

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2023-006

**TO:** Mayor Jordan Hess, Dale Bickell, Jeremy Keene, Monte Sipe, Kevin Slovarp, Troy Monroe, Ross Mollenhauer, Ellen Buchanan, Tod Gass, Annie Gorski, Donna Gaukler, Shirley Kinsey, Betsy Willet, David Selvage, Garrick Swanson, Morgan Valiant, Marty Rehbein, Leigh Griffing, Eric Hallstrom, Mike Brady, Ian Ortlieb, Gordy Hughes, Brad Davis, Phil Keating, Mike Colyer, Scott Hoffman, Brian Hensel

**CC:** City Council, Dept. City Clerk, Dept. Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** April 19<sup>th</sup>, 2023

**RE:** Mont. Code Ann. §18-2-316 imposes a 5% maximum limit for construction agreement retainage monies being withheld.

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### FACTS:

Recently there has been some clarifying inquiry and discussion pertaining to retainage monies withheld pursuant to public construction contracts as compared to the purpose of performance and payment bonds.

### ISSUE(S):

Is construction contract withholding of retainage monies different in purpose from performance and payment bonds?

### CONCLUSION(S):

Public construction contract retainage monies are separate and independent from the legal purpose of performance and payment bonds.

## **LEGAL DISCUSSION:**

Pursuant to Mont. Code Ann. §18-2-201 Montana public construction contract law requires that the successful construction contractor shall provide good and sufficient bonds that the construction contractor shall faithfully perform all provisions of the construction contract; pay all laborers, mechanics, subcontractors and material suppliers as well as pay all persons who supply the construction contractor with provisions, provender, material, or supplies for performing the work. Basically, there will be two bonds: a performance bond as well as a payment bond. Both bonds are a type of liability risk management required by state law to be available to a public entity in part to ensure complete construction contract performance as well as payment of laborers, material and suppliers and also serves as a tool to be a government protection against any construction contract related liens being successfully filed against a public government project. Both the performance bond as well as the payment bond must be in an amount at least equal to the total construction contract project cost.

With respect to building or construction contracts costing less than \$50,000; Mont. Code Ann. §18-2-201(4) allows a government entity to itself assume/absorb the liability obligations for building or construction contracts that performance and payment bonds are intended to protect the government entity from by allowing the government to waive performance and payment bonds for the project that costs less than \$50,000.

Construction contract retainage monies are separate and independent from both performance and payment bonds. Retainage monies are also a liability risk management tool for a construction project owner to better ensure that the construction project is satisfactorily completed. Black's Law Dictionary, Eighth Edition, page 1341 defines retainage as meaning:

“Retainage: A percentage of what a landowner pays a contractor withheld until the construction has been satisfactorily completed and all mechanic's liens are released or expired.”

Monetary retainage is a risk management tool for managing the potential risk of incomplete work by the construction contractor that helps the government entity ensure completion of the project. Basically, retainage monies in part serve as an incentive to the construction contractor to finish/complete every relevant detail associated with the project in order to receive the construction contract retainage monies. Retainage monies provide the construction project owner with cash in hand to if necessary complete minor items associated with the construction project.

Montana state general construction contract law establishes a 5% statutory limit on construction contract retainage pursuant to section Mont. Code Ann. § 28-3-2110.

Title 18, chapter 2, part 3 of Montana's public construction contract laws is entitled “CONTRACT REQUIREMENTS AND RESTRICTIONS”. Pursuant to Mont. Code Ann. § 18-2-316, of that part, Montana's more specific public construction contract laws provide a more detailed retainage law that likewise establishes a maximum 5% retainage. Mont. Code Ann. §

18-2-316 MCA is entitled “LIMIT ON RETAINAGE FOR PUBLIC CONTRACTS”. This section states:

“18-2-316. LIMIT ON RETAINAGE FOR PUBLIC CONTRACTS. (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 of this section, ‘RETAINAGE’ MEANS THE RATIO, IN PERCENT, OF FUNDS RETAINED TO THE TOTAL AMOUNT TO BE PAID THE CONTRACTOR BY THE GOVERNMENT ENTITY.” (emphasis added)

Examples of when a government entity might utilize the retainage monies could include, but are not limited to:

- (1) Incomplete work;
- (2) Unsatisfactory work;
- (3) Failure to remedy defective construction materials;
- (4) Repair damages that the construction contractor caused during construction project, such as failure to return lawn/land to its original state;
- (5) ETC..

This is not intended as an all-inclusive itemization; but is intended to identify some examples when a construction project owner might utilize construction contract retainage monies to address some matters of concern.

## **CONCLUSION(S):**

Public construction contract retainage monies are separate and independent from the legal purpose of performance and payment bonds.

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Jim Nugent, City Attorney



JN: MCS