

# Construction Laws and Customs: New Jersey

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A Q&A guide to construction projects in New Jersey. 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 “Little Miller Acts,” construction litigation statutes of limitation and pleading requirements, and the enforceability of specific clauses such as liquidated damages, limitations on 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 Jersey statutes and regulations govern times for payment on publicly owned or financed projects:

- The New Jersey Prompt Payment Act (N.J.S.A. 2A:30A-1 and 2A:30A-2), which applies to all contracts entered into after September 1, 2006 (*Shore Mech. Contractors, Inc. v. W.G. Osborne Constr.*, 2008 WL 4107985, at \*2 (N.J. Super. Ct. App. Div. Sept. 8, 2008)).
- Section 52:32-2 of the New Jersey Statutes (state contracts).
- Section 18A:18A-18 of the New Jersey Statutes (board of education contracts).
- Section 7:14-2.8 of the New Jersey Administrative Code (wastewater treatment facilities contracts).

### PAYMENTS BY OWNERS

A public owner must pay a prime contractor within 30 days after the billing date. If the owner has an objection to the bill, it must provide a written statement of the amount withheld, and the reason for withholding, within 20 days after receiving the bill. (N.J.S.A. 2A:30A-2(a).)

The time limit does not apply if, in the bid specifications and contract documents, a public or governmental entity included a requirement that its governing body vote on the authorizations for payment. In this case, the amount due may be approved and certified at the next scheduled public meeting of the entity’s governing body and paid during the entity’s next payment cycle. (N.J.S.A. 2A:30A-2(a).)

On the contractor’s certification of the amount owed to a subcontractor, the public owner may make payments directly to the subcontractor under either:

- A state contract (N.J.S.A. 52:32-2(c)).
- A board of education contract (N.J.S.A. 18A:18A-18(c)).

Under a contract for wastewater treatment facilities, a contractor must submit a partial payment estimate no more than once a month. The owner must pay the contractor within five days after approving the estimate. (N.J.A.C. 7:14-2.8(a), (b).)

### PAYMENT BY PRIME CONTRACTORS

A contractor must pay its subcontractors within ten days after receiving payment, if:

- The subcontractor has performed in accordance with the provisions of its contract.
  - The work has been accepted by the owner, the owner's approving agent, or the prime contractor.
  - The parties have not agreed otherwise in writing.
- (N.J.S.A. 2A:30A-2(b).)

This time limit also applies to subcontractor payments to sub-subcontractors (N.J.S.A. 2A:30A-2(b)).

#### **PENALTIES FOR FAILURE TO COMPLY**

If any payment to a contractor is delayed, the public owner must pay interest at a rate equal to the prime rate plus 1% (N.J.S.A. 2A:30A-2(c)). The prime rate is the base rate on corporate loans at large US money center commercial banks (N.J.S.A. 2A:30A-1).

Interest is due for the period beginning on the day after the payment was due and ending on the date on which the check for payment has been drawn (N.J.S.A. 2A:30A-2(c)).

In a civil action brought to collect payment under the Prompt Payment Act, the prevailing party is awarded reasonable costs and attorneys' fees (N.J.S.A. 2A:30A-2(f); see *Aire Enters., Inc. v. Warren Cnty.*, 2014 WL 5419568, at \*2 (N.J. Super. Ct. App. Div. Oct. 27, 2014)).

#### **RIGHT TO STOP WORK**

A prime contractor or subcontractor may, after providing seven calendar days' written notice, suspend performance of a construction contract without penalty for breach of contract if all of the following occur:

- The prime contractor or subcontractor is not paid as required by Section 2A:30A-2 of the New Jersey Statutes.
  - The prime contractor or subcontractor is not provided with a written statement of the amount withheld and the reason for the withholding.
  - The payor is not engaged in a good faith effort to resolve the reason for the withholding.
- (N.J.S.A. 2A:30A-2(d).)

However, the contractor may not stop work if:

- The project is a transportation project that receives federal funding.
  - Stopping work would jeopardize the project's federal funding.
- (N.J.S.A. 2A:30A-2(d) and 27:1B-3(p).)

#### **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 Jersey's Prompt Payment Act, Sections 2A:30A-1 and 2A:30A-2 of the New Jersey Statutes, governs the timing of payments on privately owned or financed construction projects.

#### **PAYMENTS BY OWNERS**

A private owner must pay a prime contractor within 30 days after the billing date. If the owner has an objection to the bill, it must provide a written statement of the amount withheld, and the reason for withholding, within 20 days after receiving the bill. (N.J.S.A. 2A:30A-2(a).)

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- The subcontractor has performed in accordance with the provisions of its contract.
  - The work has been accepted by the owner, the owner's approving agent, or the prime contractor.
  - The parties have not agreed otherwise in writing.
- (N.J.S.A. 2A:30A-2(b).)

This time limit also applies to subcontractor payments to sub-subcontractors (N.J.S.A. 2A:30A-2(b)).

#### **PENALTIES FOR FAILURE TO COMPLY**

If any payment to a contractor is delayed after the date due, the private owner must pay interest at a rate equal to the prime rate plus 1% (N.J.S.A. 2A:30A-2(c)). The prime rate is the base rate on corporate loans at large US money center commercial banks (N.J.S.A. 2A:30A-1).

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In any civil action brought to collect payment under the Prompt Payment Act, the prevailing party is awarded reasonable costs and attorneys' fees (N.J.S.A. 2A:30A-2(f); see *Aire Enters., Inc.*, 2014 WL 5419568, at \*2).

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- The prime contractor or subcontractor is not paid as required by Section 2A:30A-2 of the New Jersey Statutes.
  - The prime contractor or subcontractor is not provided with a written statement of the amount withheld and the reason for the withholding.
  - The payor is not engaged in a good faith effort to resolve the reason for the withholding.
- (N.J.S.A. 2A:30A-2(d).)

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

- Timing of payment 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 Jersey has a prompt payment act that sets out the requirements for payments and interest 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 common law restrictions on the flow down of payments to subcontractors, such as prohibiting “pay-if-paid” or “pay-when-paid” clauses?**

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

New Jersey does not prohibit “pay-if-paid” or “pay-when-paid” clauses.

**PAY-IF-PAID**

Under a pay-if-paid clause, a subcontractor is paid only if the contractor receives payment from the owner. A pay-if-paid clause shifts the burden of payment from the contractor to the subcontractor. Pay-if-paid clauses are enforceable where there is express contractual language that clearly demonstrates the intention of the parties to shift the risk of payment. (*Fixture Specialists, Inc. v. Global Constr., LLC*, 2009 WL 904031, at \*4-6 (D.N.J. Mar. 30, 2009) (citing *MidAmerican Constr. Mgmt. Co. v. Mastec N. Am. Inc.*, 436 F.3d 1257 (6th Cir. 2006)).)

**PAY-WHEN-PAID**

Under a pay-when-paid clause, a contractor must pay a subcontractor on receipt of payment from the owner. This clause suspends the contractor’s obligation to make payment for a reasonable amount of time to allow the contractor to receive payment from the owner. However, this type of clause does not create a condition precedent to the obligation to make payment. It also does not shift the risk of the owner’s nonpayment to the subcontractor. (*Fixture Specialists, Inc.*, 2009 WL 904031, at \*4 (citing *MidAmerican Constr. Mgmt. Co.*, 436 F.3d at 1257).)

For more information on these provisions, see Practice Note, Pay-if-Paid vs. Pay-When-Paid in Construction Contracts ([9-604-7025](#)).

**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 Jersey statutes regulate the withholding of retainage on publicly owned or financed construction projects:

- Section 40A:11-16.3 of the New Jersey Statutes (public contracts).
- Section 27:7-34 of the New Jersey Statutes (highway contracts).
- Section 18A:18A-40.3 of the New Jersey Statutes (board of education contracts).

- Section 7:14-2.8 of the New Jersey Administrative Code (wastewater treatment facilities contracts).

**AMOUNT OF RETAINAGE**

Public owners generally must withhold 2% of the amount due on each partial payment to the contractor pending completion of the contract (N.J.S.A. 27:7-34 and 40A:11-16.3). For wastewater treatment facilities contracts, public owners may retain up to 2% of the amount of each payment claimed (N.J.A.C. 7:14-2.8(b)).

Board of education contracts must provide for 5% retainage for a contractor that does not have a performance bond. If the contractor has a performance bond, the board of education must withhold:

- 2% of the amount due on each partial payment when the outstanding balance of the contract exceeds \$500,000.
- 5% of the amount due on each partial payment when the outstanding balance is \$500,000 or less.

(N.J.S.A. 18A:18A-40.3.)

**PARTIAL RELEASE OF RETAINAGE**

There is no New Jersey statute governing the partial release of retainage on public contracts generally.

On substantial completion of a project, the amount of retainage is reduced:

- To 1% under a highway contract (N.J.S.A. 27:7-34).
- Below 2% but not less than twice the current market value of the work to be completed under a contract related to a wastewater treatment facility (N.J.A.C. 7:14-2.8(c)).

**FINAL RELEASE OF RETAINAGE**

If the work is completed as indicated, retainage generally must be released and paid in full to the contractor within 45 days after the final acceptance date agreed on by the contractor and the contracting party (N.J.S.A. 40A:11-16.3(b)).

Other public contract statutes control the timing of payment of the final contract balance, which customarily includes any remaining retainage held (see Question 1).

**PENALTIES**

New Jersey statutes do not specifically address the obligation to pay interest on late payment of retainage. Late payments to contractors, generally, are subject to the interest rate of the prime rate plus 1% (N.J.S.A. 2A:30A-2(c); 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 Jersey has no statute governing withholding retainage on privately owned or financed construction projects.

**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**

In New Jersey, the contract generally governs the amount of retainage withheld. Typically, the percentage withheld ranges from 5% to 10% of the amount of each progress payment.

**PARTIAL RELEASE OF RETAINAGE**

Any partial or early release of retainage must be contracted for by the parties.

**FINAL RELEASE OF RETAINAGE**

The terms of the release of final retainage are governed by the contract. Parties generally contract to release all retainage withheld at substantial or final completion of the project.

**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?**

The following project delivery systems are used in New Jersey:

- Design-bid-build.
- Design-build.
- Construction manager at risk.
- Integrated project delivery (IPD).
- Engineer-procurement-construction (EPC).

Design-bid-build contracts are most common in private construction contracts. Design-build contracts are used for large-scale private construction contracts.

Design-build contracts have become increasingly popular for public works projects because they are less expensive and more efficient than traditional project delivery systems.

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

- Design.
- Type of project.
- Budget.
- Schedule.
- Owner expertise.
- Risk tolerance.

**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 following statutes and regulations specifically relate to design-build construction projects:

- Sections 13:27-7A.1 to 13:27-7A.6 of the New Jersey Administrative Code govern both private and public design-build projects. They provide specific provisions that must be included in all design-build contracts.
- Sections 19:36-1.1 to 19:36-9.3 of the New Jersey Administrative Code and Sections 18A:7G-1 to 18A:7G-48 of the New Jersey Statutes govern design-build contracts involving property owned by a board of education.

A bill is currently pending before the New Jersey Legislature to authorize the New Jersey Turnpike Authority and other public transportation authorities to enter into design-build contracts.

**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?

Standard industry form contract documents, modified for the specific requirements and circumstances of a specific project, are frequently used for construction projects.

Some common standard industry forms are provided by:

- The American Institute of Architects (AIA).
- The Engineers Joint Contract Documents Committee (EJCDC).
- ConsensusDOCS.
- The Design-Build Institute of America (DBIA).

The most commonly used forms are from the AIA.

Forms authored by the EJCDC are used when the engineer is the lead design professional on the project.

ConsensusDOCS are not generally used.

Forms authored by the DBIA have been gaining popularity with design-build projects.

For more information on industry form agreements, see Practice Note, Standard Construction Industry Documents: Overview ([9-560-0605](#)).

**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 construction contracts in New Jersey are:

- Scope of work.
- Price.
- Time frame for completion of the work.
- Indemnification obligations.

- Limitations of liability.
- Dispute resolution, for example arbitration and choice of law provisions.
- Insurance and bonds.

## 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 Jersey requires the following construction professionals to be licensed:

- Architects (N.J.S.A. 45:3-1.1; see Architects).
- Landscape architects (N.J.S.A. 45:3A-2; see Landscape Architects).
- Engineers (N.J.S.A. 45:8-28; see Engineers).
- Land surveyors (N.J.S.A. 45:8-28; see Land Surveyors).

New Jersey also requires certain contractors to be licensed, registered, or both:

- Electrical contractors (N.J.S.A. 45:5A-1 to 45:5A-38).
- Landscape irrigation contractors (N.J.S.A. 45:5AA-1 to 45:5AA-11).
- Plumbers (N.J.S.A. 45:14c-1 to 45:14c-27).
- HVACR contractors (N.J.S.A. 45:16A-1 to 45:16A-28).
- Home improvement contractors (N.J.A.C. 13:45A-17.1 to 13:45A-17.14).

## ARCHITECTS

An architect's license is required to practice architecture in New Jersey (N.J.S.A. 45:3-5).

The practice of architecture is the rendering of services in connection with the design, construction, enlargement, or alteration of a building or a group of buildings and the space within or surrounding those buildings, which have as their principal purpose human use or habitation. Architectural services include:

- Site planning.
- Providing preliminary studies.
- Architectural designs.
- Drawings, specifications, and other technical documentation.
- Administration of construction for the purpose of determining compliance with drawings and specifications.

(N.J.S.A. 45:3-1.1(k).)

The New Jersey State Board of Architects oversees the licensing and regulation of architects (N.J.S.A. 45:3-1; N.J.A.C. 13:27-1.1 to 13:27-9.17).

## LANDSCAPE ARCHITECTS

A landscape architect's license is required to practice landscape architecture in New Jersey (N.J.S.A. 45:3A-1).

The practice of landscape architecture is any service in which the principles and methodology of landscape architecture are applied in consultation, evaluation, planning, and design. This includes the preparation and filing of sketches, drawings, plans, and specifications for review and approval by governmental agencies, and responsible administration of contracts to the extent that the primary purpose of the contractual services is:

- The preservation, enhancement, or determination of:
  - proper land uses;
  - natural land features;
  - ground cover and planting;
  - naturalistic and aesthetic values;
  - settings and approaches, or environment for structures or other improvements;
  - grading of land and water forms; or
  - natural drainage.
- The determination of related impacts, assessments, and problems of land disturbance, including erosion and sedimentation, blight, or other hazards.

(N.J.S.A. 45:3A-2(b).)

The New Jersey State Board of Architects oversees the licensing and regulation of landscape architects (N.J.S.A. 45:3A-17; N.J.A.C. 13:27-1.1 to 13:27-9.17).

## ENGINEERS

An engineer's license is required to practice engineering in New Jersey (N.J.S.A. 45:8-27).

The practice of engineering includes any service or creative work the adequate performance of which requires:

- Engineering education, training, and experience.
- The application of special knowledge of the mathematical, physical, and engineering sciences to, in connection with any engineering project, services, or creative work, including:
  - consultation;
  - investigation;
  - evaluation;
  - planning and design of engineering works and systems;
  - planning the use of land and water;
  - engineering studies; or
  - the administration of construction for the purpose of determining compliance with drawings and specifications.

(N.J.S.A. 45:8-28(b).)

The New Jersey State Board of Engineers and Land Surveyors oversees the licensing and regulation of engineers (N.J.S.A. 45:8-30; N.J.A.C. 13:40-1.1 to 13:40-15.23).

## LAND SURVEYORS

A land surveyor's license is required to practice land surveying in New Jersey (N.J.S.A. 45:8-27).

The practice of land surveying includes:

- Any service or work the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law to certain measurements for:
  - the monumentation of property boundaries;
  - the platting and layout of lands and their subdivisions; or
  - the preparation and perpetuation of maps, record plats, field notes, records, and property descriptions in manual and computer-coded form.
- The establishment and maintenance of the base mapping and related control for land information systems that are developed from the above definition.

(N.J.S.A. 45:8-28(e).)

The New Jersey State Board of Engineers and Land Surveyors oversees the licensing and regulation of land surveyors (N.J.S.A. 45:8-30; N.J.A.C. 13:40-1.1 to 13:40-15.23).

**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?**

## ARCHITECTS

### Licensing Requirements

An applicant for licensure as an architect must:

- Have a bachelor's or master's degree in architecture from a university, college, or technical school which has an architectural program accredited by the National Architectural Accrediting Board, or complete education which the Board deems equivalent to an accredited full course in architecture.
- Have three or more years of experience related to architecture.
- Pass an exam established by the State Board of Architects.
- Be at least 18 years old.
- Have good moral character.

(N.J.S.A. 45:3-5.)

Architect licenses expire every two years (N.J.S.A. 45:1-7).

### Continuing Education Requirements

Architects must complete 24 hours of continuing education (CE) every two years. At least eight hours per year, or 16 hours per two-year period, must be in courses or programs addressing health, safety, and welfare. (N.J.A.C. 13:27-4A.2(a).)

An architect who exceeds CE requirements in a renewal period may carry up to 12 hours, including eight hours of health, safety, and welfare programs or courses, into the next renewal period. Hours to be carried over must be earned in the last six months of the renewal period. (N.J.A.C. 13:27-4A.2(d).)

## LANDSCAPE ARCHITECTS

### Licensing Requirements

An applicant for licensure as a landscape architect must:

- Have good moral character.
- Have a bachelor's or higher degree in landscape architecture from a college or university having a landscape architecture curriculum approved by the Board of Architects.
- Have at least eight years of experience in landscape architectural work, including both education and practical experience.
- Pass an exam established by the Board of Architects.

(N.J.S.A. 45:3A-7, 45:3A-8(a), and 45:3A-10.)

Landscape architect licenses expire every two years (N.J.S.A. 45:1-7).

### Continuing Education Requirements

Landscape architects must complete 24 hours of CE every two years. An architect licensed to practice both architecture and landscape architecture must complete 12 hours of continuing education in landscape architecture. (N.J.S.A. 45:3A-15(a), (b); N.J.A.C. 13:27-8.14(a).)

No CE hours may be carried over into another renewal period (N.J.A.C. 13:27-8.14(b)).

## ENGINEERS

### Licensing Requirements

An applicant for licensure as an engineer must fulfill one of the following sets of requirements:

- Graduate from a board-approved curriculum in engineering of four years or more and:
  - have a specific record of four or more years of experience in satisfactory engineering work; and
  - successfully pass all parts of the written examination.
- Graduate from a board-approved curriculum in engineering technology of four years or more and:
  - have a specific record of six or more years of experience in satisfactory engineering work; and
  - successfully pass all parts of the written examination.
- Graduate from a board-approved curriculum in engineering or engineering technology of four years or more and:
  - have a specific record of 15 or more years of experience in satisfactory engineering work; and
  - successfully pass the specialized portion of the written examination designated as Part P.
- Have a certificate of registration issued by any US state or territory, if:
  - the state or territory has the same minimum requirements as those listed above; and
  - the applicant has not failed any portion of a nationally administered, two-day examination, required by the board, that was taken to receive licensure by the issuing agency.

(N.J.S.A. 45:8-35(1).)

The applicant must also submit five references, at least three or more of whom are licensed professional engineers having personal knowledge of the applicant's engineering experience (N.J.S.A. 45:8-35).

Engineers must renew their licenses every two years, on or before April 30 (N.J.S.A. 45:1-7 and 45:8-37).

### Continuing Education Requirements

Engineers must complete 15 continuing professional competency credits every two years. At least two credits must be in professional practice ethics. (N.J.A.C. 13:40-13.1(b).)

## LAND SURVEYORS

### Licensing Requirements

An applicant for licensure as a land surveyor must fulfill one of the following sets of requirements:

- Graduate from a board-approved curriculum in surveying of four or more years and:
  - have three or more years of experience in satisfactory land surveying work; and
  - successfully pass a written examination.
- Have a certificate of registration issued by any US state or territory, if:
  - the state or territory has minimum requirements comparable to those in effect in New Jersey at the time;
  - the issuing agency attests to the licensing criteria at the time of the applicant's original licensure in that jurisdiction; and
  - the applicant receives a passing grade on the New Jersey specific portion of the current land surveying examination and any portions of a nationally-administered two-day examination required by the board not already passed by the applicant.

(N.J.S.A. 45:8-35(2)(a)(ii), (d).)

The applicant must also submit five references, at least three or more of whom are licensed land surveyors having personal knowledge of the applicant's land surveying experience (N.J.S.A. 45:8-35).

Land surveyors must renew their licenses every two years, on or before April 30 (N.J.S.A. 45:1-7 and 45:8-37).

### Continuing Education Requirements

Land surveyors must complete 24 credits of continuing professional competency every two years (N.J.A.C. 13:40-11.3(a)). A maximum of eight credits may be carried over into the next renewal period (N.J.A.C. 13:40-11.3(b)). Additional requirements apply to those holding dual licenses in land surveying and engineering (N.J.A.C. 13:40-11.3(d)).

**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 best way to confirm that an architect, landscape architect, engineer, land surveyor, or any trade contractor is properly licensed

in New Jersey is by searching the New Jersey Division of Consumer Affairs verification database.

## CONSEQUENCES

Courts generally will not enforce a contract for payment if a professional is unlicensed. New Jersey courts have consistently held that public policy precludes enforcement of contracts that violate a licensing statute. (*Accountemps Div. of Robert Half of Phila., Inc. v. Birch Tree Grp.*, 115 N.J. 614, 626, 560 A.2d 663, 669 (1989).)

Any person, firm, or corporation, not being duly authorized, who engages in business as one of the following licensed professionals may be subject to various fines and penalties:

- Architects and landscape architects (N.J.S.A. 45:3-23).
- Professional engineers and surveyors (N.J.S.A. 45:8-39). (N.J.S.A. 45:1-18.2, 45:1-25, 45:4B-2, and 45:4B-14.)

Unlicensed trade contractors are also guilty of a fourth-degree crime (N.J.S.A. 56:8-138(a) and 56:8-146; N.J.A.C. 13:32A-2.4, 13:32A-3.1(g), and 13:32A-5.5; see also *Rosa v. Petrino*, 2015 WL 9703470 (N.J. Super. Ct. App. Div. Jan. 15, 2016)).

## WARRANTIES

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

New Jersey law recognizes implied warranties related to both commercial and residential construction projects (see, for example, *Hodgson v. Chin*, 168 N.J. Super. 549, 553-55, 403 A.2d 942, 944-45 (App. Div. 1979)).

New Jersey courts have applied the implied warranties of reasonable workmanship and habitability to construction projects where an individual holds himself out to a consumer as a builder or vendor of new homes (*McDonald v. Miannecki*, 79 N.J. 275, 398 A.2d 1283 (1979)).

Implied warranties of good workmanship and habitability may be extended to subsequent home buyers, who are not without privity of contract with the warrantors (*Aronsohn v. Mandara*, 98 N.J. 92, 100-03, 484 A.2d 675, 679-81 (1984)).

The parties may include contractual provisions to the contrary, provided that they are not against public policy.

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

Generally, most construction contracts include an express warranty, which provides that the following will conform to good quality standards and the contract's requirements:

- Materials.
- Equipment.
- Workmanship.

This warranty is in addition to any warranty issued by product manufacturers.

Warranties typically begin on the date of substantial completion of the project or of the applicable area (for example, the roof).

Contracts often require the contractor to repair or correct defective or deficient work for one year after substantial completion of the contract. This requirement is separate from the express warranty.

**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?

New Jersey's New Home Warranty and Builder's Registration Act (HOW Act) governs warranties for new residential construction (N.J.S.A. 46:3B-1 to 46:3B-20).

**BUILDING STRUCTURES AND SYSTEMS**

The HOW Act applies to any dwelling unit not previously occupied, excluding dwelling units constructed solely for lease (N.J.S.A. 46:3B-2(d)).

**TIME PERIOD**

The HOW Act provides the following warranty periods:

- One year for defects caused by faulty workmanship or defective materials due to noncompliance with building standards.
- Two years for defects caused by faulty installation of plumbing, electrical, heating, and cooling delivery systems. However, in the case of appliances, the warranty cannot exceed the length and scope of the warranty offered by the manufacturer.
- Ten years for major construction defects. A major construction defect is any actual damage to the load-bearing portion of the home including damage due to subsidence, expansion, or lateral movement of the soil which affects its load-bearing function and which vitally affects or is imminently likely to vitally affect use of the home for residential purposes (N.J.S.A. 46:3B-2(g)).

(N.J.S.A. 46:3B-3(b).)

**RESTRICTIONS**

There are no restrictions on filing claims under the warranties.

However, the maximum liability under the new home warranty is limited to either:

- The home's purchase price in the first good faith sale of it.
- If there has been no good faith sale of the home, the fair market value of the home on its completion date.

(N.J.A.C. 5:25-3.8.)

If a home buyer elects to file a claim under the HOW Act, arbitration is the exclusive remedy for damages sustained as a result of defects in home construction. A homeowner that elects arbitration cannot file a lawsuit to recover damages. (*Frumer v. Nat'l Home Ins. Co.*, 420 N.J. Super. 7, 18 A.3d 225 (App. Div. 2011).)

**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 Jersey has a Little Miller Act, which is codified in Sections 2A:44-143 to 2A:44-147 of the New Jersey Statutes.

**MINIMUM REQUIREMENTS**

Section 2A:44-143 of the New Jersey Statutes requires a payment and performance bond on all public construction projects. Generally, the surety issuing the payment and performance bond must have the minimum surplus and capital stock or net cash assets required by Sections 17:17-6 or 17:17-7 of the New Jersey Statutes at the time the invitation to bid is issued. (N.J.S.A. 2A:44-143(a)(1)(a).) The surety must meet additional requirements when:

- The amount of the bond is at least \$850,000 but less than \$3.5 million.
- The amount of the bond exceeds \$3.5 million.
- The contract is for the state.
- The project is a school project.

(N.J.S.A. 2A:44-143(a)(1)(b), (a)(2), (a)(3).)

The payment and performance bond must be:

- In an amount equal to 100% of the contract price.
- Conditioned for the payment by the contractor of all indebtedness that may accrue to any person, firm, or corporation designated as a "beneficiary" under Section 2A:44-143 of the New Jersey Statutes in an amount not exceeding the sum specified in the bond, on account of any labor performed or materials supplied for the construction, erection, alteration, or repair of the public work.

(N.J.S.A. 2A:44-144.)

**SECURITY**

A payment bond may be posted as security. The language of the payment bond must comply with the specific language provided in Section 2A:44-147 of the New Jersey Statutes.

The security is posted with and held by the respective board, officer, or agent acting on behalf of the state, contracting unit, or school district (N.J.S.A. 2A:44-144).

**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

A beneficiary of a payment bond who does not have a direct contract with the contractor furnishing the bond must serve written notice that it is a beneficiary of the bond on the contractor before starting any work. If the beneficiary fails to do so, it will only have rights under the bond from the date of notice. (N.J.S.A. 2A:44-145.)

## STATUTE OF LIMITATIONS

The statute of limitations is one year from the date the beneficiary last worked on, or delivered supplies to, the project (N.J.S.A. 2A:44-145 and 2A:44-146).

## ADDITIONAL REQUIREMENTS

No action may be brought until the expiration of 90 days after provision to the surety and the contractor of the statement of the amount due (N.J.S.A. 2A:44-145 and 2A:44-146).

**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?**

Private owners generally do not require payment or performance bonds or other types of security. Bonds may be difficult or costly for contractors to obtain and contractors generally either resist posting them or pass along the premium to the owner. As a result, bonds are usually only obtained on very large or complex projects.

Instead of a performance bond or other security, an owner may seek additional protection through an increase in the percentage of retainage held in its contracts.

## LITIGATION CONCERNS

**21. What are the applicable statutes of limitations 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 limitations apply to claims in New Jersey:

- **Breach of contract.** The statute of limitations is:
  - six years from the date of discovery of the breach for non-sales contracts (N.J.S.A. 2A:14-1); or
  - four years from the date of the breach for sales contracts under the Uniform Commercial Code (UCC) (N.J.S.A. 12A:2-725(1), (2)).
- **Breach of warranty.** The statute of limitations is four years from the date of breach (N.J.S.A. 12A:2-725(1)).
- **Negligence resulting in bodily injury or property damage.** The statute of limitations is:
  - two years for personal injury claims (N.J.S.A. 2A:14-2(a)); or
  - six years for property damage claims (N.J.S.A. 2A:14-1).

- **Professional malpractice by a design professional.** The statute of limitations is six years (N.J.S.A. 2A:14-1; *Fraser v. Bovino*, 317 N.J. Super. 23, 34, 721 A.2d 20, 34 (App. Div. 1998)).
- **Latent defects in design or construction.** The statute of limitations is six years from the date on which the defect is discovered, or when the defect should have been discovered (N.J.S.A. 2A:14-1; *Hermes v. Staiano*, 181 N.J. Super. 424, 429-32, 437 A.2d 925, 928-29 (Law Div. 1981)). A ten-year statute of repose also applies to latent defects in construction (N.J.S.A. 2A:14-1.1; see Question 23).

**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

An affidavit of merit must be filed in professional malpractice cases in New Jersey. The affidavit must be provided by an appropriate licensed professional and provide that the work that is the subject of the complaint did not meet acceptable professional standards. The affidavit must be filed within 60 days after the complaint is filed. A court may grant an additional 60-day time period for good cause. (N.J.S.A. 2A:53A-27.)

## PROOF OF LICENSURE

A construction professional required to be licensed customarily alleges in the complaint or counterclaim that it holds the required license.

## SPECIAL REQUIREMENTS

There are no additional special requirements to allege causes of action related to latent design or construction defects.

However, under the Tort Claims Act, which applies to construction defect actions, plaintiffs must provide advance notice to government entities before filing a lawsuit. The notice of claim must be filed with the appropriate government entity within 90 days of the date the claim accrued. (N.J.S.A. 59:8-1 to 59:8-11.)

**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?

## PERIOD OF LIMITATIONS

Any action to recover damages arising out of the defective or unsafe condition of an improvement to real property must be commenced within ten years of the date on which the improvement was completed (N.J.S.A. 2A:14-1.1(a)).

The ten-year repose period generally begins:

- For developers and builders, one day after issuance of the certificate of substantial completion for the project (*State v. Perini Corp.*, 221 N.J. 412, 427, 113 A.3d 1199, 1208 (2015)).
- For contractors and design professionals, when their work reaches substantial completion (*Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 N.J. 84, 114-19, 675 A.2d 1077, 1092-94 (1996)).

### TYPES OF CLAIMS ALLOWED

New Jersey's statute of repose applies to actions based on contract or tort:

- Seeking damages for:
  - any deficiency in the design, planning, surveying, supervision, or construction of an improvement to real property;
  - any injury to property, real or personal;
  - an injury to the person; or
  - bodily injury or wrongful death.
- Where the defendant was responsible for performing or furnishing the design, planning, surveying, supervision of construction, or construction of the improvement.

(N.J.S.A. 2A:14-1.1(a); *Perini Corp.*, 221 N.J. at 426, 113 A.3d at 1207-08; see also *Russo Farms, Inc.*, 144 N.J. at 116, 675 A.2d at 1092.)

The statute of repose does not apply to actions against a person in actual possession and control of the improvement, as an owner, tenant, or otherwise, at the time the defective and unsafe condition of the improvement constitutes the proximate cause of the injury or damage for which the action is brought (N.J.S.A. 2A:14-1.1(a)).

### NOTICE OR CONDITIONS PRECEDENT

New Jersey's statute of repose does not have any special notice requirements.

#### 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 generally enforceable in New Jersey, if the liquidated damages are not a penalty. A liquidated damages clause is enforceable if:

- The amount is a reasonable forecast of the harm caused by the breach.
- The harm caused by the breach is difficult to accurately estimate.

(*Wasserman's Inc. v. Twp. of Middletown*, 137 N.J. 238, 247-51, 645 A.2d 100, 105-07 (1994).)

### LIMITATIONS OF LIABILITY

Clearly written limitations-of-liability clauses are generally enforceable in New Jersey. However, a court may strike a provision that is either:

- Unconscionable.
- In violation of public policy.

Courts will generally examine the parties' bargaining power when evaluating the validity of a limitation-of-liability clause. (See, for example, *Lucier v. Williams*, 366 N.J. Super. 485, 491-94, 841 A.2d 907, 911-12 (App. Div. 2004).)

### NO-DAMAGES-FOR-DELAY CLAUSE

No-damages-for-delay clauses are generally enforceable in contracts for private projects (*Broadway Maint. Corp. v. Rutgers*, 90 N.J. 253, 267-70, 447 A.2d 906, 913-14 (1982)).

However, no-damages-for-delay clauses are generally unenforceable in contracts for public projects, as they are considered to be against public policy (N.J.S.A. 2A:58B-3(b) (state contracts), N.J.S.A. 18A:18A-41 (school contracts), and N.J.S.A. 40A:11-19 (municipal and county contracts)).

### CHOICE OF LAW

New Jersey courts generally enforce choice of law provisions that, as applied, are not contrary to a fundamental policy of New Jersey (*Hopkins v. Duckett*, 2012 WL 124842, at \*9 (N.J. Super. Ct. App. Div. Jan. 17, 2012)).

In the absence of a contractual provision, New Jersey courts determine the appropriate law to apply by evaluating the following factors:

- The national interests of commerce among the several states.
- The interests of the parties.
- The interests underlying the contract law.
- The interests of judicial administration.
- The competing interests of the relevant states.

(*Erny v. Estate of Merola*, 171 N.J. 86, 101-02, 792 A.2d 1208, 1217 (2002) (citing *Pfizer, Inc. v. Emp'rs Ins. of Wausau*, 154 N.J. 187, 198, 712 A.2d 634, 639 (1998)).)

Forum selection clauses are generally enforceable unless the clause is unreasonable or contravenes a strong public policy of the forum where the suit is brought (*Kubis & Perszyk Assocs. v. Sun Microsystems*, 146 N.J. 176, 195, 680 A.2d 618, 628 (1996)).

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