

BY: Commerce and Government Matters Committee

AMENDMENTS TO HOUSE BILL NO. 600

(First Reading File Bill)

AMENDMENT NO. 1

On page 1, in line 2, strike "Progress Payments" and substitute "Prompt Payment"; strike beginning with "requiring" in line 3 down through "subcontractor" in line 16 and substitute "limiting the retainage that may be specified in a State procurement contract for construction under certain circumstances; authorizing a primary procurement unit to withhold payments from a contractor in addition to retainage for certain purposes; restricting the amount that a contractor may withhold from a subcontractor; restricting the amount that a subcontractor may withhold from a lower tier subcontractor; providing that certain restrictions may not be construed to restrict the withholding of certain amounts in addition to retainage based on certain determinations; modifying provisions relating to the prompt payment of subcontractors and the resolution of certain payment disputes; requiring that a State procurement contract for construction include a certain provision relating to prompt payment of subcontractors at any tier; expanding the availability of certain escrow provisions relating to retainage in connection with State construction contracts; requiring that interest on escrowed money be handled in a specified manner; restricting the availability of the escrow provisions on contracts funded with tax exempt financing"; in line 18, after "to" insert "State"; in the same line, strike "and progress payments" and substitute "contracts for construction and prompt payment and retainage issues"; and after line 23, insert:

"BY repealing and reenacting, with amendments,

Article - State Finance and Procurement

Section 15-108 and 15-226

Annotated Code of Maryland

(1995 Replacement Volume and 1999 Supplement)".

AMENDMENT NO. 2

On page 2, strike beginning with the first "A" in line 5 down through "(3)" in line 12; in line 12, after "FURNISHED" insert "100%"; in the same line, strike "OR" and substitute "AND 100%"; in

(Over)

line 14, after "ARTICLE" insert "UNDER A STATE PROCUREMENT CONTRACT FOR CONSTRUCTION"; strike beginning with "AMOUNT" in line 14 down through "PAYMENT" in line 15 and substitute "PERCENTAGE SPECIFIED IN THE CONTRACT FOR RETAINAGE"; strike beginning with "OF" in line 15 down through "PAYMENT" in line 16; after line 16, insert:

"(2) IN ADDITION TO RETAINAGE, A PRIMARY PROCUREMENT UNIT MAY WITHHOLD FROM PAYMENTS OTHERWISE DUE A CONTRACTOR ANY AMOUNT THAT THE UNIT REASONABLY BELIEVES NECESSARY TO PROTECT THE STATE'S INTEREST.";

in line 17, strike "(4)" and substitute "(3)"; in the same line, strike "AMOUNTS RETAINED" and substitute "RETAINAGE WITHHELD"; in lines 17 and 18, strike "UNDER PARAGRAPH (3) OF THIS SUBSECTION, SHALL" and substitute "MAY"; in line 19, after "ACCOUNT" insert "IN ACCORDANCE WITH § 15-108 OF THIS ARTICLE"; and strike in their entirety lines 20 through 26, inclusive.

AMENDMENT NO. 3

On page 2, strike beginning with "THAT" in line 27 down through "SECTION," in line 29; in line 30, strike "PROGRESS"; and strike in their entirety lines 32 through 36, inclusive, and substitute:

"(2) PARAGRAPH (1) OF THIS SUBSECTION MAY NOT BE CONSTRUED TO PROHIBIT A CONTRACTOR FROM WITHHOLDING ANY AMOUNT IN ADDITION TO RETAINAGE IF THE CONTRACTOR DETERMINES THAT A SUBCONTRACTOR'S PERFORMANCE UNDER THE SUBCONTRACT PROVIDES REASONABLE GROUNDS FOR WITHHOLDING THE ADDITIONAL AMOUNT."

AMENDMENT NO. 4

On page 3, in line 1, after "(D)" insert "(1)"; strike beginning with "THAT" in line 1 down through "SECTION," in line 2; in line 3, strike "ANOTHER" and substitute "A LOWER TIER"; in line 4, strike "PROGRESS"; in lines 4 and 5, strike "BY THE CONTRACTOR" and substitute "FROM THE SUBCONTRACTOR"; and after line 5, insert:

"(2) PARAGRAPH (1) OF THIS SUBSECTION MAY NOT BE CONSTRUED

TO PROHIBIT A SUBCONTRACTOR FROM WITHHOLDING ANY AMOUNT IN ADDITION TO RETAINAGE IF THE SUBCONTRACTOR DETERMINES THAT A LOWER TIER SUBCONTRACTOR'S PERFORMANCE UNDER THE SUBCONTRACT PROVIDES REASONABLE GROUNDS FOR WITHHOLDING THE ADDITIONAL AMOUNT."

AMENDMENT NO. 5

On page 3, in line 6, after "(E)" insert "IF RETAINAGE HAS BEEN PLACED IN ESCROW UNDER § 15-108 OF THIS ARTICLE, EACH PAYMENT OF RETAINAGE SHALL INCLUDE A PRO RATA PORTION OF INTEREST EARNED.

(F)".

AMENDMENT NO. 6

On page 3, after line 7, insert:

"15-108.

(a) [In this section, "transportation unit" means the Department of Transportation or the Maryland Transportation Authority.] THIS SECTION DOES NOT APPLY TO ANY PROCUREMENT CONTRACT FUNDED WITH TAX EXEMPT FINANCING.

(b) (1) Subject to the requirements of this section, a contractor under a procurement contract that a [transportation] unit awards for construction [or reconstruction] is entitled to have retainage under the procurement contract placed in an escrow account if the contractor:

(i) elects that procedure in the procurement contract in the space provided for that election; and

(ii) submits to the [transportation] unit an escrow agreement that meets the requirements of subsection (c) of this section.

(2) The procurement contract shall identify the escrow agent.

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(c) The escrow agreement shall:

- (1) be on a form that the [transportation] unit provides;
- (2) include the complete address of both the escrow agent and the surety;
- (3) authorize the [transportation] unit to pay retainage to the escrow agent; and
- (4) be signed by:
 - (i) the contractor;
 - (ii) the surety for the contractor; and
 - (iii) the escrow agent.

(d) On compliance with the requirements of subsection (b) of this section, the [transportation] unit shall pay the retainage to the escrow agent unless:

- (1) federal money is involved and application of this section would jeopardize timely recovery of that federal money; or
- (2) retainage is withheld for:
 - (i) lack of progress on the part of the contractor; or
 - (ii) other violations by the contractor.

(e) In accordance with the escrow agreement, a contractor may require an escrow agent:

- (1) to invest the retainage placed in the escrow account; and
- (2) to the extent the contractor is entitled to retainage under subsection (f)(2)(ii) of this section, to pay the earnings on the investment to the contractor.

(f) (1) Retainage may be released to the contractor only as directed by the [transportation] unit.

(2) At the time of final payment, the [transportation] unit shall direct the escrow agent to settle the escrow account by distributing money in the escrow account in the following order:

(i) to the [transportation] unit for any claim it may have against the contractor under the procurement contract;

(ii) unless waived by the Board, to the Comptroller for any claim exceeding \$50 against the contractor by the State, a unit, or a State controlled governmental entity; and

(iii) to the contractor."

AMENDMENT NO. 7

On page 3, before line 8, insert:

"15-226.

(a) In this section, "undisputed amount" means an amount owed by a contractor to a subcontractor for which there is no good faith dispute, including any retainage withheld.

(b) It is the policy of the State that, FOR WORK UNDER A STATE PROCUREMENT CONTRACT FOR CONSTRUCTION:

(1) a contractor shall promptly pay to a subcontractor any undisputed amount to which the subcontractor is entitled [for work under a State procurement contract for construction]; AND

(2) A SUBCONTRACTOR SHALL PROMPTLY PAY TO A LOWER TIER SUBCONTRACTOR ANY UNDISPUTED AMOUNT TO WHICH THE LOWER TIER

(Over)

SUBCONTRACTOR IS ENTITLED.

(c) (1) A contractor shall pay a subcontractor an undisputed amount to which the subcontractor is entitled within 10 days of receiving a progress or final payment from the State.

(2) If a contractor withholds payment from a subcontractor, within the time period in which payment normally would be made, the contractor shall:

(i) notify the subcontractor in writing and state the reason why payment is being withheld; and

(ii) provide a copy of the notice to the procurement officer.

(d) (1) If a subcontractor does not receive a payment within the required time period, the subcontractor may give written notice of the nonpayment to the procurement officer.

(2) The notice shall:

(i) indicate the name of the contractor, the project under which the dispute exists, and the amount in dispute;

(ii) provide an itemized description on which the amount is based; and

(iii) if known, provide an explanation for any dispute concerning payment by the contractor.

(e) (1) Within 2 business days of receipt of written notice from a subcontractor, a representative of the unit designated by the procurement officer shall verbally contact the contractor to ascertain whether the amount withheld is an undisputed amount.

(2) If the representative of the unit decides that a part or all of the amount withheld is an undisputed amount, the representative of the unit shall instruct the contractor to pay the subcontractor the undisputed amount within 3 business days.

(3) The representative of the unit shall verbally communicate to the subcontractor

the results of discussions with the contractor.

(4) If the contractor is instructed to pay the subcontractor and the subcontractor is not paid within the time instructed under paragraph (2) of this subsection, the subcontractor may report the nonpayment in writing to the procurement officer.

(f) (1) If the subcontractor notifies the procurement officer under subsection (e)(4) of this section that payment has not been made, the representative of the unit shall schedule a meeting to discuss the dispute with the unit's project manager, the contractor, and the subcontractor:

(i) at a time and location designated by the representative of the unit; but

(ii) not later than 10 days after receiving notice from the subcontractor under subsection (e)(4) of this section.

(2) The purpose of the meeting is to establish why the contractor has not paid the subcontractor in the required time period.

(3) The representative of the unit shall require the parties to provide at the meeting any information that the representative believes necessary to evaluate the dispute.

(4) If the representative of the unit determines that the contractor is delinquent in payment of an undisputed amount to the subcontractor, further progress payments to the contractor may be withheld until the subcontractor is paid.

(5) If payment is not paid to the subcontractor within 7 days after the representative of the unit determines that the contractor is delinquent in paying the subcontractor under this subsection, the representative shall schedule a second meeting to address the dispute:

(i) at a time and location designated by the representative of the unit; but

(ii) not later than 5 days after the close of the 7-day period.

(6) If, at the completion of the second meeting, the representative of the unit

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determines that the contractor continues to be delinquent in payments owed to the subcontractor, the representative:

(i) shall order that further payments to the contractor not be processed until payment to the subcontractor is verified;

(ii) may order that work under the contract be suspended based on the failure of the contractor to meet obligations under the contract; and

(iii) subject to paragraph (7) of this subsection, may require that the contractor pay a penalty to the subcontractor, in an amount not exceeding \$100 per day, from the date that payment was required under subsection (e)(2) of this section.

(7) A penalty may not be imposed under paragraph (6)(iii) of this subsection for any period that the representative of the unit determines the subcontractor was not diligent in reporting nonpayment to the procurement officer.

(g) (1) A contractor or a subcontractor may appeal a decision under subsection (f)(6) of this section to the procurement officer.

(2) The contractor shall comply with the procurement officer's decision.

(h) An act, failure to act, or decision of a procurement officer or a representative of a unit concerning a payment dispute between a contractor and subcontractor OR BETWEEN SUBCONTRACTORS under this section may not:

(1) affect the rights of the contracting parties under any other provision of law;

(2) be used as evidence on the merits of a dispute between the unit and the contractor or the contractor and subcontractor in any other proceeding; or

(3) result in liability against or prejudice the rights of the unit.

(i) A decision of a procurement officer or a representative of the unit designated by the

procurement officer under this section is not subject to judicial review or the provisions of Part III of this subtitle.

(J) (1) A UNIT SHALL INCLUDE IN EACH STATE PROCUREMENT CONTRACT FOR CONSTRUCTION A PROVISION:

(I) GOVERNING PROMPT PAYMENT TO SUBCONTRACTORS;
AND

(II) REQUIRING INCLUSION OF A SIMILAR PROVISION IN EACH SUBCONTRACT AT ANY TIER.

(2) THE CONTRACT PROVISION SHALL ESTABLISH PROCEDURES AND REMEDIES FOR THE RESOLUTION OF PAYMENT DISPUTES SIMILAR TO THE PROCESS AND REMEDIES PRESCRIBED IN SUBSECTIONS (C) THROUGH (G) OF THIS SECTION."