

# MAINE STATE LEGISLATURE

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# 122nd MAINE LEGISLATURE

## FIRST REGULAR SESSION-2005

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Legislative Document

No. 1478

S.P. 503

In Senate, March 24, 2005

### **An Act To Clarify Rights of Retainage in Public Improvement Construction Contracts**

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Reference to the Committee on State and Local Government 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 MILLS of Somerset.

2  
3 **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,  
5 §19, is further amended by inserting at the end a new paragraph  
6 to read:

7 This section is repealed January 1, 2008.

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

9 **§1746-A. Retainage in public improvement construction contracts**

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

13 A. "Designer" means the architect, engineer or interior  
14 design professional designated by contract documents to  
15 design a public improvement or to provide contract  
16 administration for the owner.

17 B. "Punch list" means an inventory of work that remains  
18 deficient or incomplete after substantial completion. A  
19 punch list includes reasonable estimates of cost for  
20 correction or completion of the work contained on the list.  
21 Deficiencies discovered after acceptance of the work are not  
22 punch list items but may be covered by warranty or contract  
23 obligations.

24 C. "Substantial completion" means the stage in the progress  
25 of a public improvement when the work or a designated  
26 portion thereof is sufficiently complete in accordance with  
27 the contract documents that the owner can occupy or use the  
28 public improvement for its intended use.

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

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

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

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

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

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

38           8. Assignments. Any assignment of retained payments made  
40           by the contractor of a public improvement must be honored by the  
party holding the securities as part of the procedure to  
42           accomplish the substitution of securities under this section,  
provided that such an assignment may not be made without prior  
44           notification to the contracting agency of the State and the party  
holding the securities. Such an assignment does not impair the  
46           equitable rights of the contractor's surety in the retained  
payments or in the securities substituted therefor in the event  
48           of the contractor's default in the performance of the contract or  
in the payment of labor and material bills or other obligations  
50           covered by the surety's bond.

