

Department of Legislative Services
Maryland General Assembly
2019 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 1231
Economic Matters

(Delegate Adams)

Judicial Proceedings

Real Property - Construction Contracts - Retention Proceeds

This bill increases the number of construction contracts that are subject to a 5% cap on retention proceeds. Under the bill, contracts valued at \$100,000 or more, instead of the threshold of \$250,000 or more under current law, are subject to the statutory 5% cap on retention proceeds. The bill clarifies that an “undisputed amount” includes any retention proceeds that exceed the amount authorized to be retained as specified under § 9-304 of the Real Property Article; it also specifies that undisputed retention proceeds retained by an owner must be paid within 90 days after the date of substantial completion, as defined by the applicable contract or subcontract.

Fiscal Summary

State Effect: The bill is not likely to have a material impact on State finances. Primary procurement units and the Maryland Transportation Authority are subject to different retainage provisions and may withhold other payments by any amount reasonably believed to be necessary to protect State interests.

Local Effect: Potential minimal increase in risk for local governments due to the expanded application of retention proceeds limits and payment deadlines. However, any increased risk is likely mitigated by the existing requirement that such provisions only apply if the contractor has provided 100% performance and payment security.

Small Business Effect: Potential meaningful.

Analysis

Current Law: Generally, “owner” means (1) the owner of land that is the subject of a construction contract or (2) an owner’s tenant for life or for years, provided the *tenant* enters into the contract with the contractor.

Prompt Payment

Generally, a contractor or subcontractor who performs work under a construction contract is entitled to prompt payment for services. For contracts between private parties, if the contract does not provide for specific dates or times for payment, an owner must pay a contractor any undisputed amounts under the written terms of the contract within 30 days of either the occupancy permit being granted or the owner taking possession, whichever comes first. If the contract provides for specific dates or times of payment, the owner must pay the contractor within 7 days after the date or time specified in the contract. If the contract is not with the owner, the contractor or subcontractor must pay undisputed amounts owed to its subcontractors within 7 days after receiving each payment for its subcontractor’s work or materials.

Remedies for Violations

In addition to any other remedy, a court may award any equitable relief for prompt payment of undisputed amounts that it considers necessary, including enjoining further violations. A court may also award to the prevailing party interest from the date the court determines that the amount owed was due and reasonable costs. The court may award reasonable attorney’s fees if it determines that an owner, contractor, or subcontractor has acted in bad faith by failing to pay any undisputed amounts as required.

Retention Proceeds, Generally

State law limits to 5% the percentage of a construction contract that an owner or contractor can retain to guarantee that a contractor or subcontractor completes the work required by the contract if the contractor has provided 100% performance and payment security. If an owner retains less than 5% of a contract from a contractor, the contractor may not retain more than that amount from a subcontractor. However, statute establishes that additional amounts may be withheld if a contractor’s or subcontractor’s performance warrants it. Statute exempts contracts of less than \$250,000 and any projects funded wholly or partially by the Department of Housing and Community Development from the 5% cap on retention.

These provisions do not affect the rights of contracting parties under the laws governing statutory liens on property. The provisions also do not apply to a contract for the

construction and sale of a single-family residential dwelling, a transaction under the Custom Home Protection Act, or the Maryland Home Improvement Law.

Retention Proceeds for Specified State Agencies

Under *any* State procurement contract for construction, if a contractor has provided 100% performance and payment security, the percentage specified in the contract for retainage may not exceed 5% of the total amount. However, in addition to retainage, a primary procurement unit and the Maryland Transportation Authority may withhold, from payments otherwise due a contractor, any amount that the unit reasonably believes necessary to protect the State's interest.

Small Business Effect: Contractors operating small businesses likely realize an increase in the number of contracts subject to the 5% statutory retention proceeds limit. As a result, these contractors *benefit* to the extent that a higher percentage would have otherwise been applied to such contracts. In addition, the requirement that retention proceeds retained by the owner be paid within 90 days of substantial completion may decrease the length of time small business contractors and subcontractors must wait to receive funds.

Additional Comments: The Department of General Services (DGS) advises that the bill may require it to pay all retainage withheld under a contract before work has been completed on a project. DGS notes that its practice is to pay retainage after all work is completed, including any tasks on a "punch list" created after the work is "substantially completed." DGS further advises that releasing any retainage prior to the punch list being completed may result in contractors not having a financial incentive to finish the work. However, the Department of Legislative Services advises that the bill requires retainage to be paid within 90 days after the date of substantial completion, *as defined by the applicable contract or subcontract*. Thus, DGS (and any other State agency) may define substantial completion in its contracts to require completion of the punch list.

Additional Information

Prior Introductions: HB 1627 of 2018, a similar bill as introduced, passed the House with amendments and received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken.

Cross File: None.

Information Source(s): State Board of Contract Appeals; Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts);

Department of General Services; Board of Public Works; Department of Legislative Services

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