

**Department of Legislative Services**  
Maryland General Assembly  
2007 Session

**FISCAL AND POLICY NOTE**

Senate Bill 695

(Senators Stone and Haines)

Judicial Proceedings

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**Real Property - Construction Contracts - Retention Proceeds**

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This bill limits to 5% the percentage of a construction contract that an owner or contractor can retain to guarantee that a contractor or subcontractor completes the work required by the contract. If an owner retains less than 5% of a contract from a contractor, the contractor may not retain more than that amount from a subcontractor. The bill exempts contracts of less than \$250,000 and any projects funded wholly or partially by the Department of Housing and Community Development.

The bill applies only prospectively and does not affect any contract awarded before October 1, 2007.

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**Fiscal Summary**

**State Effect:** None. State agencies are already subject to a 5% cap on retainage fees for construction contracts.

**Local Effect:** None.

**Small Business Effect:** Potentially meaningful, to the extent that construction contractors and subcontractors are small businesses.

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**Analysis**

**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 a home improvement contract by a contractor licensed under the Maryland Home Improvement Law.

Similar to the provisions of this bill, under current law, State agencies may not retain more than 5% for a State construction contract if the contractor has furnished 100% payment security and 100% performance security. However, a primary procurement unit and the Maryland Transportation Authority may withhold from payments to a contractor any amount that the unit reasonably believes is necessary to protect the State. Retainages and other withholdings must be deposited in interest-bearing escrow accounts.

Also similar to this bill, under current law, 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.

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### **Additional Information**

**Prior Introductions:** SB 302 of 2006, a similar bill, received an unfavorable report from the Senate Judicial Proceedings Committee.

**Cross File:** None designated, although HB 342 is identical.

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

**Fiscal Note History:** First Reader - March 12, 2007  
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