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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. Act 291, Session Laws of Hawaii 2006, addressed  
2 the problem of delayed payments to subcontractors and  
3 materialmen on government projects, by providing for prompt  
4 payment to subcontractors and materialmen upon the completion of  
5 their work or furnishing of materials on government projects.  
6 However, the legislature finds that subcontractors and  
7 materialmen are still experiencing delays in payment and that  
8 further action is needed to ensure that they obtain timely  
9 payment upon completion of their work, not only on government  
10 projects, but on private sector projects as well.

11 The purpose of this Act is to provide for the prompt  
12 payment of subcontractors and materialmen on government and  
13 nongovernment projects.

14 SECTION 2. Chapter 444, Hawaii Revised Statutes, is  
15 amended by adding a new section to read as follows:

16 "§444- Performance bond. (a) Except as otherwise  
17 provided by law, before commencement of construction for which a  
18 contractor or subcontractor is responsible for performing, that



1 contractor or subcontractor may execute and deliver to an owner,  
2 contractor, or subcontractor a good and sufficient bond in a sum  
3 equal to the contract price for the faithful performance of the  
4 contract. The term of the bond under this subsection shall  
5 extend to include the period during which claims of lien or  
6 notices of other encumbrances based on the construction  
7 performed under the contract may be filed under applicable law.  
8 The bond shall be approved by the owner, contractor, or  
9 subcontractor entitled to withhold retainage.

10 A faithful performance bond delivered under this section  
11 shall require that:

- 12 (1) The obligations of the contract be faithfully  
13 performed;  
14 (2) Payment be made promptly to all persons supplying  
15 labor or material to the contractor or subcontractor  
16 for performance of the work provided in the contract;  
17 (3) All contributions due under state law from the  
18 contractor or subcontractor in connection with the  
19 performance of the contract be made promptly; and  
20 (4) All sums required to be deducted and retained from the  
21 wages of employees of the contractor or subcontractor



1           pursuant to state law be paid to the department of  
2           taxation.

3           (b) If a contractor or subcontractor does not obtain the  
4           bond described in subsection (a), the owner, contractor, or  
5           subcontractor may withhold, as retainage, the percentage of the  
6           contract price of the work completed, as agreed to by the  
7           parties to the contract. The owner, contractor, or  
8           subcontractor shall pay interest at the rate of one and one-half  
9           per cent per month on the final payment due a contractor or  
10           subcontractor who did not obtain the bond described in  
11           subsection (a). The interest shall commence ten days after the  
12           date on which claims of lien or notices of other encumbrances  
13           based on the construction performed under the contract are  
14           required to be filed under applicable law.

15           For purposes of this subsection, "final payment due a  
16           contractor or subcontractor" means the amount withheld as  
17           retainage less the total monetary amount of liens and other  
18           encumbrances resulting from the failure of the contractor or  
19           subcontractor to faithfully perform the obligations of the  
20           contract and properly filed within the time required under  
21           applicable law."



1 SECTION 3. Section 103-10.5, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "**§103-10.5 Prompt payment.** (a) Any money paid to a  
4 contractor shall be disbursed to subcontractors within [~~ten~~  
5 seven days after receipt of the money in accordance with the  
6 terms of the subcontract; provided that the subcontractor has  
7 met all the terms and conditions of the subcontract and there  
8 are no bona fide disputes on which the procurement officer has  
9 withheld payment.

10 (b) Upon final payment to the contractor, full payment to  
11 the subcontractor, including retainage, shall be made within  
12 [~~ten~~ seven days after receipt of the money; provided there are  
13 no bona fide disputes over the subcontractor's performance under  
14 the subcontract.

15 (c) If any periodic or final payment to a subcontractor  
16 under subsection (a) or (b) is made by more than seven days  
17 after receipt of a periodic or final payment by the contractor,  
18 and there are no bona fide disputes over the subcontractor's  
19 performance under the subcontract, the contractor shall pay the  
20 subcontractor interest, beginning on the eighth day, at the rate  
21 of one and one-half per cent per month.



1        (d) Full payment, less authorized deductions, shall be  
2 made to subcontractors that have completed one hundred per cent  
3 of their contract by or before the project is fifty per cent  
4 complete if the subcontractor has performed satisfactorily.  
5 Payment to the early finishing subcontractors shall be  
6 contingent upon compliance with subsection (e).

7        Early finishing subcontractors under this subsection shall  
8 include structural steel, piling, caisson, rebar steel, and  
9 demolition subcontractors. The early finishing subcontractors  
10 for which line-item release of retained funds is required shall  
11 not be construed to prevent the procurement officer from  
12 identifying any other subcontractors not listed in this  
13 subsection that are also allowed line-item release of retained  
14 funds. If the procurement officer identifies any other  
15 subcontractors to be allowed line-item release of retainage,  
16 those subcontractors shall be listed in the original bid  
17 documents.

18        [~~(e)~~] (e) Where a subcontractor has provided evidence to  
19 the contractor of satisfactorily completing all work under  
20 [~~their~~] the subcontract and has provided a properly documented  
21 final payment request as described in subsection [~~(d)~~] of this  
22 section,] (g), and:



1 (1) Has provided to the contractor an acceptable  
2 performance and payment bond for the project executed  
3 by a surety company authorized to do business in the  
4 State, as provided in section 103-32.1; or

5 (2) The following has occurred:

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

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

13 (i) An acceptable release of retainage bond,  
14 executed by a surety company authorized to  
15 do business in the State, in an amount [~~e~~]  
16 not more than two times the amount being  
17 retained or withheld by the contractor;

18 (ii) Any other bond acceptable to the contractor;  
19 or

20 (iii) Any other form of mutually acceptable  
21 collateral,



1 all sums retained or withheld from a subcontractor and otherwise  
2 due to the subcontractor for satisfactory performance under the  
3 subcontract shall be paid by the procurement officer to the  
4 contractor and subsequently, upon receipt from the procurement  
5 officer, by the contractor to the subcontractor within the  
6 applicable time periods specified in subsection (a) or (b) and  
7 section 103-10.

8 (f) If the procurement officer or the contractor fails to  
9 pay in accordance with this section, a penalty of one and one-  
10 half per cent per month shall be imposed upon the outstanding  
11 amounts due that were not timely paid by the responsible party.  
12 The penalty may be withheld from future payment due to the  
13 contractor, if the contractor was the responsible party. If a  
14 contractor [~~has violated~~] violates subsection (b) three or more  
15 times within two years of the first violation, the contractor  
16 shall be referred by the procurement officer to the [~~contractor~~]  
17 contractors license board for action under section 444-17(14).

18 [~~(d)~~] (g) A properly documented final payment request from  
19 a subcontractor, as required by subsection [~~(e)~~], (e), shall  
20 include:

21 (1) Substantiation of the amounts requested;



- 1           (2) A certification by the subcontractor, to the best of  
2           the subcontractor'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 subcontract;
- 6           (B) The subcontractor has made payments due to its  
7           subcontractors and suppliers from previous  
8           payments received under the subcontract 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 subcontractor intends to withhold or  
15          retain from a subcontractor or supplier in  
16          accordance with the terms and conditions of their  
17          subcontract; and
- 18          (3) The submission of documentation confirming that all  
19          other terms and conditions required under the  
20          subcontract agreement have been fully satisfied.





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

4           ~~(e)~~ (h) In the case of a construction contract, a  
5 payment request made by a contractor to the procurement officer  
6 that includes a request for sums that were withheld or retained  
7 from a subcontractor and are due to a subcontractor may not be  
8 approved under subsection ~~(e)~~ (e) unless the payment request  
9 includes:

- 10           (1) Substantiation of the amounts requested; and
- 11           (2) A certification by the contractor, to the best of the  
12 contractor's knowledge and belief, that:
- 13           (A) The amounts requested are only for performance in  
14 accordance with the specifications, terms, and  
15 conditions of the contract;
- 16           (B) The subcontractor has made payments due to its  
17 subcontractors and suppliers from previous  
18 payments received under the contract and will  
19 make timely payments from the proceeds of the  
20 payment covered by the certification, in  
21 accordance with their subcontract agreements and  
22 the requirements of this section; and



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

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

9       ~~[(f)]~~ (i) This section shall not be construed to impair  
10 the right of a contractor or a subcontractor at any tier to  
11 negotiate and to include in their respective subcontracts  
12 provisions that provide for additional terms and conditions that  
13 are requested to be met before the subcontractor shall be  
14 entitled to receive final payment under subsection ~~[(e) of this~~  
15 ~~section]~~ (d) or (e); provided that any ~~[such]~~ payments withheld  
16 shall be withheld by the procurement officer."

17       SECTION 4. Section 103-32.1, Hawaii Revised Statutes, is  
18 amended by amending subsection (d) to read as follows:

19       "(d) Where a subcontractor has provided evidence to the  
20 contractor of:

21       (1) A valid performance and a payment bond for the project  
22       that is acceptable to the contractor and executed by a



1           surety company authorized to do business in this  
2           State;

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

4           (3) Any other form of collateral acceptable to the  
5           contractor,

6           the retention amount withheld by the contractor from its  
7           subcontractor shall be not more than the same percentage of  
8           retainage as that of the contractor. This subsection shall also  
9           apply to the subcontractors who subcontract work to other  
10          subcontractors. Any percentage of retainage on payments made by  
11 the contractor to the subcontractor that exceeds the percentage  
12 of retainage on payments made by the procurement officer to the  
13 contractor shall be subject to interest to be paid by the  
14 contractor to the subcontractor at the rate of one and one-half  
15 per cent per month commencing from the thirtieth day after the  
16 difference in retainage percentages persists."

17          SECTION 5. Section 444-25, Hawaii Revised Statutes, is  
18          amended to read as follows:

19          "**§444-25 Payment for goods and services.** [~~A contractor~~  
20 ~~shall pay the contractor's subcontractor for any goods and~~  
21 ~~services rendered within sixty days after receipt of a proper~~  
22 ~~statement by the subcontractor that the goods have been~~



1 ~~delivered or services have been performed. The subcontractor~~  
2 ~~shall be entitled to receive interest on the unpaid principal~~  
3 ~~amount at the rate of one per cent per month commencing on the~~  
4 ~~sixtieth day following receipt of the statement by the~~  
5 ~~contractor, provided that this section shall not apply if the~~  
6 ~~delay in payment is due to a bona fide dispute between the~~  
7 ~~contractor and the subcontractor concerning the goods and~~  
8 ~~services contracted for. If there is no bona fide dispute~~  
9 ~~between the subcontractor and the contractor concerning the~~  
10 ~~goods or services contracted for, the subcontractor shall be~~  
11 ~~entitled to payment for goods and services under this section.]~~

12 (a) Partial payment is allowed and may be made on contracts  
13 under this chapter. Except as otherwise provided by law, an  
14 owner, contractor, or subcontractor may withhold as retainage an  
15 amount equal to not more than five per cent of the contract  
16 price of the work completed. Partial payment allowed under this  
17 subsection shall not constitute acceptance or approval of some  
18 of the work or a waiver of defects in the work.

19 (b) The owner, contractor, or subcontractor shall pay  
20 interest at the rate of one and one-half per cent per month on  
21 the final payment due the contractor or subcontractor. Except  
22 as otherwise provided by law, the interest shall commence thirty



1 days after the contractor or subcontractor has completed and the  
2 owner has accepted the work under the contract for construction  
3 for which the final payment is due. The interest shall run  
4 until the date when final payment is tendered to the contractor  
5 or subcontractor.

6 When the contractor or subcontractor considers the work  
7 that the contractor or subcontractor is contracted to perform to  
8 be complete, the contractor or subcontractor shall notify the  
9 party to whom the contractor or subcontractor is responsible  
10 under the contract. Within fifteen days after receiving the  
11 notice, the party shall accept the work or notify the contractor  
12 or subcontractor of work yet to be performed under the contract.  
13 If the party does not accept the work or does not notify the  
14 contractor or subcontractor of work yet to be performed within  
15 the time allowed, the interest required under this subsection  
16 shall commence thirty days after the end of the fifteen-day  
17 period.

18 (c) When a contractor pays a subcontractor in full,  
19 including the amount the contractor withheld as retainage, the  
20 owner with whom the contractor has the contract shall pay the  
21 contractor a sum equal to the amount of retainage that the  
22 contractor paid the subcontractor, out of the amount that the



1 owner withheld from the contractor as retainage. The contractor  
2 shall notify the owner when the contractor pays a subcontractor  
3 in full under this section and, within fifteen days after  
4 receiving the notice, the owner shall pay the contractor the  
5 amount due the contractor under this subsection. Interest on  
6 the amount due the contractor at the rate of one and one-half  
7 per cent per month shall commence thirty days after the owner  
8 receives notice of full payment to the subcontractor.

9       (d) If payment is contingent upon receipt of funds held in  
10 escrow or trust, the contractor shall clearly state this fact in  
11 the contractor's solicitation of bids. If the solicitation for  
12 bids contains the statement that the time of payment is  
13 contingent upon the receipt of funds held in escrow or trust and  
14 a contract is awarded in response to the solicitation, interest  
15 will not begin to accrue upon any unpaid balance until the  
16 sixtieth day following receipt by the contractor of the  
17 subcontractor's statement or the thirtieth day following receipt  
18 of the escrow or trust funds, whichever occurs later."

19       SECTION 6. Section 507-43, Hawaii Revised Statutes, is  
20 amended by amending subsection (f) to read as follows:

21       "(f) Date of completion, notice of. The term "date of  
22 completion" as used in this section means the time when the



1 owner or the general contractor for the improvement completes  
2 the publication of a notice that the improvement has been  
3 completed or has been abandoned and an affidavit of the  
4 publication, together with a copy of the notice has been filed  
5 in the office of the clerk of the circuit court where the  
6 property involved is situated; provided that notice of  
7 completion shall not be effective for any purpose unless prior  
8 to the notice there has been substantial completion of the  
9 improvement and the owner, developer, or government agency has  
10 accepted the project or the improvement has been actually  
11 abandoned; and provided further that the notice shall not be  
12 published by the contractor until after the contractor has first  
13 made written demand upon the owner to publish the notice and the  
14 owner has failed to publish the notice within five days from the  
15 date of the demand. The publication of the notice by the  
16 contractor or the owner shall not be construed as an admission  
17 by either that the improvement has been satisfactorily  
18 completed. The notice required herein shall be published twice,  
19 seven days apart, in a newspaper of general circulation, printed  
20 and published in the county in which the property involved is  
21 situated, and the publishing newspaper shall promptly file the  
22 affidavit of publication above mentioned in the office of the



1 clerk. If the general contractor publishes the notice of  
2 completion, the general contractor shall provide the owner and  
3 the subcontractors and architects involved with the project with  
4 a copy of the notice of completion no later than three days  
5 after the date that the notice is first published."

6 SECTION 7. This Act does not affect rights and duties that  
7 matured, penalties that were incurred, and proceedings that were  
8 begun before its effective date.

9 SECTION 8. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11 SECTION 9. This Act shall take effect on July 1, 2112.





**Report Title:**

Construction Contracts; Subcontractors and Materialmen; Payments

**Description:**

Shortens the time by which subcontractors are to receive progress and final payments from contractors on government and private construction projects. Provides interest penalties for late payments. Effective July 1, 2112. (HB1969 HD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

