

ENROLLED SENATE
BILL NO. 250

By: Stipe of the Senate

and

Adair and Glover of the
House

An Act relating to public works; amending 61 O.S. 1991, Sections 2, 113.1 and 121, as amended by Section 2, Chapter 293, O.S.L. 1993 (61 O.S. Supp. 1994, Section 121), which relate to filing of bonds, retainage and addendums; requiring bond to provide for payment of certain taxes or overpayment of certain estimates; providing for certain claim for delinquent taxes or overpayment of certain estimates; requiring time limit; requiring certain notice; construing paragraphs; prohibiting Oklahoma Department of Transportation from withholding retainage on certain contracts under certain circumstances; allowing the Transportation Commission to authorize the Director of the Department of Transportation to approve certain change orders; requiring change orders approved by the Director to be presented to the Transportation Commission; repealing 69 O.S. 1991, Section 1103, as amended by Section 1, Chapter 203, O.S.L. 1994 (69 O.S. Supp. 1994, Section 1103), which relates to retention of monies due under contract; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 61 O.S. 1991, Section 2, is amended to read as follows:

Section 2. ~~Such bond~~ A. Bonds shall be filed in the office of the agency, institution, department, commission, municipality or government instrumentality that is authorized by law and does enter into contracts for the construction of public improvements or buildings, or repairs to the same; and the officer with whom the bond is filed shall furnish a copy thereof to any person claiming any rights thereunder. Any person to whom there is due any sum for labor, material or repair to machinery or equipment, furnished as stated in ~~the preceding section~~ Section 1 of this title, ~~his~~ the heirs or assigns of such person, may bring an action on ~~said the~~ said the bond for the recovery of ~~said the~~ said the indebtedness, provided that no action shall be brought on ~~said the~~ said the bond after one (1) year from the day on which the last of the labor was performed or material or parts furnished for which ~~such the~~ such the claim is made.

~~Provided, however, that any~~ B. Any person having direct contractual relationship with a subcontractor performing work on ~~said the~~ said the contract, but no contractual relationship express or implied with the contractor furnishing ~~said the~~ said the payment bond, shall have a right of action upon the ~~said~~ said payment bond only upon giving

written notice to ~~said~~ the contractor and surety on ~~said~~ the payment bond within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or parts for which ~~such~~ the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or parts were furnished or supplied or for whom the labor was done or performed. ~~Such~~ The notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place he the contractor maintains an office or conducts ~~his~~ business, together with a copy thereof to the surety or sureties on ~~said~~ the payment bond.

C. 1. The bond or irrevocable letter of credit issued to the Oklahoma Department of Transportation, pursuant to this section, shall also provide that the contractor shall pay all state and local taxes accruing as a result of the contract, any liquidated damages as provided by the contract and any overpayment of progressive estimates resulting in a balance due and owing the Oklahoma Department of Transportation.

2. A claim against the bond or irrevocable letter of credit for delinquent taxes shall be made by the public entity to which the tax was payable. The claim shall be made within six (6) months from the date on which the tax became delinquent. Notice of the delinquent tax shall be sent by certified mail to the surety, and a copy of the notice shall be sent to the contractor. Nothing in this paragraph shall be construed to release, at any time, the contractor from responsibility for full payment of all taxes.

3. A claim against the bond or irrevocable letter of credit for overpayment on progressive estimates shall be made by the public entity within one (1) year from the date of final acceptance of the project. Notice of the overpayment shall be sent by certified mail to the surety and a copy of the notice shall be sent to the contractor. Nothing in this paragraph shall be construed as to release, at any time, the contractor from the responsibility of refunding any amount overpaid on progressive estimates which are due and owing the Oklahoma Department of Transportation.

SECTION 2. AMENDATORY 61 O.S. 1991, Section 113.1, is amended to read as follows:

Section 113.1 A. A public construction contract shall provide for partial payment based upon work completed. The contract shall provide that up to ten percent (10%) of all ~~such~~ partial payments made shall be withheld as retainage. At any time the contractor has completed in excess of fifty percent (50%) of the total contract amount, the retainage shall be reduced to five percent (5%) of the amount earned to date if the owner or owner's duly authorized representative has determined that satisfactory progress is being made, and upon approval by the surety.

B. ~~The Oklahoma Department of Transportation may prescribe its own policy and procedures for~~ shall not withhold retainage on public construction contracts awarded by ~~said~~ the Department.

C. The Oklahoma Department of Transportation shall not withhold retainage or require any bond on projects awarded to railroads on the railroad's privately owned or operated rail property.

SECTION 3. AMENDATORY 61 O.S. 1991, Section 121, as amended by Section 2, Chapter 293, O.S.L. 1993 (61 O.S. Supp. 1994, Section 121), is amended to read as follows:

Section 121. Change orders or addendums to public construction contracts of One Million Dollars (\$1,000,000.00) or less shall not exceed a fifteen percent (15%) cumulative increase in the original contract amount. Change orders or addendums to public construction

contracts of over One Million Dollars (\$1,000,000.00) shall not exceed the greater of One Hundred Fifty Thousand Dollars (\$150,000.00) or a ten percent (10%) cumulative increase in the original contract amount. Any change orders or cumulative change orders which exceed these limits shall require a readvertising for bids on that part of the contract. Change orders in any amount shall be formally approved by the governing body of the public agency involved and the reasons therefor recorded in the permanent records. The Transportation Commission may, by rule, authorize the Director of the Department of Transportation to approve change orders in an amount of not to exceed One Hundred Fifty Thousand Dollars (\$150,000.00). Change orders approved by the Director shall be presented to the Transportation Commission during the next regular meeting and the reasons therefor recorded in the permanent records. All change orders shall contain a unit price and total for each of the following items:

1. All materials with cost per item; and
2. Itemization of all labor with number of hours per operation and cost per hour; and
3. Itemization of all equipment with the type of equipment, number of each type, cost per hour for each type, and number of hours of actual operation for each type; and
4. Itemization of insurance cost, bond cost, social security, taxes, workers' compensation, employee fringe benefits and overhead cost; and
5. Profit for the contractor.

If the construction contract was bid on a unit basis, and the change order is based exactly on the unit price or basis, such a change order will not be subject to this section. When the individual change orders are less than Ten Thousand Dollars (\$10,000.00), the change order may be based on an acceptable unit price(s) basis in lieu of cost itemization as required in paragraphs 1, 2, 3, 4 and 5 of this section. Alternates or add items bid with the original bid and contained in the awarded contract as options of the awarding public agency shall not be construed as change orders under the provisions of ~~this act~~ the Public Competitive Bidding Act of 1974, Section 101 et seq. of this title.

SECTION 4. REPEALER 69 O.S. 1991, Section 1103, as amended by Section 1, Chapter 203, O.S.L. 1994 (69 O.S. Supp. 1994, Section 1103), is hereby repealed.

SECTION 5. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 9th day of May, 1995.

President of the Senate

Passed the House of Representatives the 15th day of May, 1995.

Speaker of the House of
Representatives