

MEMORANDUM

State of Alaska
Department of Law

TO: Mike Downing
Vessel Construction Manager
Marine Highway System
Department of Transportation
and Public Facilities

DATE: January 11, 1995

FILE NO.: 663-95-0195

TELEPHONE NO.: 465-3603

SUBJECT: Interest of Retainage

FROM: Thomas H. Dahl
Assistant Attorney General
Transportation Section - Juneau

You have asked for a clarification of AS 36.90.250(a), specifically with regard to the request of Seward Ship's Drydock, Inc., for payment of interest on the periodic amounts withheld as retainage under the contract. The conclusions reached in this Memorandum of Advice are similar to and consistent with those reached by Assistant Attorney General Deborah Vogt in her Memorandum to Fred Ross dated April 28, 1994, in the Tustamena litigation, File No. 223-94-0197.

AS 36.90.250(a) states:

Retainage. (a) The state or a political subdivision of the state shall pay to the prime contractor interest on retainage, including warranty retainage, on a contract for public construction or public works at an interest rate that is equal to the amount set out in AS 45.45.101(a). Interest on retainage accrues from the date of approval of a pay request until the date of payment to the contractor.

Interest accrues on money "after it is due." AS 45.45.010. Money is not "due" until the payor is liable to pay it to the payee. *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979). "Retainage" means money withheld from a contractor until completion of a contract or satisfaction of other contingency as evidenced by approval of the applicable pay estimate. AS 36.95.010(5).

Interest accrues on the non-retained amount of a pay request from the date of approval of the pay request, plus the statutory grace period set forth in AS 36.90.200. The non-retained amount is "due" upon approval of the request, but the retained amount is not. 2A *Sutherland Stat. Const* §§ 46.01; 46.04; 47.01. An amount retained for satisfaction of contingencies is not "due" until the contingencies are met, unless those contingencies are waived

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by the owner. *See, generally, 4 Government Contracts, McBride and Wachtel, 28:330.* Approval of payment of the retained amount is generally not granted until all contingencies are satisfied. The owner is not liable to pay the retained amount until the contingencies are met. Interest accrues from the date the state approves payment of the retainage, which is the date that payment of the retainage is "due."

In summary, the following elements must be present before interest on retainage begins to accrue:

1. There must be a contract containing a provision that allows the state to withhold a percentage of the contract amount, or periodic payments of that amount, as retainage.
2. Periodic or full payment of the contract amount must have been requested, and approved for payment.
3. A percentage of the payment must have been withheld as retainage.
4. The contingencies must have been satisfied.
5. Payment of the retainage must have been requested by the contractor.
6. The request for payment of the retainage must have been approved.

THD:pao