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# A BILL FOR AN ACT

RELATING TO CONTRACTS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that this Act is  
2 necessary to address a problem within the building industry.  
3 Materialmen and subcontractors often are at the mercy of general  
4 contractors when seeking payment due them upon completion of  
5 their work or providing materials for a government project.  
6 This problem is particularly serious for materialmen and  
7 subcontractors who are involved at the beginning of a project,  
8 where their work is completed or materials are furnished long  
9 before final completion of the project. In many instances,  
10 subcontractors must wait many months, even years, before  
11 receiving full payment for their completed work. Often, the  
12 subcontractors are small, family-owned and run businesses that  
13 lack financial resources to withstand a long delay in receiving  
14 payments owed to them for work completed. The legislature finds  
15 that there is a need to provide materialmen and subcontractors  
16 with the right to payment upon furnishing of materials or  
17 completion of their work in government projects.



1           The purpose of this Act is to accelerate a subcontractor's  
2 or materialman's right to payment upon completion of the  
3 subcontract or the furnishing of materials by providing for  
4 prompt payment to a subcontractor or materialman upon completion  
5 of the subcontractor's or materialman's work in government  
6 projects.

7           SECTION 2. Section 103-10.5, Hawaii Revised Statutes, is  
8 amended to read as follows:

9           "**§103-10.5 Prompt payment.** (a) Any money [~~other than~~  
10 ~~retainage,~~] paid to a contractor shall be [~~dispersed~~] disbursed  
11 to subcontractors within ten days after receipt of the money in  
12 accordance with the terms of the subcontract; provided that the  
13 subcontractor has met all the terms and conditions of the  
14 subcontract and there are no bona fide disputes on which the  
15 procurement [~~agency~~] officer has withheld payment.

16           (b) Upon final payment to the contractor, full payment to  
17 the subcontractor, including retainage, shall be made within ten  
18 days after receipt of the money; provided there are no bona fide  
19 disputes over the subcontractor's performance under the  
20 subcontract.

21           (c) Where a subcontractor has provided evidence to the  
22 contractor of[+] satisfactorily completing all work under their



1 subcontract and has provided a properly documented final payment  
2 request as described in subsection (d) of this section, and:

3  ~~[(1) A valid union trust fund contribution bond acceptable~~  
4  ~~to the contractor in an amount not less than three months of the~~  
5  ~~subcontractor's trust fund contribution;~~

6  ~~(2) A] (1) Has provided to the contractor an acceptable~~  
7  ~~performance and payment bond for the project executed~~  
8  ~~by a surety company authorized to do business in the~~  
9  ~~State[;~~

10  ~~[(3) Any other bond acceptable to the contractor; or~~

11  ~~(4) Any other form of mutually acceptable collateral;~~

12  ~~and the contractor fails to pay in accordance with this section,~~  
13  ~~a penalty of one and one-half per cent per month shall be~~  
14  ~~imposed on the outstanding amounts due to the subcontractor.~~

15  ~~The penalty may be withheld from future payment due to the~~  
16  ~~contractor. Where a contractor has violated subsection (b)~~  
17  ~~three or more times within two years of the first violation, the~~

18  ~~contractor shall be referred to the contractor license board by~~  
19  ~~the procurement agency for action under section 444-17(14).], as~~  
20  ~~provided in section 103-32.1; or~~

21 (2) The following has occurred:

1           (A) A period of ninety days after the day on which  
2           the last of the labor was done or performed and  
3           the last of the material was furnished or  
4           supplied has elapsed without written notice of a  
5           claim given to contractor and the surety, as  
6           provided for in section 103D-324; and

7           (B) The subcontractor has provided to the contractor:

8           (i) An acceptable release of retainage bond,  
9           executed by a surety company authorized to  
10           do business in the state, in an amount of  
11           not more than two times the amount being  
12           retained or withheld by the contractor;

13           (ii) Any other bond acceptable to the contractor;  
14           or

15           (iii) Any other form of mutually acceptable  
16           collateral,

17           all sums retained or withheld from a subcontractor and otherwise  
18           due to the subcontractor for satisfactory performance under the  
19           subcontract shall be paid by the procurement officer to the  
20           contractor and subsequently, upon receipt from the procurement  
21           officer, by the contractor to the subcontractor within the  
22           applicable time periods specified in subsection (b) and section



1 103-10. If the procurement officer or the contractor fails to  
2 pay in accordance with this section, a penalty of one and one-  
3 half per cent per month shall be imposed upon the outstanding  
4 amounts due that were not timely paid by the responsible party.  
5 The penalty may be withheld from future payment due to the  
6 contractor, if the contractor was the responsible party. If a  
7 contractor has violated subsection (b) three or more times  
8 within two years of the first violation, the contractor shall be  
9 referred by the procurement officer to the contractor license  
10 board for action under section 444-17(14).

11 (d) A properly documented final payment request from a  
12 subcontractor, as required by subsection (c), shall include:

13 (1) Substantiation of the amounts requested;

14 (2) A certification by the subcontractor, to the best of  
15 the subcontractor's knowledge and belief, that:

16 (A) The amounts requested are only for performance in  
17 accordance with the specifications, terms, and  
18 conditions of the subcontract;

19 (B) The subcontractor has made payments due to its  
20 subcontractors and suppliers from previous  
21 payments received under the subcontract and will  
22 make timely payments from the proceeds of the



1 payment covered by the certification, in  
2 accordance with their subcontract agreements and  
3 the requirements of this section; and

4 (C) The payment request does not include any amounts  
5 that the subcontractor intends to withhold or  
6 retain from a subcontractor or supplier in  
7 accordance with the terms and conditions of their  
8 subcontract;

9 and

10 (3) The submission of documentation confirming that all  
11 other terms and conditions required under the  
12 subcontract agreement have been fully satisfied.

13 The procurement officer shall return any final payment  
14 request that is defective to the contractor within seven days  
15 after receipt, with a statement identifying the defect.

16 (e) In the case of a construction contract, a payment  
17 request made by a contractor to the procurement officer that  
18 includes a request for sums that were withheld or retained from  
19 a subcontractor and are due to a subcontractor may not be  
20 approved under subsection (c) unless the payment request  
21 includes:

22 (1) Substantiation of the amounts requested; and



1       (2) A certification by the contractor, to the best of the  
2       contractor's knowledge and belief, that:

3       (A) The amounts requested are only for performance in  
4       accordance with the specifications, terms, and  
5       conditions of the contract;

6       (B) The subcontractor has made payments due to its  
7       subcontractors and suppliers from previous  
8       payments received under the contract and will  
9       make timely payments from the proceeds of the  
10       payment covered by the certification, in  
11       accordance with their subcontract agreements and  
12       the requirements of this section; and

13       (C) The payment request does not include any amounts  
14       that the contractor intends to withhold or retain  
15       from a subcontractor or supplier in accordance  
16       with the terms and conditions of their  
17       subcontract.

18       The procurement officer shall return any final payment request  
19       that is defective to the contractor within seven days after  
20       receipt, with a statement identifying the defect.

21       (f) This section shall not be construed to impair the  
22       right of a contractor or a subcontractor at any tier to



1 negotiate and to include in their respective subcontracts  
2 provisions that provide for additional terms and conditions that  
3 are requested to be met before the subcontractor shall be  
4 entitled to receive final payment under subsection (c) of this  
5 section; provided that any such payments withheld shall be  
6 withheld by the procurement officer."

7 SECTION 3. Section 103-32.1, Hawaii Revised Statutes, is  
8 amended to read as follows:

9 **"§103-32.1 Contract provision for retainage;**

10 **subcontractors.** (a) Any retainage provided for in this section  
11 or requested to be withheld by the contractor shall be held by  
12 the procurement officer.

13 (b) A dispute between a contractor and subcontractor of  
14 any tier shall not constitute a dispute to which the State or  
15 any county is a party, and there is no right of action against  
16 the State or any county. The State and a county may not be  
17 interpleaded in any judicial or administrative proceeding  
18 involving such a dispute.

19 [~~a~~] (c) Any public contract may include a provision for  
20 the retainage of a portion of the amount due under the contract  
21 to the contractor to [~~insure~~] ensure the proper performance of  
22 the contract; provided that:



- 1 (1) The sum withheld by the procurement officer from the  
2 contractor shall not exceed five per cent of the total  
3 amount due the contractor and that, after fifty per  
4 cent of the contract is completed and progress is  
5 satisfactory, no additional sum shall be withheld;  
6 provided further that if progress is not satisfactory,  
7 the [~~contracting~~] procurement officer may continue to  
8 withhold, as retainage, sums not exceeding five per  
9 cent of the amount due the contractor; and
- 10 (2) The retainage shall not include sums deducted as  
11 liquidated damages from moneys due or that may become  
12 due the contractor under the contract.
- 13 [~~(b)~~] (d) Where a subcontractor has provided evidence to  
14 the contractor of:
- 15 (1) A valid performance and a payment bond for the project  
16 that is acceptable to the contractor and executed by a  
17 surety company authorized to do business in this  
18 State;
- 19 (2) Any other bond acceptable to the contractor; or  
20 (3) Any other form of collateral acceptable to the  
21 contractor [~~+~~],



1 the retention amount withheld by the contractor from its  
2 subcontractor shall be not more than the same percentage of  
3 retainage as that of the contractor. This subsection shall also  
4 apply to the subcontractors who subcontract work to other  
5 subcontractors.

6 (e) This section shall not be construed to impair the  
7 right of a contractor or a subcontractor at any tier to  
8 negotiate, and to include in their subcontract, provisions that:

9 (1) Permit the contractor or subcontractor to retain,  
10 without cause, a specified percentage of no more than  
11 ten per cent of each progress payment otherwise due to  
12 a subcontractor for satisfactory performance under the  
13 subcontract, without incurring any obligation to pay a  
14 late payment interest penalty, in accordance with  
15 terms and conditions agreed to by the parties to the  
16 subcontract, giving such recognition as the parties  
17 deem appropriate to the ability of a subcontractor to  
18 furnish a performance bond and a payment bond, subject  
19 however, to the limitations of subsection (d); and  
20 (2) Permit the contractor or subcontractor to make a  
21 determination that part or all of the subcontractor's  
22 payment request may be withheld by the procurement



1 officer in accordance with the subcontract agreement,  
2 without incurring any obligation to pay interest or a  
3 late payment penalty if:

4 (A) A notice conforming to the standards of  
5 subsection (f) has been previously furnished to  
6 the subcontractor; and

7 (B) A copy of any notice issued by the contractor or  
8 subcontractor pursuant to subparagraph (A) has  
9 been furnished to the procurement officer.

10 (f) A written notice of any withholding shall be issued to  
11 a subcontractor, with a copy to the procurement officer,  
12 specifying the following:

13 (1) The amount to be withheld;

14 (2) The specific causes for the withholding under the  
15 terms of the subcontract; and

16 (3) The remedial actions to be taken by the subcontractor  
17 to receive payment of the amounts withheld.

18 (g) A contractor may not request payment from the  
19 procurement officer of any amount withheld or retained in  
20 accordance with subsection (e) until such time as the contractor  
21 has determined and certified to the procurement officer that the  
22 subcontractor is entitled to the payment of such amount.



1        (h) The provisions of this section shall not be construed  
2 to require payment to subcontractors of retainage released to a  
3 contractor pursuant to an agreement entered into with the  
4 procurement officer meeting the requirements of section 103-  
5 32.2."

6        SECTION 4. Section 103D-501, Hawaii Revised Statutes, is  
7 amended by amending subsection (b) to read as follows:

8        "(b) Adjustments in price permitted by rules adopted under  
9 subsection (a) shall be computed in one or more of the following  
10 ways:

11        (1) By agreement on a fixed price adjustment before  
12 commencement of the pertinent performance [~~or as soon~~  
13 ~~thereafter as practicable~~];

14        (2) By unit prices specified in the contract or  
15 subsequently agreed upon[+] before commencement of the  
16 pertinent performance;

17        (3) By the costs attributable to the events or situations  
18 under such clauses with adjustment of profit or fee,  
19 all as specified in the contract or subsequently  
20 agreed upon[+] before commencement of the pertinent  
21 performance;



- 1 (4) In [~~such~~] any other manner as the contracting parties  
2 may mutually agree[~~r~~] upon before commencement of the  
3 pertinent performance; or
- 4 (5) In the absence of agreement by the parties[~~r~~]:
- 5 (A) For change orders with value not exceeding  
6 \$50,000 by documented actual costs of the work,  
7 allowing for twenty per cent of the actual costs  
8 for overhead and profit on work done directly by  
9 the contractor and ten per cent on any  
10 subcontractor's billing to the contractor for the  
11 contractor's overhead and profit. There shall be  
12 no cap on the total cost of the work if this  
13 method is used. A change order shall be issued  
14 within fifteen days of submission by the  
15 contractor of proper documentation of completed  
16 force account work, whether periodic (conforming  
17 to the applicable billing cycle) or final. The  
18 procurement officer shall return any  
19 documentation that is defective to the contractor  
20 within fifteen days after receipt, with a  
21 statement identifying the defect; or



1           (B) For change orders with value exceeding \$50,000 by  
2           a unilateral determination by the governmental  
3           body of the costs attributable to the events or  
4           situations under [~~such~~] clauses with adjustment  
5           of profit or fee, all as computed by the  
6           governmental body in accordance with applicable  
7           sections of the rules adopted under section  
8           103D-601 and subject to the provisions of part  
9           VII. When a unilateral determination has been  
10          made, a unilateral change order shall be issued  
11          within ten days. Costs included in the  
12          unilateral change order shall allow for twenty  
13          per cent of the actual costs for overhead and  
14          profit on work done directly by the contractor  
15          and ten per cent on any subcontractor's billing  
16          to the contractor for the contractor's overhead  
17          and profit. Upon receipt of the unilateral  
18          change order, if the contractor does not agree  
19          with any of the terms or conditions, or the  
20          adjustment or nonadjustment of the contract time  
21          or contract price, the contractor shall file a  
22          notice of intent to claim within thirty days

1           after the receipt of the written unilateral  
2           change order. Failure to file a protest within  
3           the time specified shall constitute agreement on  
4           the part of the contractor with the terms,  
5           conditions, amounts, and adjustment or  
6           nonadjustment of the contract time or the  
7           contract price set forth in the unilateral change  
8           order.

9           A contractor shall be required to submit cost or pricing  
10          data if any adjustment in contract price is subject to the  
11          provisions of section 103D-312. A fully executed change order  
12          or other document permitting billing for the adjustment in price  
13          under any method listed in paragraphs (1) through (4) shall be  
14          issued within ten days after agreement on the method of  
15          adjustment."

16          SECTION 5. Statutory material to be repealed is bracketed  
17          and stricken. New statutory material is underscored.

18          SECTION 6. This Act shall take effect on July 1, 2007.



HB 3036  
HD1  
SD2  
CD1

**Report Title:**

Contracts; Prompt Payment

**Description:**

Provides for prompt payment to subcontractor or materialman upon completion of the work or provision of the materials required under the contract for government projects. (HB3036 CD1)

