BY DAVID M. MCLAIN

Understanding Colorado's new retainage law

Some builders and contractors may be subject to new limits on contract terms

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THE 2021 COLORADO legislative session began this year on Jan. 13 and ran all the way through June 8, excepting a COVID-related pause. This year, I was happily surprised that the trial attorneys and plaintiffs' construction defect attorneys did not use the Democratic majorities in both houses to push through legislation that would further tilt the legal landscape in favor of homeowners, including: one-way prevailing party attorneys' fees, prejudgment interest, and an extension of Colorado's statutes of limitation and repose for construction defect claims.

Despite the absence of the drastically negative bills discussed above, there were several bills that passed that will have an effect on Colorado's construction industry. Among them, House Bill 21-1167, which is partially codified at C.R.S. § 38-46-103, prohibits property owners, contractors or subcontractors from withholding as retainage more than 5% of the price of the contract. The new law applies to contracts that: have a price of at least $150,000; are made between a property owner and a contractor; subcontracts, notwithstanding that the subcontract price is less than $150,000; and material supply agreements that are made to supply materials, goods or equipment, notwithstanding that the supply agreement price is less than $150,000.

By its terms, the new law does not apply to single contracts that govern the building of either one single-family dwelling or one multifamily dwelling with no more than four family dwelling units; or a contract with a public entity. Finally, the new law does not change, override or invalidate any other provision in contracts, subcontracts or supply agreements that pertain to timing of payment, conditions precedent to payment, backcharges, lien waivers, or pay-if-paid or pay-when-paid clauses. We anticipate that this bill will become effective on Sept. 9, and will apply to contracts entered into on or after that date.

Not surprisingly, the American Subcontractors Association of Colorado supported the bill. While the Colorado Association of Home Builders sought to amend the bill, particularly as it applied to the number of multifamily dwellings to be excluded, it was noteworthy that other industry groups actually supported the bill, including the Associated Builders and Contractors (ABC) and the Association of General Contractors (AGC). Perhaps one reason for this disparate treatment among Colorado's contractors is that home builders are also typically the owner, such that the bill would not affect retainage held from home builders. Commercial contractors, on the other hand, sitting in the seat of the contractor, but not the owner, also benefit by having retainage withheld from them limited to 5%.

While I am still waiting for the other shoe to drop with respect to attorneys' fees, prejudgment interest, and extension of Colorado's statutes of limitation and repose, this year could certainly have been a lot worse for Colorado's home builders. Stay vigilant, and be ready in 2022 if the more harmful bills should surface at the Colorado legislature. ○

Please feel free to reach out to me at (303) 987-9813 or by email at mclain@hhmrlaw.com if you would like to explore revamping your building practices in order to make yourself a hardened target.