

Closeout Paperwork Time Limit

This email responds (very much belatedly) to your research request:

We have run into a handful of contractors who just never seem to get their final paperwork in - payrolls, affidavits of wages paid, and even final pay estimates. While you would think any contractor would do what it takes to get paid, a few of them don't seem to care. (Often it's those who are going out of business and/or have multiple creditors after them. But it leaves us to deal with angry workers, agencies and subs.) It also creates an administrative mess for our procurement staff and grant close out problems if the project is funded with grant monies - eg. CDGB.

We would like to set a time limit by contract for getting all final paperwork in. One option we are looking at is setting a time limit within which contractors must submit all final paperwork or forfeit their retainage and even contract payment, despite the prompt pay law. Do you know what other cities are doing to get contractors wrap up the paperwork on projects - or cut off their right to claim retainage or other compensation?

Defining Contract Completion Time

As a time limit with forfeiture of retainage and final payment penalties is not a standard practice in the contract documents that most agencies use, this language should be highlighted and repeated as necessary. The contract documents will need to be clear and explicit as to what constitutes project completion for the purpose of setting a time limit for paperwork completion. For example, the 2002 *Standard Specifications* contain these definitions:

Substantial Completion Date

The day the Engineer determines the Contracting Agency has full and unrestricted use and benefit of the facilities, both from the operational and safety standpoint, and only minor incidental work, replacement of temporary substitute facilities, or correction or repair remains for the physical completion of the total contract.

Contract Completion Date The date by which the work is contractually required to be physically completed. The Contract Completion Date will be stated in the Notice to Proceed. Revisions of this date will be authorized in writing by the Engineer whenever there is an extension to the contract time.

Physical Completion Date The day all of the work is physically completed on the project. All documentation required by the contract and required by law does not necessarily need to be furnished by the Contractor by this date.

Completion Date The day all the work specified in the contract is completed and all the obligations of the Contractor under the contract are fulfilled by the Contractor. All documentation required by the contract and required by law must be furnished by the Contractor before establishment of this date.

Final Acceptance Date

The date on which the Contracting Agency accepts the work as complete.

There is specific language in Sections 1-05.11 and 1-05.12 (APWA) regarding final inspections, notification of deficiencies, etc., that also must be considered in setting time limits for paperwork completion.

Claim and Lien Notice Requirements (Prevailing Wages and Taxes)

State agencies (DOR, L&I, ESD) and Suppliers, Laborers and Materialmen (SLMs) have statutory lien and claim rights within certain time frames. The attached files identify the paperwork and deadlines for meeting the statutory requirements.

A likely scenario could be that the city uses the ***Physical Completion Date*** as the trigger for requesting the contractor's concurrence with the final pay estimate, submission of the Affidavit to L&I and all other documentation required by the contract. The contractor would then have X days to accomplish these or forfeit his retainage and final pay estimate amount.

An additional Y days would be allowed for DOR, L&I and ESD review and approval. The sum of X and Y would establish the ***Completion Date***, which in the contract would be the trigger that starts the 60 day retainage release clock. After the ***Completion Date***, then, the Notice of Completion would be filed with DOR, based on the city's version of the contract amount. L&I and ESD would also be notified that the contractor has not filed his Affidavit.

[Note that RCW 39.08.030 requires acceptance by the governing body of the agency, which triggers a 30 day period within which SLMs can also file a claim against the Performance and Payment Bond.]

Disposition of Retained Funds and Other Moneys

As retained funds are for the benefit of the State and SLMs, they should be kept intact at least until after the 60 day retainage release date. [Note, the city can release of retainage less any claims by the State and/or SLMs after 45 days.] If the State and/or SLMs file a Notice of Lien, they have four months from that date to foreclose on the lien through a lawsuit. So, if a Notice of Lien is filed, the retained funds should be kept intact until after the four months passes or a lawsuit resolves the lien. RCW 60.28.011 allows the contractor to select one of three options for retainage, so the city must be careful that the language creating the retainage account under any of the options contains the forfeiture clause. As retainage is money already paid to the contractor, the money in the account needs to be transferred back into the fund from which it was paid

Final payments forfeited are available for other projects in the same fund.

Prompt Pay Act

Assuming that the contractor's performance under the contract has been satisfactory and the only payment issue is forfeiture due to failure to furnish required closeout paperwork within the required time limit, there should be no Prompt Pay Act issues. Otherwise, you may want to review RCW 39.76.011, particularly subsection 2(b).

Please call if you have any questions. Jim Doherty, MRSC Legal Consultant, provided legal review.



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