

Construction Laws and Customs: New York

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A Q&A guide to construction projects in New York. This Q&A addresses state law and custom relating to public and private construction projects, including prompt payment laws, retainage, project delivery systems, contract forms, and commonly negotiated terms, warranties, and licensing requirements for construction professionals. It also addresses payment and performance bonds, including any applicable “Little Miller Act” statutes, construction statutes of limitations and repose, pleading requirements, and the enforceability of specific clauses, such as liquidated damages, limitations of liability, and no-damages-for-delay. Answers to questions can be compared across a number of jurisdictions (see Construction Laws and Customs: State Q&A Tool).

Prompt Payment Acts and Retainage

1. Does your state have any statutes governing the timing of payments to contractors or subcontractors on publicly owned or financed construction projects? If so, what do those statutes require regarding:

- Payments by owners to prime contractors?
- Payments by prime contractors to subcontractors?
- Penalties for failure to comply with requirements of the statute?
- A contractor’s right to stop work for failure to receive payment?

The following New York statutes mandate times for payment on publicly owned or financed projects:

- N.Y. State Fin. Law § 139-f, which applies to state agencies.
- N.Y. Gen. Mun. Law § 106-b(2), which applies to municipal agencies (except the City of New York).
- N.Y. Pub. Auth. Law § 2880, which applies to public authorities.

The [New York City Procurement Policy Board](#) has also passed [prompt payment rules](#) for public projects in the city ([Rules of New York City \(RCNY\), tit. 9, § 4-06](#)).

Payments by Owners

State Contracts

State agencies must promptly approve and pay requisitions for progress payments submitted by contractors according to the terms of their contracts, less:

- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.
- Any amount of retainage allowed by statute.

(N.Y. State Fin. Law § 139-f.)

Unless a statutory exception applies, the required payment is due:

- 30 calendar days (excluding legal holidays) after receipt of a requisition.
- 15 calendar days after receipt of a requisition from a small business (N.Y. State Fin. Law § 179-f(6)).
- 75 calendar days after receipt of requisition for highway construction contracts.

(N.Y. State Fin. Law § 179-f(2).)

The owner has 15 calendar days (or seven days for invoices received from small businesses) to advise the contractor of any defects or deficiencies in the requisition, which tolls the commencement of the 30-day period (N.Y. State Fin. Law § 179-f(3)).

When all or major portions of the work are substantially completed under the contract terms, the contractor submits a requisition for the contract balance. The owner must promptly approve and pay the remaining contract balance, less:

- Two times the value of any remaining items to be completed.
- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.

(N.Y. State Fin. Law § 139-f(1).)

Municipal Contracts

For contracts with municipal agencies (other than the City of New York), public owners must make payment within 30 days (excluding legal holidays) of receipt of a contractor's requisition, less:

- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.
- Any amount of retainage allowed by statute.

Where the owner is a municipal corporation that requires an elected official to approve progress payments, the payment period is increased to 45 days. (N.Y. Gen. Mun. Law § 106-b(1)(a).)

When all or major portions of the work are substantially completed under the terms of the contract, the contractor submits a requisition for the contract balance. The owner must promptly approve and pay the remaining contract balance, less:

- Two times the value of any remaining items to be completed.
- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.

(N.Y. Gen. Mun. Law § 106-b(1)(a).)

In New York City, the prompt payment date is measured from the Invoice Received or Acceptance Date (IRA Date) which, for construction-related contracts, occurs when the field engineer certifies on a payment requisition that the work has been accepted (RCNY, tit. 9, § 4-06(b)). Payment requisitions for construction contracts cannot be approved unless accompanied by the items identified in RCNY, tit. 9, § 4-06(e)(1).

The city must make payment within:

- 30 days after the IRA Date.
- 60 days after the IRA Date in the case of:
 - a contract change; or
 - substantial or final completion requisition, except as noted in RCNY, tit. 9, § 4-06(c)(3).

(RCNY, tit. 9, § 4-06(c).)

Public Authorities

For contracts with public authorities, the corporation must make the payment within 30 calendar days (excluding legal holidays) of receipt of a proper invoice for the amount of the contract payment due (N.Y. Pub. Auth. Law § 2880(7)).

Each authority has 15 calendar days after receipt of an invoice to notify the contractor in writing of any objection to the invoice, which tolls the 30-day period (N.Y. Pub. Auth. Law § 2880(8)).

Payments by Prime Contractors

For state agencies, the contractor must pay any subcontractor within seven calendar days of when the contractor or higher-tiered subcontractor receives payment, less:

- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.
- Any amount of retainage allowed by statute.

(N.Y. State Fin. Law § 139-f(2).)

For municipal agencies, the contractor must pay its subcontractors their proportionate share of the proceeds within seven calendar days of the receipt of any payment from the municipal agency, less:

- An amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor.
- Any amount of retainage allowed by statute.

(N.Y. Gen. Mun. Law § 106-b(2).)

All New York City construction contracts must contain a payment clause that obligates the contractor to pay each subcontractor and vendor not later than seven days after receiving payment from the city (RCNY, tit. 9, § 4-06(e)(2)(i)).

For public authorities, the statute does not mandate any time frame for prompt payment to a subcontractor.

Penalties for Failure to Comply

State Agencies

If a state agency does not make a contract payment by the required payment date, it owes interest on the unpaid amount at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e) (N.Y. State Fin. Law §§ 179-f(1) and 179-g).

However, interest is not applied if:

- Payment is withheld as the result of a lien, attachment, or other legal process against the money due a contractor.
- The amount of interest is less than \$10.

(N.Y. State Fin. Law § 179-f(1).)

Any interest paid must be distributed on a pro rata basis to each subcontractor in proportion to their share of the contract payment (N.Y. State Fin. Law § 179-f(1)).

Municipal Agencies

For municipal agencies, interest is paid at the rate in effect on the date the interest payment is made, computed at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e) (N.Y. Gen. Mun. Law § 106-b(1)(c)).

New York City's prompt payment law calls for interest to be paid on late payments at a rate of interest jointly set by the [New York City comptroller](#) and the [Office of Management and Budget](#) every six months ([RCNY, tit. 9, § 4-06\(b\)](#)). The current rate is published on the New York City Procurement Policy Board's [website](#).

Public Authorities

For public authorities, if the corporation fails to make a payment within the allotted period, interest is computed at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e). The corporation does not have to pay interest if the amount is less than ten dollars. (N.Y. Pub. Auth. Law § 2880(7)(c), (d).)

Right to Stop Work

None of the prompt payment statutes specifically address a contractor's right to stop work in the event of non-payment by a public owner.

For more information, see [Prompt Payment Acts \(Private Projects\): State Comparison Chart](#) and [Prompt Payment Acts \(Public Projects\): State Comparison Chart](#).

2. Does your state have any statutes governing the timing of payments to contractors or subcontractors on privately owned construction projects? If so, what do those statutes require regarding:

- Payments by owners to prime contractors?
- Payments by prime contractors to subcontractors?
- Penalties for failure to comply with the requirements of the statute?
- A contractor's right to stop work for failure to receive payment?

New York has a prompt payment act that applies to privately owned projects where the aggregate cost of construction, including all labor, services, materials, and equipment, equals or exceeds \$150,000. However, the act does not apply to contracts for the construction, reconstruction, alteration, repair, maintenance, moving, or demolition of:

- An individual one-, two-, or three-family residential dwelling.
- A residential tract development of 100 or fewer one- or two-family dwellings.
- Any residential construction project where the aggregate size of the project is 4,500 square feet or less.
- Any residential project of fewer than 75 units that receives governmental financial assistance for subsidized housing.

(N.Y. Gen. Bus. Law § 756.)

Payments by Owners

An owner must pay the contractor in the manner agreed to in the construction contract. Unless otherwise agreed by contract:

- The billing cycle is the calendar month in which the work was performed.

- The contractor invoices the owner for:
 - interim (progress) payments at the end of each billing cycle; and
 - final payment upon reaching substantial completion, as defined by the terms of the contract.
- The owner must approve or disapprove the invoice, in whole or in part, within 12 business days of receiving an invoice accompanied by all contractually required documentation. Where any part of the invoice is not approved, the owner must:
 - act in good faith; and
 - issue a written statement identifying the reason for withholding payment using the grounds identified in N.Y. Gen. Bus. Law § 756-a(2)(a)(i).
- The owner must pay the contractor in strict accordance with the terms of the construction contract, but in no event later than 30 days after approval of an interim or final invoice.

(N.Y. Gen. Bus. Law § 756-a.)

If payment is contingent on lender approval, the owner must pay the contractor's invoice or the amount of the invoice paid from the loan proceeds within seven days of the owner receiving the funds, except where N.Y. Gen. Bus. Law § 756-d applies (N.Y. Gen. Bus. Law § 756-a(3)(a)(iii)).

The owner may withhold from any interim payment only an amount sufficient to cover:

- The reasonable costs of curing any defect or deficiency noted in the written statement objecting to an invoice.
- Any liquidated damages established in the contract.

(N.Y. Gen. Bus. Law § 756-a(3)(a)(iv).)

Payments by Prime Contractors

A contractor must pay a subcontractor based on an approved invoice for work performed and materials supplied during the billing cycle (N.Y. Gen. Bus. Law § 756-a(3)(b)). The contractor must approve or disapprove the invoice, in whole or in part, within 12 business days of receiving the invoice accompanied by all contractually required documentation (N.Y. Gen. Bus. Law § 756-a(2)(a)(ii)). Where any part of the invoice is not approved, the contractor must in good faith issue a written statement specifying:

- The amount to be withheld.
- The specific causes for withholding.
- The remedial actions necessary for the subcontractor or material supplier to take to receive payment.
- The documentation and waivers required.

(N.Y. Gen. Bus. Law § 756-a(3)(c).)

The contractor must pay the subcontractor as described in the construction contract. When the subcontractor has fully performed, the contractor must pay each subcontractor the proportionate amount of funds received from the owner for its work within seven days of receipt of payment from the owner, provided all contractually required documentation and waivers are received from the subcontractor. (N.Y. Gen. Bus. Law § 756-a(3)(b)(ii).)

Penalties for Failure to Comply

If any payment to a contractor is delayed beyond the due date, the owner must pay the contractor interest beginning on the next day at a rate of 1% per month. If the construction contract specifies a higher rate of interest, the contract rate applies. The same interest rules apply to late payment from a contractor to a subcontractor. (N.Y. Gen. Bus. Law § 756-b.)

Beginning in 2022, for certain larger projects, prime contractors are jointly and severally liable for a subcontractor's failure to pay wages, benefits, and wage supplements for up to three years after the wage theft occurs (N.Y. Lab. Law § 198-e). As a precaution, the prime contractor may require a project's subcontractor to provide:

- Certified payroll records for the laborers on the project that reflect the status of the subcontractor's payment of wages and benefits.
- The names of all the subcontractor's laborers working on the project, including those designated as independent contractors.
- When applicable, the name of the contractor's subcontractor with whom the subcontractor is under contract.
- The anticipated contract start date.
- The scheduled duration of work.
- When applicable, the local unions with which the subcontractor is a signatory contractor.

- The name, address, and phone number for the subcontractor's contact person.

The prime contractor is authorized to withhold payment from a subcontractor who fails to timely comply with these requests for information. (N.Y. Gen. Bus. Law § 756-f.)

Before filing a civil action against the prime contractor for non-payment of wages or wage supplements, the laborer must provide ten days' notice to the prime contractor (N.Y. Lab. Law § 198-e).

Right to Stop Work

The contractor has the right to suspend performance under the contract if, within the prescribed time limit, the owner fails to:

- Approve a properly submitted invoice.
- Pay the contractor the undisputed invoice amount.

(N.Y. Gen. Bus. Law § 756-b(2)(a)(i).)

The contractor is not in breach of contract for suspending performance if it provides the owner with:

- Written notice.
- An opportunity to cure.

(N.Y. Gen. Bus. Law § 756-b(2)(a)(i).)

The contractor must provide the written notice at least ten calendar days before the suspension. The notice must both:

- Inform the owner that payment for undisputed invoice amounts has not been received.
- State the intent of the contractor to suspend performance due to non-payment.

(N.Y. Gen. Bus. Law § 756-b(2)(a)(ii).)

A subcontractor has the same right to suspend its performance after providing written notice to both the contractor and the owner (N.Y. Gen. Bus. Law § 756-b(2)(b)).

On receipt of any written notice of an intention to suspend performance, the parties must attempt to resolve the dispute. If the parties are unable to do so, at any time after 15 days following verification of delivery of the notice, the aggrieved party may file for expedited arbitration with the [American Arbitration Association](#) (N.Y. Gen. Bus. Law § 756-b(3)).

Any provision in a contract is void and unenforceable if it:

- Prohibits a contractor or subcontractor from suspending performance as provided in the statute.
- Attempts to make expedited arbitration unavailable.

(N.Y. Gen. Bus. Law § 757(2), (3).)

For more information, see [Prompt Payment Acts \(Private Projects\): State Comparison Chart](#) and [Prompt Payment Acts \(Public Projects\): State Comparison Chart](#).

3. If your state does not have a prompt payment act, what is the custom and practice regarding:

- Timing of payments by owners to prime contractors?
- Timing of payment by prime contractors to subcontractors?
- Payment of interest on late payments?
- A contractor's right to stop work for failure to receive a payment?

New York has a prompt payment act that sets out the requirements for payments, interest, and a contractor's right to stop work on both public and private construction projects (see Questions 1 and 2).

4. If your state does not regulate the timing of payments to subcontractors, are there any statutory or common law restrictions on the flow down of payments to subcontractors, such as prohibiting "pay-if-paid" or "pay-when-paid" clauses?

New York has a prompt payment act that regulates the timing of payments to subcontractors for public and private construction projects (see Questions 1 and 2).

The New York Court of Appeals has specifically held that any payment provision that shifts the risk of an owner's non-payment to a subcontractor is void and unenforceable as against public policy because it violates the New York Lien Law. However, a provision specifying that the subcontractor must be paid within

a set number of days after the contractor is paid is enforceable. (*West-Fair Elec. Contractors v. Aetna Cas. & Sur. Co.*, 638 N.Y.S.2d 394, 398 (1995).) The industry has distinguished the two by referring to the former as “pay-if-paid” (which would be void and unenforceable), and the latter as “pay-when-paid” (so long as it sets forth a reasonable time frame following receipt of the funds from the owner for the contractor to make payment to the subcontractor).

5. Does your state have a statute related to withholding retainage on a publicly owned or financed construction project? If so, does the statute:

- Regulate the amount of retainage that can be withheld from a contractor or subcontractor?
- Require a partial release of or reduction in retainage at any point during the project?
- Govern when and how final retainage must be released?
- Impose any penalties for failure to comply with the statute?

The following New York statutes regulate retainage on publicly owned or financed construction projects:

- N.Y. State Fin. Law § 139-f(1).
- N.Y. Gen. Mun. Law § 106-b(1).

Amount of Retainage

A public owner can retain up to:

- 5% of each progress payment due to a contractor generally.
- 10% of each progress payment where the contractor is not required to provide a performance bond and a labor and material bond in the full amount of the contract.

(N.Y. State Fin. Law § 139-f(1); N.Y. Gen. Mun. Law § 106-b(1)(a).)

A contractor can retain up to:

- 5% of each progress payment due to a subcontractor generally.
- 10% of each progress payment where, if requested by the contractor before entering into

its subcontract, the subcontractor is unable or unwilling to provide a performance bond and a labor and material payment bond in the full amount of the subcontract.

(N.Y. State Fin. Law § 139-f(2); N.Y. Gen. Mun. Law § 106-b(2).)

Partial Release of Retainage

Both statutes are silent about any obligation on the part of the public owner to:

- Make a partial or early release of retainage.
- Reduce the percentage held for retainage during the contract term.

Final Release of Retainage

The statutes do not specifically address the timing for release of all retainage at or near the conclusion of the project. The statutes only address the timing for paying the final contract balance, which customarily includes any remaining retainage held (see Question 1).

Penalties

The statutes do not specifically address the obligation to pay interest on late payment of retainage. The statutes more generally discuss payment of interest on any contract payment that is not timely paid (see Question 1).

6. Does your state have a statute related to withholding retainage on a privately owned or financed construction project? If so, does the statute:

- Regulate the amount of retainage that can be withheld from a contractor or subcontractor?
- Require a partial release of or reduction in retainage at any point during the project?
- Govern when and how final retainage must be released?
- Impose any penalties for failure to comply with the statute?

New York regulates retainage on privately owned or financed construction projects (N.Y. Gen. Bus. Law § 756-c).

Amount of Retainage

For contracts entered before November 17, 2023, by mutual agreement, owners may retain a “reasonable amount.” For contracts entered on or after November 17, 2023, by mutual agreement of the parties, an owner may retain no more than 5% of the contract sum as retainage. A contractor or subcontractor may also withhold no more than 5% for retainage from a lower-tier subcontractor so long as that amount does not exceed the amount withheld by the owner. (N.Y. Gen. Bus. Law § 756-c.)

Partial Release of Retainage

The prompt payment act is silent about any obligation of a private owner to:

- Make a partial or early release of retainage.
- Reduce the percentage held as retainage during the contract term.

Final Release of Retainage

Retainage must be released by the owner to the contractor within 30 days after final approval of the work under a construction contract (N.Y. Gen. Bus. Law § 756-c).

Penalties

The party failing to make the payment is obligated to pay interest at the rate of 1% per month from the date retention was due and owing if either:

- An owner fails to release retainage as required by statute.
- After receiving retainage from the owner, a contractor or subcontractor fails to release a proportionate amount to the party from whom it was withheld.

(N.Y. Gen. Bus. Law § 756-c.)

7. If your state does not regulate retainage on privately owned construction projects, what is the custom and practice regarding:

- The amount of retainage withheld from each payment requisition? Does it differ for labor or material?
- Partial or early release of retainage upon achieving any project milestone or for early completion subcontractors?
- Requirements for the final release of retainage, including hold backs for incomplete work or disputed amounts?

Amount of Retainage

New York’s prompt payment act regulates retainage on privately owned construction projects (see Question 6).

Partial Retainage

New York’s prompt payment act does not address partial retainage. The parties often negotiate contract terms that require one or more of the following:

- Return of early performing subcontractor retainage, such as demolition contractors, following inspection and acceptance of that subcontractor’s work by the owner.
- Reduction in the percentage held for retainage when the contractor achieves specific performance milestones.
- Return of a portion of the previously withheld retainage when the contractor achieves specific performance milestones.

Owners often agree to language in the contract requiring the release of some portion of the retainage when the owner occupies some or all of the project for its intended use (beneficial use and occupancy) or when substantial completion is achieved. The owner usually retains some amount to ensure that one or more of the following performance requirements are met by the contractor:

- Completion of all punch list items.
- Commissioning of building systems.
- Training of owner or building maintenance personnel.
- Turnover of all operations manuals and related materials.
- Turnover of all warranty documentation and service contracts.

The contract describes all retainage formulas.

Final Retainage

New York's prompt payment acts governs the final release of retainage (see Question 6).

Project Delivery Systems and Contract Forms

8. What forms of project delivery systems are most commonly used in your state? Do they differ by the nature of the construction project?

For public projects and private projects in New York, the most commonly used project delivery system is design-bid-build. On larger, more complex projects, private owners often contract with a construction manager who is paid the cost of the work plus a fee (cost-plus), usually with a guaranteed maximum price or other cap on total costs (see [Practice Note, Private Construction Project Delivery Systems: Overview](#)).

Design-build is not typically used on public works projects in New York, but a number of private project owners use design-build to take advantage of having one unified entity responsible for both the design and construction of the project. Design-build is attractive because it takes away the disputes that can develop between the designer and the contractor when something goes wrong.

The strength of the design-build delivery system is also one of its weaknesses. By having one entity responsible for both design and construction, there are fewer checks and balances to ensure that the design is appropriate and the construction complies with the plans and specifications.

Integrated project delivery (IPD) and Building Information Modeling are now becoming more

visible on private projects, and most construction professionals believe their use will continue to grow in the next few years. Adoption of IPD in New York may be advancing for certain repetitive construction models, such as educational and health care, where the same teams continue to build successful prototypes. However, this form of project delivery essentially compels the interested parties to waive certain rights and upends longstanding insurance protections, and insurance is already a complicated issue for New York projects. Compared to other states, it is unlikely that IPD will gain traction with much speed.

The selection of a particular project delivery system typically depends on several factors, including:

- Design.
- Schedule.
- Budget.
- Owner's expertise and staff.
- Owner's tolerance for risk.

For more information on project delivery systems, see [Practice Note, Selecting the Right Private Project Delivery System](#).

9. Does your state have any statutes specifically related to design-build or construction management? If so, do they apply to:

- Publicly owned or financed construction projects?
- Privately owned or financed construction projects?

The Infrastructure Investment Act

In 2012, in a departure from prior public procurement practice, New York enacted a design-build statute, the [Infrastructure Investment Act](#) (Part F of Chapter 56, Laws of 2011) applicable to:

- The [New York State Thruway Authority](#).
- The [New York State Department of Transportation](#).
- The [New York State Office of Parks, Recreation, and Historic Preservation](#).
- The [New York State Department of Environmental Conservation](#).
- The [New York State Bridge Authority](#).

Among other things, the act was intended to save money by combining design and construction under the same company. Afterwards, the [Tappan Zee Bridge Replacement Project](#) (now known as the Mario M. Cuomo Bridge) and other public projects were competitively bid and completed using a design-build delivery model.

The act was renewed in 2015 and again in 2017, when the project threshold for all five agencies was increased from \$1.2 million to \$10 million. The 2017 revision also authorized design-build as a delivery system for eight projects, including with:

- The [New York State Olympic Regional Development Authority](#).
- The [Office of General Services](#).
- The [Urban Development Corporation](#) (UDC).
- The UDC jointly with the [Dormitory Authority](#) (DASNY).

New York City Public Works Investment Act

On December 31, 2019, Governor Cuomo signed into law the [New York City Public Works Investment Act \(2019 NY AB 7636B\)](#), which authorizes some New York City agencies to use the design-build delivery method for certain capital projects including:

- The [New York City Department of Transportation](#).
- The [New York City Department of Design and Construction](#).
- The [New York City Department of Parks and Recreation](#).

New York City Public Housing Preservation Trust Act

The New York City Public Housing Preservation Trust Act authorizes the use of alternative project delivery contracts to facilitate the design, development, construction, reconstruction, improvement, modernization, rehabilitation, repair, and operation of housing owned and operated by the New York City Housing Authority (N.Y. Pub. Hous. Law §§ 626 and 634). An “alternative project delivery contract” means any authorized project delivery method for which a contract is awarded under the open and competitive procurements methods set out in N.Y. Pub. Hous. Law § 634, including the following methods:

- Construction manager build.
- Construction manager at risk.
- Design-build delivery.

(N.Y. Pub. Hous. Law § 627.)

The monetary thresholds for these projects vary by agency and project type.

10. Are industry standard forms of documents customarily used in private construction projects? If so:

- Do they vary by delivery system or type of project?
- Which forms are most widely used?

Depending on the dollar value, nature, and complexity of the project, parties in New York may use an industry standard form of agreement that is modified to reflect the specific terms of the transaction or a manuscript agreement drafted specifically for that transaction.

Examples of standard industry form agreements include:

- The [American Institute of Architects](#) forms, which are the most used.
- The [Engineers Joint Contract Document Committee](#) forms, which are generally used for projects where the engineer is the lead design professional.
- [ConsensusDOCS](#) forms, published starting in 2007, which are not commonly used but are gaining familiarity in the industry.

For more information on industry form agreements, see [Practice Note, Standard Construction Industry Documents: Overview](#).

11. What terms are customarily most heavily negotiated in construction contracts? Do they vary by delivery system or type of project?

The most commonly negotiated terms in all New York construction contracts are:

- Price.
- Scope of work included in the price, including specific exceptions.

- Schedule-related provisions, including:
 - time frame for completion of the work;
 - payment for additional costs for extended contract durations; and
 - no-damages-for-delay and liquidated damages provisions.
- Indemnification obligations and limitations of liability.
- Notice provisions.
- Consequential damage waivers.
- Termination clauses for cause and for convenience.
- Contingency clauses in at-risk construction management services agreements.
- Liability or assumption of risk for unanticipated subsurface conditions.
- Dispute resolution clauses.

In certain types of contracts, such as cost-plus and guaranteed maximum price contracts, parties also negotiate:

- What is included and excluded from the definition of “cost of the work.”
- The formula for paying the contractor’s fee (fixed amount or percentage), plus reimbursable items and general conditions costs.
- The mechanism for adjusting the fee paid on change orders.

Licensing

12. Does your state license construction professionals? If so:

- Which construction professionals are licensed (general contractors, specialty contractors, construction managers, design professionals)?
- Which departments oversee the licensing and regulation of these construction professionals?

New York requires the following construction professionals to be licensed or registered:

- Architects (N.Y. Educ. Law § 7302; see Architecture).
- Landscape architects (N.Y. Educ. Law § 7322; see Landscape Architecture).

- Engineers (N.Y. Educ. Law § 7202; see Engineering).
- Land surveyors (N.Y. Educ. Law § 7204; see Land Surveyor).
- Geology (N.Y. Educ. Law § 7204-b; see Geology).
- Home improvement contractors (see Home Improvement Contractors).

While the range of services performed by a licensed architect or engineer may include construction management and administration of construction contracts, contractors and builders who perform those services for construction projects are exempt from professional licensing requirements (N.Y. Educ. Law §§ 7208(p) and 7306(g)).

New York does not license contractors, except for asbestos abatement contractors. Certain specialized contractors, such as electricians, master plumbers, and welders, may be required to obtain licenses in certain jurisdictions within the state. In addition, many jurisdictions license home improvement contractors.

The [New York City Department of Buildings](#) (NYC Buildings) issues licenses and registrations to contractors and others working in the construction trades in New York City. More information on the specific licenses and forms is available on the department’s [website](#). (See NYC Admin. Code § 28-418.1.)

Architecture

An architect’s license is required for the profession of architecture, which is defined as the rendering of services that require the application of art, science, and aesthetics of design and construction of buildings.

These services may include, but are not limited to:

- Consultation.
- Evaluation.
- Planning.
- Preliminary studies.
- Designs.
- Construction documents.
- Construction management.
- Administration of construction contracts. (N.Y. Educ. Law § 7301.)

The [NYSED Office of the Professions](#) oversees the licensure and registration of professionals in New York, including architects. The NYSED's [Board of Regents](#) appoints a [state board for architecture](#) on the recommendation of the commissioner to assist the Board on matters relating to the professional licensing of architects (N.Y. Educ. Law § 7303).

Landscape Architecture

A license is required for the profession of landscape architecture, which is the performance of services in connection with the development of land areas where the dominant purpose of the services is:

- The preservation, enhancement, or determination of proper land uses.
- Ground cover and planting.
- Natural drainage.
- The consideration and determination of inherent problems of the land relating to:
 - erosion;
 - wear and tear;
 - blight; or
 - other hazards.

This practice includes the location and arrangement of tangible objects and features that are incidental and necessary to the stated purposes, but only to the extent those services are not the type normally associated with the practice of architecture, engineering, or land surveying. (N.Y. Educ. Law § 7321.)

The NYSED's Office of Professions oversees the licensure and registration of professionals in New York, including landscape architects. The Board of Regents appoints a [state board for landscape architecture](#) on the recommendation of the commissioner to assist the Board on matters relating to the professional licensing of landscape architects (N.Y. Educ. Law § 7323).

Engineering

An engineer's license is required to perform professional services requiring the application of engineering principles and data in connection with any utilities, structures, buildings, machines, equipment, or processes where the safeguarding of life, health, and property is concerned.

These services may include:

- Consultation.
- Investigation.
- Evaluation.
- Planning.
- Design.
- Supervision.
- Construction.
- Operation.

(N.Y. Educ. Law § 7201.)

The NYSED's Office of the Professions oversees the licensure and registration of professionals in New York, including professional engineers. The Board of Regents appoints a [state board for engineering, land surveying, and geology](#) on the recommendation of the commissioner to assist the Board on matters relating to the professional licensing of engineers, land surveyors, and geologists (N.Y. Educ. Law § 7205).

Land Surveyor

A license is required for the profession of land surveying, which is the branch of engineering and applied mathematics that includes the measuring and plotting of the dimensions and areas of any portion of the earth and the application of local requirements incidental to subdivisions for the correct determination, description, conveying, and recording of results (N.Y. Educ. Law § 7203).

The NYSED's Office of Professions oversees the licensure and registration of professionals in New York, including land surveyors (N.Y. Educ. Law § 7205; see Engineering).

Geology

A professional geologist's license is required to perform professional services such as:

- Researching, investigating, consulting, and geological mapping.
- Describing the natural processes that act on the earth's materials.
- Predicting the probable occurrence of natural resources.
- Predicting and locating natural or human-induced phenomena that may be useful or hazardous to humankind.

- Recognizing, determining, and evaluating geological factors.
- Inspecting, performing, and responsibly supervising geological work in furtherance of the health, safety, and welfare of the public.

Geological mapping, however, must not include the practice of land surveying. (N.Y. Educ. Law § 7204-b; see Land Surveyor.)

The NYSED's Office of the Professions oversees the licensure and registration of professionals in New York, including professional geologists. The Board of Regents appoints a [state board for engineering, land surveying, and geology](#) on the recommendation of the commissioner to assist the board of regents on matters relating to the professional licensing of engineers, land surveyors, and geologists (N.Y. Educ. Law § 7205).

Home Improvement Contractors

Cities and many counties typically require contractors involved in the construction, repair, remodeling, or addition to any land or building used as a residence, including condominiums and cooperatives, to obtain a home improvement contractor license. This provides some assurance to homeowners that the contractor is legitimate. To receive a license, the contractor must (among other things) provide information about its legal structure, insurance, and prior projects or references. For example, see [New York City Consumer Affairs: Home Improvement Contractor](#).

13. What are the licensing requirements for each licensed construction professional in Question 12? Are there any continuing education requirements for those licensed construction professionals?

New York requires licenses to practice in the following professions.

Architecture

Licensing Requirements

To obtain a license to practice architecture, an individual must apply for the license and:

- Have a bachelor's degree or higher in architecture.
- Have a combined eight years of college study and experience in appropriate architectural work.
- Be at least 21 years old.
- Pass an examination.
- Be of good moral character as determined by the [New York State Education Department](#) (NYSED).
- Pay the required fees, including \$345 for the examination and initial license.

(N.Y. Educ. Law § 7304(1).)

Candidates may be exempt from the degree and experience requirements if they have 12 years of practical experience in architectural work acceptable to the [New York State Board for Architecture](#), as long as each full year of college study is accepted in substitution for two years of experience, but not for more than nine of the total 12 years (N.Y. Educ. Law § 7304(2)).

Candidates may be exempt from the degree, experience, and examination requirements if they have:

- Ten years of lawful practice of architecture outside of the state and pass a practical examination (N.Y. Educ. Law § 7304(3)).
- A certificate of qualification issued by the [National Council of Architectural Registration Boards](#) based on fulfillment of requirements satisfactory to the New York State Board for Architecture (N.Y. Educ. Law § 7304(4)).

Licenses must be renewed on a three-year cycle. The fee to renew is \$210. (N.Y. Educ. Law § 7304(1)(8).)

Continuing Education Requirements

All practicing architects must complete 36 hours of acceptable continuing education courses every three years, including a minimum of 24 hours in the areas of health, safety, and welfare (N.Y. Educ. Law § 7308(2)).

"Acceptable continuing education" means courses and educational activities in architecture, engineering, interior design, land surveying, landscape architecture, and geology that may contribute to professional practice in architecture and meet the standards of the commissioner (N.Y. Educ. Law § 7308(4)).

Landscape Architecture

Licensing Requirements

To obtain a license to practice landscape architecture, an individual must apply for the license and:

- Have a bachelor's degree or higher in landscape architecture.
- Have a combined eight years of college study and experience in appropriate landscape architecture work.
- Be at least 21 years old.
- Pass an examination.
- Be a US citizen or lawful permanent resident.
- Be of good moral character as determined by the NYSED.
- Pay the required fees, including \$220 for the examination and initial license.

(N.Y. Educ. Law § 7324(1).)

The requirements to obtain and renew a license to practice landscape architecture are similar to those for obtaining a license to practice architecture, including the exemptions from the degree, experience, and examination requirements (N.Y. Educ. Law § 7324(2), (3); see Architecture).

Licenses must be renewed on a three-year cycle. The fee to renew is \$155. (N.Y. Educ. Law § 7324(1)(8).)

Continuing Education Requirements

The continuing education requirements for landscape architects are very similar to those for architects (N.Y. Educ. Law § 7328(2), (4); see Architecture: Continuing Education Requirements). However, landscape architects are exempt from the continuing education requirement during their first three years of practice (N.Y. Educ. Law § 7328(1)(b)).

Engineering

Licensing Requirements

To obtain a license to practice engineering, an individual must submit an application and:

- Have a bachelor's degree or higher in engineering.
- Have at least four years' satisfactory work experience, provided that the [Board of Regents](#)

may accept study beyond the bachelor's degree as partial fulfillment.

- Pass an examination.
- Be at least 21 years old.
- Be a US citizen or lawful permanent resident.
- Be of good character as determined by the NYSED.
- Pay the required fees, including \$135 for the examination and initial license.

(N.Y. Educ. Law § 7206(1).)

For applications filed before April 7, 2024, candidates may be exempt from the degree and experience requirements if they have 12 years of practical work experience in engineering work satisfactory to the Board, provided that each full year of college study in engineering is accepted in place of two years of experience (N.Y. Educ. Law § 7206(4)).

Individuals may obtain an identification card as an "engineer in training" (formerly known as an "intern engineer"). For an identification card as an engineer in training, an individual must:

- Complete all but the experience, age, and citizenship requirements under N.Y. Educ. Law § 7206(1).
- Pay the examination and initial license fee of \$70.

(N.Y. Educ. Law § 7206(2).)

The NYSED may waive requirements, except for the age, character, and citizenship requirements, for applicants in good standing who have practiced lawfully for more than 15 years (N.Y. Educ. Law § 7206(3)).

Licenses must be renewed on a three-year cycle. The fee to renew is \$210. (N.Y. Educ. Law § 7206(1)(8).)

Continuing Education Requirements

After the first three years of practice, all practicing engineers must complete 36 hours of acceptable continuing education courses every three years (N.Y. Educ. Law § 7211(2)).

Land Surveyor

Licensing Requirements

To obtain a license to practice as a land surveyor, an individual must submit an application and:

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- Have a bachelor's degree or higher in land surveying, or:
 - an associate's degree in land surveying; or
 - an associate's degree or higher in engineering, math, or a related science with acceptable credits in land surveying.(N.Y. Educ. Law § 7206-a(2).)
- Have practical experience satisfactory to the NYSED.
- Pass an examination.
- Be at least 21 years old.
- Be a US citizen or lawful permanent resident.
- Be of good character as determined by the NYSED.
- Pay the \$135 initial licensing fee.

(N.Y. Educ. Law § 7206-a(1).)

The NYSED may also accept both:

- Eight years of practical experience in lieu of the education and experience requirements in N.Y. Educ. Law § 7206-a(1).
- Each full year of an applicant's college study in engineering or land surveying in lieu of one year of the required eight years of experience.

(N.Y. Educ. Law § 7206-a(2-b).)

An applicant must fulfill the education, experience, and other requirements for admission to the fundamentals of surveying examination. On successful completion, the NYSED issues an "intern land surveyor" card. The fee for the examination and identification card is \$70. (N.Y. Educ. Law § 7206-a(2-a); 8 NYCRR § 68.6.)

Licenses must be renewed on a three-year cycle. The fee to renew is \$210. (N.Y. Educ. Law § 7206-a(1)(8).)

Continuing Education Requirements

After the first three years of practice, all practicing land surveyors must complete 24 hours of acceptable continuing education courses every three years (N.Y. Educ. Law § 7211(2)).

Geology

Licensing Requirements

To obtain a professional geologist's license, an individual must:

- File an application.
- Have received a bachelor's degree or higher in geological sciences.
- Have at least five years' practical experience satisfactory to the Board in appropriate geological work, with up to one year of experience that may be credited for an advanced degree (masters, doctorate, or an equivalent degree).
- Pass an examination.
- Be at least 21 years old.
- Be of good moral character as determined by the NYSED.
- Pay the required fees, including \$220 for the examination and initial license.

(N.Y. Educ. Law § 7206-b(1).)

Candidates may be exempt from the degree and experience requirements if they have 12 years of practical work experience in geological work of a grade and character satisfactory to the Board (N.Y. Educ. Law § 7206-b(2)).

Individuals may obtain an identification card as an "intern geologist" by:

- Completing the requirements for licensure except for the experience and age requirements.
- Taking the examination when the applicant:
 - is within 20 credits of a bachelor's or higher degree; or
 - has completed the requisite practical experience.
- Paying the examination and initial license fee of \$70.

(N.Y. Educ. Law § 7206-b(3).)

Licenses must be renewed on a three-year cycle. The fee to renew is \$210. (N.Y. Educ. Law § 7206-b(1)(g).)

Continuing Education Requirements

After the first three years of practice, all practicing professional geologists must complete 36 hours of acceptable continuing education courses every three years (N.Y. Educ. Law § 7211(2)).

14. What is the best way to confirm that a construction professional is duly licensed? Are there any consequences if a construction professional is not properly licensed?

License Confirmation

The New York State Education Department provides a search engine on its [website](#) to confirm that an architect, landscape architect, engineer, or land surveyor is licensed in New York. Many local governments that license construction participants have their own databases or regulating agencies.

Consequences of Violation

Anyone who offers to, holds themselves out to, or does engage in business as one of the following licensed professionals may be subject to criminal prosecution, imprisonment, fines, or all three:

- Architects.
- Landscape architects.
- Engineers.
- Land surveyors.
- Geologists.

(N.Y. Educ. Law §§ 6512, 6513, and 6516.)

An unlicensed contractor generally cannot recover for services rendered (*Bujas v. Katz*, 520 N.Y.S.2d 18, 19 (2d Dep't 1987)). Additionally, an owner may disavow the contract after learning that its architect or engineer was not licensed (*P.C. Chipouras & Assocs., Inc. v. 212 Realty Corp.*, 549 N.Y.S.2d 55, 56 (2d Dep't 1989)). Obtaining a license after completing the work does not allow a construction professional to recover payment for services it performed without a license where the statute required a license at the time of performance (*B & B Bros. v. Vath*, 712 N.Y.S.2d 739, 740 (App. Term 2d Dep't 2000)).

In New York, unless a home improvement contractor obtains its license before entering into a contract, it has no right to recover monies for the work performed either in contract or quantum meruit (*Vatco Contracting, Ltd. v. Kirschenbaum*, 902 N.Y.S.2d 589, 590 (2010)).

Warranties

15. Does your state recognize any implied warranties related to construction projects, whether established by statute or case law?

In New York, implied warranties may arise by virtue of the law or the parties' conduct. An implied warranty may arise if a contractor makes representations regarding the performance of its work.

For example, the Appellate Division found an implied warranty in a contract to install a septic system because the builder represented that it knew the area and was familiar with the swampy condition of the land. The contractor's assurances to the homeowner that there would be no problems and its increased bid because it anticipated taking extra precautions due to the swampy nature of the land constituted an implied warranty. (*Lange v. Blake*, 397 N.Y.S.2d 290, 290 (4th Dep't 1977).)

To avoid that result, most contractors negotiate for a specific disclaimer of implied warranties.

To recover solely economic loss damages due to breach of an implied warranty, the injured party must be in privity with the party allegedly responsible (*Coffey v. U.S. Gypsum Co.*, 540 N.Y.S.2d 92, 93 (4th Dep't 1989)).

The New York Uniform Commercial Code (NY UCC) provides that all goods, unless otherwise specified in the sales contract, are covered by the implied warranties of:

- Merchantability.
- Course of dealing or usage of trade.
- Fitness for a particular purpose.

(NY UCC §§ 2-314, 2-314(3), 2-315, and 2-313.)

In a construction setting, courts look to the primary purpose of the contract to determine whether the contract is governed by the Uniform Commercial Code and do not usually apply the requirements of the NY UCC.

16. What types of warranties are customarily included in construction contracts? What are the customary warranty periods?

Most construction contracts in New York require the contractor to obtain the manufacturers' warranties for all equipment and systems installed at the project. Owners generally require that all warranties run from the date of acceptance of the equipment or building systems, rather than from the date of delivery or installation of the equipment, which can occur:

- When the owner assumes beneficial use and occupancy of the premises.
- When substantial completion has been achieved.
- On commissioning and acceptance of building systems.

Contractors generally warrant all work and agree to repair any deficient or defective work for a period of one or two years after one of the following milestones:

- Beneficial use and occupancy of the premises by the owner.
- Substantial completion of the work.
- Final completion of the contract.

Most form construction contracts require the contractor to guarantee that its work is free from defects for one year following completion of the work.

17. Does your state have any statutes governing warranties for new residential construction? If so:

- What building structures and systems are warranted?
- When is each warranty in effect?
- Are there any restrictions on filing claims under the warranty?

Article 36-B of the New York General Business Law mandates warranties on the sale of a new home, which includes any:

- Single family house.
- For-sale unit in a multi-unit residential structure of five stories or less in which title to an individual unit is transferred to an owner under a condominium or cooperative regime.

(N.Y. Gen. Bus. Law § 777(5).)

Contracts for the purchase of units in a multi-unit residential structure greater than five floors often limit the warranties and the prospective owner's remedies to those found in the statute.

Building Structures and Systems

New York's housing merchant implied warranty warrants the home itself, as well as the plumbing,

electrical, heating, cooling, and ventilation systems (N.Y. Gen. Bus. Law § 777-a(1)).

Time Period

The housing merchant implied warranty provides the following warranty periods running from the warranty date:

- **One year.** The home will be free from defects caused by a failure to have been constructed in a skillful manner.
- **Two years.** The plumbing, electrical, heating, cooling, and ventilation systems of the home will be free from defects caused by the builder's failure to have installed such systems in a skillful manner.
- **Six years.** The home will be free from material defects consisting of physical damage to the load-bearing portions of the home causing the home to become unsafe, unsanitary, or unlivable.

(N.Y. Gen. Bus. Law § 777-a(1).)

Restrictions

Unless the parties agree otherwise, the implied warranty does not extend to:

- Discoverable patent defects where the buyer inspected or refused to inspect the home before taking title.
- Defects not due to the design, workmanship, or materials of the builder or its agents, the designer, or the subcontractors.

The warranty applies only to new homes as defined under the act. It does not apply to a custom home. (N.Y. Gen. Bus. Law § 777-a(2).)

Before bringing suit on any implied warranty (and no later than thirty days after the applicable warranty period expires), the homeowner must give the builder written notice and a reasonable opportunity to repair the defect (N.Y. Gen. Bus. Law § 777-a(4)(a)).

An owner may commence an action as late as the later of:

- One year from the end of the applicable warranty period.
- Four years from the date the warranty began.

(N.Y. Gen. Bus. Law § 777-a(4)(b).)

If the builder makes repairs, an action may be brought within one year of the last date repairs are performed (N.Y. Gen. Bus. Law § 777-a(4)(b)).

For more information on residential construction warranties, see Quick Compare Chart, Statutory Residential Construction Warranties - Select States.

Payment and Performance Bonds

18. Does your state have a “Little Miller Act” requiring contractors to provide security in connection with performing public improvement contracts? If so:

- What are the minimum requirements to trigger the law?
- What types of security can be posted?
- Where is the security posted?

New York has a Little Miller Act, which is codified in Section 137 of the New York State Finance Law (N.Y. State Fin. Law § 137).

Minimum Requirements

Payment and performance bonds are mandatory on all public construction projects. However, the head of the owner agency may waive the bonding requirement where the aggregate amount of the bid for the project is less than:

- \$100,000, where the projects are subject to N.Y. State Fin. Law § 135 (the Wick’s Law).
- \$200,000, where the projects are not subject to the Wick’s Law.

(N.Y. State Fin. Law § 137(1).)

Where bonds are waived, the public owner may withhold retainage of 20% from each progress payment until the project is completed and accepted (N.Y. State Fin. Law § 137(1)).

Security

A payment bond may be posted as security (N.Y. State Fin. Law § 137(1)).

A copy of the payment bond is kept in the office of the head of the department or bureau in charge of

the public improvement. A copy is also held at the office of the comptroller or other financial officer. These copies are open to public inspection. (N.Y. State Fin. Law § 137(2).)

19. What is the mechanism for making a claim or filing a lawsuit against the security? Specifically:

- Are there any statutory notices for making claims against the security?
- What is the statute of limitations for making a claim against the security? For filing a lawsuit?
- Are there any other requirements associated with collection of funds against the security?

Statutory Notices

Under New York law, an eligible party may bring a claim against a payment bond 90 days after the party last furnished labor or materials if the bond remains unpaid. Sub-subcontractors, suppliers, and materialmen to subcontractors may also bring a claim against the payment bond, but only if they first put the contractor on notice of the claim within 120 days of the date they last furnished labor or materials to the project. (N.Y. State Fin. Law § 137(3).)

The notice to the contractor must:

- Set out with substantial accuracy:
 - the amount claimed; and
 - the name of the party to whom the material was furnished or for whom labor was performed.
- Be served personally or by registered mail.

(N.Y. State Fin. Law § 137(3).)

Statute of Limitations

Any action against the bond must be filed within one year of the date the project is completed and accepted by the public owner (N.Y. State Fin. Law § 137(4)(b)).

Additional Requirements

The claim may include interest and the court may award attorneys’ fees to the prevailing party. These fees are covered by the bond if the court determines that the original claim or the defense to the claim was

without substantial basis in law or fact. (N.Y. State Fin. Law § 137(4)(c).)

20. Do private owners generally require payment or performance bonds or other types of security? Does the security vary by project type or dollar value of the construction? What types of security can be posted?

In New York, whether private owners require additional security for performance depends on several factors, including the contractor's:

- Financial assets.
- Track record for project completion and claims.

Bonds may be difficult or costly for contractors to obtain, so contractors either resist posting them or pass along the costs to the owner. As a result, they are usually found only on very large or complex projects. If not provided with a payment or performance bond, an owner usually seeks additional protection through an increase in the percentage of retainage held.

Litigation Concerns

21. What are the applicable statutes of limitation for filing a lawsuit or commencing arbitration in connection with a construction project for:

- Breach of contract?
- Breach of warranty?
- Negligence resulting in bodily injury or property damage?
- Professional malpractice by a design professional?
- Latent defects in design or construction?

The following statutes of limitation apply to commencing lawsuits in New York for:

- **Breach of contract.** The statute of limitations is six years (N.Y. Civil Practice Law and Rules (CPLR) 213).

- **Breach of warranty under the New York Uniform Commercial Code.** The statute of limitations is four years (NY UCC § 2-725). However, courts usually apply the six-year statute of limitations for breach of contract to construction contracts unless the contract's primary purpose is considered to be the sale of goods (see, for example, *Kamath v. Building New Lifestyles, Ltd.*, 44 N.Y.S.3d 532, 534 (2d Dep't 2017)).
- **Negligence resulting in bodily injury or property damage.** The statute of limitations is three years (CPLR 214).
- **Professional malpractice by a design professional.** The statute of limitations is three years, regardless of whether the complaint sounds in tort or breach of contract (CPLR 214). Where the occurrence giving rise to the claim occurred more than ten years earlier, additional notice requirements are imposed before suing an architect or engineer under CPLR 214-d.
- **Latent defects in design or construction.** The statute of limitations is six years (CPLR 213).

The parties can contract for shorter limitations periods, which is usually the case where the contract specifies arbitration as the method for resolving disputes. Shorter limitations periods are enforceable in New York. (CPLR 201; *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551 (1979)).

Economic Loss Doctrine

Under New York's economic loss doctrine, a party who is not in privity of contract with an architect may not recover damages against the architect for economic loss (see *Travelers Cas. and Sur. Co. v. Dormitory Auth.-State of N.Y.*, 735 F. Supp. 2d 42, 80 (S.D.N.Y. 2010)).

There is a limited exception to this doctrine. Under this exception, if a party (such as a contractor) can establish that the relationship was so close as to be the "functional equivalent of privity," it may recover damages (see *Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 419 (1989); *Pile Found. Constr. Co. v. Berger, Lehman Assocs., P.C.*, 676 N.Y.S.2d 664, 665 (2d Dep't 1998)).

22. Are there any special requirements for filing a construction-related lawsuit? For example:

- Is an affidavit of merit required for filing a professional malpractice claim against a design professional?
- Must a party required to be licensed allege or attach proof of licensure?
- Are there any special requirements for lawsuits alleging damages resulting from latent design or construction defects?

Affidavit of Merit

New York does not require a certificate or affidavit of merit when filing claims against design or construction professionals.

Proof of Licensure

Although not fatal to a pleading if omitted, a construction professional required to be licensed under New York law customarily alleges in its complaint or counterclaim that it holds the required license.

Special Requirements

There are no special requirements to allege causes of action related to latent design or construction defects generally. However, where a claim is being made against a licensed design professional based on its performance, conduct, or omission occurring more than ten years before the date of the claim, the claimant must give written notice to the design professional at least 90 days before bringing the action and the notice must be filed in court within 30 days of service. Service of the required notice tolls the applicable statute of limitations for 120 days following service. (CPLR § 214-d.)

23. Does your state have a statute of repose? If so:

- What is the applicable period of limitations?
- What types of claims fall under the statute?
- Are there any special notice requirements or conditions precedent to filing a lawsuit?

New York does not have a statute of repose related to construction activities.

24. Are the following contractual provisions enforceable in your state:

- Liquidated damages?
- Limitations on liability?
- No-damages-for-delay clause?
- Choice of law or forum?

Liquidated Damages

A liquidated damages clause is valid in New York as long as it is not used to penalize a party. If the clause attempts to assess a significant penalty rather than approximate actual damages, it generally will be held to be void and unenforceable. (See *JMD Holding Corp. v. Cong. Fin. Corp.*, 795 N.Y.S.2d 502, 506-07 (2005).)

Courts hold that such clauses are enforceable if:

- Actual damages are potentially difficult to determine.
- The liquidated sum is not obviously disproportionate to the possible loss.

(*Walter E. Heller & Co., Inc. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 899 (2d Cir. 1972).)

Limitations of Liability

Limitation of liability clauses are generally enforceable as long as they are not used to shield a party from liability for its own negligent misrepresentation or gross negligence (N.Y. Gen. Oblig. Law § 5-322.1(1); *Sear-Brown Grp. v. Jay Builders, Inc.*, 665 N.Y.S.2d 162, 163 (4th Dep't 1997)).

An agreement by an owner, contractor, subcontractor, or supplier to indemnify an architect, engineer, or surveyor from liability for bodily injury or property damage arising out of a design defect is void as against public policy and wholly unenforceable (N.Y. Gen. Oblig. Law § 5-324).

For more information, see [Practical Law, Construction Anti-Indemnity Statutes: State Comparison Chart](#).

No-Damages-for-Delay Clause

No-damage-for-delay clauses are generally valid and enforceable in New York as long as the basic requirements for a valid contract are present (*Corinno Civetta Constr. Corp. v. City of New York*, 502 N.Y.S.2d 681, 685-86 (1986)).

However, these clauses are not absolute. Based on the specific facts of each case, the New York courts recognize several exceptions to the enforceability of no-damages-for-delay clauses:

- When the conduct that caused the delay suggests intentional wrongdoing on the part of the owner (*Kalisch-Jarcho, Inc. v. City of New York*, 461 N.Y.S.2d 746, 750 (1983)).
- When the delay is caused by bad faith, willful or malicious acts, or gross negligence of the owner (*Corinno Civetta Constr. Corp.*, 502 N.Y.S.2d at 686).
- Where the delay was not contemplated by the parties at the time the contract was executed (*Peckham Road Co. v. State*, 300 N.Y.S.2d 174 (3d

Dep't 1969); *Corinno Civetta Constr. Corp.*, 502 N.Y.S.2d at 686).

- Where the delays are so unreasonable as to constitute an intentional abandonment of the contract (*Corinno Civetta Constr. Corp.*, 502 N.Y.S.2d at 688).
- Where the delays result from the owner's breach of a fundamental obligation of the contract (*Corinno Civetta Constr. Corp.*, 502 N.Y.S.2d at 688).

Choice of Law or Forum

Any provision in or collateral to a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration, or other dispute resolution proceeding arising from the contract be conducted in another state is void and unenforceable (N.Y. Gen. Bus. Law § 757(1)).

For more information, see [Practical Law, Choice of Law and Forum Selection in Construction Contracts: State Comparison Chart](#).

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