

**DPARB Monthly Meeting  
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**Retainage in Public Sector Contracts**

**1. What is “retainage”?**

A sum of money earned by a contractor that is withheld until the contract is completed. Is intended as an assurance and financial incentive that the project will be timely completed by the contractor. It is usually a percentage of the total contract price and is specifically mentioned in a contract. Used in many states especially for construction contracts.

**2. Montana Law Concerning Retainage**

A) **MCA Section 18-2-316** (attached): Applies specifically to “construction” contracts in public sector projects.

B) Is silent on retainage for professional **consulting** contracts-leaving this as a discretionary/negotiable item within a consulting contract.

**3. Retainage Distinguished From Payment and Performance Bonds**

A) **Payment Bond:** Insurance purchased by contractor that allows Owner to file a claim if contractor fails to pay employees, subcontractors, etc. Insurance company issuing the bond steps in and pays on behalf of contractor.

B) **Performance Bond:** Insurance purchased by contractor that allows Owner to file a claim if contractor fails to complete job or is unable to complete due to financial distress, inability to perform requirements of contract for whatever reason. Insurance company issuing the bond hires and pays for another contractor to step in and complete project. Owner usually does not have additional financial obligation.

C) **Claim Procedure:** Owner makes a “claim” on Payment or Performance Bond in accordance with claims procedure specifically provided in the

bond. In practice, claim on either type of bond is usually a last resort by Owner after attempt to informally resolve issues has been unsuccessful.

D) **Impact of a Claim:** Claims on these bonds can and often do negatively impact contractor's ability to obtain bonds for future projects-therefore additional incentive for project to be completed by contractor without the need for a claim by Owner.

E) **Retainage is Different:** usually no issue about Payment of workers/subs and no issue about ability to perform contract; rather the retained money is security for the job to be completed timely and as required by contract.

#### 4. **Pros/Cons of Retainage:**

**Pros:** Owners/general contractors like it-financial insurance for them; subcontractors do not like it. Protects taxpayers as much as possible on public contracts.

**Cons:** Some contractors believe it requires them to complete job without full payment and they are then temporarily financing a small part of the project. As a practical matter, like many other contractual items, retainage is part of the bidding calculation by contractors.

#### 5. **Nation-Wide Practices**

A)**Varies**-some states have reduced percentage allowed; some have eliminated it. Many allow it but with a maximum limit-such as Montana's statute MCA 18-2-316.

#### 6. **Conclusion:**

A) Prudent in **construction** contracts.

B) Policy decision as to including/excluding in **consulting** contracts-most of consulting usually completed by project start, although some consulting contracts include construction manage by consultant while construction project is in progress.

C) neither required nor prohibited in consulting contracts-discretion by public entity and subject to negotiation in contract.

West's Montana Code Annotated
Title 18. Public Contracts
Chapter 2. Construction Contracts
Part 3. Contract Requirements and Restrictions

**MCA 18-2-316**

**18-2-316. Limit on retainage for public contracts**

Currentness

(1) The maximum retainage applied to construction contracts administered by the state of Montana or any department, agency, or political subdivision of the state of Montana, by any county, municipality, or political subdivision of a county or municipality, or by a school district may not exceed 5% if the contractor is performing by the terms of the contract.

(2) The retainage percentage withheld by a government entity, as provided for in subsection (1), from a contractor is the maximum retainage percentage that a contractor may withhold from a subcontractor.

(3) For the purposes for this section, "retainage" means the ratio, in percent, of funds retained to the total amount to be paid to the contractor by the government entity.

**Credits**

Enacted by Laws 1999, ch. 222, § 2.

MCA 18-2-316, MT ST 18-2-316

Current through the 2013 Session, and the 2014 general election. Court Rules in the Code are current with amendments received through August 1, 2014.

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