

CONSTRUCTION LAW

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Tennessee Legislature Amends Retainage Law

Failure to Place Retainage in Interest Bearing Account Now a Misdemeanor

July 18, 2008

Effective July 1, 2008, the Tennessee Legislature amended the Prompt Pay Act to put more teeth into the requirement that any retainage withheld under construction contracts must be placed in a separate, interest bearing escrow account. Failure to follow this requirement is now a Class A misdemeanor, subject to a penalty of \$3,000 per day. The Act also has been clarified as to its application.

Former Section 66-11-144 of the Tennessee Code made it mandatory for retainage withheld to be deposited into a separate, interest bearing escrow account. This provision, which was inexplicably included in the mechanic's lien statutes, has now been moved to the Prompt Pay Act and has been clarified to state that it applies to all contracts (including subcontracts) if the amount of the prime contract is \$500,000 or greater. See new Tenn. Code Ann. § 66-34-104. Previously, there had been some confusion as to whether the requirement applied to retainage withheld by a prime contractor on a subcontract that was less than \$500,000.

Perhaps the most important changes are found in Section 66-34-103. That provision has now been amended to state that it is a Class A misdemeanor for a person, firm or corporation to fail to comply with the requirement to deposit retainage into a separate, interest bearing escrow account, subject to a fine of \$3,000. Strikingly, each day that a person, firm or corporation fails to comply is treated as a separate violation, subject to consecutive fines of \$3,000 each. See Tenn. Code Ann. § 66-34-103(e).

Another amendment to Section 66-34-103 clarifies that if an owner or prime contractor withholds retainage for the use and benefit of the prime contractor, its subcontractors or both, then neither the prime contractor nor any of its subcontractors are required to deposit additional retained funds into an interest bearing escrow account. See Tenn. Code Ann. § 66-34-103(d).

These amendments apply to construction contracts entered into on or after July 1, 2008.

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