

and

Boren of the House

[Fair Pay for Construction Act - terms - notice -
codification -

effective date]

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 621 of Title 15, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Fair Pay for Construction Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 622 of Title 15, unless there is created a duplication in numbering, reads as follows:

As used in the Fair Pay for Construction Act:

1. "Construction contract" means a written or oral 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 also be included under this definition;

2. "Contractor" means any person, firm, partnership, corporation, association or other organization, or a combination, that has a direct contract with an owner to perform work under a construction contract;

3. "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;

4. "Owner" means any person, firm, partnership, corporation, association or other organization, or a combination, that causes a building, structure or improvement to be constructed, altered, repaired, maintained, moved or demolished or that causes land to be excavated or otherwise developed or improved, whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee or another interest or estate less than fee;

5. "Retainage" means funds due and payable for satisfactory performance under a construction contract, but withheld until completion of all work;

6. "Subcontractor" means any person, firm, partnership, corporation, association or other organization, or a combination, that has a direct contract with a contractor to perform a portion of the work under a construction contract; and

7. "Sub-subcontractor" means any person, firm, partnership, corporation, association or other organization, or a combination, that has a direct contract with another subcontractor to perform a portion of the work under a construction contract.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 623 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. By mutual agreement with a contractor, an owner may make progress payments on construction contracts of less than sixty (60) days. An owner shall make progress payments to a contractor on all other construction contracts. Progress payments shall be made on the basis of a duly certified and approved billing of the work performed and the materials supplied during the preceding monthly billing cycle. The owner shall make progress payments to the contractor within fourteen (14) days after the date the billing is received by the owner.

B. A billing shall be deemed approved and certified seven (7) days after the owner receives the billing, unless before that time

the owner or the owner's agent prepares and issues a written statement detailing those items in the billing that are not approved and certified. An owner may decline to approve and certify a billing or portion of a billing for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed, failure of the contractor, subcontractor, or a sub-subcontractor to make timely payments for labor, equipment and materials, damage to the owner, or reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum. If the owner declines to approve all of the billing as submitted, the contractor make a good faith effort to notify all subcontractors and material suppliers, if any, that are affected by the owner's decision to disapprove any portion of the billing. Within seven (7) days after the owner's decision to disapprove any portion of the billing, the contractor shall make a good faith effort to justify and reinstate any nonapproved items. Seven (7) days after the initial approval date, any items previously rejected or reduced, but revised and/or reinstated back into the billing by owner, shall also become approved and certified. The owner is deemed to have received the billing when the billing is submitted to any person designated by the owner for the receipt of these submissions or for review or approval of the billing.

C. An owner may withhold from a progress payment only an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to correct any items set forth in writing pursuant to subsection B of this section.

D. Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing for the work performed or the material supplied in accordance with the terms of the construction contract between the parties.

E. A construction contract shall not alter the rights of any contractor, subcontractor, sub-subcontractor, or material supplier to receive prompt and timely payments as provided under this act.

F. If an owner or a third party designated by an owner as the person responsible for making payments on a construction contract does not make a timely payment pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half percent (1 1/2%) a month or fraction of a month on the unpaid balance, or at a higher rate as agreed by the parties to the construction contract.

G. Upon the written request of a subcontractor, sub-subcontractor, or material supplier, the owner shall notify the requesting party within five (5) days after the issuance of any payment to the contractor. A subcontractor, sub-subcontractor, or material supplier cannot be held in breach of a construction contract for contacting the owner under this subsection.

H. In any action or arbitration brought to collect payments or interest pursuant to this section, the prevailing party may be awarded costs and attorney fees in a reasonable amount.

I. If the owner and contractor are a single entity, then the owner/contractor shall be considered as an owner, subcontractors will be considered as contractors, and first-tier sub-subcontractors will be considered as subcontractors as it may apply throughout this act.

J. Nothing in this act prohibits any party in a construction contract from agreeing to an accelerated payment schedule.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 624 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. Notwithstanding the other provisions of this section, performance by a contractor, subcontractor, sub-subcontractor, or material supplier in accordance with the provisions of a

construction contract entitles the contractor, subcontractor, sub-subcontractor or material supplier to payment from the party with whom the contractor, subcontractor, sub-subcontractor, or material supplier contracts.

B. If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the contractor shall pay to its subcontractors and material suppliers, within seven (7) days of corresponding owner payment, the full amount for such work and materials supplied and properly applied for under the subcontract. If a sub-subcontractor or material supplier has performed in accordance with the provisions of a construction contract, each subcontractor shall pay to its sub-subcontractors and material suppliers, within seven (7) days of corresponding contractor payment, the full amount for such work and materials supplied and properly applied for under the subcontract. Payment shall not be required pursuant to this subsection unless the subcontractor, sub-subcontractor, or material supplier provides to the contractor or subcontractor a billing or invoice for the work performed or material supplied in compliance with the terms of the contract between the parties. Each subcontractor, sub-subcontractor, or material supplier shall, upon request, provide a waiver of any mechanic's or materialman's lien, but only conditioned upon payment for the work completed or material supplied. It shall be against public policy in this state and thus unenforceable in any construction contract for work performed or materials supplied, to waive any lien rights before payment is received for such work performed or materials supplied. The contractor or subcontractor may require that such conditional waivers of lien be notarized. Any diversion by the contractor, subcontractor, or sub-subcontractor of payments received for work performed pursuant to a construction contract, or failure to reasonably account for the application or use of such payments, constitutes a violation of Sections 152 and

153 of Title 42 of the Oklahoma Statutes, and may result in applicable penalties and prosecution.

C. A subcontractor or material supplier billing under a construction contract shall be deemed proper and approved at the time that the contractor submits the corresponding billing to the owner, unless before that time the contractor prepares and issues a written statement detailing those items in the billing that are not approved. A contractor may reduce a billing or portion of a billing from the subcontractor or material supplier, but only upon proportionally reducing the same billing to the owner, and only for the following; unsatisfactory job progress, defective work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed, failure of the subcontractor, or sub-subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, or reasonable evidence that the construction contract cannot be completed for the unpaid balance of the subcontract sum. The written statement detailing those items in such reduced billing shall also be forwarded with the contractor billing to the owner. For the purpose of this subsection, a subcontractor shall have the same relationship with a sub-subcontractor and material supplier as contractor has with subcontractor.

D. If a periodic or final payment to a subcontractor or material supplier is received later than the prescribed day as specified in subsection B of this section, the contractor shall pay its subcontractor or material supplier interest, except for periods of time during which payment is withheld pursuant to subsection C of this section, beginning on the next day after payment is due, at the rate of one and one-half percent (1 1/2%) per month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree. If a periodic or final payment to a sub-subcontractor or

material supplier is received later than the prescribed day as specified in subsection B of this section, the subcontractor shall pay its sub-subcontractor or material supplier interest, except for periods of time during which payment is withheld pursuant to subsection C of this section, beginning on the next day after payment is due, at the rate of one and one-half percent (1 1/2%) per month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree.

E. In any action or arbitration brought to collect payments or interest pursuant to this section, the prevailing party may be awarded costs and attorney fees in a reasonable amount.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 625 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. A contractor may suspend performance under a construction contract or terminate a construction contract for failure by the owner to make timely payment of the amount certified and approved pursuant to Section 3 of this act. A contractor shall provide written notice to the owner at least seven (7) days before the contractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the owner and contractor. A contractor shall not be deemed in breach of the construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a contractor to suspend performance or terminate a construction contract under this subsection.

B. A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner fails to make timely payment of amounts certified and approved pursuant to Section 3 of this act for the subcontractor's work and the contractor fails to pay the subcontractor for the certified and

approved work. A subcontractor shall provide written notice to the contractor and owner at least three (3) days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship with the contractor shall have the same rights as a subcontractor under this subsection.

C. A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner makes timely payment of amounts certified and approved pursuant to Section 3 of this act to the contractor for the subcontractor's work but the contractor fails to pay the subcontractor for the certified and approved work. A subcontractor shall provide written notice to the contractor and owner at least seven (7) days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship with the contractor shall have the same rights as a subcontractor under this subsection.

D. A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner declines to approve and certify portions of the contractor's billing pursuant

to Section 3 of this act for that subcontractor's work but the reasons for that failure by the owner to approve and certify are not the fault of or directly related to the subcontractor's work. A subcontractor shall provide written notice to the contractor and the owner at least seven (7) days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship with the contractor shall have the same rights as a subcontractor under this subsection.

E. A sub-subcontractor may suspend performance under a construction contract or terminate a construction contract if the contractor fails to make timely payment of amounts approved pursuant to Section 4 of this act for the sub-subcontractor's work and the subcontractor fails to pay the sub-subcontractor for the approved work. A sub-subcontractor shall provide written notice to the owner, contractor, and subcontractor at least three (3) days before the sub-subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the subcontractor and sub-subcontractor. A sub-subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a sub-subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship

with the subcontractor shall have the same rights as a sub-subcontractor under this subsection.

F. A sub-subcontractor may suspend performance under a construction contract or terminate a construction contract if the contractor makes timely payment of amounts approved pursuant to Section 4 of this act for the sub-subcontractor's work but the subcontractor fails to pay the sub-subcontractor for the approved work. A sub-subcontractor shall provide written notice to the owner, contractor, and subcontractor at least seven (7) days before the sub-subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the subcontractor and sub-subcontractor. A sub-subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a sub-subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship with the subcontractor shall have the same rights as a sub-subcontractor under this subsection.

G. A sub-subcontractor may suspend performance under a construction contract or terminate a construction contract if the contractor declines to approve portions of the subcontractor's billing pursuant to Section 4 of this act for that sub-subcontractor's work but the reasons for that failure by the contractor to approve are not the fault of or directly related to the sub-subcontractor's work. A sub-subcontractor shall provide written notice to the owner, contractor, and subcontractor at least seven (7) days before the sub-subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the subcontractor and sub-subcontractor. A sub-subcontractor shall not be deemed in breach of

a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a sub-subcontractor to suspend performance or terminate a construction contract under this subsection. A material supplier that has a contractual relationship with the subcontractor shall have the same rights as a sub-subcontractor under this subsection.

H. Any party that suspends performance as provided in this section is not required to furnish further labor, materials or services until such party is paid for the full amount 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.

I. If the owner delays in making payments to the contractor, notwithstanding of any other provision of this act that may be enforced or not enforced, any agreed upon schedule and/or completion date and their resulting penalties, damages, bonuses, or rewards, shall be extended by the same amount of days that payments were late for the project or any particular phase of the project. Such extension shall be granted without written application and shall not result in breach of contract.

J. In any action or arbitration brought pursuant to this section, the prevailing party may be awarded costs and attorney fees in a reasonable amount.

K. Written notice required under this section shall be deemed to have been provided if either of the following occurs:

1. The written notice is delivered in person or sent by any means that provides written, third party verification of delivery to the individual, member of the entity, or an officer of the corporation for which it was intended; or

2. The written notice is delivered in person or sent by any means that provides written, third party verification of delivery to

the last business address known by the party giving notice, of the individual, member of the entity, or an officer of the corporation for which it was intended.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 626 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. A construction contract may include a provision for the retainage of a portion of payment due from the owner to the contractor, not to exceed five percent (5%) of the amount of the payment due. The retainage may not be withheld on any payment due pursuant to the construction contract without being deposited into an income bearing escrow account, with such income accruing for the benefit of the contractor. Any amounts so retained by the owner shall be held by the owner in trust for the benefit of the contractor and contractor's subcontractors, sub-subcontractors, and suppliers at whatever tier who are not in default, in proportion to their respective interests. Such retainage shall be subject to the conditions and limitations in this section.

B. 1. The owner and contractor must mutually agree upon the escrow arrangement and any use of an escrow agent.

2. Funds in the escrow account shall only be invested in certificates of deposit, U.S. Treasury bonds, U.S. Treasury notes, U.S. Treasury bills, or bonds and notes of the State of Oklahoma or political subdivision thereof.

3. As income on escrowed investments becomes available, it shall be collected into the escrow account and paid to the contractor.

4. The escrow arrangement shall provide monthly reports to the owner and contractor. Reports shall detail the beginning value, changes, and the ending value of the account. The owner or contractor shall not be permitted to withdraw funds from the account

without written consent from the other party, except in the event of default.

5. If an owner enters into more than one construction contract that requires the maintenance of escrow accounts, the escrow accounts may be combined, or may be established separately.

6. Upon default or overpayment, as determined by a court or other ruling authority having jurisdiction over the contract, the escrow arrangement shall deliver funds within ten (10) days to the owner in the amount of such default or overpayment, provided, however, that the redemption value of the account is sufficient to cover the disbursement.

7. The owner shall pay all fees and expenses of the escrow account.

8. The escrow account constitutes a specific pledge to the owner, and the contractor or subcontractor shall not, except to its surety, otherwise assign, pledge, discount, or transfer interest in the account in any way. Funds in the escrow account are not subject to levy, garnishment, attachment, or other process.

9. The owner is not liable to the contractor, subcontractor, or their sureties for the failure of the escrow agent to perform under the escrow agreement.

10. An escrow agent is not liable to a party to the escrow agreement unless the escrow agent breaches the fiduciary duty under the agreement.

11. If the owner and contractor are the same entity, or if one entity has a controlling interest in another, then the escrow agent, all terms of the escrow agreement, and all withdrawals must be approved in writing by a majority of subcontractors on that particular project.

12. At such time as the construction contracts are completed, and all duties of all parties to the escrow agreement have been fulfilled, the escrow account may be terminated.

C. The contractor may tender to the owner acceptable substitute security as set forth in subsection E of this section with a written request for release of retainage in the amount of the substitute security. If the tender is made after retainage has been withheld, the owner shall, within seven (7) days after receipt of the tender, pay to the contractor the withheld retainage to the extent of the substitute security. If the tender is made before retainage has been withheld, the owner shall, to the extent of the substitute security, refrain from withholding any retainage from the future payments.

D. A subcontractor of the contractor may tender to the contractor acceptable substitute security as set forth in subsection E of this section with a written request for release of retainage in the amount of the substitute security. The contractor shall tender the subcontractor's substitute security to the owner with a like request, pursuant to the provisions of subsection C of this section. The contractor shall pay to the subcontractor, within seven (7) days after receipt from owner, any accumulated retainage paid by the owner to the contractor on account of substitute security tendered by the subcontractor. The contractor shall refrain from withholding retainage from payments to the subcontractor to the extent the owner has refrained from withholding retainage from payments to the contractor on account of the subcontractor's substituted security. The subcontractor shall be entitled to receive, upon receipt by the contractor, all income received by the contractor from the owner on account of income producing securities deposited by the subcontractor as substitute security.

E. The following shall constitute acceptable substitute security for purposes of subsections C and D of this section:

1. Certificates of deposit drawn and issued by a national banking association located in this state or by any banking corporation incorporated pursuant to the laws of this state, and

mutually agreeable to the project owner and the contractor or subcontractor, in the amount of the retainage released; and

2. Any other security mutually agreed upon by both parties of the construction contract.

The contractor shall be entitled to receive, in all events, all interest and income earned on any securities deposited by the contractor in substitution for retainage. The subcontractor shall be entitled to receive, in all events, all interest and income earned on any securities deposited by the subcontractor in substitution for retainage.

F. Until a subcontractor's performance has been satisfactorily completed, a contractor may withhold retainage from payments to a subcontractor, but such percentage shall not exceed five percent (5%) of the amount due. A contractor shall not withhold from the subcontractor any retainage in excess of the retainage withheld from the contractor by the owner for the subcontractor's work, unless the contractor has substituted securities pursuant to subsections C and E of this section, and the subcontractor has not substituted securities pursuant to subsections D and E of this section.

G. When a subcontractor's performance has been satisfactorily completed, the contractor shall request the elimination of retainage for such subcontractor, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full. The owner, whose approval shall not be unreasonably withheld, shall as part of the next contractual payment cycle release the subcontractor's retainage to the contractor, who shall, within seven (7) days of receipt, release such retainage as is due the subcontractor.

H. Until the sub-subcontractor's performance has been satisfactorily completed, a subcontractor may withhold retainage from payments to a sub-subcontractor, but such percentage shall not exceed five percent (5%) of the amount due. A subcontractor shall not withhold from sub-subcontractor any retainage in excess of the

retainage withheld from the subcontractor by the contractor for the sub-subcontractor's work, unless the subcontractor has substituted securities pursuant to subsections D and E of this section. A subcontractor must release, within seven (7) calendar days of receipt, any retainage received as is due to any sub-subcontractor.

I. No later than fourteen (14) days after the project reaches substantial completion, as defined in subsection J of this section, all retainage or substitute security shall be released by the owner to the contractor less an amount equal to one hundred fifty percent (150%) of the estimated costs to complete any remaining items. Upon receipt of such funds or substitute security from the owner, the contractor shall, within seven (7) days, release to each subcontractor that subcontractor's share of the funds or substitute security. Upon receipt of such funds from the contractor, the subcontractor shall, within seven (7) days, release to each sub-subcontractor that sub-subcontractor's share of the funds.

J. The project shall be deemed to have reached substantial completion upon the occurrence of the earlier of the following:

1. The architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract documents;

2. The owner receiving a certificate of occupancy;

3. The owner accepting the project. A project shall be defined as all work under a portion of a construction contract for which the contract, contract addendum, change order, or any other authorization to perform work for an additional sum states a separate price;

4. A required federal agency's final approval or certification;

or

5. The owner receiving full beneficial use of the project.

K. If retainage is withheld in violation of this section, then in addition to any other remedies or awards for damages, the party

to which the retainage was due shall be entitled to interest on the unpaid balance, beginning on the next day after payment is due, at the rate of one and one-half percent (1 1/2%) per month or a fraction of a month, or at such higher rate as the parties agree. If retainage is withheld in violation of this section, then the party to which the retainage was due shall be entitled to all remedies available under Section 5 of this act. In any action or arbitration brought pursuant to this section, the successful party may be awarded costs and attorney fees.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 627 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. This act shall not apply to any aspect of highway construction and related government agencies, including but not limited to the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority.

B. The following are against this state's public policy and are void and unenforceable:

1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state; and

2. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract stating that a party to the contract cannot suspend performance under the contract or terminate the contract if another party to the contract fails to make payments under this act.

SECTION 8. This act shall become effective November 1, 2003.

Passed the Senate the 11th day of March, 2003.

Presiding Officer of the Senate

Passed the House of Representatives the ____ day of _____,
2003.

Presiding Officer of the House
of Representatives