

**ONE HUNDRED PERCENT CONFUSION:  
CONSTRUCTION CONTRACT RETAINAGE AND THE "100% SECURITY"  
By Patrick M. Martyn, Esquire**

The Maryland Legislature has again chipped away at the freedom of parties to contract by passing Senate Bill 313 which limits the amount of retention proceeds which may be held by an Owner under a construction contract. Unfortunately, but perhaps not surprisingly, the effect of these restrictions may prove to be confusing and a subject of dispute when negotiating a construction contract.

In general terms, Senate Bill 313 extends to the realm of private construction contracts certain limitations on the retention of contract proceeds which apply to State agencies when entering into State construction contracts.

Specifically, pursuant to Senate Bill 313 an Owner may not retain more than five percent (5%) of the contract price to guaranty the contractor's performance under any construction contract for which the Contractor "has furnished 100% security to guarantee the performance of a contract and 100% security to guarantee payment for labor and materials." The bill also provides that the amount of any retention under the terms of a contract between a Contractor and any of its subcontractors may not exceed the percentage of retention proceeds under the construction contract between the Contractor and the Owner. Notwithstanding these limitations, the bill does not prohibit the withholding of any amount due from an Owner to Contractor if the Owner reasonably determines that the Contractor's performance under the contract provides reasonable grounds for withholding the additional amount. Identical provisions apply with respect to Contractors and subcontractors under subcontracts.

More troubling than the fact that the Legislature found it necessary to restrict the parties' ability to freely contract, is the lack of clarity in the legislation and the resulting uncertainty as to when these limitations on retention actually apply.

Although the language of Senate Bill 313 clearly states that the limitation on retention amounts applies to construction contracts in which the Contractor has furnished 100% security to guarantee performance and payment, it does not provide any clues as to what actually constitutes 100% security to guarantee performance and payment.

Does 100% security mean a bond or letter of credit in the amount of the contract sum? Or does a written third-party guaranty from a principal or affiliate of the contractor suffice? A review of the corresponding, and pre-existing, COMAR regulation imposing the same restriction on State construction contracts does not provide any additional guidance.

Although this lack of clarity may not have proven to be a source of much difficulty in negotiating State construction contracts, that may not prove to be the case in

the realm of private construction contracts in which the parties' respective bargaining power may tend to be more equal.

Thankfully, there is one aspect of Senate Bill 313 which is 100% clear and unambiguous. Senate Bill 313 does not apply to a contract of less than \$250,000 or a contract or subcontract funded in whole or in part through the Department of Housing and Community Development.

If you have any questions regarding compliance with this new law or need assistance with any of your real estate needs, please contact Patrick Martyn (410-727-6617, or [pmartyn@rosenbergmartin.com](mailto:pmartyn@rosenbergmartin.com)) or any attorney in our real estate group:

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