



CLIENT NEWS BRIEF

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NEW LEGISLATION IMPACTS RETENTION AND PAYMENT TERMS FOR PUBLIC WORKS PROJECTS

Governor Brown recently signed into law Senate Bill (SB) 293, which contains numerous changes to the law on public works construction contracts, including a requirement that the public entity withhold no more than 5% of the contract price as retention.

The Public Contract Code permits public entities to retain a percentage of the contract price from progress payments to a general contractor. Such "retention" is normally held by the public entity to cover, if necessary, the cost of defects or other issues arising from the work performed by the contractor and to cover stop notices if funds are available. If not applied to cover the cost of such issues, retention funds are released following the completion of the project. Until now, public agencies have typically withheld 10% of the contract price, in reliance on Public Contract Code section 9203. Also, Public Contract Code section 7200 provides that the amount withheld by a public entity cannot exceed the percentage specified in the contract – in other words, the public entity cannot withhold more than it has been agreed upon in the construction contract.

SB 293 enacts a new statute, Public Contract Code section 7201, which provides that for contracts entered into after January 1, 2012, a public entity cannot withhold more than 5% of progress payments as retention. However, the new statute also provides that the public agency may withhold more than 5% on specific projects where the governing body of the public entity or designee finds that the project is "substantially complex" and therefore requires a higher retention amount. The findings must be made during a properly noticed and regularly scheduled public hearing prior to the bid and must be included in the bid documents, along with the higher retention amount.

Public Contract Code section 7201 is in effect until January 1, 2016, at which time it will be deemed repealed unless a new statute is enacted before that time. SB 293 includes similar provisions relating to the 5% retention cap for state entities under section 10261 of the Public Contract Code. However, SB 293 does not address section 9203, and therefore clean-up legislation may be needed.

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Because this new legislation limits the amount a public agency can withhold as retention, agencies are well-advised to carefully track and, when possible, predict potential damages and costs incurred during the course of a project. If the withheld retention is not sufficient to cover the project's damages and costs, then the agency may be forced to withhold from progress payments (assuming the contract permits it).

SB 293 also amends section 7108.5 of the Business and Professions Code, shortening the time by which a prime contractor or subcontractor must pay subcontractors from 10 days after receipt of each progress payment down to 7 days.

If you have questions or would like additional information on issues regarding managing public works projects, please contact one of our [eight offices](#) located statewide, visit our [website](#), or follow Lozano Smith on [Facebook](#).

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