

STATE OF OKLAHOMA

2nd Session of the 50th Legislature (2006)

COMMITTEE SUBSTITUTE
FOR
SENATE BILL 1789

By: Coates

COMMITTEE SUBSTITUTE

An Act relating to public buildings and public works; amending Section 2, Chapter 256, O.S.L. 2004, as last amended by Section 1, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005, Section 3, Chapter 256, O.S.L. 2004, as last amended by Section 2, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005, Section 5, Chapter 256, O.S.L. 2004, as last amended by Section 3, Chapter 92, O.S.L. 2005 and as renumbered by Section 6, Chapter 92, O.S.L. 2005, and Section 6, Chapter 256, O.S.L. 2004, as amended by Section 4, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005 (61 O.S. Supp. 2005, Sections 222, 223, 225 and 226), which relate to definitions, owner's duty to make progress payments, and retainage provision in contracts and subcontracts; modifying definitions; modifying certain contract amount; requiring certain payments under certain circumstances; requiring retainage; setting maximum percentage of retainage; modifying time limit and other requirement for payment; clarifying language for retainage provisions in public contract; 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 last amended by Section 1, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005 (61 O.S. Supp. 2005, Section 222), is amended to read as follows:

Section 222. 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 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 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, submitted in accordance with the contract, based on work performed on a construction contract;

6. "Retainage" means the difference between ~~a gross proper invoice~~ the amount earned by the contractor on a construction contract and the amount paid on ~~said~~ the contract by the owner;

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 2. AMENDATORY Section 3, Chapter 256, O.S.L. 2004, as last amended by Section 2, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005 (61 O.S. Supp. 2005, Section 223), is amended to read as follows:

Section 223. A. On all construction contracts exceeding ~~Twenty-five Thousand Dollars (\$25,000.00)~~ Fifty Thousand Dollars (\$50,000.00) 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 proper invoice of 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.

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 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 3. AMENDATORY Section 5, Chapter 256, O.S.L. 2004, as last amended by Section 3, Chapter 92, O.S.L. 2005, and as renumbered by Section 6, Chapter 92, O.S.L. 2005, (61 O.S. Supp. 2005, Section 225), is amended to read as follows:

Section 225. 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. 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 work performed, material supplied, or services rendered, together with any costs incurred for demobilization, mobilization and other costs attributable to delay of the work 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.

SECTION 4. AMENDATORY Section 6, Chapter 256, O.S.L. 2004, as amended by Section 4, Chapter 92, O.S.L. 2005, and as

renumbered by Section 6, Chapter 92, O.S.L. 2005 (61 O.S. Supp. 2005, Section 226), is amended to read as follows:

Section 226. 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 value of the contract~~ public construction contract shall provide for partial payment based upon work completed. The contract shall provide that up to ten percent (10%) of all 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 of the surety.

B. A subcontract may include a provision for the ~~retainage~~ withholding 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 shall not exceed that percentage withheld from the entity withholding retainage~~ shall not exceed the retained percentage to be withheld from the prime contractor for the subcontractor's completed work.

C. No later than ~~twenty-one (21)~~ thirty (30) 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, in proportion to the usable area that has been substantially completed, 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 5. This act shall become effective November 1, 2006.

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