

Department of Legislative Services
Maryland General Assembly
2024 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 994 (Delegate Adams)
Health and Government Operations

State Finance and Procurement - Retention Proceeds

This bill requires that undisputed retention proceeds on State construction contracts that are retained by a State agency or a contractor be paid within 90 days after the *substantial* completion of a project, as defined by the applicable contract or subcontract.

Fiscal Summary

State Effect: State expenditures (all funds) may increase due to double payment for some components of State construction projects, as discussed below. No effect on revenues.

Local Effect: None.

Small Business Effect: Meaningful.

Analysis

Current Law: “Payment security” means security to guarantee payment for labor and materials, including leased equipment, under a contract for construction. “Performance security” means security to guarantee the performance of a contract for construction. Before a public body, including the State, awards a construction contract exceeding \$100,000, the contractor must provide payment and performance security. Performance security must be in an amount the public body considers adequate, and payment security must be at least 50% of the total amount payable under the contract. Different requirements apply for construction contracts valued at \$100,000 or less. Security must be (1) a bond executed by a surety company authorized to do business in the State; (2) cash in the amount equivalent to a bond; or (3) other security that the public body considers satisfactory.

In general, retainage is a portion of the final payment due to the contractor that is withheld pending final completion of a project. If a contractor has furnished 100% payment security and 100% performance security, the percentage specified in the contract for retainage may not exceed 5% of the total amount. A contractor may not retain a percentage of payments due to a subcontractor that exceeds the percentage retained by the State.

State Expenditures: The bill requires payment of retainage within 90 days after *substantial*, rather than *final*, completion of a project. This generally means that payment is made prior to the completion of the “punch list,” a construction industry term that refers to a list of items that, toward the end of a project, the contractor and project sponsor agree must be addressed by a contractor once the site is operational but before a project is considered complete. Often the items on the punch list are minor, such as scratches or markings on a wall, but the punch list may also include items that require rework.

The Department of General Services (DGS) and Maryland Department of Transportation advise that retainage provides an incentive for contractors to quickly and completely perform the items on the punch list to bring a project to completion so they can receive their final payment. Payment of retainage prior to completion of the punch list means that contractors are not incentivized to complete the items (or to do so on a timely basis), which may require agencies to contract with a third party to finish the work, resulting in double payment for the work. DGS also advises that it has discretion to reduce retainage and regularly uses this discretion. Nevertheless, to the extent that contractors do not complete punch list items following payment of retainage, State expenditures (all funds) for construction projects may increase, but a reliable estimate of the overall effect is not feasible.

Small Business Effect: Small construction companies that work on State construction projects likely are paid their retainage payments sooner than they are paid under current law.

Additional Information

Recent Prior Introductions: Similar legislation has been introduced within the last three years. See HB 949 of 2023, HB 552 of 2022, and HB 327 of 2021.

Designated Cross File: SB 921 (Senators Mautz and Carozza) - Budget and Taxation.

Information Source(s): Department of General Services; Board of Public Works; Comptroller’s Office; Department of Public Safety and Correctional Services; Maryland Department of Transportation; Department of Legislative Services

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