

CONSTRUCTION LAW NEWSLETTER

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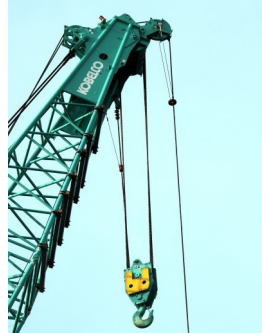
TRENDS IN CONSTRUCTION LAW

Retainage is a continuous issue for contractors. It requires the contractor to extend unsecured credit in the form of retainage for a period of time which can stretch to 1-2 years after your work is complete.

It is important to note that on public projects, State Finance Law 139-f and General Municipal Law 106-b provide that if you furnish a bond, the owner may only withhold 5% retainage. If no bond is required, retainage is

limited to 10%.

Even with this limitation in retainage set forth in the law, some public contract specifications require a breakdown in the schedule of values which could be “disguised retainage.” For example, the specification may have a line item for meeting attendance, punch list, project closeout, and so on. Those line items may add up to more than 5% of the contract value. This is a mechanism for owners to withhold more than the permissible 5% retainage because the amounts with-



held are couched as line items for other tasks.

Contractors should be aware that the assignment of arbitrary values for line items in a schedule of values may result in “disguised retainage.”

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CASE LAW UPDATE

On November 22, 2016, the New York Court of Appeals decided the case of *Matter of ACME Bus. Corp. v. Orange County*

The case addressed whether a municipality must follow the formula for awarding contracts set forth in its request for proposals (“RFP”).

In the case, Orange County Department of General Services issued an RFP from companies to provide transportation of children receiv-

ing pre-school special education services. After receiving cost proposals, the County awarded the contract. After an unsuccessful offeror was notified of the contract award, it filed a lawsuit against the County, arguing that the contract award was arbitrary and capricious and should be nullified.

The Supreme Court sided with the County and upheld the award. The Appellate Division upheld that deci-

sion. However, the Court of Appeals reversed, stating that because Orange County had failed to follow the mechanism for awarding contracts set forth in the RFP, the award must be nullified.

This decision creates a new legal standard in New York State and brings RFP awards more in line with the legal standard for awarding contracts under competitive bidding procedures.

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Consult your attorney regarding specific legal needs. This may be construed as attorney advertising. Prior results do not guarantee a similar outcome.