



EASTERN CONTRACTORS ASSOCIATION, INC.

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December 4, 2020

The Honorable Andrew M. Cuomo
The Governor of the State of New York
Executive Chambers
NYS Capitol
Albany, NY 12224

S7664 Breslin/A9117 Cusick

Dear Governor Cuomo:

On behalf of Eastern Contractors Association, Inc. (ECA), we urge you to sign S7664 Breslin (A3552 Cusick) that clarifies the meaning of substantial completion, ensuring the timely completion of construction projects and payments to contractors.

The Eastern Contractors Association, Inc. is a trade association of general contractors, subcontractors, suppliers, and service firms engaged in commercial, industrial, and institutional construction throughout eastern New York. ECA traces its history to 1890 and the builders' exchanges in Albany, Schenectady, and Troy. ECA is the only regional "full-service" contractor association serving the needs of all segments of the construction industry. The Association's footprint covers counties in the eastern part of New York State, from just south of Albany up to the Canadian border.

This legislation is needed because the term "substantial completion" is not defined in the law. This has resulted in many public owners, particularly at the local level, abusing the process and holding retainage for months or even up to a year after a project has been fully occupied or utilized for its intended purpose.

Retainage is not intended to serve as a warranty, although many public owners misuse retainage for that very purpose. The rightful purpose of retainage is to assure contract performance. It is money that a contractor has earned but is held back by the public owner during the course of project performance. Virtually all public projects our members have been involved in require contractors to provide contractual guarantees in addition to performance bonds. These, and not retainage, are the owner protections that are intended to survive contract completion. Defining substantial completion in the law will make it clear that when the project is substantially complete, public owners must reduce retainage to no more than two times the value of the punch list and an amount necessary to satisfy any claims, liens or judgments which have not been discharged.

In addition, requiring public owners to provide contractors with a complete punch list within 45 business days after substantial completion of the project has been reached will allow companies like our members to promptly complete the punch list, close out the project, and receive, on a timely basis, final payment for the remaining retainage being held. Some public owners have a reputation and history of prolonging the procedure for completing the punch list for many months or even years after a project has been fully occupied or utilized. Receiving new "punch list" items from a public owner three or four years after project completion is an unacceptable practice because those items don't generally represent remaining items of work to be completed by the contractor in accordance with his contract, they represent routine maintenance of the facility due to normal wear and tear of use.

It must be noted that this legislation still permits the public owner to withhold twice the value of any uncompleted items on the punch list and to hold the contractor liable for any uncompleted work or work that is not completed pursuant to the requirements and standards of the contract. It is in the best interest of both the public owner and the contractor(s) to have the same understanding of when a project reaches "substantial completion," in order to avoid unfinished work, late payments to contractors and full use of the project by the public owner.

It is discouraging for our member contractors to routinely wait for months or years to recoup all of their outstanding retainage once our project has been completed. Therefore, we strongly ask that you approve S7664 Breslin.

Respectfully,

Todd G. Helfrich
President and CEO
Eastern Contractors Association, Inc.

Cc: Rebecca Wood, First Special Counsel to the Governor
Stephanie Siaw, Assistant Counsel to the Governor