
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[+] work satisfactorily completed in the form of a



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

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) An acceptable performance and payment bond for~~
7 ~~the project executed by a surety company authorized to~~
8 ~~do business in the State[+], as provided in section~~
9 ~~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 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).]~~

20 (2) The following has occurred:

21 (A) A period of ninety days after the day on which
22 the last of the labor was done or performed and



1 the last of the material was furnished or
2 supplied has elapsed without written notice of a
3 claim given to contractor and the surety, as
4 provided for in section 103D-324; and
5 (B) The subcontractor has provided to the contractor
6 an acceptable release of retainage bond, executed
7 by a surety company authorized to do business in
8 the State, in an amount of not more than two
9 times the amount being retained or withheld by
10 the contractor or has provided any other bond
11 acceptable to the contractor or any other form of
12 mutually acceptable collateral;
13 all sums retained or withheld from a subcontractor and otherwise
14 due to the subcontractor for satisfactory performance under the
15 subcontract shall be paid by the procurement officer to the
16 contractor and subsequently, upon receipt from the procurement
17 officer, by the contractor to the subcontractor within the
18 applicable time periods specified in subsection (b) and section
19 103-10. If the procurement officer or the contractor fails to
20 pay in accordance with this section, a penalty of one and one-
21 half per cent per month shall be imposed upon the outstanding
22 amounts due that were not timely paid by the responsible party.



1 The penalty may be withheld from future payment due to the
2 contractor, if the contractor was the responsible party. If a
3 contractor has violated subsection (b) three or more times
4 within two years of the first violation, the contractor shall be
5 referred by the procurement officer to the contractor license
6 board for action under section 444-17(14).

7 (d) A properly documented final payment request from a
8 subcontractor, as prescribed in subsection (c), shall include:

9 (1) Substantiation of the amounts requested;

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

12 (A) The amounts requested are only for performance in
13 accordance with the specifications, terms, and
14 conditions of the subcontract;

15 (B) The subcontractor has made payments due to its
16 subcontractors and suppliers from previous
17 payments received under the subcontract and will
18 make timely payments from the proceeds of the
19 payment covered by the certification, in
20 accordance with their subcontract agreements and
21 the requirements of this section; and



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

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

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

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

- 18 (1) Substantiation of the amounts requested; and
19 (2) A certification by the contractor, to the best of the
20 contractor's knowledge and belief, that:



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

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

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

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

19 (f) This section shall not be construed to impair the
20 right of a contractor or a subcontractor at any tier to
21 negotiate and to include in their respective subcontracts
22 provisions that provide for additional terms and conditions that

1 are requested to be met before the subcontractor shall be
2 entitled to receive final payment under subsection (c) of this
3 section; provided that any such payments withheld shall be
4 withheld by the procurement officer."

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

7 "**§103-32.1 Contract provision for retainage;**

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

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

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

21 (1) The sum withheld by the procurement officer from the
22 contractor shall not exceed five per cent of the total



1 amount due the contractor and that, after fifty per
2 cent of the contract is completed and progress is
3 satisfactory, no additional sum shall be withheld;
4 provided further that if progress is not satisfactory,
5 the [~~contracting~~] procurement officer may continue to
6 withhold, as retainage, sums not exceeding five per
7 cent of the amount due the contractor; and

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

11 [~~(b)~~] (d) Where a subcontractor has provided evidence to
12 the contractor of:

13 (1) A valid performance and a payment bond for the project
14 that is acceptable to the contractor and executed by a
15 surety company authorized to do business in this
16 State;

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

18 (3) Any other form of collateral acceptable to the
19 contractor;

20 the retention amount withheld by the contractor from its
21 subcontractor shall be not more than the same percentage of
22 retainage as that of the contractor. This subsection shall also



1 apply to the subcontractors who subcontract work to other
2 subcontractors.

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

6 (1) Permit the contractor or subcontractor to retain,
7 without cause, a specified percentage, not more than
8 the same percentage that the contractor may be subject
9 to in the construction contract, of each progress
10 payment otherwise due to a subcontractor for
11 satisfactory performance under the subcontract,
12 without incurring any obligation to pay interest or a
13 late payment penalty, in accordance with terms and
14 conditions agreed to by the parties to the
15 subcontract, giving such recognition as the parties
16 deem appropriate to the ability of a subcontractor to
17 furnish a performance bond and a payment bond, subject
18 however to the limitations of subsection (c); and

19 (2) Permit the contractor or subcontractor to make a
20 determination that part or all of the subcontractor's
21 request for payment may be withheld by the procurement
22 officer in accordance with the subcontract agreement,



1 without incurring any obligation to pay interest or a
2 late payment penalty if:

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

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

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

12 (1) The amount to be withheld;

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

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

17 (g) A contractor may not request payment from the
18 procurement officer of any amount withheld or retained in
19 accordance with subsection (d) until such time as the contractor
20 has determined and certified to the procurement officer that the
21 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[+] 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 not less than twenty per cent of the
8 actual costs for overhead and profit on work done
9 directly by the contractor and ten per cent on
10 any subcontractor's billing to the contractor for
11 the contractor's overhead and profit. A change
12 order shall be issued within fifteen days of
13 submission by the contractor of proper
14 documentation of completed force account work.
15 The procurement officer shall return any
16 documentation that is defective to the contractor
17 within fifteen days after receipt, with a
18 statement identifying the defect; or

19 (B) For change orders with value exceeding \$50,000 by
20 a unilateral determination by the governmental
21 body of the costs attributable to the events or
22 situations under [~~such~~] clauses with adjustment



1 of profit or fee, all as computed by the
2 governmental body in accordance with applicable
3 sections of the rules adopted under section
4 103D-601 and subject to the provisions of part
5 VII. When a unilateral determination has been
6 made, a unilateral change order shall be issued
7 within ten days. Costs included in the
8 unilateral change order shall allow for not less
9 than twenty per cent of the actual costs for
10 overhead and profit on work done directly by the
11 contractor and ten per cent on any
12 subcontractor's billing to the contractor for the
13 contractor's overhead and profit. Upon receipt
14 of the unilateral change order, if the contractor
15 does not agree with any of the terms or
16 conditions, or the adjustment or nonadjustment of
17 the contract time or contract price, the
18 contractor shall file a notice of intent to claim
19 within thirty days after the receipt of the
20 written unilateral change order. Failure to file
21 a protest within the time specified shall
22 constitute agreement on the part of the



1 contractor with the terms, conditions, amounts,
2 and adjustment or nonadjustment of the contract
3 time or the contract price set forth in the
4 unilateral change order.

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

12 SECTION 5. Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 6. This Act shall take effect on July 1, 2060.



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. (SD2)

