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Notice Regarding Citation of these Laws

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The Maryland "Little Miller Act"

Maryland Code, State Finance and Procurement Law, Division II, General Procurement Law, Title 17, Special Provisions – State and Local Subdivisions, Subtitle 1, Security for Construction Contracts, Sections 101 through 111

Note: An amendment to § 17-104 took effect on October 1, 2009. See below.

§ 17-101. Definitions.

(a) *In general.*- In this subtitle the following words have the meanings indicated.

(b) *Payment security.*- "Payment security" means security to guarantee payment for labor and materials, including leased equipment, under a contract for construction.

(c) *Performance security.*- "Performance security" means security to guarantee the performance of a contract for construction.

(d) *Public body.*- "Public body" means:

- (1) the State;
- (2) a county, municipal corporation, or other political subdivision;
- (3) a public instrumentality; or
- (4) any governmental unit authorized to award a contract.

(e) *Supplier.*-

- (1) "Supplier" means a person who supplies labor or materials.
- (2) "Supplier" includes a lessor of equipment to the extent of the fair rental value of the equipment.

§ 17-102. Scope of subtitle.

(a) *In general.*- This subtitle does not limit the authority of a public body to require performance security in addition to, or in cases other than, those specified under §§ 17-103, 17-104, 17-106, and 17-107 of this subtitle.

(b) *Application to construction contracts.*- This subtitle applies only to security for a construction contract.

(c) *Application to Baltimore City.*-

(1) By ordinance, Baltimore City may provide for a program to satisfy the bonding requirements under §§ 17-103, 17-104, 17-106, and 17-107 of this subtitle with respect to any construction contract:

(i) that does not exceed \$200,000; and

(ii) for which State money is not used.

(2) The program shall provide for payment security of at least 50% of the total amount payable under the contract.

§ 17-103. Security on construction contracts.

(a) *Contracts exceeding \$100,000.*-

(1) Before a public body awards a construction contract exceeding \$100,000, the contractor shall provide payment security and performance security that meet the requirements of § 17-104 of this subtitle.

(2) The security shall be:

(i) for performance security, in an amount that the public body considers adequate for its protection; and

(ii) for payment security, at least 50% of the total amount payable under the contract.

(b) *Contracts exceeding \$25,000 but not exceeding \$100,000.*- A public body, other than the State or a unit of the State government, may require payment security or performance security for a construction contract if:

(1) the contract exceeds \$25,000 but does not exceed \$100,000; and

(2) the amount of the security does not exceed 50% of the contract amount.

NOTE: THE FOLLOWING IS THE TEXT OF AMENDED § 17-104, WHICH TOOK EFFECT ON OCTOBER 1, 2009:

§ 17-104. Type of security

(a) *In general.*- Payment security or performance security required under this subtitle shall be:

(1) a bond executed by a surety company authorized to do business in the State;

(2) cash in an amount equivalent to a bond; or

(3) cash in an amount that is satisfactory to the public body awarding the contract.

(b) Amount of mortgage or deed of trust included.-

(1) Subject to paragraphs (2) and (3) of this subsection, performance security may include the granting of a mortgage or deed of trust on real property located within the State if such security is satisfactory to the public body awarding the contract.

(2) The face amount of a mortgage or deed of trust on real property granted as security under this subsection may not exceed 75% of the contractor's equity interest in the property.

(3) A mortgage or deed of trust accepted under this subsection shall be recorded by an official designated by the public body accepting the mortgage or deed of trust in the land records of the county where the real property is situated in accordance with § 3-103 of the Real Property Article.

THE FOLLOWING IS THE TEXT OF FORMER § 17-104, WHICH WAS SUPERSEDED ON OCTOBER 1, 2009:

§ 17-104. Type of security

(a) *In general.-* Payment security or performance security required under this subtitle shall be:

(1) a bond executed by a surety company authorized to do business in the State;

(2) a bond executed by an individual surety that meets the requirements of this section;

(3) cash in an amount equivalent to a bond; or

(4) another form of security:

(i) authorized by federal or State regulation; or

(ii) that is satisfactory to the public body awarding the contract.

(b) Amount of mortgage or deed of trust included.-

(1) Subject to paragraphs (2) and (3) of this subsection, performance security may include the granting of a mortgage or deed of trust on real property located within the State if such security is satisfactory to the public body awarding the contract.

(2) The face amount of a mortgage or deed of trust on real property granted as security under this subsection may not exceed 75% of the contractor's equity interest in the property.

(3) A mortgage or deed of trust accepted under this subsection shall be recorded by an

official designated by the public body accepting the mortgage or deed of trust in the land records of the county where the real property is situated in accordance with § 3-103 of the Real Property Article.

(c) *Requirements for acceptance as payment security.*- A bond executed by an individual surety shall be acceptable as payment security or performance security under this subtitle if:

(1) the contractor has been denied corporate surety credit;

(2) the individual surety only transacts business through an insurance agency licensed by the Maryland Insurance Administration;

(3) the individual surety attaches an affidavit of individual surety in a format that the Board requires to the bid security;

(4) the individual surety provides a UCC-1 filing security interest to the public body for one or more of the assets listed in item (5)(i) through (iv) and (vi) of this subsection at the time the bond is furnished; and

(5) the individual surety pledges one or more assets in an amount equal to or greater than the aggregate penal amounts of the bonds required by the solicitation, including:

(i) cash or certificates of deposit;

(ii) cash equivalents held with a federally insured financial institution, or assets that are evidenced by a security interest, including an irrevocable trust receipt issued by the financial institution or by an independent trustee in the name of the public body that:

1. are issued in accordance with § 9-109 of the Commercial Law Article;

2. contain a payout clause in the event that default cannot be remedied; and

3. identify the solicitation or contract number for which the security interest is provided;

(iii) United States government securities at market value;

(iv) stocks and bonds that:

1. are actively traded on a national United States security exchange;

2. are accompanied by certificates issued in the name of the individual surety; and

3. are pledged at 90% of their 52-week low, as reflected at the time of submission of the bond;

(v) real property:

1. that is owned by the contractor or individual surety in fee simple or with cotenants that all agree to act jointly;
2. that may include the granting of a mortgage or deed of trust on real property located within the State if satisfactory to the public body;
3. for which the face amount of the mortgage or deed of trust on the real property located within the State does not exceed 75% of the contractor's or individual surety's equity interest in the property; and
4. for which a mortgage or deed of trust accepted under this subsection is recorded by an official designated by the unit where the real property is situated in accordance with § 3-103 of the Real Property Article; or

(vi) irrevocable letters of credit that:

1. are issued by a federally insured financial institution in the name of the contracting agency;
2. identify the agency and the solicitation or contract number for which the irrevocable letter of credit is provided; and
3. contain a payout clause if that default cannot be remedied.

(d) *Restrictions on use of pledged property.*- Any asset listed under subsection (c)(5) of this section shall be pledged only for the intended security and may not be pledged for any other security or contract in or outside the State until the asset is released by the public body.

§ 17-105. Form of security; filing.

(a) *In general.*- Security under this subtitle:

(1) if required by the State or a unit of the State government, shall be payable to "the State of Maryland"; or

(2) if required by any other public body, shall be payable to that public body.

(b) *Approval.*- The form of payment security or performance security shall be approved:

(1) for the State or a unit of the State government, by the Attorney General; and

(2) for any other public body, by its attorney.

(c) *Filing required.*- The contractor shall file the security or evidence of a trust account established as security:

(1) if payable to the State under this section, in the Office of the Comptroller; or

(2) if payable to any other public body, in the appropriate office of that public body.

§ 17-106. Certification of payments.

Before a contractor receives a progress or final payment under a contract covered by payment security, the contractor shall certify in writing that, in accordance with contractual arrangements, suppliers:

- (1) have been paid from the proceeds of previous progress payments; and
- (2) will be paid in a timely manner from the proceeds of the progress or final payment currently due.

§ 17-107. Waiver of mechanics' liens.

A contractor who provides payment security under this subtitle in connection with a construction contract awarded by a public body need not execute a waiver of a mechanics' lien to the public body.

§ 17-108. Action on security.

(a) *In general.*- Subject to subsection (b) of this section, a supplier may sue on payment security if the supplier:

- (1) supplied labor or materials in the prosecution of work provided for in a contract subject to this subtitle; and
- (2) has not been paid in full for the labor or materials within 90 days after the day that the person last supplied labor or materials for which the claim is made.

(b) *Payment owed by subcontractor.*-

(1) A supplier who has a direct contractual relationship with a subcontractor or sub-subcontractor of a contractor who has provided payment security but no contractual relationship with the contractor may sue on the security if the supplier gives written notice to the contractor within 90 days after the labor or materials for which the claim is made were last supplied in prosecution of work covered by the security.

(2) A notice under this subsection:

(i) shall state with substantial accuracy the amount claimed and the person to whom the labor or material was supplied; and

(ii) shall be sent by certified mail to the contractor at the contractor's residence or a place where the contractor has an office or does business.

(c) *Certification of security.*-

(1) On request by a person who submits an affidavit verifying that the person has supplied labor or materials but has not been paid or is being sued under this section, the Comptroller or the officer in charge of the office where the payment security or evidence of security is required to be filed shall issue:

- (i) a certified copy of the payment bond; or
- (ii) for other security, a certified statement of the security.

(2) The person requesting certification shall pay a reasonable fee, set by the Comptroller or other officer required to issue the certification, to cover the costs of preparation.

(3) A certification under this section is prima facie evidence of the contents, execution, and delivery of payment security.

(d) *Executory contract between supplier and contractor.-*

(1) An executory contract between a supplier and a contractor or subcontractor that is related to a construction contract may not waive or require the supplier to waive the right to sue on payment security under this section.

(2) A provision in an executory contract between a supplier and a contractor or subcontractor that is related to a construction contract and that conditions payment to the supplier on receipt of payment by the person from a public body or other third party, may not abrogate or waive the right of the supplier to sue on payment security under this subtitle.

(3) A provision of a contract made in violation of this subsection is void as against the public policy of the State.

§ 17-109. Venue; limitations; costs.

(a) *Venue.-* An action on a payment bond required by this subtitle shall be filed in the appropriate court of the county where:

- (1) the contract was executed and performed; or
- (2) the contractor has its principal place of business.

(b) *Limitations period.-* An action on a payment bond required by this subtitle shall be filed within 1 year after the public body finally accepts the work performed under the contract.

(c) *Costs.-* An obligee named in a bond or a trustee for any other security is not liable for any costs in connection with an action on a payment bond required by this subtitle.

§ 17-110. Retention of percentage of total amount of contract as security.

(a) *Applicability of subsections (b)(1) through (3), (c) and (d).-* Subsections (b)(1), (2), and (3), (c), and (d) of this section do not apply to an entity that is required to comply with the provisions of § 13-225 of this article.

(b) *In general.-*

(1) If a contractor has furnished 100% payment security and 100% performance security in accordance with this subtitle under a contract for construction awarded by a public body, the percentage specified in the contract for retainage may not exceed 10% of the total amount for the

first 50% of the contract.

(2) Unless a public body demonstrates the need to retain more than 5% to protect the public interest, after 50% of the contract is completed, a public body may retain only 5% of the total amount.

(3) In addition to retainage, a public body may withhold from payments otherwise due a contractor any amount that the public body reasonably believes necessary to protect the public body's interest.

(4) Except as provided in paragraph (5) of this subsection, within 120 days after satisfactory completion of a contract for construction, a public body shall release any retainage due to the contractor.

(5) If there is a dispute or contract claim between the contractor and the public body concerning the satisfactory completion of a contract for construction, the public body shall release the retainage to the contractor within 120 days after the resolution of the dispute or contract claim.

(c) Retention of payments due a subcontractor.-

(1) A contractor may not retain a percentage of payments due a subcontractor that exceeds the percentage of payments retained by the public body.

(2) Paragraph (1) of this subsection may not be construed to prohibit a contractor from withholding any amount in addition to retainage if the contractor determines that a subcontractor's performance under the subcontract provides reasonable grounds for withholding the additional amount.

(d) Retention of payments due a lower tier subcontractor.-

(1) A subcontractor may not retain a percentage of payments due a lower tier subcontractor that exceeds the percentage of payments retained from the subcontractor.

(2) Paragraph (1) of this subsection may not be construed to prohibit a subcontractor from withholding any amount in addition to retainage if the subcontractor determines that a lower tier subcontractor's performance under the subcontract provides reasonable grounds for withholding the additional amount.

(e) Construction.- This section may not be construed to limit the application of the remaining provisions of this subtitle.

§ 17-111. Short title.

This subtitle may be cited as the "Maryland Little Miller Act".

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