

ENROLLED SENATE
BILL NO. 1561

By: Coates of the Senate

and

Paulk, Kirby, Adkins,
Morgan (Fred), Smithson,
Calvey and Peters of the
House

An Act relating to contracts; creating the Fair Pay for Construction Act; providing short title; defining terms; establishing specified guidelines and procedures for proper invoices and payment; requiring payment under certain circumstances; allowing suspension or termination of performance of contract under certain circumstances; requiring certain notice; stating certain consequences of suspension or termination; stating results of delay in making certain payments; requiring payment of specified interest under certain circumstances; allowing certain retainage of payment; providing procedures for certain retainage; limiting applicability of act; describing void and unenforceable provisions; providing for codification; and providing an 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 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;

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 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 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;

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 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. 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) 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 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. If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the prime contractor shall make payment to the subcontractor or material supplier no later than ten (10) calendar days after the prime contractor receives its corresponding payment for the work performed.

B. If a sub-subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the sub-subcontractor or material supplier shall be entitled to receive payment no later than seven (7) calendar days after subcontractor receives its corresponding payment for the work performed.

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. 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 prime contractor, subcontractor, sub-subcontractor or material supplier 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 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 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. Such retainage is not to exceed ten percent (10%) of the amount of the payment due. When the gross proper invoice of the prime contractor first equal or exceed fifty percent (50%) of the value of the contract, the amount of retainage withheld thereafter shall not exceed five percent (5%) of the total proper invoice.

B. A subcontract may include a provision for the retainage of a portion of payment due. Such retainage is not to exceed ten percent (10%) of the amount of the payment due. When the gross proper invoice of the subcontractor or sub-subcontractor first equal or exceed fifty percent (50%) of the value of the subcontract, the retainage percentage withheld thereafter shall not exceed that percentage withheld from the entity withholding retainage.

C. No later than twenty-one (21) calendar days after a certificate of substantial completion is issued for the project or separate usable phase of the project and upon adequate performance of the prime contractor and with approval of any applicable surety, retainage shall be released by the owner to the prime contractor less an amount no greater than one hundred fifty percent (150%) of the estimated costs to correct any incomplete or defective work as identified, itemized, and attached to the certificate of substantial completion. All remaining funds shall be released as each deficiency is satisfactorily completed. The prime contractor shall release within ten (10) calendar days of receipt, the share of those funds that have been withheld from other entities. All other entities shall release within seven (7) calendar days of receipt, the share of those funds that have been withheld from other entities.

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. 1. This act shall not apply to:

- a. highway construction, or
- b. railroad construction.

2. Except as the following may be a portion of a construction contract as defined in Section 2 of this act, this act shall not apply to:

- a. roads,
- b. bridges,
- c. utilities,
- d. traffic control,
- e. drainage construction,
- f. sanitary sewer construction, or
- g. waterline construction.

3. This act shall not apply to any contract relating to a single-, two-, three-, or four-family dwelling.

B. The following are against the public policy of this state 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 that disallows or alters the rights of any prime contractor, subcontractor, sub-subcontractor, or material supplier to receive and enforce any and all rights under this act.

SECTION 8. This act shall become effective November 1, 2004.

Passed the Senate the 28th day of April, 2004.

Presiding Officer of the Senate

Passed the House of Representatives the 20th day of April, 2004.

Presiding Officer of the House
of Representatives