ENGROSSED SENATE
BILL NO. 1001

By: Coates of the Senate

and

Liebmann of the House

An Act relating to contracts and public buildings and public works; amending Section 2, Chapter 256, O.S.L. 2004, as amended by Section 2, Chapter 425, O.S.L. 2004, Section 3, Chapter 256, O.S.L. 2004, as amended by Section 3, Chapter 425, O.S.L. 2004, Section 5, Chapter 256, O.S.L. 2004, as amended by Section 4, Chapter 425, O.S.L. 2004, Section 6, Chapter 256, O.S.L. 2004, and Section 7, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Sections 622, 623, 625, 626 and 627), which relate to the Fair Pay for Construction Act; modifying definition; clarifying term; authorizing payment of specified costs under certain contracts; clarifying authorized amount of certain retainage; adding certain exception; providing for recodification; 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 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 based on work performed ~~to the owner's satisfaction~~ on a construction contract;

6. "Retainage" means 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 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.

B. An owner or entity designated by the owner, may not reduce a ~~payment application~~ <u>proper invoice</u> 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 ~~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 3. 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 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 (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~~ value of the contract.

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 5. 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 shall not apply to:

a. highway construction, ~~or~~

b. railroad construction<u>, or</u>

<u>c. turnpike construction</u>.

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 6. RECODIFICATION Section 1, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 621), shall be recodified as Section 221 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering;

Section 2, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 622), as last amended by Section 1 of this act, shall be recodified as Section 222 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering;

Section 3, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 623), as last amended by Section 2 of this act, shall be recodified

as Section 223 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering;

Section 4, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 624), shall be recodified as Section 224 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering;

Section 5, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 625), as last amended by Section 3 of this act, shall be recodified as Section 225 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering;

Section 6, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 626), as last amended by Section 4 of this act, shall be recodified as Section 226 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering; and

Section 7, Chapter 256, O.S.L. 2004 (15 O.S. Supp. 2004, Section 627), as amended by Section 5 of this act, shall be recodified as Section 227 of Title 61 of the Oklahoma Statutes, unless there is created a duplication in numbering.

SECTION 7. This act shall become effective November 1, 2005.

Passed the Senate the 9th day of March, 2005.

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Presiding Officer of the Senate

Passed the House of Representatives the ____ day of _____, 2005.

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Presiding Officer of the House
of Representatives