

A Bill for an Act Relating to Contracts.

Be It Enacted by the Legislature of the State of Hawaii:

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

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

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

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

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

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

- ~~[(1) A valid union trust fund contribution bond acceptable to the contractor in an amount not less than three months of the subcontractor's trust fund contribution;~~
- ~~(2) A] (1) Has provided to the contractor an acceptable performance and payment bond for the project executed by a surety company authorized to do business in the State[;]~~
- ~~(3) Any other bond acceptable to the contractor; or~~
- ~~(4) Any other form of mutually acceptable collateral;~~

~~and the contractor fails to pay in accordance with this section, a penalty of one and one-half per cent per month shall be imposed on the outstanding amounts due to the subcontractor. The penalty may be withheld from future payment due to the contractor. Where a contractor has violated subsection (b) three or more times within two years of the first violation, the contractor shall be referred to the contractor license board by the procurement agency for action under section 444-17(14).], as provided in section 103-32.1; or~~

(2) The following has occurred:

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

(B) The subcontractor has provided to the contractor:

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

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

(iii) Any other form of mutually acceptable collateral,

all sums retained or withheld from a subcontractor and otherwise due to the subcontractor for satisfactory performance under the subcontract shall be paid by the procurement officer to the contractor and subsequently, upon receipt from the procurement officer, by the contractor to the subcontractor within the applicable time periods specified in subsection (b) and section 103-10. If the procurement officer or the contractor fails to pay in accordance with this section, a penalty of one and one-half per cent per month shall be imposed upon the outstanding amounts due that were not timely paid by the responsible party. The penalty may be withheld from future payment due to the contractor, if the contractor was the responsible party. If a contractor has violated subsection (b) three or more times within two years of the first violation, the contractor shall be referred by the procurement officer to the contractor license board for action under section 444-17(14).

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

(1) Substantiation of the amounts requested;

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

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

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

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

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

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

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

(1) Substantiation of the amounts requested; and

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

- (A) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
- (B) The subcontractor has made payments due to its subcontractors and suppliers from previous payments received under the contract and will make timely payments from the proceeds of the payment covered by the certification, in accordance with their subcontract agreements and the requirements of this section; and
- (C) The payment request does not include any amounts that the contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of their subcontract.

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

(f) This section shall not be construed to impair the right of a contractor or a subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under subsection (c) of this section; provided that any such payments withheld shall be withheld by the procurement officer.’’

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

“§103-32.1 Contract provision for retainage; subcontractors. (a) Any retainage provided for in this section or requested to be withheld by the contractor shall be held by the procurement officer.

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

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

- (1) The sum withheld by the procurement officer from the contractor shall not exceed five per cent of the total amount due the contractor and that, after fifty per cent of the contract is completed and progress is satisfactory, no additional sum shall be withheld; provided further that if progress is not satisfactory, the [contracting] procurement officer may continue to withhold, as retainage, sums not exceeding five per cent of the amount due the contractor; and
- (2) The retainage shall not include sums deducted as liquidated damages from moneys due or that may become due the contractor under the contract.

[{b}] (d) Where a subcontractor has provided evidence to the contractor of:

- (1) A valid performance and a payment bond for the project that is acceptable to the contractor and executed by a surety company authorized to do business in this State;
- (2) Any other bond acceptable to the contractor; or
- (3) Any other form of collateral acceptable to the contractor[;],

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

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

- (1) Permit the contractor or subcontractor to retain, without cause, a specified percentage of no more than ten per cent of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract, without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond, subject however, to the limitations of subsection (d); and
- (2) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's payment request may be withheld by the procurement officer in accordance with the subcontract agreement, without incurring any obligation to pay interest or a late payment penalty if:
 - (A) A notice conforming to the standards of subsection (f) has been previously furnished to the subcontractor; and
 - (B) A copy of any notice issued by the contractor or subcontractor pursuant to subparagraph (A) has been furnished to the procurement officer.

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

- (1) The amount to be withheld;
- (2) The specific causes for the withholding under the terms of the subcontract; and
- (3) The remedial actions to be taken by the subcontractor to receive payment of the amounts withheld.

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

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

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

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

- (1) By agreement on a fixed price adjustment before commencement of the pertinent performance [~~or as soon thereafter as practicable~~];
- (2) By unit prices specified in the contract or subsequently agreed upon[;] before commencement of the pertinent performance;
- (3) By the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon[;] before commencement of the pertinent performance;
- (4) In [such] any other manner as the contracting parties may mutually agree[;] upon before commencement of the pertinent performance; or
- (5) In the absence of agreement by the parties[;]:
 - (A) For change orders with value not exceeding \$50,000 by documented actual costs of the work, allowing for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to

- the contractor for the contractor's overhead and profit. There shall be no cap on the total cost of the work if this method is used. A change order shall be issued within fifteen days of submission by the contractor of proper documentation of completed force account work, whether periodic (conforming to the applicable billing cycle) or final. The procurement officer shall return any documentation that is defective to the contractor within fifteen days after receipt, with a statement identifying the defect; or
- (B) For change orders with value exceeding \$50,000 by a unilateral determination by the governmental body of the costs attributable to the events or situations under [such] clauses with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the rules adopted under section 103D-601 and subject to the provisions of part VII. When a unilateral determination has been made, a unilateral change order shall be issued within ten days. Costs included in the unilateral change order shall allow for twenty per cent of the actual costs for overhead and profit on work done directly by the contractor and ten per cent on any subcontractor's billing to the contractor for the contractor's overhead and profit. Upon receipt of the unilateral change order, if the contractor does not agree with any of the terms or conditions, or the adjustment or nonadjustment of the contract time or contract price, the contractor shall file a notice of intent to claim within thirty days after the receipt of the written unilateral change order. Failure to file a protest within the time specified shall constitute agreement on the part of the contractor with the terms, conditions, amounts, and adjustment or nonadjustment of the contract time or the contract price set forth in the unilateral change order.

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

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

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

(Approved July 10, 2006.)