



School Business Law Update

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UPDATE ON CONTRACT RETENTION: SB 802 VETOED

It has come to our attention that some contractors are complaining about the amount of retention being held under traditional public works contract documents. A few contractors are saying the Legislature passed a bill reducing the retention that can be withheld by a school district to a cap of five percent. While the Legislature did pass Senate Bill 802, the Governor vetoed it, the law has not changed, and the retention remains as properly set in your contract documents.

By statute, Public Contract Code Section 9203, school districts are compelled to retain a minimum of five percent of payments made during a construction project until at least 50 percent of the work is completed and satisfactory progress is being made. The current figure in the Schools Legal Service public works contract documents sets retention at 10 percent of the amount due. This is an industry standard for school construction and is common throughout the state. SB 802 would have reduced the maximum amount of retention permitted to be withheld to five percent; however, the bill would only apply to contracts entered into after January 1, 2010, and the bill has been rejected by the Governor who returned it to the Senate unsigned. The action taken by the Governor on October 11, 2009, is his way of indicating a veto.

In his veto message, the Governor indicated:

“When a contractor fails to complete a public works project, the public entity needs recourse to ensure that the project gets completed. Public works contracts have a higher level of risk as public entities usually have to accept the low bidder. Though there are options available to the State to go after a contractor who fails to complete the terms of a public works contract, retaining portions of payment to the contractor provides incentive for the contractor to complete the project. While I am sympathetic with the concerns of subcontractors, the State’s responsibility is to protect the taxpayer to make certain that public works projects are completed correctly and within budget”

So if a contractor tries to convince you that your retention is too high, remind them that this bill to reduce the maximum amount of retention did not become law. And remember, when the project is at least 50 percent completed and making satisfactory progress, your Board of Trustees has the discretion, but not the obligation, to voluntarily reduce the retention or refrain from taking further retention.

Give us a call if there are questions.

— *William A. Hornback*

Client Alerts are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.