

STATE OF OKLAHOMA

2nd Session of the 49th Legislature (2004)

CONFERENCE COMMITTEE
SUBSTITUTE
FOR ENGROSSED
HOUSE BILL NO. 2554

By: Nations of the House

and

Nichols of the Senate

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to contracts; stating that certain provisions of construction agreements are void; providing nonapplicability to certain provisions; providing definition; providing certain exclusion; stating that indemnity agreements relating to certain wells are void under certain circumstances; providing definition; stating that certain provisions of an insurance contract indemnity agreement are void; providing nonapplicability; prohibiting performance of certain services; providing exception; amending Sections 2, 3, and 5 of Enrolled Senate Bill No. 1561 of the 2nd Session of the 49th Oklahoma Legislature, which relates to the Fair Pay for Construction Act; modifying certain definitions; increasing number of calendar days for certain payment reduction procedure; clarifying those persons or entities that may suspend performance; providing for codification; providing an effective date; and declaring an emergency.

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

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 422.1 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. Except as provided in subsection B of this section, any provision in a construction agreement that requires a person or that person's surety or insurer to defend, hold harmless, or indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee is void.

B. This section does not affect any provision in a construction agreement that requires a person or that person's surety or insurer to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property to the extent that the death or bodily injury to persons or damage to property arises out of the fault of the indemnitor, or the fault of the indemnitor's agents, representatives or subcontractors.

C. As used in this section, "construction agreement" means any written agreement for the construction, alteration, repair, improvement or maintenance of any building, highway, road excavation or other structure, project, development or improvement attached to real estate including moving, demolition or tunneling in connection therewith. Without limiting those agreements that are not construction agreements, a "construction agreement" does not include:

1. Any real property lease or rental agreement between a landlord and tenant whether or not any provision of the lease or rental agreement relates to or involves construction, alteration, repair, improvement or maintenance as long as the predominant purpose of the lease or rental agreement is not construction, alteration, repair, improvement or maintenance of real property; or

2. Any personal property lease or rental agreement.

D. The provisions of this section shall not apply to a railroad.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 422.2 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. An agreement, covenant or promise, foreign or domestic, contained in, collateral to or affecting an agreement pertaining to a well for oil, gas or water, or mine for a mineral, within this state, that purports to defend, hold harmless, or indemnify the indemnitee against loss or liability for damages arising from the

circumstances specified in paragraph 1, 2 or 3 of this subsection is against public policy and is void:

1. The sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee;

2. The sole or concurrent negligence of an independent contractor who is directly responsible to the indemnitee; or

3. An accident that occurs in operations carried on at the direction or under the supervision of the indemnitee, an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee.

B. As used in this section, "agreement pertaining to a well for oil, gas or water, or mine for a mineral" means an agreement:

1. Concerning any operations related to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging or otherwise rendering services in connection with a well drilled for the purpose of producing or disposing of oil, gas or other minerals or water;

2. For rendering services in connection with a mine shaft, drift or other structure intended for use in the exploration for or production of a mineral; or

3. To perform a portion of the work or services described in paragraph 1 or 2 of this subsection or an act collateral thereto.

C. A provision in an insurance contract indemnity agreement naming a person as an additional insured or a provision in an insurance contract or any other contract requiring a waiver of rights of subrogation or otherwise having the effect of imposing a duty of indemnification on the primary insured party that would, if it were a direct or collateral agreement described in subsections A and B of this section be void, is against public policy and void.

D. Nothing in this section shall:

1. Deprive an owner of the surface estate of the right to secure indemnity from a lessee, operator, contractor or other person conducting operations for the exploration of minerals on the owner's land; or

2. Affect the validity of a benefit conferred by Title 85 of the Oklahoma Statutes.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 765.4 of Title 15, unless there is created a duplication in numbering, reads as follows:

Any person or entity that inspects houses for mold shall not also render service for removing the mold; provided that, if the total cost of the inspection and removal does not exceed Two Hundred Dollars (\$200.00), the consumer may consent to the inspection and removal by the same person or entity.

SECTION 4. AMENDATORY Section 2 of Enrolled Senate Bill No. 1561 of the 2nd Session of the 49th Oklahoma Legislature, is amended to read as follows:

Section 2. As used in the Fair Pay for Construction Act:

1. "Construction contract" means a written ~~agreement relating to the construction, alteration, repair, maintenance, moving or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land.~~ A subcontract shall be included under this definition contract or subcontract awarded by an owner or contracting entity for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same;

2. "Material supplier" means any entity that supplies materials, services, or equipment to be used in conjunction with the performance of work on a construction contract;

3. "Prime contractor" means any entity that has a direct contract with an owner to perform work under a construction contract;

4. "Owner" means any state government entity, municipality, township, public trust or ~~any other publicly funded entity~~ an instrumentality of a state government entity, municipality, township or public trust in this state, or any entity designated by the owner to act on the owner's behalf, that requests work to be performed by a contractor under a construction contract;

5. "Proper invoice" means a request for payment or partial payment based on work performed to the owner's satisfaction on a construction contract;

6. "Retainage" means ~~funds due and payable for satisfactory performance under a construction contract, but withheld until substantial completion, or as set forth in the construction contract documents~~ the difference between a gross proper invoice amount on a construction contract and the amount paid on said contract;

7. "Subcontractor" means any entity that has a direct contract with a prime contractor to perform a portion of the work under a construction contract; and

8. "Sub-subcontractor" means any entity that has a direct contract with another subcontractor to perform a portion of the work under a construction contract.

SECTION 5. AMENDATORY Section 3 of Enrolled Senate Bill No. 1561 of the 2nd Session of the 49th Oklahoma Legislature, is amended to read as follows:

Section 3. A. On all construction contracts exceeding Twenty-five Thousand Dollars (\$25,000.00) in value an owner shall make progress payments to the prime contractor for work performed and materials properly stored, within thirty (30) calendar days after a proper invoice is submitted to the owner or a representative designated by the owner.

B. An owner or entity designated by the owner, may not reduce a payment application of a prime contractor without detailing and forwarding to the prime contractor, within ~~seven (7)~~ fourteen (14)

calendar days of receipt of the proper invoice, the reasons for reduction. The reduction may not be more than an amount that is reasonable to correct the work, as set forth in writing.

C. If a contracting entity has had their proper invoice reduced by another entity all other affected entities having a construction contract with the contracting entity shall be notified within seven (7) calendar days. Except as affected by a prior reduction, a prime contractor or subcontractor may not reduce the proper invoice of another subcontractor, sub-subcontractor, or material supplier without detailing and forwarding to the subcontractor, sub-subcontractor, or material supplier, within seven (7) calendar days of receipt of the proper invoice, the reasons for reduction. A prime contractor, subcontractor, or sub-subcontractor may also reduce a payment of a contracted party from a previous proper invoice. Any such reductions may not be more than an amount that is reasonable to correct the reasons for reduction, as set forth in writing. Any owner, prime contractor, subcontractor or sub-subcontractor may be exempt from notification if the reduction is less than one percent (1%) of its net proper invoice or is due to mathematical errors.

SECTION 6. AMENDATORY Section 5 of Enrolled Senate Bill No. 1561 of the 2nd Session of the 49th Oklahoma Legislature, is amended to read as follows:

Section 5. A. Any prime contractor that performs work under a construction contract may suspend performance of the work or may terminate a construction contract if the prime contractor is not properly paid within forty-nine (49) calendar days of the date that the corresponding proper invoice is submitted. Written notice must be received by the owner at least seven (7) calendar days before any such intended suspension or termination.

B. ~~Any A prime contractor, subcontractor, sub-subcontractor or material supplier~~ any entity that suspends performance ~~as provided~~

~~in this act, including those entities that suspend performance~~ due to the suspension of a prime contractor, is not required to furnish further performance until such entity is paid for the full amount, less retainage, of work performed, material supplied, or services rendered, together with any costs incurred for mobilization resulting from the shutdown and start-up of a project.

C. Any entity that suspends performance of the work or terminates a construction contract for nonpayment under this act shall not be held in breach of the construction contract.

D. If the owner delays in making payments to the prime contractor, any agreed-upon schedule or completion date and their resulting penalties, damages, bonuses, or rewards shall be extended by the same amount of calendar days that payments were late.

E. If a payment to a prime contractor is received later than as specified in this act, that prime contractor shall be entitled to receive interest pursuant to Section 41.4b of Title 62 of the Oklahoma Statutes. If the prime contractor has already paid a subcontractor, then no interest is due and owing to the subcontractor. If interest is paid to a prime contractor as provided herein, then any subsequent timely payment made to a subcontractor shall bear interest at the same rate paid to the prime contractor. If a prime contractor fails to timely pay a subcontractor, such payment to a subcontractor shall bear interest at the rate of one and one-half percent (1 1/2%) per month, ~~if it is the prevailing party in any action brought to seek enforcement pursuant to this act. In addition, the prevailing party may not be precluded from seeking dispute costs in a reasonable amount.~~

F. ~~If a payment to a subcontractor, sub-subcontractor, or material supplier is received later than as specified in this act, that subcontractor, sub-subcontractor, or material supplier shall be entitled to receive interest at the rate of one and one-half percent (1 1/2%) per month, if it is the prevailing party in any action~~

~~brought to seek enforcement pursuant to this act. In addition, the prevailing party may not be precluded from seeking dispute costs in a reasonable amount.~~

SECTION 7. This act shall become effective July 1, 2004.

SECTION 8. 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.

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