

MAINE STATE LEGISLATURE

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119th MAINE LEGISLATURE

FIRST REGULAR SESSION-1999

Legislative Document

No. 529

S.P. 173

In Senate, January 19, 1999

**An Act Regarding Retainage on Major State and School Construction
Projects.**

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

A handwritten signature in cursive script, reading 'Joy J. O'Brien'.

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator NUTTING of Androscoggin.
Cosponsored by Representative BUMPS of China and
Senator MURRAY of Penobscot, Representatives: BROOKS of Winterport, CAMPBELL of
Holden, PLOWMAN of Hampden.

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

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

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

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

22 **§1746-A. Retention of part of contract payment for state and**
24 **major school construction projects**

26 This section governs the retention of part of the contract
28 payment for public improvement projects as defined in subsection
30 1. This section does not prevent the withholding of payment to
32 cover good faith claims as provided in Title 10, section 1118.

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

40 A. "Nonperformance" includes, but is not limited to,
42 defects in workmanship or materials, failure to perform all
44 the work specified or delay by the general contractor or
46 subcontractor that causes adverse financial consequences.

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

C. "Public improvement project" means: the construction,
major alteration or repair of buildings or public works
owned or leased or hereafter constructed, acquired or leased
by the State or any department, officer, board, commission
or agency of the State when that construction, major
alteration or repair of buildings or public works is in
excess of \$1,000,000 in value; or the construction, major
alteration or repair of school buildings that is in excess
of \$1,000,000 in value and for which state school
construction aid is paid.

D. "Punch list" means a list made near the completion of
work that indicates minor items to be corrected or work to
be performed by the general contractor or subcontractor in
order to complete the work as specified in the contract
documents.

2 2. Bases of retention. Payment under a contract or
4 subcontract for a public improvement project may not be withheld
6 except for nonperformance, for known defects or for retainage as
 provided in this section. Payment may not be retained in
 anticipation of warranty defects for which there is no evidence.

8 3. Line item retainage. Payment and retention of payment
10 on a public improvement project must be based on contract line
12 items. Contract line items for each project must be identified
14 by the parties prior to the start of the project. If payment is
16 retained under this subsection, the amount retained may not
18 exceed 5% of the payment for approved work on that line item. An
20 owner under this subsection is not obligated to make payment on a
 contract line item in the case of nonperformance on that line
 item. When the owner determines that performance has been
 completed or corrected for that line item and has accepted the
 work on the line item, the owner must authorize release of
 retained payments at the next regular requisition meeting under
 the contract and pay in accordance with subsection 7.

22 4. Value of line item. At the end of the performance
24 period for each contract line item, the owner may retain up to
26 the last 5% of payments due to the general contractor on that
28 line item. The total of any payments retained under this
 subsection and subsection 3 may not exceed 5% of the value of the
 line item. When work on the line item is accepted as complete by
 the owner, the owner must pay in accordance with subsection 7.

30 5. Inspection; substantial completion and payment. The
32 general contractor shall notify the owner in writing when the
34 project is substantially complete, and the owner shall inspect
36 the project. If the owner agrees that the project is ready for
38 issuance of the substantial completion certificate, the owner
40 shall establish jointly with the general contractor a punch list
42 and a list of incomplete work remaining on the project, and the
44 parties shall jointly assign dollar values to the items on those
46 lists as follows: for punch list items, 150% of the value; and
48 for incomplete items, 100% of the value. Assignment of punch
50 list and incomplete list values must occur not later than the
52 next regularly scheduled inspection under the contract or as
 otherwise required by law. At this time, a substantial
 completion certificate must be issued with the punch list, the
 list of incomplete work and the assigned item values attached.
 All retained payments except those for punch list or incomplete
 items or good faith claims as provided in Title 10, section 1118
 must be authorized for payment as part of the current
 requisition, and payment must be made in accordance with
 subsection 7.

52 6. Payment of final retainage. The general contractor
 shall ensure that any punch list items and any incomplete items
 identified on the list provided in accordance with subsection 5

2 are corrected or completed within a period of time mutually
3 agreeable to the owner and the general contractor. When one or
4 more line items on the list are corrected or completed, the
5 general contractor may notify the owner, who shall inspect the
6 work. If the owner determines that the work has been corrected
7 or completed satisfactorily, the owner shall pay the general
8 contractor in accordance with subsection 7.

9
10 7. Inspections; prompt payment; penalties. Any inspection
11 required by this section must take place not later than the next
12 regularly scheduled inspection under the contract or as otherwise
13 required by law. A payment required under this section must be
14 made and a penalty for nonpayment or late payment of a required
15 payment under this section must be imposed in accordance with
16 Title 10, chapter 201-A.

17
18 8. Subcontractors. The owner shall include in uniform
19 construction documents for public improvement projects provisions
20 establishing the same relationship between general contractors
21 and their subcontractors as this section establishes between the
22 owner and the general contractor with regard to payments and
23 retention of payments due under the contract for the project.

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

26 **§1747. Questionnaire as prebid qualification**

27
28 The public official may require, from a firm proposing to
29 bid on public work duly advertised, a standard qualification
30 statement and a letter from a licensed bonding company confirming
31 that the firm has the financial capacity to perform the work
32 before furnishing that ~~person~~ firm with plans and specifications
33 for the proposed public work advertised.
34

35 The Director of General Services, after consultation with
36 the appropriate department head or superintendent of schools, may
37 refuse to release plans and specifications to a general
38 contractor or subcontractor for the purpose of bidding on a
39 project:
40

41
42 **1. Untimely completion.** If, in the opinion of the
43 director, there is evidence the general contractor or
44 subcontractor has not completed in a timely manner a prior
45 construction project or projects and the resulting noncompletion
46 clearly reflects disregard for the completion date and has
47 created a hardship for the owner;
48

49
50 **2. Incomplete work.** If, in the opinion of the director,
51 there is evidence the general contractor or subcontractor has a
52 history of inability to complete similar work;

