

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

Legislative Document

No. 577

S.P. 247

In Senate, March 6, 1989

Submitted by the Department of Transportation pursuant to Joint Rule 24.

Reference to the Committee on Transportation suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator THERIAULT of Aroostook.

Cosponsored by Representative MILLS of Bethel, Representative STROUT of Corinth and Representative MARTIN of Van Buren.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-NINE

An Act Relating to Contracts Administered by the Department of Transportation.



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

3 **Sec. 1. 5 MRSA §1749, 4th ¶,** as amended by PL 1971, c. 593,
5 §22, is further amended to read:

7 Nothing in this section shall ~~may~~ apply to the construction,
9 improvement or repair of any and all ways, roads and bridges with
appurtenances or other public improvements which, by law, are
under the supervision of the Department of Transportation.

11 **Sec. 2. 5 MRSA §1831, sub-§2,** as enacted by PL 1983, c. 188,
13 is amended to read:

15 2. **Limitation.** This section does not apply to purchase of
17 supplies, services, materials and equipment or to public
improvements, as described under chapters 153 and 155. This
19 section does not apply to construction, improvement or repair of
any and all ways, roads or bridges with appurtenances or other
public improvements which by law are under the supervision of the
Department of Transportation in accordance with section 1741.

21 **Sec. 3. 23 MRSA §52-A, sub-§§1 and 2,** as enacted by PL 1979, c.
23 580, are amended to read:

25 1. **Retention of part of contract price.** Notwithstanding any
27 other law, in any contract awarded by the Department of
Transportation and to which the department is a party for the
29 construction and maintenance of public highways, bridges and
other structures, the department may withhold up to 5% of the
money due the contractor until the project under the contract has
31 been accepted by or for the department. Upon receipt of a claim
from a subcontractor pursuant to subsection 2, the department may
withhold a greater percentage of the money due if it determines
that the additional amount may be required to pay the claim.
33 When the contract has been substantially completed, the
35 department may, upon request, further reduce the amounts withheld
37 if it deems it desirable and prudent. The reduction shall not
reduce the amount withheld to an amount less than the amount of
39 any pending claim against the contractor filed by a subcontractor
pursuant to subsection 2.

41 Under any contract subject to this section, the contractor may,
43 from time to time, withdraw the whole or any portion of the
amount retained for payments to the contractor pursuant to the
45 terms of the contract, upon depositing with the Treasurer of
State: A a negotiable certification of deposit, United States
47 treasury bonds, United States treasury notes, United States
treasury certificates of indebtedness, United States treasury
49 bills, ~~or~~ bonds or notes of the State ~~of Maine~~ or bonds of any
political subdivision of the State ~~of Maine~~. No amount shall ~~may~~
51 be withdrawn in excess of the market value of the securities at
the

1 time of deposit or of the par value of such securities, whichever
is lower.

3

4 The value of the amount retained and of the securities deposited
5 pursuant to this section shall not be reduced to an amount less
6 than the amount of any pending claim against the contractor filed
7 by a subcontractor pursuant to subsection 2.

9 Except as otherwise provided, the Treasurer of State shall
10 collect all interest or income when due on the obligations so
11 deposited and shall pay the same, when and as collected, to the
12 contractor who deposited the obligations. If the deposit is in
13 the form of coupon bonds, the Treasurer of State shall deliver
14 each coupon as it matures to the contractor. The Treasurer of
15 state State shall have the power to enter into a contract or
16 agreement with any national bank, trust company or safe deposit
17 company located in New England or New York City for custodial
18 care and servicing of any securities deposited with him the
19 Treasurer of State pursuant to this section. Such services shall
20 consist of the safekeeping of the securities and of all services
21 required to effectuate the purposes of this section.

23 Any amount deducted by the department pursuant to the terms of
24 the contract, from the retained payments due the contractor,
25 shall be deducted first from that portion of the retained
26 payments for which no security has been substituted, then from
27 the proceeds of any deposited security. In the latter case, the
28 contractor shall be entitled to receive interest, coupons or
29 income only from those securities which remain after such amount
has been deducted.

31

32 Any assignment of retained payments made by the contractor shall
33 be honored by the Treasurer of State as part of the procedure to
34 accomplish the substitution of securities under this section,
35 provided that such assignment shall not be made without prior
36 notification to the contracting agency of the State and the
37 Treasurer of State. Such assignment shall not impair the
38 equitable rights of the contractor's surety in the retained
39 payments or in the securities substituted therefor in the event
40 of the contractor's default in the performance of the contract or
41 in the payment of labor and material bills or other obligations
covered by the surety's bond.

43

44 **2. Settlement of claims by subcontractor.** In any contract
45 subject to this section, any subcontractor employed pursuant to
46 that contract may file a claim with the department. The claim
47 shall be only for final payment for goods and services received
48 by the contractor and provided by the subcontractor employed
49 pursuant to the contract and may be filed any time within 90 days
50 after delivery of final goods and services. If the contractor
51 fails or refuses to pay the claim, the subcontractor may submit
the claim to arbitration within an additional 60 days after

1 filing the claim with the department. The subcontractor shall
2 notify the department of the submission of the claim to
3 arbitration. Failure to file a claim with the department or
4 failure to submit it to arbitration as provided under this
5 subsection shall constitute a waiver of the claim with respect to
6 the department and shall further constitute a release of any
7 liability against the department by the subcontractor for
8 retained funds being returned to the contractor. The department
9 shall--submit--the--dispute--to--arbitration--and--both Both the
10 contractor and subcontractor shall be bound by the decision of
11 the arbitrator. The department shall pay any amount awarded by
12 the arbitrator, including any costs of arbitration, from money
13 due and securities deposited pursuant to subsection 1, up to the
14 full value of the money and securities. In addition, the
15 contractor shall pay to the subcontractor any interest or other
16 income which was earned and received by the contractor on the
17 money or securities awarded by the arbitrator from the date of
18 receipt of final goods and services to the date of payment of the
19 award by the contractor.

21 The membership of the American Arbitration Association shall be
22 used as arbitrators and the procedures used for arbitration shall
23 be in conformity with the Construction Industry Arbitration Rules
24 as administered by the American Arbitration Association.

27 STATEMENT OF FACT

29 Sections 1 and 2 of the bill clarify an oversight. Public
30 Law 1985, chapter 130, amended the definition of public
31 improvement in the Maine Revised Statutes, Title 5, section 1741
32 to exclude other public improvements which by law are under the
33 supervision of the Department of Transportation. The amendments
34 contained in sections 1 and 2 apply this new definition to Title
35 5, sections 1749 and 1831, and thus make all 3 sections
36 consistent.

37 Section 3 clarifies the procedures under which the
38 Department of Transportation administers certain contracts with
39 respect to protection of subcontractors claiming nonpayment.
40 Section 3 gives the department authority to retain payment in
41 addition to the 5% previously authorized upon receipt of a
42 subcontractor's claim if it determines that the additional amount
43 may be needed to pay the claim. Section 3 of the bill also
44 clarifies that the subcontractor must file a claim within 90 days
45 of final delivery of goods and services. If the contractor and
46 subcontractor cannot reach agreement on the claim, the bill gives
47 the subcontractor an additional 60 days to request arbitration.