

MAINE STATE LEGISLATURE

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119th MAINE LEGISLATURE

FIRST REGULAR SESSION-1999

Legislative Document

No. 411

H.P. 303

House of Representatives, January 14, 1999

An Act to Amend the Amount of Retainage on Public Building Contracts.

Reference to the Committee on State and Local Government suggested and ordered printed.

A handwritten signature in black ink that reads "Joseph W. Mayo".

JOSEPH W. MAYO, Clerk

Presented by Representative MUSE of South Portland.
Cosponsored by Representatives: BROOKS of Winterport, BUMPS of China, GLYNN of South Portland, MENDROS of Lewiston, QUINT of Portland.

Be it enacted by the People of the State of Maine as follows:

2 Sec. 1. 5 MRSA §1746, as amended by PL 1989, c. 483, Pt. A,
4 §19, is further amended to read:

6 **§1746. Retention of part of contract price prohibited**

8 In Except as provided in section 1746-A, in any contract
10 awarded for any public improvement the State shall withhold 5% of
12 the money due the contractor until the project under the contract
14 has been accepted by or for the State, except that when the
 contract has been substantially completed the State may, upon
 request, further reduce the amounts withheld if it deems
 determines it desirable and prudent.

16 ~~Under any contract made or awarded by the State or by any~~
18 ~~public department or official thereof, including the~~
20 ~~construction, improvement or repair of any and all ways, roads or~~
22 ~~bridges with appurtenances which, by law, are under the~~
24 ~~supervision of the Department of Transportation, the contractor~~
26 ~~may, from time to time, withdraw the whole or any portion of the~~
28 ~~amount retained for payments to the contractor pursuant to the~~
30 ~~terms of the contract, upon depositing with the Treasurer of~~
 ~~State: A negotiable certificate of deposit, United States~~
 ~~treasury bonds, United States treasury notes, United States~~
 ~~treasury certificates of indebtedness, United States treasury~~
 ~~bills, or bonds or notes of the State of Maine or bonds of any~~
 ~~political subdivision in the State of Maine. No amount shall be~~
 ~~withdrawn in excess of the market value of the securities at the~~
 ~~time of deposit or of the par value of such securities, whichever~~
 ~~is lower.~~

32 ~~The Treasurer of State shall collect all interest or income~~
34 ~~when due on the obligations so deposited and shall pay the same,~~
36 ~~when and as collected, to the contractor who deposited the~~
38 ~~obligations. If the deposit is in the form of coupon bonds, the~~
40 ~~Treasurer of State shall deliver each coupon as it matures to the~~
42 ~~contractor. The Treasurer of State shall have the power to enter~~
44 ~~into a contract or agreement with any national bank, trust~~
 ~~company or safe deposit company located in New England or New~~
 ~~York City for custodial care and servicing of any securities~~
 ~~deposited with him pursuant to this section. Such services shall~~
 ~~consist of the safekeeping of said securities and of all services~~
 ~~required to effectuate the purposes of this section.~~

46 ~~Any amount deducted by the State, or by any public~~
48 ~~department or official thereof, pursuant to the terms of the~~
50 ~~contract, from the retained payments due the contractor, shall be~~
 ~~deducted, first from that portion of the retained payments for~~
 ~~which no security has been substituted, then from the proceeds of~~

2 any deposited security. In the latter case, the contractor shall
be entitled to receive interest, coupons or income only from
4 these securities which remain after such amount has been deducted.

6 Any assignment of retained payments made by the contractor
shall be honored by the Treasurer of State as part of the
8 procedure to accomplish the substitution of securities under this
section, provided that such assignment will not be made without
10 prior notification to the contracting agency of the State and the
Treasurer of State. Such assignment shall not impair the
12 equitable rights of the contractor's surety in the retained
payments or in the securities substituted therefor in the event
14 of the contractor's default in the performance of the contract or
in the payment of labor and material bills or other obligations
covered by said surety's bond.

16 Any contract made or awarded by the State, political
18 subdivision or department or official thereof shall include the
cost of necessary pollution control, if any, which will be
20 required during the execution of the contract, provided the cost
of pollution control activity which is required by legislation or
22 regulation, passed or promulgated after the date on which bids
are received for the project for which such contract is made or
24 awarded, shall be paid for in an equitable manner.

26 The Director of the Bureau of Public Improvements may
approve contracts with a provision for daily financial incentive
28 for projects completed before the scheduled date when it can be
demonstrated that the early completion will result in a financial
30 savings to the owner or to the State. The financial incentive
may not be greater than the projected daily rate of savings to
32 the owner or the State.

34 Sec. 2. 5 MRSA §1746-A is enacted to read:

36 **§1746-A. Retention of part of contract payment for state and**
38 **major school construction projects**

40 This section governs the retention of part of the contract
42 payment for public improvement projects. Nothing in this section
prevents the withholding of payment to cover good faith claims as
provided in Title 10, section 1118.

44 1. Definitions. As used in this section, unless the
46 context otherwise indicates, the following terms have the
following meanings.

48 A. "Owner" means the State, a school administrative unit or
a school building committee having an interest in real

2 property on which a public improvement project is or will be
3 constructed.

4 B. "Public improvement project" means the construction,
5 major alteration or repair of buildings or public works
6 owned or leased or hereafter constructed, acquired or leased
7 by the State or any department, officer, board, commission
8 or agency of the State that is in excess of \$1,000,000 in
9 value; or the construction, major alteration or repair of
10 school buildings that is in excess of \$1,000,000 in value
11 and for which state school construction aid is paid.

12 2. Bases of retention. Payment under a contract or
13 subcontract under a public improvement project may not be
14 withheld except for nonperformance, for known defects or for
15 retainage as provided in this section. Payment may not be
16 retained in anticipation of warranty defects for which there is
17 no evidence. As used in this subsection, "nonperformance"
18 includes, but is not limited to, defects in workmanship or
19 materials, failure to perform all of the work specified or delay
20 by the general contractor or subcontractor that causes adverse
21 financial consequences.

22 3. Line-item retainage. Payment and retention of payment
23 on a public improvement project must be based on contract line
24 items. Contract line items for each project must be identified
25 by the parties prior to the start of the project. If payment is
26 retained under this subsection, the amount retained may not
27 exceed 5% of the payment for approved work on that line item.
28 Nothing in this subsection obligates an owner to make payment of
29 a contract line item in the case of nonperformance on that line
30 item. When the owner determines that performance has been
31 completed or corrected for that line item, and has accepted the
32 work on the line item, the owner must authorize release of
33 retained payments at the next regular requisition meeting under
34 the contract and pay in accordance with subsection 7.

35 4. Retention of final 5% of line item payments. At the end
36 of the performance period for each contract line item, the owner
37 may retain up to the last 5% of payments due to the general
38 contractor on that line item. The total of any payments retained
39 under this subsection and subsection 3 may not exceed 5% of the
40 value of the line item. When work on the line item is accepted
41 as complete by the owner, the owner must pay in accordance with
42 subsection 7.

43 5. Inspection; substantial completion and payment. The
44 general contractor shall notify the owner in writing when the
45 project is substantially complete and the owner shall inspect the
46 project. If the owner agrees it is ready for issuance of the

2 substantial completion certificate, the owner shall establish
3 jointly with the general contractor a punch list and a list of
4 incomplete work remaining on the project and the parties shall
5 jointly assign dollar values to the items on those lists as
6 follows: for punch list items, 150% of the value; and for
7 incomplete items, 100% of the value. Assignment of punch list and
8 incomplete list values must occur not later than the next
9 regularly scheduled inspection under the contract or as otherwise
10 required by law. At this time, a substantial completion
11 certificate must be issued with the punch list, the list of
12 incomplete work and assigned item values attached. All retained
13 payments except those for punch list or incomplete items or good
14 faith claims as provided in Title 10, section 1118 must be
15 authorized for payment as part of the current requisition and
16 payment made in accordance with subsection 7. As used in this
17 section, "punch list" means a list, made near the completion of
18 work, indicating minor items to be corrected or work to be
19 performed by the general contractor or subcontractor in order to
20 complete the work as specified in the contract documents.

21 6. Payment of final retainage. The general contractor
22 shall ensure that any punch list items and any incomplete items
23 identified on the list provided in subsection 5 are corrected or
24 completed within a period of time mutually agreeable to the owner
25 and the general contractor. When one or more line items on the
26 list are corrected or completed, the general contractor may
27 notify the owner, who shall inspect the work. If the owner
28 determines that the work has been corrected or completed
29 satisfactorily, the owner shall pay the general contractor in
30 accordance with subsection 7.

31 7. Inspections; prompt payment; penalties. Any inspection
32 required by this section must take place not later than the next
33 regularly scheduled inspection under the contract or as otherwise
34 required by law. Any payment required under this section must be
35 made and any penalty for nonpayment or late payment of a required
36 payment under this section must be imposed in accordance with
37 Title 10, chapter 201-A. Any penalty imposed on an owner under
38 this section may not be paid with state funds or with funds that
39 are reimbursable by the State.

40 8. Subcontractors. The owner shall include in uniform
41 construction documents for public improvement projects provisions
42 establishing the same relationship between general contractors
43 and their subcontractors as this section establishes between the
44 owner and the general contractor with regard to payments and
45 retention of payments due under the contract for the project.

46 Sec. 3. 5 MRSAs §1747, as amended by PL 1997, c. 295, §1, is
47 further amended to read:
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2 **§1747. Questionnaire as prebid qualification**

4 The public official may require, from a firm proposing to
6 bid on public work duly advertised, a standard qualification
8 statement and a letter from a licensed bonding company confirming
10 that the firm has the financial capacity to perform the work
12 before furnishing that person with plans and specifications for
14 the proposed public work advertised.

16 The Director of General Services, after consultation with
18 the appropriate department head or superintendent of schools, may
20 refuse to release plans and specifications to a general
22 contractor or subcontractor for the purpose of bidding on a
24 project:

26 1. **Untimely completion.** If, in the opinion of the
28 director, there is evidence the general contractor or
30 subcontractor has not completed in a timely manner a prior
32 construction project or projects and the resulting noncompletion
34 clearly reflects disregard for the completion date and has
36 created a hardship for the owner;

38 2. **Incomplete work.** If, in the opinion of the director,
40 there is evidence the general contractor or subcontractor has a
42 history of inability to complete similar work;

44 3. **Insufficient resources.** If, in the opinion of the
46 director, there is evidence the general contractor or
48 subcontractor does not have sufficient resources to successfully
complete the work or if the general contractor or subcontractor
is unable to obtain bonding for the project; or

 4. **Misconduct.** If the general contractor or subcontractor
has been convicted of collusion or fraud or any other civil or
criminal violation relating to construction projects.

 If a general contractor or subcontractor is disqualified for
any of the reasons stated in subsection 1, 2 or 4, the director
may disallow the general contractor or subcontractor from bidding
on any similar public improvements for a period not to exceed one
year.

Sec. 4. Application. This Act applies to public improvement
projects for which contracts are signed on or after January 1,
2000.

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SUMMARY

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4 This bill applies to state construction projects over
6 \$1,000,000 in value and to school construction projects over
8 \$1,000,000 in value and for which state aid is received. The
10 bill limits the retention of contract payments on those public
12 improvement construction projects to line items in the project
14 contract and to situations in which unsatisfactory progress has
16 been made by a contractor or subcontractor. In those cases, up
18 to 5% of the payment due under the project contract may be
20 withheld until all contract requirements for the line item have
 been completed. Following completion of a line item, any
 retained payments must be paid promptly. At the end of a
 project, the value of punch list and incomplete items may be
 retained as well as withholding to cover good faith claims of the
 owner, including claims for unsatisfactory progress on the
 project. Over the course of the project, the owner makes the
 determination of how much of the payment due will be retained up
 to the 5% limit and as to whether satisfactory progress has been
 made on the project.