

HOUSE BILL 371

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P2

2003 Regular Session
3r1344
CF 3r1729

By: Delegates Hubbard and Rosenberg, Rosenberg, Bates, Benson, Boutin, Bromwell, Costa, Donoghue, Elliott, Goldwater, Hammen, Haynes, Hurson, Mandel, McDonough, Morhaim, Murray, Nathan-Pulliam, Oaks, Pendergrass, Redmer, Rudolph, Smigiel, V. Turner, Weldon, and Arnick

Introduced and read first time: February 4, 2003
Assigned to: Health and Government Operations

Committee Report: Favorable with amendments
House action: Adopted
Read second time: March 21, 2003

CHAPTER _____

1 AN ACT concerning

2 **Procurement - Security for Construction Contracts - Retainage**

3 FOR the purpose of limiting the retainage that may be specified in a construction
4 contract awarded by a public body under certain circumstances; authorizing a
5 public body to withhold payments in addition to retainage under certain
6 circumstances; limiting the amount that a contractor may withhold from a
7 subcontractor or that a subcontractor may withhold from a lower tier
8 subcontractor under a construction contract awarded by a public body under
9 certain circumstances; providing for certain exceptions to the limitations on
10 withholding; ~~providing for the availability of escrow for retainage in~~
11 ~~construction contracts awarded by a public body; requiring that interest on~~
12 ~~money placed in escrow be handled in a certain manner; restricting the~~
13 ~~availability of escrow in certain circumstances; requiring the escrow agent to~~
14 ~~follow the directions of the contractor in relation to the investment of retainage~~
15 ~~being held by the escrow agent requiring a certain construction contract to~~
16 ~~contain a certain clause concerning verification of payment; providing for the~~
17 application and construction of this Act; and generally relating to construction
18 contracts awarded by a public body.

19 BY renumbering
20 Article - State Finance and Procurement
21 Section 17-110
22 to be Section ~~17-112~~ 17-111

1 Annotated Code of Maryland
2 (2001 Replacement Volume and 2002 Supplement)

3 BY adding to
4 Article - State Finance and Procurement
5 Section 17-110 ~~and 17-111~~
6 Annotated Code of Maryland
7 (2001 Replacement Volume and 2002 Supplement)

8 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
9 MARYLAND, That Section(s) 17-110 of Article - State Finance and Procurement of
10 the Annotated Code of Maryland be renumbered to be Section(s) ~~17-112~~ 17-111.

11 SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland
12 read as follows:

13 **Article - State Finance and Procurement**

14 17-110.

15 (A) (1) IF A CONTRACTOR HAS FURNISHED 100% PAYMENT SECURITY AND
16 100% PERFORMANCE SECURITY IN ACCORDANCE WITH THIS SUBTITLE UNDER A
17 CONTRACT FOR CONSTRUCTION AWARDED BY A PUBLIC BODY, THE PERCENTAGE
18 SPECIFIED IN THE CONTRACT FOR RETAINAGE MAY NOT EXCEED ~~5%~~ 10% OF THE
19 TOTAL AMOUNT FOR THE FIRST 50% OF THE CONTRACT.

20 (2) UNLESS A PUBLIC BODY DEMONSTRATES THE NEED TO RETAIN
21 MORE THAN 5% TO PROTECT THE PUBLIC INTEREST, AFTER 50% OF THE CONTRACT IS
22 COMPLETED, A PUBLIC BODY MAY RETAIN ONLY 5% OF THE TOTAL AMOUNT.

23 (3) IN ADDITION TO RETAINAGE, A PUBLIC BODY MAY WITHHOLD FROM
24 PAYMENTS OTHERWISE DUE A CONTRACTOR ANY AMOUNT THAT THE PUBLIC BODY
25 REASONABLY BELIEVES NECESSARY TO PROTECT THE PUBLIC BODY'S INTEREST.

26 ~~(3) RETAINAGE WITHHELD BY A PUBLIC BODY MAY BE DEPOSITED IN AN~~
27 ~~INTEREST BEARING ESCROW ACCOUNT IN ACCORDANCE WITH § 17-111 OF THIS~~
28 ~~SUBTITLE.~~

29 (4) BEFORE ENTERING INTO A CONSTRUCTION CONTRACT UNDER THIS
30 SUBSECTION, A PUBLIC BODY SHALL REQUIRE THAT THE CONTRACT INCLUDE A
31 CLAUSE STATING THAT FINAL PAYMENT SHALL BE MADE TO A CONTRACTOR ONLY
32 AFTER THE CONTRACTOR PROVIDES WRITTEN VERIFICATION, PROVIDED BY THE
33 SUBCONTRACTORS UNDER THE CONTRACT, THAT THE SUBCONTRACTORS HAVE
34 BEEN PAID.

35 (B) (1) A CONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS DUE
36 A SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF PAYMENTS RETAINED BY
37 THE PUBLIC BODY.

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

6 (C) (1) A SUBCONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS
7 DUE A LOWER TIER SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF
8 PAYMENTS RETAINED FROM THE SUBCONTRACTOR.

9 (2) ~~PARAGRAPH (1) PARAGRAPHS (1) AND (2)~~ OF THIS SUBSECTION MAY
10 NOT BE CONSTRUED TO PROHIBIT A SUBCONTRACTOR FROM WITHHOLDING ANY
11 AMOUNT IN ADDITION TO RETAINAGE IF THE SUBCONTRACTOR DETERMINES THAT A
12 LOWER TIER SUBCONTRACTOR'S PERFORMANCE UNDER THE SUBCONTRACT
13 PROVIDES REASONABLE GROUNDS FOR WITHHOLDING THE ADDITIONAL AMOUNT.

14 (D) ~~IF RETAINAGE HAS BEEN PLACED IN ESCROW UNDER § 17-111 OF THIS~~
15 ~~SUBTITLE, EACH PAYMENT OF RETAINAGE SHALL INCLUDE A PRO RATA PORTION OF~~
16 ~~INTEREST EARNED.~~

17 ~~(E)~~ THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF
18 THE REMAINING PROVISIONS OF THIS SUBTITLE.

19 ~~17-111.~~

20 ~~(A)~~ ~~THIS SECTION DOES NOT APPLY TO ANY PROCUREMENT CONTRACT~~
21 ~~FUNDED WITH TAX EXEMPT FINANCING.~~

22 ~~(B)~~ ~~(1)~~ ~~SUBJECT TO THE REQUIREMENTS OF THIS SECTION, A CONTRACTOR~~
23 ~~UNDER A PROCUREMENT CONTRACT THAT A PUBLIC BODY AWARDS FOR~~
24 ~~CONSTRUCTION IS ENTITLED TO HAVE RETAINAGE UNDER THE PROCUREMENT~~
25 ~~CONTRACT PLACED IN AN ESCROW ACCOUNT IF THE CONTRACTOR:~~

26 ~~(1)~~ ~~ELECTS THAT PROCEDURE IN THE PROCUREMENT CONTRACT~~
27 ~~IN THE SPACE PROVIDED FOR THAT ELECTION; AND~~

28 ~~(II)~~ ~~SUBMITS TO THE PUBLIC BODY AN ESCROW AGREEMENT THAT~~
29 ~~MEETS THE REQUIREMENTS OF SUBSECTION (C) OF THIS SECTION.~~

30 (2) ~~THE PROCUREMENT CONTRACT SHALL IDENTIFY THE ESCROW~~
31 ~~AGENT.~~

32 ~~(C)~~ ~~THE ESCROW AGREEMENT SHALL:~~

33 ~~(1)~~ ~~BE ON A FORM THAT THE PUBLIC BODY PROVIDES;~~

34 ~~(2)~~ ~~INCLUDE THE COMPLETE ADDRESS OF BOTH THE ESCROW AGENT~~
35 ~~AND THE SURETY;~~

1 (3) ~~AUTHORIZE THE PUBLIC BODY TO PAY RETAINAGE TO THE ESCROW~~
2 ~~AGENT; AND~~

3 (4) ~~BE SIGNED BY:~~

4 (I) ~~THE CONTRACTOR;~~

5 (II) ~~THE SURETY FOR THE CONTRACTOR; AND~~

6 (III) ~~THE ESCROW AGENT.~~

7 (D) ~~ON COMPLIANCE WITH THE REQUIREMENTS OF SUBSECTION (B) OF THIS~~
8 ~~SECTION, THE PUBLIC BODY SHALL PAY THE RETAINAGE TO THE ESCROW AGENT~~
9 ~~UNLESS:~~

10 (1) ~~FEDERAL MONEY IS INVOLVED AND APPLICATION OF THIS SECTION~~
11 ~~WOULD JEOPARDIZE TIMELY RECOVERY OF THAT FEDERAL MONEY; OR~~

12 (2) ~~RETAINAGE IS WITHHELD FOR:~~

13 (I) ~~LACK OF PROGRESS ON THE PART OF THE CONTRACTOR; OR~~

14 (II) ~~OTHER VIOLATIONS BY THE CONTRACTOR.~~

15 (E) ~~IN ACCORDANCE WITH THE ESCROW AGREEMENT, A CONTRACTOR MAY~~
16 ~~REQUIRE AN ESCROW AGENT:~~

17 (1) ~~TO INVEST THE RETAINAGE PLACED IN THE ESCROW ACCOUNT; AND~~

18 (2) ~~TO THE EXTENT THE CONTRACTOR IS ENTITLED TO RETAINAGE~~
19 ~~UNDER SUBSECTION (F)(2)(II) OF THIS SECTION, TO PAY THE EARNINGS ON THE~~
20 ~~INVESTMENT TO THE CONTRACTOR.~~

21 (F) (1) ~~RETAINAGE MAY BE RELEASED TO THE CONTRACTOR ONLY AS~~
22 ~~DIRECTED BY THE PUBLIC BODY.~~

23 (2) ~~AT THE TIME OF FINAL PAYMENT, THE PUBLIC BODY SHALL DIRECT~~
24 ~~THE ESCROW AGENT TO SETTLE THE ESCROW ACCOUNT BY DISTRIBUTING MONEY~~
25 ~~IN THE ESCROW ACCOUNT IN THE FOLLOWING ORDER:~~

26 (I) ~~TO THE PUBLIC BODY FOR ANY CLAIM IT MAY HAVE AGAINST~~
27 ~~THE CONTRACTOR UNDER THE PROCUREMENT CONTRACT; AND~~

28 (II) ~~TO THE CONTRACTOR.~~

29 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall be
30 construed to apply only prospectively and may not be applied or interpreted to have
31 any effect on or application to any contracts entered into before the effective date of
32 this Act.

1 SECTION 4. AND BE IT FURTHER ENACTED, That this Act shall take effect
2 October 1, 2003.