

STATE OF OKLAHOMA

1st Session of the 50th Legislature (2005)

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 1748

By: Sullivan

COMMITTEE SUBSTITUTE

An Act relating to contracts; amending Sections 2 and 3, Chapter 256, O.S.L. 2004, as amended by Sections 2 and 3, Chapter 425, O.S.L. 2004, Section 4, Chapter 256, O.S.L. 2004, Section 5, Chapter 256, O.S.L. 2004, as amended by Section 4, Chapter 425, O.S.L. 2004, and Sections 6 and 7, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Sections 622, 623, 624, 625, 626 and 627), which relate to the Fair Pay for Construction Act; modifying certain definitions; adding certain definitions; removing monetary requirement on construction contracts; providing for certain method of progress payments; clarifying method of making reductions for certain payments; modifying certain notice procedures; removing reference to material supplier; modifying reference to certain construction contract; modifying procedures for suspension of performance; modifying reference for calculation of interest; modifying method of providing for retainage; adding certain exceptions; modifying items declared to be void and unenforceable; and providing an effective date.

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

SECTION 1. AMENDATORY Section 2, Chapter 256, O.S.L. 2004, as amended by Section 2, Chapter 425, O.S.L. 2004 (15 O.S. Supp. 2004, Section 622), is amended to read as follows:

Section 622. As used in the Fair Pay for Construction Act:

1. "Construction contract" means a written contract ~~or subcontract~~ awarded by an owner ~~or contracting entity~~ to a prime contractor for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same under the Public Competitive Bidding Act;

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 written contract with an owner to perform work under a construction contract;

4. "Owner" means any state government entity, municipality, township, public trust or 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~~ contracts for work to be performed by a contractor under a construction contract;

5. "Proper invoice" means a request for payment or partial payment ~~based on~~ made in accordance with the construction contract for completed work performed and materials properly stored to the owner's satisfaction ~~on a~~ in accordance with the construction contract;

6. "Retainage" means the difference between ~~a gross proper invoice~~ the amount earned by the contractor on a public construction contract, with the work being accepted by the public agency, and the amount paid on ~~said~~ the contract by the public agency;

7. "Subcontractor" means any entity that has a direct written contract with a prime contractor to perform a portion of the work or any material supplier that provides supplies, materials, services, or equipment under a construction ~~contract~~ subcontract; and

8. "Sub-subcontractor" means any entity that has a direct written contract with ~~another~~ a subcontractor to perform a portion of the work or any material supplier that provides supplies, materials, services, or equipment under a construction ~~contract~~ sub-subcontract;

9. "Construction subcontract" means a written contract between the prime contractor and a subcontractor for the purpose of providing work, service, equipment, and/or material; and

10. "Construction sub-subcontract" means a written contract between a subcontractor and a sub-subcontractor for the purpose of providing work, service, equipment, and/or material.

SECTION 2. AMENDATORY Section 3, Chapter 256, O.S.L. 2004, as amended by Section 3, Chapter 425, O.S.L. 2004 (15 O.S. Supp. 2004, Section 623), is amended to read as follows:

Section 623. 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. Provided, however, whenever the construction contract is between a prime contractor and two or more owners, either directly or indirectly, then the owners shall have thirty (30) calendar days after a proper invoice is submitted to the owner in accordance with the construction contract to make progress payments to the prime contractor. A public agency is not obligated to pay for any work or any portion of any work not performed, completed, or provided in accordance with the public construction contract or applicable law. A public agency is not obligated to pay for any materials that do not meet the requirements and conditions of the public construction contract or are not stored in accordance with the public construction contract or applicable law.

B. An owner ~~or entity designated by the owner,~~ may not reduce a ~~payment application of~~ progress payment to a prime contractor without detailing and forwarding to the prime contractor, within 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~~

However, the owner need not notify the prime contractor of a reduction for retainage which is based upon the construction contract or applicable laws. The owner is not obligated to pay for any work or portion of work not performed, completed, or provided in accordance with the construction contract or applicable law. Any owner is exempt from notification if the reduction is less than one percent (1%) of its gross proper invoice or is due to mathematical errors.

C. If a ~~contracting entity~~ prime contractor has had ~~their~~ its proper invoice reduced by ~~another entity all other affected entities~~ having a construction contract with the contracting entity shall be notified the owner, the prime contractor shall notify its subcontractors within seven (7) calendar days of receipt of the reduction notice from the owner. Except as affected by a prior reduction, a prime contractor ~~or subcontractor~~ may not reduce the proper invoice of ~~another~~ its 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~~ reduction notice from the owner, the reasons for reduction. A prime contractor, ~~subcontractor, or sub-subcontractor~~ may also reduce a payment ~~of~~ to a party with whom it has 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~~ perform the work or provide the materials in accordance with the construction subcontract, as set forth in writing. ~~Any owner,~~ A prime contractor, ~~subcontractor or sub-subcontractor may be~~ is exempt from notification if the reduction is less than one percent (1%) of its ~~net~~ gross proper invoice or is due to mathematical errors.

D. If a subcontractor has had its proper invoice reduced by the prime contractor, the subcontractor shall notify its sub-subcontractors within seven (7) calendar days of receipt of the

reduction notice from the prime contractor. Except as affected by a prior reduction, a subcontractor may not reduce the proper invoice of its sub-subcontractor without detailing and forwarding to the sub-subcontractor, within seven (7) calendar days of receipt of the reduction notice from the prime contractor, the reasons for reduction. A subcontractor or sub-subcontractor may also reduce a payment to a party whom it has contracted from a previous proper invoice. Any such reductions may not be more than an amount that is reasonable to perform the work or provide the materials in accordance with the construction subcontract, as set forth in writing. Any subcontractor is exempt from notification if the reduction is less than one percent (1%) of its gross proper invoice or is due to mathematical errors.

E. Payment will be deemed to have been received when:

1. Sent by first class United States mail;

2. Hand-delivered;

3. Deposited in an account pursuant to a direct deposit agreement; or

4. Upon agreement of the payor and the payee, the prime contractor, subcontractor, or sub-subcontractor is notified by e-mail or facsimile, with receipt confirmation, that the payment is ready for immediate pickup during regular business hours.

SECTION 3. AMENDATORY Section 4, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 624), is amended to read as follows:

Section 624. A. If a subcontractor ~~or material supplier~~ has performed in accordance with the provisions of a construction ~~contract~~ subcontract, 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 from the owner for the work performed.

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

SECTION 4. AMENDATORY Section 5, Chapter 256, O.S.L. 2004, as amended by Section 4, Chapter 425, O.S.L. 2004 (15 O.S. Supp. 2004, Section 625), is amended to read as follows:

Section 625. 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, or seventy-nine (79) calendar days for construction contracts with two or more owners, of the date that the corresponding proper invoice is submitted to the owner for completed work and stored materials that comply with the construction contract and applicable laws. Written notice of the prime contractor's intent to either suspend or terminate work must be received by the owner from the prime contractor at least seven (7) calendar days before any such intended suspension or termination. The written notice shall also contain an offer of settlement detailing the reasons therefor. Should the payment dispute fail to be resolved within the seven-calendar-day notice period and should the prime contractor suspend or terminate work then the owner may contract with another party or parties to complete the work.

B. A prime contractor ~~or any entity that suspends 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 completed work performed, material supplied, or services rendered in accordance with the construction

contract and applicable laws, together with any costs incurred for ~~mobilization~~ remobilization 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~~ at the same rate established in Section ~~41.4b~~ 113.3 of Title ~~62~~ 61 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.

SECTION 5. AMENDATORY Section 6, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 626), is amended to read as follows:

Section 626. ~~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~~ equals or ~~exceed~~ exceeds 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 6. AMENDATORY Section 7, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 627), is amended to read as follows:

Section 627. A. 1. ~~This act~~ The Fair Pay for Construction Act shall not apply to:

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

c. contracts involving federal funds, grants, or obligations, or the subject of federal mandates or orders.

2. Except as the following may be a portion of a construction contract as defined in Section ~~2~~ 622 of this ~~act~~ title, this act shall not apply to the following projects:

- a. ~~roads~~ road, runway, taxiway, and parking lot,
- b. ~~bridges~~ bridge,
- c. ~~utilities~~ utility,
- d. traffic control,
- e. drainage construction,
- f. sanitary sewer infrastructure construction, or
- g. ~~waterline~~ water infrastructure 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~~ 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 7. This act shall become effective November 1, 2005.

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