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By: **Senators Conway, Stone, and Jones**  
Introduced and read first time: February 5, 2003  
Assigned to: Rules

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A BILL ENTITLED

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; providing for the application and construction of  
16 this Act; and generally relating to construction contracts awarded by a public  
17 body.

18 BY renumbering

19 Article - State Finance and Procurement  
20 Section 17-110  
21 to be Section 17-112  
22 Annotated Code of Maryland  
23 (2001 Replacement Volume and 2002 Supplement)

24 BY adding to

25 Article - State Finance and Procurement  
26 Section 17-110 and 17-111  
27 Annotated Code of Maryland  
28 (2001 Replacement Volume and 2002 Supplement)

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

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

3 **Article - State Finance and Procurement**

4 17-110.

5 (A) (1) IF A CONTRACTOR HAS FURNISHED 100% PAYMENT SECURITY AND  
6 100% PERFORMANCE SECURITY IN ACCORDANCE WITH THIS SUBTITLE UNDER A  
7 CONTRACT FOR CONSTRUCTION AWARDED BY A PUBLIC BODY, THE PERCENTAGE  
8 SPECIFIED IN THE CONTRACT FOR RETAINAGE MAY NOT EXCEED 5% OF THE TOTAL  
9 AMOUNT.

10 (2) IN ADDITION TO RETAINAGE, A PUBLIC BODY MAY WITHHOLD FROM  
11 PAYMENTS OTHERWISE DUE A CONTRACTOR ANY AMOUNT THAT THE PUBLIC BODY  
12 REASONABLY BELIEVES NECESSARY TO PROTECT THE PUBLIC BODY'S INTEREST.

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

16 (B) (1) A CONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS DUE  
17 A SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF PAYMENTS RETAINED BY  
18 THE PUBLIC BODY.

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

24 (C) (1) A SUBCONTRACTOR MAY NOT RETAIN A PERCENTAGE OF PAYMENTS  
25 DUE A LOWER TIER SUBCONTRACTOR THAT EXCEEDS THE PERCENTAGE OF  
26 PAYMENTS RETAINED FROM THE SUBCONTRACTOR.

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

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

35 (E) THIS SECTION MAY NOT BE CONSTRUED TO LIMIT THE APPLICATION OF  
36 THE REMAINING PROVISIONS OF THIS SUBTITLE.

1 17-111.

2 (A) THIS SECTION DOES NOT APPLY TO ANY PROCUREMENT CONTRACT  
3 FUNDED WITH TAX EXEMPT FINANCING.

4 (B) (1) SUBJECT TO THE REQUIREMENTS OF THIS SECTION, A CONTRACTOR  
5 UNDER A PROCUREMENT CONTRACT THAT A PUBLIC BODY AWARDS FOR  
6 CONSTRUCTION IS ENTITLED TO HAVE RETAINAGE UNDER THE PROCUREMENT  
7 CONTRACT PLACED IN AN ESCROW ACCOUNT IF THE CONTRACTOR:

8 (I) ELECTS THAT PROCEDURE IN THE PROCUREMENT CONTRACT  
9 IN THE SPACE PROVIDED FOR THAT ELECTION; AND

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

12 (2) THE PROCUREMENT CONTRACT SHALL IDENTIFY THE ESCROW  
13 AGENT.

14 (C) THE ESCROW AGREEMENT SHALL:

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

16 (2) INCLUDE THE COMPLETE ADDRESS OF BOTH THE ESCROW AGENT  
17 AND THE SURETY;

18 (3) AUTHORIZE THE PUBLIC BODY TO PAY RETAINAGE TO THE ESCROW  
19 AGENT; AND

20 (4) BE SIGNED BY:

21 (I) THE CONTRACTOR;

22 (II) THE SURETY FOR THE CONTRACTOR; AND

23 (III) THE ESCROW AGENT.

24 (D) ON COMPLIANCE WITH THE REQUIREMENTS OF SUBSECTION (B) OF THIS  
25 SECTION, THE PUBLIC BODY SHALL PAY THE RETAINAGE TO THE ESCROW AGENT  
26 UNLESS:

27 (1) FEDERAL MONEY IS INVOLVED AND APPLICATION OF THIS SECTION  
28 WOULD JEOPARDIZE TIMELY RECOVERY OF THAT FEDERAL MONEY; OR

29 (2) RETAINAGE IS WITHHELD FOR:

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

31 (II) OTHER VIOLATIONS BY THE CONTRACTOR.

1 (E) IN ACCORDANCE WITH THE ESCROW AGREEMENT, A CONTRACTOR MAY  
2 REQUIRE AN ESCROW AGENT:

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

4 (2) TO THE EXTENT THE CONTRACTOR IS ENTITLED TO RETAINAGE  
5 UNDER SUBSECTION (F)(2)(II) OF THIS SECTION, TO PAY THE EARNINGS ON THE  
6 INVESTMENT TO THE CONTRACTOR.

7 (F) (1) RETAINAGE MAY BE RELEASED TO THE CONTRACTOR ONLY AS  
8 DIRECTED BY THE PUBLIC BODY.

9 (2) AT THE TIME OF FINAL PAYMENT, THE PUBLIC BODY SHALL DIRECT  
10 THE ESCROW AGENT TO SETTLE THE ESCROW ACCOUNT BY DISTRIBUTING MONEY  
11 IN THE ESCROW ACCOUNT IN THE FOLLOWING ORDER:

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

14 (II) TO THE CONTRACTOR.

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

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