

JAN 25 2006

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 the payment due to them upon completion
5 of their work or upon their providing materials for a 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 the project is completed. 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.



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 subcontract or materialman's work.

6 SECTION 2. Chapter 507, Hawaii Revised Statutes, is
7 amended by adding three new sections to part II to be
8 appropriately designated and to read as follows:

9 "§507-A Certificate of completion. (a) On the written
10 request of a qualifying materialman or subcontractor who has
11 completed work required under a materials contract or
12 subcontract, the payment certifier, within thirty days after the
13 date of the request, shall determine whether the contract or
14 subcontract has been completed and, if the payment certifier
15 determines that it has been completed, the payment certifier
16 shall issue a certificate of completion stating:

- 17 (1) That the contract has been completed;
18 (2) The dollar amount of the materials contract or
19 subcontract; and
20 (3) The dollar amount of the materials contract or
21 subcontract that remains unpaid, which shall
22 constitute the "certified amount" to be paid.



1 (b) In order to be a qualifying materialman or
2 subcontractor, the subcontractor or materialman shall meet the
3 following requirements:

4 (1) Have a contract in writing for labor or materials and
5 services;

6 (2) Make a written request for a certificate of completion
7 not later than forty-five days after the date of
8 completion of that contract for labor or materials and
9 services; and

10 (3) Complete all obligations required under the materials
11 contract or subcontract, including where applicable,
12 providing lien releases from the subcontractor's
13 subcontractors or materialmen, proofs of insurance,
14 and compliance with applicable labor laws.

15 (c) A materialman or subcontractor is not required to seek
16 a certificate of completion under this section and may otherwise
17 assert a claim of lien and pursue that lien under section
18 507-43.

19 (d) If a certificate of completion is issued, the payment
20 certifier, within seven days after issuing the certificate of
21 completion, shall:



- 1 (1) Deliver a copy of the certificate to the owner and the
2 general contractor, if any;
- 3 (2) Deliver a copy of the certificate of completion to the
4 materialman or subcontractor who made the request for
5 the certificate of completion; and
- 6 (3) Post, in a prominent place on the project, a copy of
7 the certificate of completion.
- 8 (e) If the payment certifier fails or refuses to issue a
9 certificate of completion to the subcontractor or materialman as
10 provided in subsection (a), the materialman or the
11 subcontractor, within thirty days after the payment certifier is
12 required to issue a certificate of completion as set forth in
13 section 507-A(a), may apply to the circuit court of the circuit
14 in which the property is located for an order that the materials
15 contract or subcontract has been completed. If the court is
16 satisfied that the materials contract or the subcontract has
17 been completed, the court shall enter an order declaring that
18 the materials contract or the subcontract has been completed.
19 If the payment certifier issues a certificate of completion to
20 the subcontractor or materialman as provided in subsection (a),
21 the owner or general contractor, within thirty days after the
22 payment certifier is required to issue a certificate of



1 completion as set forth in section 507-A(a), may apply to the
2 circuit court of the circuit in which the property is located
3 for an order that the materials contract or subcontract has not
4 been completed. If the court is satisfied that the materials
5 contract or subcontract has not been completed, the court shall
6 enter an order declaring that the materials contract or
7 subcontract has not been completed.

8 (f) An order under subsection (e):

9 (1) May be made on terms and conditions as to costs or
10 other terms that the court considers just; and

11 (2) Where such order declares that the subcontract has
12 been completed, it shall have the same effect as a
13 certificate of completion issued by a payment
14 certifier.

15 (g) If an order is made under subsection (e) declaring
16 that a contract or subcontract has been completed, the payment
17 certifier shall comply with subsection (d) as if the order were
18 a certificate of completion within seven days after receipt of
19 the order by the payment certifier.

20 (h) The certified amount set forth in a certificate of
21 completion or order issued under this section shall constitute a



1 lien against the property, and the materialman or subcontractor
2 to whom the certificate is issued may enforce that lien.

3 **§507-B Certificate of completion payment by owner.** (a)

4 An owner, upon receipt of either a certificate of completion
5 from a payment certifier or an order entered by a court pursuant
6 to section 507-A, within thirty days after receipt of the
7 certificate or order or on the date of completion, as defined in
8 section 507-43(f), whichever is earlier, shall make payment of
9 the certified amount set forth in that certificate or order to
10 the materialman or subcontractor.

11 (b) If an owner fails to make a payment as required in
12 subsection (a), the failure to make that payment shall
13 constitute a neglect to pay the sum upon demand, and the
14 materialman or subcontractor may then pursue foreclosure or
15 other remedies as provided for in section 507-47 by filing an
16 action in the circuit court of the circuit in which the property
17 is situated.

18 **§507-C Impact of certificate of completion upon retention**
19 **of funds by owner.** (a) As an exception to section 507-48 and

20 as an exception to any provision in a contract that provides
21 that an owner may withhold payment of an amount as retention
22 funds for the contract, if a certificate of completion is issued



1 on a subcontract or materials contract or an order is entered by
2 a court pursuant to section 507-A, the owner shall be obligated
3 to pay the entire certified amount set forth in the certificate
4 of completion or in the order entered by the court to the
5 materialman or subcontractor, and the owner may not withhold any
6 amounts under section 507-48 or otherwise. The owner shall pay
7 the certified amount within thirty days after receipt of the
8 certificate of completion or order.

9 (b) Payment of the certified amount, including any
10 retention amounts, by an owner pursuant to subsection (a), shall
11 fully discharge the owner of the owner's obligation to pay
12 amounts on that subcontract or materials contract.

13 (c) When payment is made by an owner of a certified
14 amount, the materialman or subcontractor, upon the request of
15 owner, shall execute a release of lien for that certified
16 amount."

17 SECTION 3. Section 507-41, Hawaii Revised Statutes, is
18 amended by adding four new definitions to be appropriately
19 inserted and to read as follows:

20 "Certificate of completion" means a certificate under
21 section 507-A stating that:



1 (1) A contract in which materials are provided by a
2 materialman; or

3 (2) A subcontract in which labor or labor and materials is
4 provided by a subcontractor;

5 has been completed. An order issued by the court under section
6 507-A shall also constitute a certificate of completion.

7 "Materialman" or "materialmen" means a person or persons
8 who are in the business of the furnishing of materials.

9 "Payment certifier" means:

10 (1) The architect, engineer, or other person identified in
11 the general contract as the person responsible for
12 issuing a payment certificate; or

13 (2) If there is no person as described in paragraph (1),
14 the owner acting alone or the owner's representative
15 which may be the architect, engineer project manager
16 or other representative selected by the owner.

17 "Subcontractor" means a person who enters into a contract
18 with a general contractor to provide labor or labor and
19 materials to the owner for the improvement of real property."

20 SECTION 4. Section 507-47, Hawaii Revised Statutes, is
21 amended to read as follows:



1 "**§507-47 Demand; enforcement; foreclosure; other**
2 **attachment.** After demand and refusal of the amount due or upon
3 neglect to pay the same upon demand, the lien or certificate of
4 completion may be enforced by action filed in the circuit court
5 of the circuit in which the property is situated. The demand
6 may be included in the Application and Notice, and when so
7 included, it shall not be necessary to make separate demand upon
8 any other person. The complaint, in addition to setting forth a
9 claim in the nature of assumpsit, may seek any remedies that the
10 party may otherwise have a right to under existing statutory or
11 common law. In addition, where a party has obtained a lien in
12 accordance with section 507-43, the party may pray for the
13 foreclosure of the lien as to which notice has been filed and
14 may pray for any incidental relief according to the usual
15 practice of courts of equity and according to this section in
16 enlargement thereof. The owner or the owner's assigns on whose
17 property the lien has attached may file a third-party action
18 against a licensed contractor whom the owner has paid for
19 improvements as provided for in section 444-28(g). All
20 proceedings concerning the same improvement shall, unless good
21 reason otherwise appears, be consolidated for trial and the
22 court may order publication of notice of the pendency of the



1 action. Any person having or claiming an interest in any such
2 proceeding or in the property, including other claimants,
3 lienors, encumbrancers, sureties, indemnitors, and the
4 contractors license board may be joined as parties, may be
5 interpleaded, or may be permitted to intervene, under such
6 orders as the court may enter. Interlocutory and final decrees
7 for the foreclosure of the liens, for deficiency judgments, and
8 relief against the parties liable therefor, and fixing the
9 priority of liens between the mechanics and materialmen as a
10 group and other parties having liens against or interests in the
11 property shall be made and entered as near as may be in
12 accordance with the practice on foreclosure of mortgages. If
13 the property or proceeds realized upon the foreclosure sale are
14 insufficient to satisfy all mechanic's and materialmen's liens
15 filed against the same, the property or proceeds shall, after
16 satisfaction of liens for wages for labor entitled to priority
17 under section 507-46, be divided pro rata among the liens
18 according to the principal amounts of the liens, without regard
19 to the order or priority in which the respective Applications
20 and Notices have been filed or the respective actions or
21 interventions commenced.



1 The court having jurisdiction of the action to foreclose
2 the lien shall have all of the powers pertaining to courts of
3 equity, and in addition may direct the issuance of a writ of
4 attachment or execution upon the motion of any party against the
5 property of any other party, in the same manner as is provided
6 in chapter 651 provided that the writ shall only issue where the
7 claim upon which the motion therefor is based is upon a
8 contract, express or implied, between the parties. In addition
9 to costs of the action the court may allow any fee or fees for
10 legal services rendered by the attorneys for any of the parties,
11 and apportion the same as costs for payment by and between the
12 parties or any of them, all as to the court seems equitable in
13 the light of the services performed and the benefits derived
14 therefrom by the parties respectively."

15 SECTION 5. Section 507-48, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "**§507-48 Owner may retain amount due.** Whenever the work
18 or material for which a lien is filed is furnished to any
19 contractor for use as set forth in section 507-42, the owner may
20 retain from the amount payable to the contractor an amount
21 sufficient to cover the amount due or to become due to the



1 person or persons who filed the lien[-], except as provided in
2 section 507-C."

3 SECTION 6. Section 507-49, Hawaii Revised Statutes, is
4 amended by amending subsection (b) to read as follows:

5 "(b) Anything contained in this chapter to the contrary
6 notwithstanding, no general contractor as defined in this
7 chapter or [~~his~~] the subcontractor or the subcontractor's
8 subcontractor who is required to be licensed pursuant to chapter
9 444, shall have lien rights or have the right to seek a
10 certificate of completion under section 507-A, unless [~~such~~] the
11 contractor was licensed pursuant to chapter 444 when the
12 improvements to the real property were made or performed, and no
13 subcontractor or subcontractor's subcontractor so licensed shall
14 have lien rights or the right to seek a certificate of
15 completion under section 507-A if [~~his~~] the work was
16 subcontracted to [~~him~~] the subcontractor by a general contractor
17 as defined in this chapter or [~~his~~] the contractor's
18 subcontractor who was required to be licensed but was not
19 licensed pursuant to chapter 444."

20 SECTION 7. Section 103-1.5, Hawaii Revised Statutes, is
21 amended to read as follows:



1 "[+]§103-1.5[+] **Definitions.** The definitions of chapter
2 103D and chapter 507 shall apply to this chapter unless the
3 context clearly requires otherwise."

4 SECTION 8. Chapter 103, Hawaii Revised Statutes, is
5 amended by adding two new sections to part I to be appropriately
6 designated and to read as follows:

7 "§103-A Certificate of completion. (a) On the written
8 request of a qualifying materialman or subcontractor who has
9 completed work required under a materials contract or
10 subcontract, the payment certifier, within thirty days after the
11 date of the request, shall determine whether the contract or
12 subcontract has been completed and, if the payment certifier
13 determines that it has been completed, the payment certifier
14 shall issue a certificate of completion stating that:

- 15 (1) The contract has been completed;
- 16 (2) The dollar amount of the materials contract or
17 subcontract; and
- 18 (3) The dollar amount of the materials contract or
19 subcontract that remains unpaid which shall constitute
20 the "certified amount" to be paid.



1 (b) In order to be a qualifying materialman or
2 subcontractor, the materialman or subcontractor shall meet the
3 qualifying requirements:

4 (1) Have a contract in writing for labor or materials and
5 services;

6 (2) Make a written request for a certificate of completion
7 not later than forty-five days after the date of
8 completion of that contract for materials or
9 subcontract; and

10 (3) Complete all obligations required under the materials
11 contract or subcontract, including where applicable,
12 providing lien releases from the subcontractor's
13 subcontractors or materialmen, proofs of insurance,
14 and compliance with applicable labor laws.

15 (c) A materialman or subcontractor is not required to seek
16 a certificate of completion under this section and may otherwise
17 assert its rights as set forth in this chapter.

18 (d) If a certificate of completion is issued, the payment
19 certifier shall, within seven days after issuing the certificate
20 of completion:

21 (1) Deliver a copy of the certificate to the paying
22 agency, the general contractor and surety, if any;



1 (2) Deliver a copy of the certificate of completion to the
2 materialman or subcontractor who made the request for
3 certificate of completion; and

4 (3) Post, in a prominent place on the improvement, a copy
5 of the certificate of completion.

6 (e) If the payment certifier fails or refuses to issue a
7 certificate of completion as provided in subsection (a), the
8 materialman or the subcontractor, within thirty days after the
9 payment certifier is required to issue a certificate of
10 completion as set forth in section 103-A(a), may apply to the
11 circuit court of the circuit in which the property is located
12 for an order that the materials contract or subcontract has been
13 completed. If the court is satisfied that the materials
14 contract or the subcontract has been completed, the court shall
15 enter an order declaring that the materials contract or the
16 subcontract has been completed. If the payment certifier issues
17 a certificate of completion to the subcontractor or materialman
18 as provided in subsection (a), the paying agency or general
19 contractor, within thirty days after the payment certifier is
20 required to issue a certificate of completion as set forth in
21 section 103-A(a), may apply to the circuit court of the circuit
22 in which the property is located for an order that the materials



1 contract or subcontract has not been completed. If the court is
2 satisfied that the materials contract or subcontract has not
3 been completed, the court shall enter an order declaring that
4 the materials contract or subcontract has not been completed.

5 (f) An order, under subsection (e):

6 (1) May be made on terms and conditions as to costs or
7 other terms that the court considers just; and

8 (2) Where such order declares that the subcontract has
9 been completed it shall have the same effect as a
10 certificate of completion issued by a payment
11 certifier.

12 (g) If an order is made under subsection (e) declaring
13 that a subcontract has been completed, the payment certifier
14 shall comply with subsection (d) as if the order were a
15 certificate of completion within seven days after receipt of the
16 order by the payment certifier.

17 **§103-B Certificate of completion by paying agency.** (a) A
18 paying agency, upon receipt of either a certificate of
19 completion from a payment certifier or an order entered by a
20 court pursuant to section 103-A, within thirty days after
21 receipt of the certificate or order or on the date of
22 completion, whichever is earlier, shall make payment of the



1 certified amount set forth in that certificate or order to the
2 materialman or subcontractor.

3 (b) If a paying agency fails to make a payment as required
4 in subsection (a), the failure to make that payment shall
5 constitute a neglect to pay the sum upon demand, and the
6 materialman or subcontractor may then pursue any remedies as
7 provided for in this chapter or section 103D-324 by filing an
8 action in the circuit court of the circuit in which the property
9 is situated. Presentation of the certificate of completion to
10 the paying agency shall constitute written notice for the
11 purposes of section 103D-124."

12 SECTION 9. Section 103-32.1, Hawaii Revised Statutes, is
13 amended to read as follows:

14 **"§103-32.1 Contract provision for retainage;**
15 **subcontractors.** (a) Any public contract may include a
16 provision for the retainage of a portion of the amount due under
17 the contract to the contractor to insure the proper performance
18 of the contract; provided that:

19 (1) The sum withheld by the procurement officer from the
20 contractor shall not exceed five per cent of the total
21 amount due the contractor and that after fifty per
22 cent of the contract is completed and progress is



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

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

9 (b) Where a subcontractor has provided evidence to the
10 contractor of:

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

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

16 (3) Any other form of collateral acceptable to the
17 contractor;

18 the retention amount withheld by the contractor from its
19 subcontractor shall be the same percentage of retainage as that
20 of the contractor. This subsection shall also apply to the
21 subcontractors who subcontract work to other subcontractors.



1 (c) Subsection (b) notwithstanding, where a subcontractor
2 or materialman presents to the paying agency a certificate of
3 completion, as set forth in section 103-10, the paying agency
4 shall be obligated to pay to the subcontractor or materialman
5 the entire certified amount set forth in the certificate of
6 completion no later than thirty days after receipt of the
7 certificate of completion, and the paying agency may not
8 withhold any amounts as retainage.

9 (d) Payment of the certified amount, including any
10 retained amounts by a paying agency pursuant to this section,
11 shall fully discharge the paying agency and the State or county
12 from any further obligation to pay amounts on that subcontract
13 or materials contract.

14 (e) For purposes of calculating the amount of retainage
15 that may be withheld by the procurement officer from a general
16 contractor pursuant to section 103-32-1(1), the procurement
17 officer shall take into consideration amounts paid to
18 subcontractors on certificates of completion and shall adjust
19 the retainage it withholds from the general contractor
20 accordingly."



1 SECTION 10. Section 103D-104, Hawaii Revised Statutes, is
2 amended by adding two new definitions to be appropriately
3 inserted and to read as follows:

4 "Paying agency" means the purchasing agency or such other
5 agency that is responsible for payment of a contract as
6 described in section 103-10.

7 "Payment certifier" means:

8 (1) The architect, engineer, or other person identified in
9 the general contract as the person responsible for
10 issuing a payment certificate; or

11 (2) If there is no person as described in paragraph (1),
12 the paying agency acting alone or the paying agency's
13 representative, which may be the architect, engineer
14 project manager, or other representative selected by
15 the paying agency."

16 SECTION 11. Section 103D-324, Hawaii Revised Statutes, is
17 amended to read as follows:

18 **"§103D-324 Contract performance and payment bonds. (a)**

19 Unless the policy board determines otherwise by rules, the
20 following bonds or security shall be delivered to the purchasing
21 agency and shall become binding on the parties upon the
22 execution of the contract if the contract which is awarded



1 exceeds \$25,000 and is for construction, or the purchasing
2 agency secures the approval of the chief procurement officer:

3 (1) A performance bond in a form prescribed by the rules
4 of the policy board, executed by a surety company
5 authorized to do business in this State or otherwise
6 secured in a manner satisfactory to the purchasing
7 agency, in an amount equal to one hundred per cent of
8 the price specified in the contract;

9 (2) A payment bond in a form prescribed by the rules of
10 the policy board, executed by a surety company
11 authorized to do business in this State or otherwise
12 secured in a manner satisfactory to the purchasing
13 agency, for the protection of all persons supplying
14 labor and material to the contractor for the
15 performance of the work provided for in the contract.
16 The bond shall be in an amount equal to one hundred
17 per cent of the price specified in the contract; or

18 (3) A performance and payment bond which satisfies all of
19 the requirements of paragraphs (1) and (2).

20 (b) The policy board may adopt rules that authorize the
21 head of a purchasing agency to reduce the amount of performance
22 and payment bonds.



1 (c) Nothing in this section shall be construed to limit
2 the authority of the chief procurement officer to require a
3 performance bond or other security in addition to those bonds,
4 or in circumstances other than specified in subsection (a).

5 (d) Every person who has furnished labor or material to
6 the contractor for the work provided in the contract, in respect
7 of which a payment bond or a performance and payment bond is
8 furnished under this section, and who has not been paid amounts
9 due therefor before the expiration of a period of ninety days
10 after the day on which the last of the labor was done or
11 performed or material was furnished or supplied, for which such
12 a claim is made, may institute an action for the amount, or
13 balance thereof, unpaid at the time of the institution of the
14 action against the contractor and its sureties, on the payment
15 bond or the performance and payment bond, and have their rights
16 and claims adjudicated in the action, and judgment rendered
17 thereon; subject to the State's priority on the bonds. If the
18 full amount of the liability of the sureties on the payment bond
19 is insufficient to pay the full amount of the claims, then,
20 after paying the full amount due the State, the remainder shall
21 be distributed pro rata among the claimants.



1 As a condition precedent to any such suit, written notice
2 shall be given to the paying agency, contractor, and surety,
3 within ninety days from the date on which the person did or
4 performed the last labor or furnished or supplied the last of
5 the material for which claim is made, stating with substantial
6 accuracy the amount claimed and the name of the party to whom
7 the material was furnished or supplied or for whom the labor was
8 done or performed.

9 The written notice shall be served by registered or
10 certified mailing of the notice, to the paying agency,
11 contractor, and surety, at any place they maintain an office or
12 conduct their business, or in any manner authorized by law to
13 serve summons.

14 (e) Every suit instituted under subsection (d) shall be
15 brought in the circuit court of the circuit in which the project
16 is located, but no such suit shall be commenced after the
17 expiration of one year after the day on which the last of the
18 labor was performed or material was supplied for the work
19 provided in the contract. The obligee named in the bond need
20 not be joined as a party in any such suit.

21 The terms "labor" and "material" have the same meanings in
22 this section as the terms are used in section 507-41.



1 (f) A subcontractor or materialman may also seek a
2 certificate of completion from the paying agency by following
3 the procedures set forth in sections 103-A to 103-B.

4 (g) In the event that a subcontractor or materialman
5 obtains a certificate of completion as described in section
6 103-A, the subcontractor or materialman may present the
7 certificate of completion to the paying agency for payment.

8 (h) A paying agency presented with a certificate of
9 completion, shall make payment of the certified amount no later
10 than thirty calendar days following receipt of the certificate
11 of completion.

12 (i) In the event that a paying agency presented with a
13 certificate of completion, fails to make payment as provided in
14 subsection (h), the subcontractor or materialman who has not
15 been paid the certified amount may institute an action for the
16 amount or balance thereof, unpaid at the time of the institution
17 of the action against the general contractor and, if a payment
18 bond or performance bond is issued for the project, on those
19 bonds, and may have all rights and claims adjudicated in the
20 action and judgment rendered, subject to the State's priority on
21 any bonds. Presentation of the certificate of completion to the



1 paying agency, general contractor and surety, if any, shall
2 constitute written notice as set forth in section 103D-324(d)."

3 SECTION 12. In codifying the new sections added by
4 sections 2 and 8 of this Act, the revisor of statutes shall
5 substitute appropriate section numbers for the letters used in
6 designating the new sections in this Act.

7 SECTION 13. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 14. This Act shall take effect on January 1, 2007.

10

INTRODUCED BY: 



Report Title:

Contracts; Liens; Certificate of Completion; Prompt Payment

Description:

Provides for prompt payment to subcontractors upon completion of the subcontractor's work or providing of materials for a project; permits subcontractor or materialman to obtain a certificate of completion; requires payment pursuant to certificate of completion within 30 days.

