

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
GENERAL MUNICIPAL LAW
CHAPTER 24 OF THE CONSOLIDATED LAWS
ARTICLE 5-A--PUBLIC CONTRACTS

Current through L.2003, chs. 4 to 9.

§ 106. Withdrawal of retained percentages

Notwithstanding any inconsistent provision of any general, special or local law, under any contract heretofore or hereafter made or awarded by any political subdivision, or any officer, board or agency thereof, or of any district therein, the contractor may, from time to time, withdraw the whole or any portion of the amount retained from payments to the contractor pursuant to the terms of the contract, upon depositing with the fiscal officer of the political subdivision or district therein or, if so directed by the fiscal officer of the political subdivision or district therein, with a bank or trust company which has entered into an agreement with said fiscal officer to provide the services which said fiscal officer is required to perform pursuant to the provisions of this section (1) bonds or notes of the United States of America, or obligations, the payment of which is guaranteed by the United States of America, or (2) bonds or notes of the state of New York, or (3) bonds of any political subdivision in the state of New York, of a market value equal to the amount so withdrawn. The fiscal officer of the political subdivision or of a district therein, from time to time, shall collect all interest and income on the obligations so deposited, and shall pay the same, when and as collected, to the contractor who deposited such obligations. When the deposit is in the form of coupon bonds, the coupons shall be clipped, presented for payment, and the proceeds remitted to the contractor as they respectively come due. The contractor shall not be entitled to interest or income on, or the coupons of, any obligations so deposited by him, the proceeds of which shall have been used or applied by the political subdivision or district therein pursuant to the terms of the contract. The fiscal officer of the political subdivision or district therein or any such bank or trust company when authorized by said fiscal officer, may impose upon each contractor a service charge for receiving, handling and disbursing obligations, funds and coupons pursuant to the provisions of this section in amount to be determined by said fiscal officer. Such a service charge shall not exceed a reasonable amount which is generally consistent with charges by a bank or trust company for such a service.

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(Added L.1953, c. 861, § 18; amended L.1981, c. 683, § 1.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

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Derivation

Former section 86-b, added L.1916, c. 176, § 1; amended L.1920, c. 857, § 1; L.1922, c. 193, and repealed by L.1953, c. 861, § 19.

CROSS REFERENCES

Payments of retained amount from county road fund, see Highway Law § 127.

LIBRARY REFERENCES

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American Digest System
Municipal Corporations ↻ 344.

Encyclopedias
C.J.S. Municipal Corporations § 1171.

Texts and Treatises
27 NY Jur 2d, Counties, Towns, and Municipal Corporations § 1249.

NOTES OF DECISIONS

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1. Amounts retained—In general

The word “retained”, as it is used in this section, refers only to amounts withheld by a municipality from a contractor pursuant to the retained percentage provisions of a public works contract and does not include amounts held by the municipality pursuant to other provisions of the contract, such as moneys representing liquidated damages to which the municipality would be entitled in the event of default by the contractor. 33 Op.State Compt. 108, 1977.

This section authorizes custodial agreements in connection with obligations substituted in lieu of retained percentages by contractors with banks or trust companies only, and does not authorize such agreements with brokerage firms. Op.State Compt. 81-376.

2. ---- Interest, amounts retained

Under New York law, county violated statute by withholding from insurance company who deposited funds in retainage account interest and other income earned on principal in retainage account. Federal Ins. Co. v. County of Westchester, 1996, 921 F.Supp. 1136.

Where contractor substituted two interest-bearing United States Treasury notes to retain payments and where county had expended sums to cure contractor’s defaults, county properly retained two interest payments received on the bonds to cover the amounts owed to it. Crow-Crimmins-Wolfe & Munier v. Shulman (2 Dept. 1983) 91 A.D.2d 1023, 458 N.Y.S.2d 250, appeal denied 58 N.Y.2d 609, 462 N.Y.S.2d 1026, 449 N.E.2d 426.

3. ---- Securities, amounts retained

When a contractor substitutes securities at the time of withdrawal of amounts retained from payments to the contractor, the municipality may not require that the securities have a market value in excess of the amount of the retained percentage under the contract. Op.State Compt. 85-64.

4. ---- Withdrawal, amounts retained

After a public improvement mechanic’s lien has been filed, amounts retained from payments to a contractor may be withdrawn by such contractor only if he both discharges the mechanic’s lien and deposits appropriate bonds with the proper officer.

29 Op.State Compt. 187, 1973.

Amounts retained from payments to a contractor may be withdrawn by the contractor upon deposit with the fiscal officer of bonds of a central school district and a union free school district. 19 Op.State Compt. 394, 1963.

A political subdivision does not have any discretion or option to refuse the withdrawal of retained percentages by a contractor when the proper securities are tendered. 19 Op.State Compt. 354, 1963.

5. Bonds

Bonds issued by the Municipal Assistance Corporation for the city of New York may be deposited with a political subdivision by a contractor in order to withdraw all or part of the amount retained by the political subdivision as security for completion of a public contract but, the bonds deposited must have a market value equal to the amount withdrawn. Op.State Compt. 80-27.

Bonds of the Power Authority of New York State, of the New York State Thruway Authority, of the Babylon et al. Union-Free School District and New York State general obligation housing bonds may be accepted by a school district for substitution in lieu of retained percentages, but bonds of the New York State Housing Finance Agency and of the New York State Dormitory Authority may not be so accepted. 25 Op.State Compt. 322, 1969.

Bonds of the New York State Thruway Authority and the New York City Housing Authority are securities which may be substituted in lieu of retained percentages pursuant to the provisions of this section. 21 Op.State Compt. 121, 1965.

6. Conversion

Although electrical contractor and city were entitled to engage common agent to purchase bonds on behalf of contractor and, in exchange for cash retained by city under construction contract, deposit bonds with city, city, which subsequently changed

arrangement by designating agent to hold as well as purchase bonds, thereby extended agency of common agent beyond original arrangement and enabled agent to convert cash retainage to its own use, and thus had to bear the loss that resulted from such conversion and agent's adjudication as a bankrupt. *Connors-Haas, Inc. v. Board of Ed. of City of Rochester*, 1978, 44 N.Y.2d 860, 407 N.Y.S.2d 474, 378 N.E.2d 1043.

7. Subcontractors

Where general contractors, under contract with city for construction of pollution control project, and subcontractors for pile driving incident to such construction, were free to make their own arrangement for payments so long as right of city to retain from installment payments to the contractors was unaffected, the provisions in subcontract for payment of retainage to subcontractors were not in conflict with pertinent terms of the principal agreement, and hence the parties to subcontract were concluded by its terms relative to the retainage. *Fehlhaber Corp. v. Unicon Management Corp.* (1 Dept. 1969) 32 A.D.2d 367, 302 N.Y.S.2d 98, affirmed 27 N.Y.2d 828, 316 N.Y.S.2d 435, 265 N.E.2d 257.

8. Parties that may sue

Possession by city of construction corporation's bonds deposited by corporation and held by city in lieu of retainages under corporation's construction contract with city's lessee with respect to work done by corporation created sufficient relationship between corporation and city so that corporation had right to sue city to obtain corporation's bonds. *Renel Const. Inc. v. Brooklyn Co-op. Meat Distribution Center Inc.* (1 Dept. 1977) 59 A.D.2d 391, 399 N.Y.S.2d 429, affirmed 46 N.Y.2d 859, 414 N.Y.S.2d 511, 387 N.E.2d 222.

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