



The Soto Law Group, P.A.

# CONSTRUCTION PRACTICE GROUP

Legal Information for the Construction Industry

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## TOP TEN CONSTRUCTION CLAUSES – PART IX – PAYMENT TERMS

This article is the ninth in a ten-part series analyzing the top ten critical construction clauses. In this installment, we analyze the “payment terms” provision, which encompasses a discussion on retainage and final payment. This article will focus primarily on the updated American Institute of Architects’ Agreement between the Owner and Contractor (AIA Document A101-2017) as well as Florida case law.

### I. OVERVIEW

The payment terms provision is perhaps the most palpable of all construction clauses as each party to a construction contract has unique concerns when it comes to payment. An owner is concerned about overpaying its general contractor before its work is completed and will require some kind of assurance that the work will be completed. Meanwhile, a general or subcontractor is concerned about receiving prompt payment so not to create financial hardship. In negotiating the terms of payment, the goal is to reach a balanced resolution of all concerns.

### II. PAYMENT PROCEDURES

The American Institute of Architects’ Agreement between the Owner and Contractor (AIA Document A101-2017) attempts to find this balance by incorporating monthly progress payments based upon applications for payment submitted to the owner after being reviewed and approved by the architect. The AIA form provides that prior to any application for payment being submitted, the contractor must first submit an itemized schedule of values for the architect’s approval. The schedule of values allocates a line item value for various items of work. An application for payment will typically list each item on the schedule of value and provide the percentage complete along with the value of the completed work. The architect is tasked with reviewing the payment application and signing off on it. The owner is then responsible for making the determined payment minus any retainage. The owner’s failure to make payment in accordance with the contractual requirements constitutes a material breach of contract. See J.M. Beeson Co. v. Sartori, 553 So. 2d 180 (Fla. 4<sup>th</sup> DCA 1989); see also Newkirk Construction Corp. v. Gulf County, 366 So. 2d 813 (Fla. 1<sup>st</sup> DCA 1979).

### **III. TIMING OF PAYMENT**

Under Florida's Construction Contract Prompt Payment Law, any party with an obligation to make payments under a written construction contract must make the payments promptly once certain conditions have been met. Fla. Stat. §715.12(4) (2017). The law generally provides that, unless some exception exists, the obligor has 14 days to make payment to the obligee otherwise the payment due will bear interest at the statutory rate. Fla. Stat. §715.12(5)(a) (2017).

With this in mind, AIA Document A101-2017 provides a form provision that leaves it to the contracting parties to set their own deadlines for payment. The relevant provision reads as follows:

“§ 5.1.3 Provided that an Application for Payment is received by the Architect not later than the \_\_\_\_\_ day of a month, the Owner shall make payment of the amount certified to the Contractor not later than the \_\_\_\_\_ day of the month. If an Application for Payment is received by the Architect after the application date fixed above, payment of the amount certified shall be made by the Owner not later than \_\_\_\_\_ ( ) days after the Architect received the Application for Payment.”

### **IV. RETAINAGE & FINAL PAYMENT**

As previously mentioned, the owner has an interest in ensuring there are sufficient funds to complete the contractor's scope of work in the event the contractor fails to do so. Hence, it is common for contracts to provide for retainage, commonly 10% of the contract amount, of each payment application. The retainage is held by the owner until the contractor reaches some pre-defined stage of construction and all other conditions have been met.

The American Institute of Architects' General Conditions of the Contract for Construction is incorporated into AIA A101-2017 by reference. Section 9.10.2 of the General Conditions contains contractual conditions that the contractor must satisfy in order to receive final payment of the retainage. Specifically, the contractor is required to submit to the architect 1) proof that all payrolls, bills for materials and equipment, and other indebtedness connected with the work for which the owner or the owner's property might in any way be responsible have been paid or satisfied, 2) written proof that all insurance required by the contract is in effect and will remain in effect unless written notice is provided 30 days in advance, 3) a written statement that the contractor knows of no reason why the insurance will not be renewable to cover the period required by the contract, 4) written proof of any surety's consent to final payment, and 5) any additional data that the owner requires to establish the contractor's payment or satisfaction of all contractual obligations.

Under the AIA, contractors must be conscience of the General Conditions § 9.10.5 which provides that once the contractor accepts final payment it is deemed to have waived all claims not previously made in writing and identified by the contractor as unsettled at the time of the final payment application.

It is important to note that you may encounter non-AIA form contracts. Regardless of the form used in drafting any construction contract, the payment terms provision should be concisely drafted and touch on all the basics discussed above to reduce ambiguity. Whether you are an owner, contractor or subcontractor, it is advisable to consult with an attorney knowledgeable in construction contracts to assist you in deciding what payment terms are best suited for your business.

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