

Department of Legislative Services
Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

House Bill 1627
Economic Matters

(Delegates Adams and W. Miller)

Judicial Proceedings

Real Property - Construction Contracts - Retention Proceeds

This bill increases the number of construction contracts that are subject to a 5% cap on retention proceeds. Under the bill, contracts valued at \$100,000 or more, instead of the threshold of \$250,000 or more under current law, are subject to the statutory 5% cap on retention proceeds. The bill clarifies that an “undisputed amount” includes any retention proceeds that exceed the amount authorized to be retained as specified under § 9-304 of the Real Property Article; it also specifies that retention proceeds must be paid within 30 days after the issuance of a final certificate of payment, as defined by the applicable contract or subcontract.

Fiscal Summary

State Effect: The bill is not likely to have a material impact on State finances. Primary procurement units and the Maryland Transportation Authority are subject to different retainage provisions and may withhold other payments by any amount reasonably believed to be necessary to protect State interests.

Local Effect: Potential minimal increase in risk for local governments due to the expanded application of retention proceeds limits and payment deadlines. However, any increased risk is likely mitigated by the existing requirement that such provisions only apply if the contractor has provided 100% performance and payment security.

Small Business Effect: Potential meaningful.

Analysis

Current Law:

Prompt Payment

Generally, a contractor or subcontractor who performs work under a construction contract is entitled to prompt payment for services. 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 30 days of either the occupancy permit being granted or the owner taking possession, whichever comes first. If the contract provides for specific dates or times of payment, the owner must pay the contractor within 7 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 7 days after receiving each payment for its subcontractor's work or materials.

Remedies for Violations

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.

Retention Proceeds, Generally

State law 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, statute establishes that additional amounts may be withheld if a contractor's or subcontractor's performance warrants it. Statute exempts contracts of less than \$250,000 and any projects funded wholly or partially by the Department of Housing and Community Development from the 5% cap on retention.

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.

Retention Proceeds for Specified State Agencies

Under *any* State procurement contract for construction, if a contractor has provided 100% performance and payment security, the percentage specified in the contract for retainage may not exceed 5% of the total amount. However, in addition to retainage, a primary procurement unit and the Maryland Transportation Authority may withhold, from payments otherwise due a contractor, any amount that the unit reasonably believes necessary to protect the State's interest.

Small Business Effect: Contractors operating small businesses likely realize an increase in the number of contracts subject to the 5% statutory retention proceeds limit. As a result, these contractors *benefit* to the extent that a higher percentage would have otherwise been applied to such contracts. In addition, the requirement that retention proceeds be paid within 30 days after the issuance of a final certificate of payment may decrease the length of time small business contractors and subcontractors must wait to receive funds.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General (Consumer Protection Division); Judiciary (Administrative Office of the Courts); Department of General Services; Department of Legislative Services

Fiscal Note History: First Reader - March 12, 2018
mag/kdm Third Reader - March 26, 2018
Revised - Amendment(s) - March 26, 2018

Analysis by: Nathan W. McCurdy

Direct Inquiries to:
(410) 946-5510
(301) 970-5510