E's certification of substantial completion or the owner's acceptance of performance. Mo. Rev. Stat. § 436.327.

Subcontractors at every tier are bound to their lower tiered subcontractors the same as the general contractor is bound to its subcontractors. Mo. Rev. Stat. § 436.330.

Contract terms inconsistent with the statute shall be unenforceable. Mo. Rev. Stat. § 436.333.

If wrongful withholding of retainage occurs, interest at the rate of up to 1.5% per month from the date of wrongful withholding may be awarded, plus attorneys' fees by a court or arbitrator. Mo. Rev. Stat. § 436.330.

The statute applies to contracts entered into after August 28, 2002, but does not apply to residential construction consisting of 4 or fewer units. Mo. Rev. Stat. § 436.336.

MONTANA

Public

A public body may withhold no more than 5% of a contract as retainage. MONT. CODE. ANN. § 18-2-316(1).

The contractor can hold no more on a subcontract than has been withheld by the public body. MONT. CODE. ANN. § 18-2-316(2).

The contractor can substitute certain securities for retainage and the subcontractors must be given the same opportunity. MONT. CODE. ANN. § 18-1-301(1). Interest accrued in deposit accounts must be paid to the contractor and subcontractor who participates in making deposits of substitute security. MONT. CODE. ANN. § 18-1-301(3 and (4).

The contractor shall extend to its subcontractors the opportunity to make deposits of securities in lieu of retainage in which case additional retainage may not be withheld. MONT. CODE. ANN. § 18-1-301(4).

Private

The owner may not withhold more than 5% as retainage. MONT. CODE. ANN. § 28-2-2110(1).

The contractor can withhold no more on subcontract than has been withheld by the owner. MONT. CODE. ANN. § 28-2-2110(2).

Line-item release is mandatory upon completion and acceptance of each portion of work for which a separate price is stated in the construction contract. MONT. CODE. ANN. § 28-2-2110(3). Query: Does this mean that if a schedule of values is called for in the contract, then retainage must be released upon "final acceptance" of that portion of the work?

Residential projects with a total cost of less than \$400,000 are exempt. MONT. CODE. ANN. § 28-2-2107(4).

NEBRASKA

Public

The state and its agencies (as defined) “shall make payment in full for all goods delivered or services rendered” within 45 days of receipt of the goods or services or a bill for same whichever is later. Neb. Rev. Stat. Sec. 81-2403

The word “services” is defined to include construction, architectural, and engineering services. Neb. Rev. Stat. Sec. 81-2402

For highway and bridge contracts, when the contractor has provided all required reports and has not been paid by the owner for more than 60 days after final completion, the retained funds (and final payment) are subject to an interest rate of 3% above the annual Federal Reserve composite prime lending rate from the previous year. Interest begins 60 days after the work is completed running until payment is tendered. Neb. Rev. Stat. Sec. 39-1349.

Private

Retainage for non-residential projects is capped at 10% for the first 50% of the project. When the contractor’s or subcontractor’s scope of work is 50% complete no more than 5% of additional progress payments may be withheld. Neb. Rev. Stat. Sec. 45-1204 and 45-1207.

Retainage shall be released by the owner within 45 days after the project, or a designated portion thereof, is substantially completed. The contractor shall release retainage to its subcontractor within 10 days after receipt of retainage. Neb. Rev. Stat. Sec. 45-1203.

Interest on past due payments is due at the rate of one percent per month only after the person being charged has been notified of the statutory provisions. Neb. Rev. Stat. Sec. 45-1205.

NEVADA

Public

Ninety-five percent of the amount of any progress payment must be paid and five percent withheld as retainage until fifty percent of the work required by the contract has been performed. Once 50 percent of the work has been performed, if the public body determines that the performance is satisfactory, it may pay any of the remaining progress payments without retaining additional funds and may pay any funds previously retained. If the public body determines progress is unsatisfactory and decides to retain from remaining progress payments, it may not retain more than 2.5 percent of any such progress payment. The public body must pay the

contractor, at the end of each quarter, interest for the quarter on the amount retained at a rate equal to the rate quoted by at least three financial institutions. NEV. REV. STAT. § 338.515 (effective January 1, 2016).

When a public body occupies, partially occupies, or begins use of one or more buildings of a public work, the agency shall pay the contractor the proportional value of the occupied portion, including retainage and interest. NEV. REV. STAT. § 338.520.

A contractor or subcontractor may retain up to 5 percent of any progress payment due under a subcontract until half of the work is complete. After fifty percent of the subcontractor's work is complete, the contractor shall pay any additional progress payments due under the subcontract without withholding any retainage, if satisfactory progress is being made. If the contractor receives interest earned on the retainage, it shall, within 10 days, pay each subcontractor the interest which has accrued from the retainage. NEV. REV. STAT. § 338.555

Private

Retainage may not exceed 5 percent, though additional amounts may be withheld for value of work not performed but for which payment is sought, and for costs to repair deficient work. The same rules apply to subcontractors. NEV. REV. STAT. §§ 624.609, 624.624.

NEW HAMPSHIRE

Public

The Granite State has not adopted a retention statute. However, contractors are allowed on contracts exceeding \$500,000 to withdraw cash retainage by substituting defined securities having a value equal to the amount withdrawn on contracts with state agencies. The initial amount must be at least \$10,000. The minimum value of an individual security is \$5,000. The contractor is entitled to receive the interest and income earned from the securities. RSA 21-I:20.

NEW JERSEY

Public

For highway work, 2 percent shall be retained. Upon substantial completion, 1 percent shall be retained. If work is not progressing, as defined by the New Jersey Department of Transportation Standard Specifications for Road and Bridge Construction, 4 percent may be retained. The contractor may substitute securities in lieu of retainage. N.J. STAT. ANN. § 27:7-34.

For municipalities and counties, the rate of retainage is also 2 percent; upon substantial competition, 1 percent shall be retained. N.J. STAT. ANN. § 40A:11-16.3.

For Board of Education projects, 5 percent is retained if there is no performance bond. If there is a performance bond, then 2 percent is retained when the outstanding contract balance exceeds \$500,000 and 5 percent is retained when the outstanding contract balance is less than \$500,000. N.J. STAT. ANN. § 18A:18A-40.3.

See also N.J. STAT. ANN. § 2A:30A-2.

Private

None.

NEW MEXICO

Public and Private

Retainage is prohibited for the majority of private and public construction contracts. N.M. STAT. ANN. § 57-28-5. *NOTE: Certain owners and contractors have modified their contracts to require that the schedule of values contain a line item for closeout after the work is substantially performed. The amount allocated to this closeout line item usually is required to be either 5 or 10 percent of the contractors' or subcontractors' total contract value, so functionally is « retainage » just dressed up in another term. The claim is that the owner and contractor are not retaining funds, but rather that the contract amounts are not yet due to the contractor or subcontractor. No decision has addressed this approach to retainage.

For road contracts 5 percent may be retained. N.M. STAT. ANN. § 67-3-48.

NEW YORK

Public

Contractor: The public owner shall retain not more than 5 percent of each progress payment to the contractor except that the public owner may retain in excess of 5 percent but not more than 10 percent of each progress payment to the contractor provided that there are no requirements by the public owner for the contractor to provide a performance bond and a labor and material bond or both in the full amount of the contract. N.Y. STATE FINANCE LAW § 139-f(1); N.Y. GENERAL MUNICIPAL LAW § 106-b(1).

Subcontractor: The contractor shall not retain more than 5 percent of each payment to the subcontractor and/or materialman except that the contractor may retain in excess of 5 percent but not more than 10 percent of each payment to the subcontractor provided that prior to entering into a subcontract with the contractor, the subcontractor is unable or unwilling to provide a performance bond and a labor and material payment bond, both in the full amount of the subcontract, at the request of the contractor. N.Y. STATE FINANCE LAW § 139-f(2); N.Y. GENERAL MUNICIPAL LAW § 106-b(2).

Thus, unless the contractor asks for a performance bond and a labor and material payment bond prior to entering into the subcontract (and presumably pays for the same), the contractor cannot retain more than 5 percent.

Private

By mutual agreement of the parties, an owner may retain a reasonable amount of the contract sum. A contractor or subcontractor may also retain as long as that amount does not exceed the amount retained by the owner. Retainage shall be released no later than 30 days after the final approval of the work under the contract. Late payments accrue interest at a rate of 1 percent per month. N.Y. GENERAL BUSINESS LAW § 756-C.

NORTH CAROLINA

Public

Neither the owner nor contractor may hold retainage on public contracts in which the total project costs are less than \$100,000.00. N.C. GEN. STAT. §143-134.1(b1). For contracts equal to or greater than

\$100,000, the maximum rate of retainage is 5 percent. When the project is 50 percent complete, no funds can be retained if the work is satisfactory. If the work is unsatisfactory, retainage may be reinstated up to the maximum amount of 5 percent. N.C. GEN. STAT. §143-134.1(b1)(2). For those trades that reach 100% completion of their contracts before the project is 50% complete (“early finishing trades”), the owner shall reduce retainage to five-tenths percent (0.5%). N.C. GEN. STAT. §143-134.1(b2). This reduction of retainage for early finishing trades is contingent upon certification by the architect or engineer that the contractor has performed satisfactorily. *Id.*

For provisions concerning the Department of Transportation see N.C. GEN. STAT. §136-28.9 and NCDOT’s Standard Specifications for Roads and Structures §109-4.

Private

Although no North Carolina statutes or appellate opinions directly address retainage on private projects, North Carolina’s Prompt Payment Act, N.C. GEN. STAT. § 22C-4, requires contractors to release “full payment” to their subcontractors within seven (7) days of receipt of payment from the owner for the relevant work. The Act likewise requires subcontractors to release payment to their subcontractors within seven (7) days of receipt of payment for the relevant work. Therefore, the Prompt Payment Act appears to prohibit the contractor from withholding more retainage from its subcontractors than the owner withholds from the contractor. The same rule applies to subcontractors with respect to their subcontractors.

NORTH DAKOTA

Public

The mandatory rate of retainage is 10% of the estimated value of the labor and material furnished on a contract until 50% of the work is completed. Thereafter, no further funds are retained. At 95% completion, the state may pay 95% of the retained funds to the contractor. The remainder will be paid upon final acceptance. Retained funds are deposited in a North Dakota financial institution with interest accruing to the contractor. N.D. CENT. CODE § 48-01.2-13; and § 40-22-37 (dealing with municipal governments).

North Dakota also has laws governing retainage in contracts with water district boards (N.D. CENT. CODE § 61-35-103) and the North Dakota Mill and Elevator Association (N.D. CENT. CODE § 54-18-18). The retainage provisions in these statutes are similar to those in N.D. CENT. CODE §§ 48-01.2-13 and 40-22-37.

Private

Retainage is a maximum of 10% until the project is 50% complete. Thereafter, no further retainage can be withheld. If retainage funds are invested, interest earned on funds goes to the contractor. N.D. CENT. CODE § 43-07-23.

OHIO

Public

The maximum rate of retainage is 8 percent of the labor estimates prepared by the contractor and approved by the architect/engineer. When 50 percent of the project is complete, no funds may be retained. OHIO REV. CODE ANN. § 153.12.

On contracts in excess of \$15,000, from the date the contract is 50% complete retained funds are to be placed in an escrow account with interest accruing to the contractor. Retainage and interest are paid to the contractor upon final completion and acceptance of the work. OHIO REV. CODE ANN. § 153.13. See also OHIO REV. CODE ANN. § 4113.61.

Private

A contractor may reduce the amount paid by any retainage provision contained in a contract, invoice or purchase order between the contractor and the subcontractor and may withhold any amounts that may be necessary to resolve disputes. OHIO REV. CODE ANN. § 4113.61(A)(1)(b). This section, does not apply to any construction of single-, two-, or three-family detached dwelling houses. OHIO REV. CODE ANN. § 4113.61(C).

OKLAHOMA

Public

The rate of retainage may not exceed 5 percent of all partial payments. In a subcontract, the maximum rate of retainage is 5 percent. OKLA. STAT. tit. 61, § 226. A contractor may substitute securities in lieu of retainage. OKLA. STAT. tit. 61, § 113.2.

Neither the Department of Transportation nor the Turnpike Authority may retain on public contracts. OKLA. STAT. tit. 61, § 113.1.

Private

None.

OREGON

Public

Partial payment is allowed and may be made on contracts for construction and home improvement. Or. Rev. Stat. §§ 279c.555; 701.420. Retainage may not exceed 5 percent of a progress payment except when the charter of the contracting agency provides for retainage higher than 5 percent. Or. Rev. Stat. § 279c.570(7). As work progresses, a public agency may reduce or eliminate the amount of retainage after 50 percent of the work under the contract is complete if, in the contracting agency's opinion, such work is satisfactory. Or. Rev. Stat. § 279c.570(7). Elimination or reduction of retainage is permitted only upon written application by the contractor, which shall include written approval of the contractor's surety. Or. Rev. Stat. § 279c.570(7). However, when the contract work is 97.5 percent complete, the contracting

agency may, without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work not yet complete. Or. Rev. Stat. § 279c.570(7).

At the option of the contractor, retainage may be held in a fund by the public body, deposited in an interest-bearing account in a bank, or placed in escrow with a bank or trust company. Or. Rev. Stat. § 279c.560(5).

The retainage held by a contracting agency must be included in the final payment of the contract price. The contracting agency must pay to the contractor interest at the rate of 1.5 percent per month on the final payment owed to the contractor, with interest to commence 30 days after the work under the contract has been completed and accepted, and to run until the contractor receives final payment. Or. Rev. Stat. § 279C.570(8).

If the contract price exceeds \$500,000, the owner, contractor, and subcontractor shall place amounts withheld as retainage into an interest bearing escrow account. Interest on retainage accrues from the date the payment request is approved to the date to the date retainage is paid to the contractor or subcontractor. Or. Rev. Stat. § 701.420(2)(b)

Private

Retainage may not exceed 5 percent of the contract price of the work completed. Or. Rev. Stat. § 701.420(1). This provision is applicable to owners, contractors, and subcontractors. Or. Rev. Stat. § 701.420(1). Interest on retainage shall commence 30 days after the contractor or subcontractor has completed, and the owner has accepted, the work for which the final payment is due. Or. Rev. Stat. § 701.420(2). The interest shall run until the date when final payment is tendered to the contractor or subcontractor. Or. Rev. Stat. § 701.420(2). Securities may be substituted in lieu of retainage. See Or. Rev. Stat. § 701.435.

If the contract price exceeds \$500,000, the owner, contractor, and subcontractor shall place amounts withheld as retainage into an interest bearing escrow account. Interest on retainage accrues from the date the payment request is approved to the date to the date retainage is paid to the contractor or subcontractor. Or. Rev. Stat. § 701.420(2)(b)

PENNSYLVANIA

Public

The rate of retainage may not exceed 10 percent of the amount due for work done and value of materials stored. After 50 percent of the work is complete, the rate of retainage may not exceed 5 percent. Upon 50 percent completion of the work, one-half of the retained funds shall be returned to the contractor, provided that progress is satisfactory and there is no specific cause for retaining the greater amount. 62 Pa. C.S.A. § 3921(a).

For contracts with the Department of General Services, the maximum rate of retainage is 6 percent until half of the project is complete. Thereafter, retainage may not exceed 3 percent. 62 Pa. C.S.A. § 3921.

For contracts involving state-aided public highway work, retainage is 5 percent until the project is 50 percent complete. Thereafter, no additional funds may be retained. The Secretary of Transportation may waive or reduce retainage, if otherwise assured that the contract will be completed, and may release payment to further reduce retainage when the project is 95 percent complete. 62 Pa. C.S.A. § 746.

Retainage may continue to be withheld after a determination of substantial completion if another prime contractor asserts a claim for increased costs allegedly caused by “delays or other actions” of the contractor attaining substantial completion. 62 Pa. C.S.A. § 3941. If retainage is withheld because of claims by other prime contractors, retainage may be withheld in an amount one and one-half times the amount of any possible liability to the government agency arising from the claim until that claim is resolved. Any remaining retainage is due and payable. 62 Pa. C.S.A. §§ 3921(a) and 3941.

Retainage may also continue to be withheld after a determination of substantial completion because of incomplete work. If retainage is withheld because of incomplete work, the amount retained is to be equal to one and one-half times the total amount required to complete the remaining work and such amount must be certified by the architect or engineer and supported by a detailed list of all incomplete items of work and the reasonable cost of completion. 62 Pa. C.S.A. § 3941(a). Retainage held to assure completion of the final work becomes due and payable upon completion of the items listed by the engineer or architect. 62 Pa. C.S.A. § 3941(a).

Private

There is no Pennsylvania statute that regulates the amount of retainage to be withheld on a private project. The Contractor and Subcontractor Payment Act, which governs the timing for payment to contractors and subcontractors on privately-owned or financed projects, does regulate the timing for the final release of retainage to a contractor and subcontractor.

A contractor and subcontractor may facilitate the release of retainage on its contract before final completion of the project by posting a maintenance bond with an approved surety for 120% of the amount of retainage being held. 73 P.S. § 509(a.1). Within 30 days after final completion and acceptance of the work, the retainage amount must be paid to the contractor or subcontractor unless there is reason to withhold the release of retainage for deficiency items to which the contractor or subcontractor has received notice thereof in compliance with the Act. 73 P.S. §§ 509(a), (b) and (d). Retainage must be paid to the subcontractor no later than fourteen (14) days after contractor's receipt of the retainage relating to subcontractor's work. 73 P.S. §§ 509(c).

RHODE ISLAND

Public and Private

No private (defined as lienable) or state or municipal public works contract shall include retainage that exceeds 5% of a progress payment. R.I. GEN. LAWS § 37-12-10.1(a).

Within the time allowed by the contract, or if no time is provided, following 60 days after substantial completion, a person may apply for retention and shall include a certified list of completed punch list work and deliverables. Retainage shall be paid within 30 days after the submission of the application with certain exceptions. The due date for each lower tier is extended by 7 days from the time applicable to the above tier. R.I. GEN. LAWS § 37-12-10.1(e).

No amount shall be withheld from retainage unless the person seeking payment shall have received before the due date for payment a certified list describing deficiencies. Amounts withheld from retainage payments shall not exceed: (1) One-half percent for up to one year to cover unknown defects; (2) Up to 2.5% of the total adjusted contract price of the person seeking retainage for incomplete, incorrect, or missing deliverables; (3) 150% of the cost to complete or correct work; and (4) reasonable value of claims, including attorneys' fees if permitted by contract. R.I. GEN. LAWS § 37-12-10.1(f).

Unless the prime contractor has been declared in default, the owner shall not withhold retainage that is due a subcontractor/supplier for a claim the owner asserts against the prime contractor that is not based on performance or default of the subcontractor/supplier. R.I. GEN. LAWS § 37-12-10.1(h).

Statutory terms regarding retainage are not subject to contractual waiver or limitation. R.I. GEN. LAWS § 37-12-10.1(k).

Public

For public works contracts (R.I. GEN. LAWS § 37-13-1) that exceed 12 months in duration, subcontractors whose work is substantially complete within the first one-third of the project are entitled to request early release of their retainage. R.I. GEN. LAWS § 37-12-10.1(l).

The Rhode Island department of transportation is exempt from the provisions of R.I. GEN. LAWS § 37-12-10.1 except for the 5% cap on retainage.

A contractor on a public works contract may substitute security for cash retainage. The contractor shall be entitled to interest income earned on the securities. R.I. GEN. LAWS § 37-12-11.

SOUTH CAROLINA

Public

In contracts and subcontracts that provide for progress payments based upon an estimated percentage of completion, the amount of each progress payment retained must not exceed 3.5%. When work is performed by multiple prime contractors or by a prime contractor and multiple subcontractors, for the purpose of retainage the work by each individual contractor or subcontractor is considered a separate division. As each division is certified as complete, that portion of the retainage allocable to the completed division must be released forthwith to the prime contractor, who, within ten days of receipt, must release to the subcontractor the full amount of retainage previously withheld. S.C. CODE ANN. § 11-35-3030(4).

Private

There are no statutes or cases directly regulating retainage on private work. However, the Prompt Pay Act, S.C. CODE § 29-6-10, et seq., requires that the contractor release payment to subcontractors within seven days of receipt of payment from the owner. Thus, the Prompt Pay Act seems to prohibit a contractor from retaining from a subcontractor a higher percentage than the owner retains from the contractor.

SOUTH DAKOTA

Public (State and Municipal)

The rate of retainage is not specified. If retainage is withheld from a contractor's progress payment, interest shall be paid on the amount withheld at the rate of 4% per annum beginning 30 days after furnishing all records, reports, and a progress inspection. S.D.C.L. §5-18B-11; S.D.C.L. §9-42-12.

An amount necessary to complete the improvement shall be retained from the final payment until the contract is fully executed, completed, and accepted. However, interest is due on withheld sums if the contractor has furnished all records and reports and a final inspection has been made. Interest at the rate of 4%/annum begins 30 days after the A/E's letter of acceptance or use and occupancy unless payment is delayed by receipt of federal funds in which case interest begins 30 days after receipt of the federal funds. S.D.C.L. §5-18B-11; S.D.C.L. §9-42-12.

At the state's option, a contractor may provide substitute security in lieu of retainage in the form of a bond or securities. S.D.C.L. §5-18B-12.

Public (Counties)

There is mandatory retainage on progress payments on county buildings:

Contract Amount	Rate
Up to \$50,000	12%
Next \$200,000	5%
Excess of \$250,000	2.5%

Upon final inspection and receipt of all required records and reports, the owner shall pay interest at a statutory rate of 4.5% per annum beginning 60 days after completion unless delayed by federal participation, in which case interest begins to run 60 days after federal funds are paid. S.D.C.L. §7-25-10.

TENNESSEE

Public

The maximum rate of retainage on all public contracts is 5 percent. Tenn. Code Ann. §4-15-102 and Tenn. Code Ann. §66-34-103(a).

Private

Like public contracts, the maximum rate of retainage is 5 percent. Tenn. Code Ann. §66-34-103(a)

For both public and private contracts in the amount of \$500,000 or over, all retainage must be kept in a separate interest bearing escrow account with a third party. Tenn. Code Ann. §66-34-104(a). In the case of a private contract only, the party responsible for depositing the retained amount in a separate, interest-bearing escrow account with a third party has the affirmative duty to provide written notice that the party has complied with this section to any prime contractor upon withholding the amount retained from each pay application by providing specific information required by Tenn. Code Ann. §§66-34-104(d)(1), (2) and (3).

In the case of both a public and private project, the owner is required to release all retainage for work completed pursuant to the terms of any contract with the prime contractor within 90 days after completion of the work or within 90 days after substantial completion, whichever occurs first. Tenn. Code Ann. §66-34-103(b). Pursuant to Tenn. Code Ann. §66-34-204, when an owner (1) has received a certificate of

occupancy permit, (2) has received a certificate of substantial completion from an architect or engineer or (3) begins to use or could have begun to use an improvement, the owner shall pay all retainage the owner withheld pursuant to the contract within 90 days of the date of the occurrence set forth. Prime contractors are required to release retainage to remote contractors and suppliers within 10 days of the payment of retainage by the owner. Tenn. Code Ann. §66-34-103(b).

On public contracts, prime contractors and remote contractors may substitute securities in lieu of retainage or provide a line of contract. Tenn. Code Ann. §12-4-108(c) and (d).

TEXAS

Public

The Texas Government Code does not specify a maximum rate of retainage. It does provide, however, that all contracts providing for retainage of more than 5 percent, except those under \$400,000 and certain specified public works contracts, shall have the retainage deposited in an interest-bearing account, of which the interest earned is paid to the contractor upon completion. TEX. GOV'T CODE ANN. §§ 2252.032 and 2252.033. In addition, a claim for retainage is never valid for an amount greater than 10 percent or the amount specified on the contract, whichever is less. TEX. GOV'T CODE ANN. § 2253.076. Under the Texas Transportation Code, the public entity may retain a maximum of 5 percent of the contract price. At the request of the prime contractor and with approval of the public entity and the comptroller, the retained amount may be deposited under a trust agreement with a bank and the interest earned shall be paid to the contractor. TEX. TRANS. CODE ANN. § 223.010.

Under the Texas Water Code, retainage shall be 10 percent until final completion of the project. However, if satisfactory progress is being made, the board may eliminate retention when the project is 50 percent complete. At substantial completion, the board may release all or a portion of these monies. The contractor receives no interest on retainage held on the first 50 percent of the work, but does receive interest on any retainage held on the remaining 50 percent of the work. TEX. WATER CODE ANN. § 49.276.

Private

For work for which a mechanic's lien may be claimed, the owner must retain 10 percent of either the contract price or the value of the work completed. TEX. PROP. CODE ANN. § 53.101. Although the statute only requires the owner to retain funds for 30 days, revisions to § 53.057 of the Texas Property Code, for perfecting a claim on retainage, complicate matters. Hence the owner may retain funds for significantly more than 30 days. Practitioners should note that where the owner has failed to comply with the requirement to hold 10 percent retainage, various lien perfection requirements may not be used by owner to defeat the lien claimant(s)' right to payment.

UTAH

Retention may not exceed 5% of any payment or the contract price; and if the owner holds less than 5% from a payment or in the aggregate, the General Contractor (GC) cannot hold more from its subcontractors. The owner must hold retention in an interest-bearing account and account for it separately from other amounts paid under the contract. Because the retention and interest belong to the

contractor and subcontractors, the owner holds them in a constructive trust, and these funds must be paid after the project is completed and accepted by the owner. The interest accrued on the retainage is distributed by the contractor to subcontractors on a pro rata basis.

Retention and interest must be released within 45 days from the later of the date: 1) the owner receives the billing statement from the GC; 2) a certificate of occupancy or final acceptance notice is issued; 3) a public owner permits partial or complete occupancy of a newly constructed or remodeled building; or 4) the date the contractor accepts the final pay quantities. For partial occupancy retention and interest are partially released in direct proportion to the value of the part of the building occupied. Once a GC of subcontractor receives retention, they must pay each of their subcontractors their share within 10 days of receipt. If retention is specifically designated for a particular subcontractor, payment must go to that subcontractor.

If a contractor or subcontractor is in default or breach of the contract, the owner may: 1) withhold a reasonable amount for as long as reasonably necessary to cure the breach or default; or 2) if a project or a portion of the project is substantially complete, retain until completion up to twice the fair market value of the work that has not been completed: a) in accordance with the construction contract documents, plans, and specifications; or b) in the absence of plans and specifications, to generally accepted craft standards. Procedurally, within 45 days of withholding, the owner must provide a written description of what portion of the work was not completed according to the standards.

Finally, if retention is wrongfully withheld, the wronged party can recover attorney's fees and 2% interest per month. These rights and requirements cannot be waived by contract. Utah's retention rules apply to owners, contractors, and subcontractors, but not lenders. UTAH CODE ANN. § 13-8-5.

VERMONT

Public & Private

The rate of retainage is not specified. If there is retainage withheld, the amount retained must be released to the contractor within 30 days after completion of the work and acceptance. VT. STAT. ANN. tit. 9, § 4005(a).

Even if the owner is not withholding retainage from its contractor, the contractor may withhold retainage from its subcontractors. The retainage shall be paid within 30 days after final acceptance. VT. STAT. ANN. tit. 9, § 4005(b).

Within 7 days after receipt of retainage, contractors and subcontractors must pay their subcontractors the retainage due to each subcontractor. VT. STAT. ANN. tit. 9, § 4005(c).

If an owner, contractor, or subcontractor fails to pay retainage when due or unreasonably withholds acceptance, then that party shall be subject to interest, penalty, and attorney's fees as allowed by statute. VT. STAT. ANN. tit. 9, § 4005(d). Interest is 12% per year 12 V.S.A. §2903(c). The statutory penalty is 1% per month of the amount wrongfully withheld. VT. STAT. ANN. tit. 9, § 4007(b). To not be considered "wrongfully withheld" the amount should bear a reasonable relation to the value of the claim held in good faith. Reasonable attorneys' fees shall be awarded to the "substantially prevailing party." VT. STAT. ANN. tit. 9, § 4005(c).

There shall be no retainage for material (when labor is not performed by the materialman) that is accepted by the contractor and delivered on or off site and covered by a manufacturer's warranty or graded to meet industry standards. VT. STAT. ANN. tit. 9, § 4005(e).

VIRGINIA

Public

The maximum rate of retainage is 5 percent. This provision is applicable to both contractors and subcontractors. VA. CODE ANN. § 2.2-4333.

On public contracts exceeding \$200,000 for certain types of contracts, a contractor may place the retained funds in an escrow account; this option must be exercised in the bid proposal. VA. CODE ANN. § 2.2- 4334.

Private

None.

WEST VIRGINIA

Public and Private

None.

WASHINGTON

Public

A contract retainage not to exceed 5 percent is required for maintenance of a trust fund, which is designed to pay claims arising under the contract. The contractor may request that retainage be reduced to 100 percent of the value of the uncompleted work. At the option of the contractor, the retainage may be held in a fund by the public body, deposited in an interest-bearing account, or placed in escrow. Wash. Rev. Code § 60.28.011(1)(3)(4).

A contractor or subcontractor may not retain more than 5 percent from the monies earned by any subcontractor. Any funds retained by a contractor or subcontractor shall earn interest at the rate received by the contractor from the reserved funds. Wash. Rev. Code § 60.28.011(5).

After completion of all contract work, the contractor may request that the public body release and pay in full the amounts retained during the performance of the contract; once requested, the public body must do so within 60 days. Wash. Rev. Code § 60.28.011(3). If the work performed by a subcontractor on a project has been completed within the first half of the time provided in the contract for completing the work, the public body may accept completion of the subcontract, and must give public notice of this acceptance. After a 45 day period for giving notice of liens, the public body may release the subcontractor's portion of the retained funds. Claims against the retained funds are not valid after 45 days. Wash. Rev. Code § 60.28.011(11).

In lieu of retainage, a contractor may submit a bond for all or part of the contract retainage to the public body. If the public body accepts a bond in lieu of retainage from the contractor, the contractor must accept like bonds from its subcontractors. Wash. Rev. Code § 60.28.011(6). At any time prior to formal acceptance of the project, a subcontractor may request the contractor to submit a bond to the public body

for the subcontractor's portion of the contractor's retainage. The contractor may withhold the subcontractor's portion of the bond premium. Within 30 days of receiving the request, the contractor must provide the bond unless the public body demonstrates good cause for refusing to accept it, the bond is not commercially available, or the subcontractor refuses to pay the subcontractor's portion of the bond premium. Wash. Rev. Code § 60.28.011(6).

In contracts of \$150,000 or less, the public entity and contractor, general contractor, or construction manager may agree, in lieu of a bond, to retain 10 percent of the contract price for 30 days after date of final acceptance. Wash. Rev. Code § 39.08.010(3).

Private

None.

WISCONSIN

Public

The rate of retainage withheld from a contractor shall not exceed 5% of the department's estimate of the amount and proportionate value of work properly completed. No additional retainage shall be withheld when the project reaches 50% complete unless the department certifies that that job is not proceeding satisfactorily. If the progress of the work is not satisfactory, additional amounts may be retained not to exceed 10% of the value of the work completed. Wis. Stat. § 16.855(19)(a).

Upon substantial completion of the work, retainage shall be paid to the contractor less the value of required corrective or uncompleted work. Wis. Stat. § 16.855(19)(a).

For a subcontractor, the prime contractor shall pay upon request of the subcontractor an amount equal to the proportionate value of the subcontractor's work properly completed less retainage. The retainage shall be an amount equal to not more than 5% of the subcontractor's work completed until the subcontractor's work is 50% completed at which point no further retainage shall be withheld unless the department or Board of Regents certifies that the subcontractor's work is not proceeding satisfactorily. If the progress of the work is not satisfactory, additional amounts may be retained not to exceed 10% of the value of the work completed. Wis. Stat. § 16.855(19)(b).

Upon substantial completion of the subcontractor's work, retainage shall be paid to the subcontractor less the value of required corrective or uncompleted work. Wis. Stat. § 16.855(19)(b).

All payments the prime contractor is required to make to its subcontractor shall be made within 7 calendar days after the date the prime contractor receives payment from the department of board. Wis. Stat. § 16.855(19)(b).

WYOMING

Public

The public entity may retain no more than 5% of the calculated value of any work completed as retainage. Wyo. Stat. Ann. 16-6-702(b)

Retainage is due and payable as follows:

The public entity issues a certificate of substantial completion,

The public entity publishes the notice of the certificate of substantial completion for 2 weeks, and

No claim from a subcontractor or supplier is submitted within 41 days after the first day of publication, or

If a claim is made or the public entity withholds funds for any incomplete or defective work, the retained/withheld funds are not due until the public entity issues a notice of final completion. Wyo. Stat. Ann. 16-6-116(a)

Retainage shall be held in an account in the name of the contractor which account has been assigned to the public entity. Wyo. Stat. Ann. 16-6-702(b)

If the public entity finds that satisfactory progress is being made in all phases of the contract it may, upon written request by the contractor, authorize payment from the withheld percentage. Wyo. Stat. Ann. 16-6-702(b)

The general contractor can request that the retention be held in an interest-bearing account. Wyo. Stat, Ann. 16-6-704.

Private

No limitations.

Retainage Law in 50 States
CONTRIBUTING EDITORS

Kevin Amadio, Kaplin Stewart Meloff Reiter & Stein, PC
Chip Bachara, Bachara Construction Law Group
Eric Biesecker, Nexsen Pruet
Charles Burkhardt, Balch & Bingham LLP
Sean Calvert, Calvert Menicucci PC
Brian Carroll, Sanderford & Carroll, PC
Andrew Cook, K&L Gates, LLP
Clyde Copeland, Jernigan Copeland Attorneys, PLLC
Jason Ebe & James Sienicki, Snell & Wilmer, LLP
Brian Esler and James Yand, Miller Nash Graham & Dunn, LLP
Dana Farmer, Dentons Durham Jones Pinegar
Marc Felezzola, Babst Calland Clements & Zomnir, PC
Mark Gruskin, Senn Visciano Canges, P.C.
Adam Harrison, Harrison Law Group
Scott Holbrook, Crawford & Bangs, LLP
Ted Laperouse, Laperouse APLC
Courtney Little, Esq., ACE Glass
Jordan Pavlus, Byrne Costello & Pickard, PC
Brian Rickert, BrownWinick Law Firm
Ben Shapiro, Baker Donelson Bierman Caldwell & Berkowitz, PC
Beth Stengel, Evans Petree, PC
Richard Stockenberg, Stockenberg Law Firm
Eric Travers, Kegler Brown Hill + Ritter, LPA
Greg Vitali, Lindabury McCormick Estabrook & Cooper, PC
Girard Visconti, Shechtman Halperin Savage, LLP
David Walls, Phillips Murrah, PC
Thomas Yocum, Yocum & Neuroth

<p>Alabama Charles Burkhart <i>Balch & Bingham LLP</i> 3708 Mountain Park Drive Birmingham, AL 35213 (205) 251-8100 cburkhart@balch.com</p>	<p>Alaska, Oregon, Washington Brian Esler and James Yand <i>Miller Nash Graham & Dunn, LLP</i> Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 97121-1128 206-624-8300 james.yand@millernash.com brian.esler@millernash.com</p>
<p>Arizona, Nevada Jason Ebe & James Sienicki <i>Snell & Wilmer, LLP</i> One Arizona Center, Suite 1900 Phoenix, AZ 85004-2202 (602) 382-6000 jebe@swlaw.com jsienicki@swlaw.com</p>	<p>Arkansas Courtney Little, Esq. ACE Glass 3101 Dugan Drive Little Rock, AR 72206 courtney.little@aceglass.net</p>
<p>California Scott Holbrook <i>Crawford & Bangs, LLP</i> 1290 East Center Court Drive Covina, CA 91724-3600 (626) 858-4207 Sholbrook@BuildersLaw.com</p>	<p>Connecticut, Delaware, Hawaii, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, Vermont, Wisconsin Richard Stockenberg <i>Stockenberg Law Firm, LLC</i> 3636 South Geyer Road, Suite 100 St Louis, MO 63127 314-324-7001 richard@stockenberglawfirm.com</p>
<p>Colorado Mark Gruskin <i>Senn Visciano Canges, P.C.</i> 1700 Lincoln Street, Suite 4300 Denver, CO 80203 (303) 298-1122 mgruskin@sennlaw.com</p>	<p>Florida Chip Bachara <i>Bachara Construction Law Group</i> 1 Independent Drive, Suite 1800 Jacksonville, FL 32202 904-562-1060 cbachara@bacharagroup.com</p>
<p>Georgia Ben Shapiro <i>Baker Donelson Bierman Caldwell & Berkowitz, PC</i> 3414 Peachtree Road, Suite 1600 Atlanta, GA 30326 (678) 406-8709 bshapiro@bakerdonelson.com</p>	<p>Iowa Brian Rickert <i>BrownWinick Law Firm</i> 666 Grand Avenue Suite 2000 Ruan Center Des Moines, Iowa 50309 515-242-2457 brian.rickert@brownwinick.com</p>

<p>Kentucky Thomas Yocum <i>Yocum & Neuroth</i> 1 Levee Way, Suite 3109 Newport, KY 41071 (513) 721-5672 tom@ynlawusa.com</p>	<p>Louisiana Ted Laperouse <i>Laperouse APLC</i> 8034 Jefferson Hwy. Baton Rouge, LA 70809 225.416.0614 ted.laperouse@laperouselaw.com</p>
<p>Maryland Adam Harrison <i>Harrison Law Group</i> 40 West Chesapeake Avenue, Suite 600 Towson, MD 21204 (410) 832-0000 aharrison@harrisonlawgroup.com</p>	<p>Mississippi Clyde Copeland <i>Jernigan Copeland Attorneys, PLLC</i> PO Box 2598 Ridgeland, MS 39158-2598 (601) 427-0048 ccopeland@jcalawfirm.com</p>
<p>New Jersey Greg Vitali <i>Lindabury McCormick Estabrook & Cooper, PC</i> 53 Cardinal Drive Westfield, NJ 07091 (908) 233-6800 gvitali@lindabury.com</p>	<p>New Mexico Sean Calvert <i>Calvert Menicucci PC</i> 8804 Washington Street, NE, Suite E Albuquerque, NM 87113 (505) 247-9100 scalvert@hardhatlaw.net</p>
<p>New York Jordan Pavlus <i>Byrne Costello & Pickard, PC</i> 100 Madison Street Suite 1600, Tower I Syracuse, NY 13202 (315) 474-6448 jpavlus@bcplegal.com</p>	<p>North Carolina, South Carolina Eric Biesecker <i>Nexsen Pruet</i> 701 Green Valley Road, Suite 100 Greensboro, NC 27408 (336) 373-1600 ebiesecker@nexsenpruet.com</p>
<p>Ohio Eric Travers <i>Kegler Brown Hill + Ritter, LPA</i> 65 East State Street, Suite 1800 Columbus, OH 43215-4213 (614) 462-5473 ETravers@keglerbrown.com</p>	<p>Oklahoma David Walls <i>Phillips Murrah, PC</i> Corporate Tower I Thirteenth Floor 101 N. Robinson Avenue Oklahoma City, OK 73102 (405) 552-2480 davidwalls@lawdaw.com</p>

<p>Pennsylvania Kevin Amadio <i>Kaplin Stewart Meloff Reiter & Stein, PC</i> 910 Harvest Drive P.O. Box 3037 Blue Bell, PA 19422-0765 (610) 941-2549 kamadio@kaplaw.com</p>	<p>Rhode Island Girard Visconti <i>Shechtman Halperin Savage, LLP</i> 39 Pike Street Providence, RI 02903 (401) 238-8500 gvisconti@savagelawpartners.com</p>
<p>Tennessee Beth Stengel <i>Evans Petree, PC</i> 1715 Aaron Brenner Drive Suite 800 Memphis, TN 38120 901- 474-6138 bstengel@evanspetree.com</p>	<p>Texas Brian Carroll <i>Sanderford & Carroll, PC</i> 2110 Birdcreek Drive Temple, TX 76502 (254) 773-8311 Brian@txconstructionlaw.com</p>
<p>Utah, Wyoming Dana Farmer <i>Dentons Durham Jones Pinegar</i> 111 S Main St #2400 Salt Lake City, UT 84111 (801) 395-2424 dana.farmer@dentons.com</p>	<p>Washington, DC, Virginia Andrew Cook <i>K&L Gates, LLP</i> 1601 K Street NW Washington, DC 20006 (202) 778-9106 andrew.cook@klgates.com</p>
<p>West Virginia Marc Felezzola <i>Babst Calland Clements & Zomnir, PC</i> 603 Stanwix St., Two Gateway Center Pittsburgh, PA 15222 (412) 773-8705 mfelezzola@babstcalland.com</p>	