

SB 61: Pay Attention to Retention!

New CA Law May Require 5% Retention for Certain Construction Contracts

Retention, also sometimes called "retainage", is the concept that an owner withholds a portion of payment due to a general contractor to ensure that the contractor completes the work. Retention provisions in construction contracts have always required attention as the owner and contractor need to agree on how much retention is withheld, what the retention applies to, and when it gets released. However, until now, the actual amount of retention for a private contract was not governed by statute, and the parties were free to negotiate the retention amount. 10% retention was typical. That changes with California Senate Bill 61 (SB 61). Effective January 1, 2026, SB 61 limits retention payments on a private construction contract to a maximum of 5% of the payment amount, with certain key exceptions.

What is Changing?

Starting January 1, 2026, SB 61 will limit retention payments to a maximum of 5% of the payment amount for some private construction projects. This means those project owners, contractors, and subcontractors can no longer withhold more than 5% of the total payment due as retention.

Does SB 61 Apply to Your Project?

Maybe! SB 61 includes two exceptions: (1) for certain residential projects, and (2) if a subcontractor fails to furnish a required payment and performance bond:

- **Residential Projects:** The 5% cap does *not* apply to residential projects *unless* the project is "mixed-use" or five stories or more.
- **Failure to provide Bond:** If a contractor provides written notice to a subcontractor by the time a bid is requested that a faithful performance and payment bond is required and the subcontractor fails to provide the bond by an admitted surety insurer, the 5% limit will not apply to that subcontractor.

What Does This Mean for Affordable Housing Developers?

If you are an affordable housing developer, this new law may affect how you structure your construction contract depending on the size of the project or the project's use.

Retention is limited to 5% if: your project is over four stories or "mixed use." SB 61 does not define "mixed use," so any housing project with non-residential use, including ground floor commercial use, would likely be subject to the new limit. If your project is 100% residential, or less than four stories, SB 61 does not apply, and retention can exceed 5%.

When applicable, the new retention cap will need to be included in the construction contract, and you will also need to ensure all of your project financing documents are consistent with the limited retention. While SB 61 applies to contracts executed after January 1, 2026, SB 61 could affect an existing contract if all subcontracts are not executed before January 1, 2026.

What Does this Mean for other Work?

For non-residential work, an owner should consider requiring the general contractor to provide evidence that the subcontractors have been notified of the bonding requirement and require the general contractor to provide evidence that subcontractors have provided the required bond.

What Should You Do Next?

Retention provisions in your construction contracts and financing documents may need to be updated to comply with the new law. You will need to pay attention to retention now more than ever. If you have any questions on SB 61, please contact Isabel Brown, William DiCamillo, Thomas Levendosky, or any Goldfarb & Lipman attorney.

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