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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,~~] money paid to a contractor shall be dispersed to  
11 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 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 work satisfactorily completed in the form of a

1 properly documented payment request as described in subsection  
2 (d) of this section, and: [of:

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

6 ~~(2) A] (1) Shall have posted a performance and payment~~  
7 ~~bond for the project executed by a surety company~~  
8 ~~authorized to do business in the [State,] State as~~  
9 ~~provided in section 103-32.1; or~~

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~~  
13 ~~section,]~~

14 (2) (A) Shall have posted a valid union trust fund  
15 contribution bond acceptable to the contractor in an  
16 amount not less than three months of the  
17 subcontractor's trust fund contribution, the ninety  
18 days have expired since the day on which the last of  
19 the labor was done or performed or material was  
20 furnished or supplied, and a retainage bond or any  
21 other bond has been posted that is acceptable to the



1           contractor, or any other form of mutually acceptable  
2           collateral;  
3 all sums retained or withheld from a subcontractor and otherwise  
4 due to the subcontractor for satisfactory performance under the  
5 subcontract shall be paid by the paying agency or the  
6 contractor. If the paying agency or the contractor fails to pay  
7 in accordance with this section, a penalty of one and one-half  
8 per cent per month shall be imposed on the outstanding amounts  
9 due to the subcontractor which was not timely paid by the  
10 responsible party. The penalty may be withheld from future  
11 payment due to the contractor. Where a contractor has violated  
12 subsection (b) three or more times within two years of the first  
13 violation, the contractor shall be referred to the contractor  
14 license board by the procurement agency for action under section  
15 444-17(14).

16           (d) The subcontractor shall be entitled to payment from  
17 the agency of any amount withheld or retained from the  
18 subcontractor in accordance with subsection (c) when the  
19 subcontractor has determined and certified to the contractor and  
20 the agency that the subcontractor is entitled to the payment of  
21 such amount as provided in its payment request if such request  
22 includes the following:



- 1        (1) Substantiation of the amounts requested; and
- 2        (2) A certification by the subcontractor, to the best of
- 3        the subcontractor's knowledge and belief, that:
- 4        (A) The amounts requested are only for performance in
- 5        accordance with the specifications, terms, and
- 6        conditions of the subcontract; and
- 7        (B) Payments to lower tier subcontractors have been
- 8        made from previous payments received under the
- 9        contract, and timely payments will be made from
- 10       the proceeds of the payment covered by the
- 11       certification, in accordance with their
- 12       subcontract agreements and the requirements of
- 13       this chapter.

14 The agency shall return any such payment request which is  
 15 defective to the subcontractor within ten days after receipt,  
 16 with a statement identifying the defect."

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

19        "**§103-32.1 Contract provision for retainage;**  
 20 **subcontractors.** (a) Any public contract may include a  
 21 provision for the retainage of a portion of the amount due under

1 the contract to the contractor to insure the proper performance  
2 of the contract; provided that:

3 (1) The sum withheld by the procurement officer from the  
4 contractor shall not exceed five per cent of the total  
5 amount due the contractor and that after fifty per  
6 cent of the contract is completed and progress is  
7 satisfactory, no additional sum shall be withheld;  
8 provided further that if progress is not satisfactory,  
9 the contracting officer may continue to withhold as  
10 retainage, sums not exceeding five per cent of the  
11 amount due the contractor; and

12 (2) The retainage shall not include sums deducted as  
13 liquidated damages from moneys due or that may become  
14 due the contractor under the contract.

15 (b) Where a subcontractor has provided evidence to the  
16 contractor of:

17 (1) A valid performance and a payment bond for the project  
18 that is acceptable to the contractor and executed by a  
19 surety company authorized to do business in this  
20 State;

21 (2) Any other bond acceptable to the contractor; or



1           (3) Any other form of collateral acceptable to the  
2                   contractor;  
3 the retention amount withheld by the contractor from its  
4 subcontractor shall be the same percentage of retainage as that  
5 of the contractor. [~~This subsection shall also apply to the~~  
6 ~~subcontractors who subcontract work to other subcontractors.~~]

7           (c) Subject to the provisions of subsection (d) and unless  
8 the subcontractor can satisfy the provisions of the foregoing  
9 subsection (b), a contractor or a subcontractor at any tier may  
10 negotiate, and include in their subcontract, provisions which:

11           (1) Permit the contractor to direct the paying agency to  
12 retain (without cause) a specified percentage of no  
13 more than ten per cent of each progress payment  
14 otherwise due to a subcontractor for satisfactory  
15 performance under the subcontract, giving such  
16 recognition as the parties deem appropriate to the  
17 ability of a subcontractor to furnish a performance  
18 bond and a payment bond. In no event may the  
19 contractor include in its subcontract a provision  
20 which permits the contractor to retain or withhold any  
21 portion of the amount due under the subcontract to the  
22 subcontractor under this subsection; and

1       (2) Permit the contractor or subcontractor to make a  
2       determination that part or all of the subcontractor's  
3       request for payment may be withheld in accordance with  
4       the subcontract agreement by the paying agency.

5       (d) The provisions of subsection (c) shall apply only to  
6       construction contracts and only if:

7       (1) A notice conforming to the standards of subsection (e)  
8       has been previously furnished to the subcontractor;  
9       and

10       (2) A copy of any notice issued by the contractor or  
11       subcontractor pursuant to paragraph (1) has been  
12       furnished to the procurement officer.

13       (e) A written notice of any withholding shall be issued to  
14       a subcontractor (with a copy to the agency of any such notice  
15       issued by a contractor), specifying the following:

16       (1) The amount to be withheld;

17       (2) The specific causes for the withholding under the  
18       terms of the subcontract; and

19       (3) The remedial actions to be taken by the subcontractor  
20       in order to receive payment of the amounts withheld."

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



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

- 4           (1) By agreement on a fixed price adjustment before  
5           commencement of the pertinent performance or as soon  
6           thereafter as practicable;
- 7           (2) By unit prices specified in the contract or  
8           subsequently agreed upon;
- 9           (3) By the costs attributable to the events or situations  
10          under such clauses with adjustment of profit or fee,  
11          all as specified in the contract or subsequently  
12          agreed upon;
- 13          (4) In such other manner as the contracting parties may  
14          mutually agree; or
- 15          (5) In the absence of agreement by the parties, an interim  
16          price shall be determined by a unilateral  
17          determination by the governmental body of the costs  
18          attributable to the events or situations under such  
19          clauses with adjustment of profit or fee, all as  
20          computed by the governmental body in accordance with  
21          applicable sections of the rules adopted under section  
22          103D-601 and subject to the provisions of part VII.



1           The adjusted interim price shall be paid in accordance  
2           with progress payment procedures upon satisfactory  
3           progress of the work and the final amount shall be  
4           determined within thirty days after the satisfactory  
5           completion of the changed work.

6 A contractor shall be required to submit cost or pricing data if  
7 any adjustment in contract price is subject to the provisions of  
8 section 103D-312."

9           SECTION 5. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11           SECTION 6. This Act shall take effect on July 1, 2050.



**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. (SD1)

