

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 313

(Senator Stone, *et al.*)

Judicial Proceedings

Economic Matters

Real Property - Construction Contracts - Retention Proceeds

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 the contractor has provided 100% performance and payment security. 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. However, the bill provides that additional amounts may be withheld if a contractor's or subcontractor's performance warrants it. 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, 2008.

Fiscal Summary

State Effect: None. State agencies are already subject to a 5% cap on retainage fees for construction contracts, unless they believe that additional withholdings are necessary to protect the State's interest.

Local Effect: None.

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

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.

Similar to the provisions of this bill, State regulations allow State agencies to retain not 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 contractor payments by 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, State regulations allow a contractor under a State construction contract that has a percentage of progress payments retained to retain a percentage of payments due to a subcontractor that is not greater than the percentage 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.

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.

Small Business Effect: It is assumed that most contractors and subcontractors on construction contracts are small businesses. For contracts affected by this bill, 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: SB 695 of 2007 was heard by the Judicial Proceedings Committee, but no further action was taken. HB 342 of 2007 passed the House and was assigned to the Judicial Proceedings Committee, but no further action was taken. SB 302 of 2006 received an unfavorable report from the Senate Judicial Proceedings Committee.

Cross File: HB 647 (Delegate Minnick, *et al.*) – Economic Matters.

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 - February 25, 2008
ncs/rhh Revised - Senate Third Reader - March 31, 2008

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