

RETAINAGE OF PAYMENT

When retainage is used, the objectives of the Owner and the impact on contractors should be properly balanced to achieve project objectives within the constraints of state statutes.

Retainage of payment (or more commonly referred to as retention of payment or simply retention) is the practice of withholding a portion of the payment due to a contractor. Retainage can be an effective tool for Owners to obtain contract compliance. For contractors and subcontractors, retainage can be a burden on cash flow and profitability. The objectives of the Owner and the impact on the contractor should be properly balanced to achieve the project objectives.

The amount of retainage and any special circumstances that affect the amount of retainage should be clearly defined in the Contract Documents.

Typically, retainage is calculated as a percentage of the payment due, but specific amounts at certain defined events may also be used. In order not to unduly burden subcontractors that perform work early in the project, retainage can be reduced at certain project milestones, such as 50% completion, substantial completion and certificate of occupancy. Other milestones may include phase completion in a multi-phase project, partial occupancy or any other appropriate event. One alternative is a defined schedule of values for deliverables.

Retainage should not be confused with denial of payment for work that does not comply with the contract documents, breaches of contract or for reasons to protect the Owner from claims from third parties.

In Missouri, statutes regulate the use of retainage in both public works contracts and private contracts. The statutes distinguish retainage depending on the purpose. Retainage deducted according to a formula without a specific cause is treated in one manner, while retainage connected with identified completion or correction issues is treated in another manner.

Missouri statutes, referenced below, include the following requirements:

PRIVATE CONTRACTS

1. For retainage not connected with any identified completion or correction issues:
 - a. Retainage may not exceed 10% of any payment due from the Owner where there has been proper performance of the contract.
 - b. Contractors may not withhold retainage from a subcontractor in excess of the retainage held by the Owner for the subcontractor's work that is properly performed.

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- c. Retainage shall be held in trust for the benefit of each contractor, subcontractor and supplier in proportion to the respective interest of each. This retainage may reduce the effectiveness to obtain overall contract compliance when individual subcontractor or sub-subcontractor have low retainage amounts. In these instances, careful selection of critical subcontractors along with well written contracts and bonding requirements may be essential.
- d. The contractor may request an adjustment in retainage held for a subcontractor prior to substantial completion of a project, including payment in full, if it is determined that:
 - 1) The subcontractor's performance has been satisfactorily completed, and
 - 2) There is no risk to the Owner involving the subcontractor's work.
- e. Contractors may tender acceptable substitute security for a release of retainage in the amount of the security, such as a retainage bond, certificates of deposit, or irrevocable letter of credit. State statutes limit the duration for which letters of credit are valid.
- f. Retainage and any substitute security for retainage shall be released within thirty days of substantial completion, which occurs the earlier of the architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract or the owner accepting the performance of the full contract. The Owner may retain one hundred fifty percent of the cost to complete any remaining items, which are typically the items identified in the punch list. The Contractor shall release subcontractor retainage within seven days of receipt of payment from Owner.

PUBLIC WORKS PROJECTS

- 1. For retainage not connected with any identified completion or correction issues:
 - a. Retainage may not exceed 5% of the value of the contract or subcontract unless both the public Owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage may not exceed 10% of the value of the contract or subcontract.
 - b. The public owner is not required to accept substitute retainage, such as bonds or other security.
 - c. Any amount due, less retainage, shall be paid pursuant to the Missouri or Federal Prompt Pay statutes. At substantial completion, if there are any remaining items identified to be completed as determined by the public Owner's representative, such as would be typically contained in the punch list, an amount equal to two hundred percent of the value of each item shall be withheld until such items are completed.

References:

AIA A201 General Conditions
CSI Project Delivery Practice Guide
Supplementary General Conditions

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ConsensusDOCS 200, Paragraph 9.2.4

Guidelines for Progress Payment and Project Closeout

Missouri Statutes – Chapter 34, Section 34.057 (prompt payment) and Section 436.300-436.336

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