

1 certain escrow provisions relating to retainage in connection with State
 2 construction contracts; requiring that interest on escrowed money be handled in
 3 a specified manner; restricting the availability of the escrow provisions on
 4 contracts funded with tax exempt financing; defining certain terms; providing
 5 for the application and construction of this Act; and generally relating to State
 6 procurement and progress payments contracts for construction and prompt
 7 payment and retainage issues.

8 BY adding to
 9 Article - State Finance and Procurement
 10 Section 13-225
 11 Annotated Code of Maryland
 12 (1995 Replacement Volume and 1999 Supplement)

13 BY repealing and reenacting, with amendments,
 14 Article - State Finance and Procurement
 15 Section 15-108 and 15-226
 16 Annotated Code of Maryland
 17 (1995 Replacement Volume and 1999 Supplement)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
 19 MARYLAND, That the Laws of Maryland read as follows:

20 **Article - State Finance and Procurement**

21 13-225.

22 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
 23 INDICATED.

24 (2) "PAYMENT SECURITY" HAS THE MEANING STATED IN § 17-101 OF
 25 THIS ARTICLE.

26 (3) "PERFORMANCE SECURITY" HAS THE MEANING STATED IN § 17-101
 27 OF THIS ARTICLE.

28 (B) (1) ~~A CONSTRUCTION CONTRACT THAT REQUIRES A PRIMARY~~
 29 ~~PROCUREMENT UNIT TO MAKE PROGRESS PAYMENTS SHALL MEET THE~~
 30 ~~REQUIREMENTS OF THIS SUBSECTION.~~

31 ~~(2) PROGRESS PAYMENTS:~~

32 ~~(I) SHALL BE MADE AT LEAST EVERY MONTH; AND~~

33 ~~(II) MAY BE MADE MORE FREQUENTLY IF STIPULATED IN THE~~
 34 ~~CONTRACT.~~

1 ~~(3)~~ IF A CONTRACTOR HAS FURNISHED 100% PAYMENT SECURITY OR
2 AND 100% PERFORMANCE SECURITY IN ACCORDANCE WITH TITLE 17, SUBTITLE 1, OF
3 THIS ARTICLE UNDER A STATE PROCUREMENT CONTRACT FOR CONSTRUCTION, THE
4 AMOUNT RETAINED BY THE PRIMARY PROCUREMENT UNIT FROM EACH PROGRESS
5 PAYMENT PERCENTAGE SPECIFIED IN THE CONTRACT FOR RETAINAGE MAY NOT
6 EXCEED 5% OF THE TOTAL AMOUNT OF EACH PROGRESS PAYMENT.

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

10 ~~(4)~~ (3) ~~AMOUNTS RETAINED~~ RETAINAGE WITHHELD BY A PRIMARY
11 PROCUREMENT UNIT UNDER PARAGRAPH (3) OF THIS SUBSECTION, SHALL MAY BE
12 DEPOSITED IN AN INTEREST-BEARING ESCROW ACCOUNT IN ACCORDANCE WITH §
13 15-108 OF THIS ARTICLE.

14 ~~(5)~~ WITHIN 30 DAYS OF FINAL ACCEPTANCE BY THE PRIMARY
15 PROCUREMENT UNIT OF THE WORK REQUIRED UNDER THE CONSTRUCTION
16 CONTRACT, THE PRIMARY PROCUREMENT UNIT SHALL PAY THE CONTRACTOR THE
17 FULL AMOUNT OF MONEY RETAINED UNDER THIS SUBSECTION, TOGETHER WITH
18 THE INTEREST ACCRUED ON THE MONEY RETAINED.

19 ~~(6)~~ THE CONSTRUCTION CONTRACT SHALL INCLUDE CLAUSES
20 COVERING THE PROVISIONS OF PARAGRAPHS (2) THROUGH (5) OF THIS SUBSECTION.

21 (C) (1) A CONTRACTOR THAT HAS A PERCENTAGE OF PROGRESS PAYMENTS
22 RETAINED BY A PRIMARY PROCUREMENT UNIT UNDER SUBSECTION (B) OF THIS
23 SECTION, MAY NOT RETAIN A PERCENTAGE OF PAYMENTS DUE A SUBCONTRACTOR
24 THAT EXCEEDS THE PERCENTAGE OF PROGRESS PAYMENTS RETAINED BY THE
25 PRIMARY PROCUREMENT UNIT.

26 ~~(2)~~ AFTER RECEIVING MONEY RETAINED BY A PRIMARY PROCUREMENT
27 UNIT UNDER THIS SECTION, THE CONTRACTOR SHALL DISTRIBUTE:

28 ~~(I)~~ MONEY RETAINED BY THE CONTRACTOR FROM PAYMENTS DUE
29 A SUBCONTRACTOR; AND

30 ~~(II)~~ THE INTEREST ACCRUED ON THE MONEY RETAINED.

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

36 (D) (1) A SUBCONTRACTOR THAT HAS A PERCENTAGE OF PROGRESS
37 PAYMENTS RETAINED BY A CONTRACTOR UNDER SUBSECTION (C) OF THIS SECTION,
38 MAY NOT RETAIN A PERCENTAGE OF PAYMENTS DUE ANOTHER A LOWER TIER
39 SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF PROGRESS PAYMENTS
40 RETAINED BY THE CONTRACTOR FROM THE SUBCONTRACTOR.

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

6 (E) IF RETAINAGE HAS BEEN PLACED IN ESCROW UNDER § 15-108 OF THIS
7 ARTICLE, EACH PAYMENT OF RETAINAGE SHALL INCLUDE A PRO RATA PORTION OF
8 INTEREST EARNED.

9 (F) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF
10 THE PROVISIONS OF TITLE 17, SUBTITLE 1 OF THIS ARTICLE.

11 15-108.

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

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

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

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

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

24 (c) The escrow agreement shall:

25 (1) be on a form that the [transportation] unit provides;

26 (2) include the complete address of both the escrow agent and the surety;

27 (3) authorize the [transportation] unit to pay retainage to the escrow
28 agent; and

29 (4) be signed by:

30 (i) the contractor;

31 (ii) the surety for the contractor; and

32 (iii) the escrow agent.

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

1 (1) federal money is involved and application of this section would
2 jeopardize timely recovery of that federal money; or

3 (2) retainage is withheld for:

4 (i) lack of progress on the part of the contractor; or

5 (ii) other violations by the contractor.

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

8 (1) to invest the retainage placed in the escrow account; and

9 (2) to the extent the contractor is entitled to retainage under subsection
10 (f)(2)(ii) of this section, to pay the earnings on the investment to the contractor.

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

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

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

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

21 (iii) to the contractor.

22 15-226.

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

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

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

31 (2) A SUBCONTRACTOR SHALL PROMPTLY PAY TO A LOWER TIER
32 SUBCONTRACTOR ANY UNDISPUTED AMOUNT TO WHICH THE LOWER TIER
33 SUBCONTRACTOR IS ENTITLED.

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

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

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

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

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

12 (2) The notice shall:

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

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

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

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

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

27 (3) The representative of the unit shall verbally communicate to the
28 subcontractor the results of discussions with the contractor.

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

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

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

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

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

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

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

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

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

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

20 (6) If, at the completion of the second meeting, the representative of the
21 unit determines that the contractor continues to be delinquent in payments owed to
22 the subcontractor, the representative:

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

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

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

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

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

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

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

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

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

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

9 (i) A decision of a procurement officer or a representative of the unit
10 designated by the procurement officer under this section is not subject to judicial
11 review or the provisions of Part III of this subtitle.

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

14 (I) GOVERNING PROMPT PAYMENT TO SUBCONTRACTORS; AND

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

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

20 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall be
21 construed only prospectively and may not be applied or interpreted to have any effect
22 on or application to any contracts entered into before the effective date of this Act.

23 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect
24 October 1, 2000.