

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

House Bill 188
Economic Matters

(Delegate Minnick, *et al.*)

Judicial Proceedings

Real Property - Construction Contracts - Retention Proceeds

This bill limits the amount of retention proceeds that an owner, contractor, or subcontractor may retain to guarantee performance under a construction contract.

The bill only applies prospectively and does not affect any contract awarded before October 1, 2005.

Fiscal Summary

State Effect: The bill would not directly affect governmental operations or finances.

Local Effect: None.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: Retention proceeds are amounts of money earned but retained under the terms of a contract or subcontract to guarantee the performance of a contractor or subcontractor under the contract's terms.

Generally, the retention proceeds under the terms of a contract may not exceed 5% of the contract price. Also, the retention proceeds of any payment due under the terms of a contract from an owner to a contractor may not exceed 5% of the payment. The retention proceeds of any payment due under the terms of a contract from a contractor to a subcontractor or from a subcontractor to another subcontractor may not exceed the

percentage of retention proceeds from the owner to the contractor or the contractor to the first subcontractor, respectively.

The bill does not prohibit withholding an amount after a reasonable determination that the contractor's or subcontractor's performance under the contract provides reasonable grounds for withholding the additional amount.

The bill does not affect the rights of contracting parties under the laws governing statutory liens on property. Further, the bill does 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.

Current Law: Generally, a contractor or subcontractor who performs work under a construction contract is entitled to prompt payment for services rendered under a construction contract.

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 the earlier of 30 days after the day on which: (1) the occupancy permit is granted; or (2) the owner or owner's agent takes possession. If the contract provides for specific dates or times of payment, the owner must pay the contractor within seven 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 seven days after receiving each payment for its subcontractor's work or materials.

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.

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.

Background: Similar to the provisions of this bill, the amount specified for retainage in a State procurement contract for construction may not exceed 5% of the total amount if the contractor has furnished 100% payment security and 100% performance security.

Also similar to this bill, a contractor under a State construction contract that has a percentage of progress payments retained may not retain a greater percentage of payments due to a subcontractor than are retained from the contractor. Further, a subcontractor under a State construction contract that has a percentage of progress payments retained may not retain a greater percentage of payments due to another subcontractor than are retained from the subcontractor.

Small Business Effect: It is assumed that most contractors and subcontractors on construction contracts are small businesses. The bill's limitation on the percentage of retention proceeds under a construction contract could make money available more quickly to general contractors, subcontractors, and lower tier subcontractors.

Additional Information

Prior Introductions: An identical bill, HB 662, was introduced during the 2004 session and received an unfavorable report from the House Economic Matters Committee.

Cross File: None

Information Source(s): Department of General Services, Board of Public Works, Maryland Transportation Authority, Maryland Department of Transportation, Department of Budget and Management, Department of Legislative Services

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