

Contract Close-out & Claims Against Bond and Retainage

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Agenda

- Release of Retainage
- Filing and Renewal of Claims
- Foreclosure and Payment
- Preventing Payment Disputes
- Applicable Laws
- Small Group Exercise

Release of Retainage

- State law: “completion of all contract work”
- Key Dates
 - Substantial Completion Date
 - Physical Completion Date
 - Final Acceptance Date
- Prepare “Notice of Completion of Public Works Contract” (to Department of Revenue)

Releases from State Agencies

- Department of Revenue
- Employment Security Department
- Department of Labor and Industries
 - Workers Compensation
 - Employer Liability Certificate from website
- Prevailing Wages
 - Statements of Intent to Pay Prevailing Wages
 - Affidavits of Wages Paid

When to Release Retainage

- 60 Days: Must release within 60 days of project being declared formally complete, provided agency has received:
 - Release from Department of Revenue
 - For projects over \$35,000. Previous law was \$20,000. SHB 1328 effective 7-22-07 increases amount
 - Prevailing wage documents from Labor and Industries for contractor and each subcontractor:
 - Statement of Intent to Pay Prevailing Wages
 - Affidavit of Wages Paid
- Prompt Pay Act: Impact if non-timely release of retainage.
- Claims: May withhold amount of retainage sufficient to cover “live” claims (not expired).

Filing of Claims

Claim Filing Period:

- End of Claim filing period is triggered by when the Owner has declared the contract complete and formally accepted the project.
- Different timing for filing claim against Payment Bond versus Retainage.
 - Payment Bond: 30 days after (*RCW 39.08.030*)
 - Retainage: 45 days after (*RCW 60.28.011*)

Renewal of Claim - Retainage

– Renewal Deadlines:

- Every 4 months, or
- File a lawsuit to foreclose on the claim
- May not renew (or file for first time) after the 45th day following the contract being declared complete by Owner

– If deadlines are missed:

- Claim lapses
- May not re-file the claim

Renewal of Claim – Payment Bond

– Renewal Deadlines:

- None
- May not be filed after the 30th day following the contract being declared complete by Owner

Pre-Claim Notices

- Purpose: To provide contractors and subcontractors with notice that delivery has occurred on the project
- Applies to: Those furnishing materials, supplies, or equipment

Pre-Claim Notices

- Content of Notice:
 - Name of subcontractor who requested delivery
 - Statement that a claim against the bond and/or retainage may be filed by the provider of the materials

Pre-Claim Notices

- Failure to file: No foreclosure action against a claim will be considered valid by the courts.
- Filing Deadlines:
 - Payment Bond: within 10 days after the first delivery of materials (*RCW 39.08.065*)
 - Retainage: within 60 days of beginning to furnish materials (*RCW 60.28.015*)

Keeping Track of Claims

- Owner should designate one central file where claims, renewals, and releases should be filed.

Release of Claim

- If the subcontractor, supplier, or worker is subsequently paid, they should file a Release of Claim with the Owner.

Foreclosure and Payment

- Foreclosure: To preserve their legal rights, a claimant must “perfect” their claim against the Retainage by filing a lawsuit for foreclosure on the claim.
- Timing: Action to foreclose must be within 4 months of filing (claim may be renewed before expiration of 4 months)

Foreclosure and Payment

Payment Based on a Claim:

An Owner should not make payments to subcontractors, suppliers, or workers who have filed a claim against the Retainage without a court order directing the Owner to make such a payment. The Owner typically does not review or pass judgment on a claim to determine if the amount claimed should actually be paid. That role is reserved for the courts.

Foreclosure and Payment

Priority of Claims against Retainage:

1. Workers for payment of prevailing wages (court order required)
2. State Department of Revenue for unpaid taxes (no court order required)
3. Subcontractors, suppliers, and materialmen (court order required)
4. Other taxes due (no court order required)
5. The Owner (no court order required)

Foreclosure and Payment

- If an inadequate amount of money remains in the Retainage to cover all claims due to be paid, the protections provided by the Payment Bond become applicable and the amounts due to subcontractors, suppliers, materialmen, and workers should be paid by the contractor's bonding company.

Evaluating Claims – Group Discussion

- Break into small groups.
- Discuss handout of how to analyze release of retainage on the 45th day after Final Acceptance.
- Share observations with large group.

Preventing Payment Disputes

From the Subcontractor's View

- Subcontractors and suppliers may contact you for advice on how to get paid by the contractor. The following information is basic information to help them prevent payment disputes with contractors.

Preventing Payment Disputes

- Know the Contractor:
 - Call references on similar projects
 - Check contractor's registration and claims
 - <https://fortress.wa.gov/lni/bbip/> (Labor and Industries)
 - Investigate reputation
 - <http://www.thebbb.org/> (Better Business Bureau)

Preventing Payment Disputes

- Written Contract: Have a clear written agreement of what the subcontractor or supplier will provide and what the contractor will pay.
- Invoice: The subcontractor or supplier should provide the contractor with a clear, written invoice.

Preventing Payment Disputes

- Talk: Attempt to discuss payment dispute issues with the contractor.
- Joint Check: Request the Owner issue a joint check to the contractor and the subcontractor (or supplier).

Applicable Laws

- State Law: RCW 39.08 – Bonding
- State Law: RCW 60.28 – Retainage

Questions



Mike Purdy has more than 27 years of experience as a manager in public contracting and procurement. He is currently the Contracts Manager for the University of Washington's Capital Projects Office and is responsible for managing design and construction contracts for more than \$1 billion worth of projects at the University. Before joining the UW in 2005, he spent five years at the Seattle Housing Authority where he served as Contracting and Procurement Manager, overseeing all of the contracting and purchasing (construction, design consultants, other consultants, goods, supplies, and services) for the largest residential landlord in the state. Prior to that he worked for the City of Seattle for more than 21 years, where he administered the city's construction and consultant contracts as the city's Contracting Manager.

He has a bachelor's degree in business and public administration and an MBA, both from the University of Puget Sound, and a master of divinity degree from Fuller Theological Seminary. Mike is also the principal of Michael E. Purdy Associates (www.mpurdy.com), a consulting firm providing contracting and procurement advice to government agencies in the area.

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