

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)



# 121st MAINE LEGISLATURE

## FIRST REGULAR SESSION-2003

---

Legislative Document

No. 110

H.P. 119

House of Representatives, January 21, 2003

### An Act to Clarify Rights of Retainage in Public Construction Contracts

---

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

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative MILLS of Cornville.

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

4 **Sec. 1. 5 MRSA §1746**, as amended by PL 1989, c. 483, Pt. A,  
§19, is repealed and the following enacted in its place:

6 **§1746. Retainage in public construction contracts**

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

12 A. "Designer" means the architect or engineer designated by  
14 the contract documents to design the work or to provide  
contract administration for the owner.

16 B. "Punch list" means an inventory of work that remains  
deficient or incomplete after substantial completion.  
18 "Punch list" includes reasonable estimates of cost for  
correction or completion of the work contained on the list.  
20 "Punch list" does not include deficiencies discovered after  
acceptance of the work.

22 C. "Substantial completion" means the stage in the progress  
24 of the work when the work or designated portion of the work  
is sufficiently complete in accordance with the contract  
26 documents so the owner can occupy or utilize the work for  
its intended use.

28 **2. Retainage.** In a contract awarded for a public  
30 improvement, the public owner may retain 5% of the money due the  
contractor until substantial completion of the work. At  
32 substantial completion, the owner and the contractor shall  
inspect the work and prepare a punch list. The owner may, after  
34 inspection of the work, withhold for defective or incomplete work  
only those funds that are sufficient to account for 1.5 times the  
36 value of punch list work. As punch list work is completed, the  
retainage held by the owner must be correspondingly reduced.  
38 Funds may not be retained in anticipation of warranty claims but  
may be retained as directed by the contractor's surety or as  
40 necessary to account for liquidated damages or other contract  
defaults as determined by the designer.

42 **3. Designer's role.** Issues between the contractor and the  
44 owner concerning substantial or final completion or concerning  
the scope or cost of punch list work and any other questions  
46 necessary to determine when retained funds are due to be released  
must be promptly resolved by the designer, whose decisions are  
48 not binding by virtue of this section for any other purpose.

2 4. Contractor's remedy. An owner that retains for more  
4 than 30 days funds in excess of those properly calculated from  
6 the punch list or an owner that retains contract funds more than  
30 days beyond final completion is liable to the contractor for  
interest on overdue amounts at the rate of 1.5% per month and for  
reasonable attorney's fees for collection of overdue funds.

8 5. Secured releases. Under a contract made for a public  
10 improvement, the contractor may withdraw retained funds upon  
12 depositing with the Treasurer of State or the public owner  
negotiable public securities or certificates of deposit greater  
in value than the amount withdrawn.

14 6. Authority of Treasurer of State or owner. The Treasurer  
16 of State or public owner shall pay over to the contractor all net  
18 income from the escrowed securities as it is received. The  
20 Treasurer of State or owner may contract with a suitable  
financial institution for custodial care and servicing of any  
securities deposited pursuant to this section.

22 7. Deductions. Any amount deducted by the public owner  
24 pursuant to the terms of the contract from the retained payments  
26 due the contractor must be deducted first from that portion of  
28 the retained payments for which no security has been substituted,  
30 then from the proceeds of any deposited security. In the case of  
a deduction from the proceeds of a deposited security, the  
contractor is entitled to receive interest, coupons or income  
only from those securities that remain after such amount has been  
deducted.

32 8. Assignments. Any assignments of retained payments made  
34 by the contractor must be honored by the party holding the  
36 securities as part of the procedure to accomplish the  
38 substitution of securities under this section, as long as the  
40 assignment is not made without prior notification to the  
42 contracting agency of the State and the party holding the  
securities. Such assignment may not impair the equitable rights  
of the contractor's surety in the retained payments or in the  
securities substituted for the retained payments in the event 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 the surety's bond.

44 9. Environmental control costs. Any contract made for a  
46 public improvement must include the cost of environmental control  
48 measures required for execution of the contract; the cost of  
50 environmental control activity that is required by legislation or  
rules passed or adopted after the date on which bids are received  
for the project for which such contract is made or awarded must  
be paid for in an equitable manner.

2           10. Daily financial incentive. The Director of the Bureau  
of General Services may approve contracts with a provision for a  
4           daily financial incentive for projects completed before the  
scheduled date when it can be demonstrated that the early  
6           completion will result in a financial savings to the public  
owner. The financial incentive may not exceed the projected  
8           daily rate of savings to the owner.

10           **Sec. 2. Application.** This Act applies to public construction  
contracts in which substantial completion is reached after  
12           September 31, 2003.

14

### SUMMARY

16

          This bill amends the law governing public construction  
18           contracts, providing definitions of the terms "designer," "punch  
list" and "substantial completion." The bill also clarifies  
20           rights of retainage in public construction contracts; the  
designer's role in resolving questions pertaining to the time  
22           when retained funds are due; and the contractor's remedy when an  
owner retains funds for more than 30 days after final completion  
24           of the contract.