

# MAINE STATE LEGISLATURE

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MAJORITY  
STATE AND LOCAL GOVERNMENT

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STATE OF MAINE  
HOUSE OF REPRESENTATIVES  
118TH LEGISLATURE  
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1108, L.D. 1551, Bill, "An Act to Amend the Amount of Retainage on Public Building Contracts"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

Sec. 1. 5 MRSA §1746, first ¶ is amended to read:

~~In~~ Except as provided in section 1746-A, in any contract awarded for any public improvement the State shall withhold 5% of the money due the contractor until the project under the contract 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.

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

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

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

A. "Owner" means the State, a school administrative unit or a school building committee having an interest in real property on which a public improvement project is or will be constructed.

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

10  
11 2. Retention for nonperformance only. Under a contract  
12 awarded for a public improvement project, the owner may not  
13 withhold payment due a general contractor except for  
14 nonperformance of the contract. Payment may not be retained to  
15 cure warranty defects in construction materials.

16  
17 3. Line item retainage. Payment and retention of payment  
18 on a public improvement project must be based on contract line  
19 items. Contract line items for each project must be identified  
20 by the parties prior to the start of the project. If payment is  
21 retained for nonperformance of any contract line item under this  
22 subsection, the amount retained may not exceed 5% of the payment  
23 due on that line item. When the owner determines that  
24 performance has been completed or corrected for that line item,  
25 the owner must authorize release of retained payments at the next  
26 regular requisition meeting under the contract and pay in  
27 accordance with subsection 7.

28  
29 4. Retention of final 5% of line item payments. At the end  
30 of the performance period for each contract line item, the owner  
31 may retain up to the last 5% of payments due to the general  
32 contractor on that line item. The total of any payments retained  
33 under this subsection and subsection 3 may not exceed 5% of  
34 payments due. When work on the line item is accepted as complete  
35 by the owner, the owner must pay in accordance with subsection 7.

36  
37 5. Inspection; substantial completion and payment. The  
38 general contractor shall notify the owner in writing when the  
39 project is substantially complete and the owner shall inspect  
40 the project. If the owner agrees it is ready for issuance of the  
41 substantial completion certificate, the owner shall establish  
42 jointly with the general contractor a punch list and a list of  
43 incomplete work remaining on the project and the parties shall  
44 jointly assign dollar values to the items on those lists as  
45 follows: for punch list items, 150% of the value; and for  
46 incomplete items, 100% of the value. Assignment of punch list  
and incomplete list values must occur not later than the next

2 regularly scheduled inspection under the contract or as otherwise  
3 required by law. At this time, a substantial completion  
4 certificate must be issued with the punch list, the list of  
5 incomplete work and assigned line item values attached. All  
6 retained payments except those for punch list or incomplete items  
7 or good faith claims as provided in Title 10, section 1118 must  
8 be authorized for payment as part of the current requisition and  
9 payment made in accordance with subsection 7. As used in this  
10 section, "punch list" means a list, made near the completion of  
11 work, indicating minor items to be corrected or work to be  
12 performed by the general contractor or subcontractor in order to  
13 complete the work as specified in the contract documents.

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

24 7. Inspections; prompt payment; penalties. Any inspection  
25 required by this section must take place not later than the next  
26 regularly scheduled inspection under the contract or as otherwise  
27 required by law. Any payment required under this section must  
28 be made and any penalty for nonpayment or late payment of a  
29 required payment under this section must be imposed in accordance  
30 with Title 10, chapter 201-A. Nothing in this section prevents  
31 the withholding of payment to cover good faith claims as provided  
32 in Title 10, section 1118. Any penalty imposed on an owner under  
33 this section may not be paid with state funds or with funds that  
34 are reimbursable by the State.

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

41 Sec. 3. 5 MRSA §1747, as amended by PL 1997, c. 295, §1, is  
42 further amended to read:

43 **§1747. Questionnaire as prebid qualification**

44 The public official may require, from a firm proposing to  
45 bid on public work duly advertised, a standard qualification  
46 document.

statement and a letter from a licensed bonding company confirming that the firm has the financial capacity to perform the work before furnishing that person with plans and specifications for the proposed public work advertised.

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

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

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

3. **Insufficient resources.** If, in the opinion of the director, there is evidence the general contractor or 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, 1999.'

Further amend the bill by inserting at the end before the summary the following:

**FISCAL NOTE**

The costs associated with these new public improvement contract and inspection procedures can be absorbed by the

affected State departments and agencies utilizing existing budgeted resources.'

### SUMMARY

This amendment replaces the bill. The amendment applies to state construction projects over \$1,000,000 in value and to school construction projects over \$1,000,000 in value and for which state aid is received. The amendment limits the retention of contract payments on those public improvement construction projects to line items in the project contract and to situations in which unsatisfactory progress has been made by a contractor or subcontractor. In those cases, up to 5% of the payment due under the project contract may be 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.