

Department of Legislative Services  
Maryland General Assembly  
2015 Session

FISCAL AND POLICY NOTE

House Bill 343 (Delegate Impallaria)  
Economic Matters

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**Real Property - Construction Contracts - Retention Proceeds - Repeal**

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This bill repeals provisions that limit the retention proceeds to a maximum of 5% of funds from a construction contract by an owner or by a contractor. Accordingly, an owner or contractor may negotiate retention proceeds that exceed 5% of the funds from a construction contract, even if the contractor provides 100% performance and payment security.

The bill applies only prospectively and does not affect any contract entered into before the bill's October 1, 2015 effective date.

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**Fiscal Summary**

**State Effect:** The bill is not likely to have a material impact on State finances. Primary procurement agencies and the Maryland Transportation Authority are subject to different retainage provisions and may withhold retention proceeds by any amount reasonably believed to be necessary to protect State interests.

**Local Effect:** Potential minimal expenditure reduction for local governments to the extent that retention proceeds greater than 5% of a contract can be withheld to ensure contract performance.

**Small Business Effect:** Potential meaningful, to the extent that construction contractors and subcontractors are small businesses.

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## Analysis

### **Current Law:**

#### *Retention Proceeds:*

State law limits to 5% the percentage of a construction contract that an owner or contractor can retain to guarantee that a contractor or subcontractor completes the work required by the contract if the contractor has provided 100% performance and payment security. If an owner retains less than 5% of a contract from a contractor, the contractor may not retain more than that amount from a subcontractor. However, statute provides that additional amounts may be withheld if a contractor's or subcontractor's performance warrants it. The statute exempts contracts of less than \$250,000 and any projects funded wholly or partially by the Department of Housing and Community Development.

#### *Prompt Payment*

Other protections for parties to construction contracts remain in place. For contracts between private parties, if the contract does not provide for specific dates or times for payment, an owner must pay a contractor any undisputed amounts under the written terms of the contract within the earlier of 30 days after the day on which (1) the occupancy permit is granted or (2) the owner or owner's agent takes possession. If the contract provides for specific dates or times of payment, the owner must pay the contractor within seven days after the date or time specified in the contract. If the contract is not with the owner, the contractor or subcontractor must pay undisputed amounts owed to its subcontractors within seven days after receiving each payment for its subcontractor's work or materials.

#### *Remedies for Violations*

In addition to any other available remedy, a court may award equitable relief for prompt payment of undisputed amounts that it considers necessary, including enjoining further violations. A court may also award to the prevailing party interest from the date the court determines that the amount owed was due and reasonable costs. The court may award reasonable attorney's fees if it determines that an owner, contractor, or subcontractor has acted in bad faith by failing to pay any undisputed amounts as required.

**Small Business Effect:** For future contracts involving small businesses that are affected by this bill, the repeal of the limitation on the percentage of proceeds under a construction contract that may be retained could lead to more money being withheld from general contractors and subcontractors. Additionally, subcontractors may be adversely impacted by the removal of the provision requiring that, if an owner retains less than 5% of a

contract from a contractor, the contractor may not retain more than that amount from a subcontractor.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** State Department of Assessments and Taxation, Office of the Attorney General (Consumer Protection Division), Judiciary (Administrative Office of the Courts), Department of Legislative Services

**Fiscal Note History:** First Reader - February 16, 2015  
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