

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE BILL 1245*
Commerce, Small Business and Entrepreneurship Committee Substitute Adopted
5/1/07
House Committee Substitute Favorable 7/19/07

Short Title: Retainage Payments/Construction Contracts.

(Public)

Sponsors:

Referred to:

March 26, 2007

A BILL TO BE ENTITLED

AN ACT AMENDING THE LAWS RELATED TO RETAINAGE PAYMENTS ON
PUBLIC CONSTRUCTION CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-134.1 reads as rewritten:

"§ 143-134.1. Interest on final payments due to prime contractors; payments to subcontractors.

(a) On all public construction contracts which are let by a board or governing body of the State government or any political subdivision thereof, except contracts let by the Department of Transportation pursuant to G.S. 136-28.1, the balance due prime contractors shall be paid in full within 45 days after respective prime contracts of the project have been accepted by the owner, certified by the architect, engineer or designer to be completed in accordance with terms of the plans and specifications, or occupied by the owner and used for the purpose for which the project was constructed, whichever occurs first. ~~Provided, however, that whenever~~ However, when the architect or consulting engineer in charge of the project determines that delay in completion of the project in accordance with terms of the plans and specifications is the fault of the contractor, the project may be occupied and used for the purposes for which it was constructed without payment of any interest on amounts withheld past the 45 day limit. No payment shall be delayed because of the failure of another prime contractor on ~~such~~ the project to complete his contract. Should final payment to any prime contractor beyond the date ~~such~~ the contracts have been certified to be completed by the designer or architect, accepted by the owner, or occupied by the owner and used for the purposes for which the project was constructed, be delayed by more than 45 days, ~~said~~ the prime contractor shall be paid interest, beginning on the 46th day, at the rate of one percent (1%) per month or fraction thereof unless a lower rate is agreed upon on ~~such~~ the unpaid balance as may be due. In addition to the above final payment provisions, periodic

1 payments due a prime contractor during construction shall be paid in accordance with
2 the provisions of this section and the payment provisions of the contract documents that
3 do not conflict with this section, or ~~said~~ the prime contractor shall be paid interest on
4 any ~~such~~ unpaid amount at the rate stipulated above for delayed final payments. ~~Such~~
5 The interest shall begin on the date the payment is due and continue until the date on
6 which payment is made. ~~Such~~ The due date may be established by the terms of the
7 contract. Funds for payment of ~~such~~ the interest on state-owned projects shall be
8 obtained from the current budget of the owning department, institution, or agency.
9 Where a conditional acceptance of a contract exists, and where the owner is retaining a
10 reasonable sum pending correction of ~~such~~ the conditions, interest on ~~such~~ the
11 reasonable sum shall not apply.

12 (b) Within seven days of receipt by the prime contractor of each periodic or final
13 payment, the prime contractor shall pay the subcontractor based on work completed or
14 service provided under the subcontract. ~~Should~~ If any periodic or final payment to the
15 subcontractor ~~be~~ is delayed by more than seven days after receipt of periodic or final
16 payment by the prime contractor, the prime contractor shall pay the subcontractor
17 interest, beginning on the eighth day, at the rate of one percent (1%) per month or
18 fraction thereof on ~~such~~ the unpaid balance as may be due.

19 (b1) No retainage on periodic or final payments made by the owner or prime
20 contractor shall be allowed on public construction contracts in which the total project
21 costs are less than one hundred thousand dollars (\$100,000). Retainage on periodic or
22 final payments on public construction contracts in which the total project costs are equal
23 to or greater than one hundred thousand dollars (\$100,000) is allowed as follows:

24 (1) The owner shall not retain more than five percent (5%) of any periodic
25 payment due a prime contractor.

26 (2) When the project is fifty percent (50%) complete, the owner shall not
27 retain any further retainage from periodic payments due the contractor
28 if the contractor continues to perform satisfactorily and any
29 nonconforming work identified in writing prior to that time by the
30 architect, engineer, or owner has been corrected by the contractor and
31 accepted by the architect, engineer, or owner. If the owner determines
32 the contractor's performance is unsatisfactory, the owner may reinstate
33 retainage for each subsequent periodic payment application as
34 authorized in this subsection up to the maximum amount of five
35 percent (5%). The project shall be deemed fifty percent (50%)
36 complete when the contractor's gross project invoices equal or exceed
37 fifty percent (50%) of the value of the contract.

38 (3) A subcontract on a contract governed by this section may include a
39 provision for the retainage on periodic payments made by the prime
40 contractor to the subcontractor. However, the percentage of the
41 payment retained: (i) shall be paid to the subcontractor under the same
42 terms and conditions as provided in subdivision (2) of this subsection
43 and (ii) shall not exceed the percentage of retainage on payments made
44 by the owner to the prime contractor. Any percentage of retainage on

1 payments made by the prime contractor to the subcontractor that
2 exceeds the percentage of retainage on payments made by the owner to
3 the prime contractor shall be subject to interest to be paid by the prime
4 contractor to the subcontractor at the rate of one percent (1%) per
5 month or fraction thereof.

6 (4) Within 60 days after the submission of a pay request and one of the
7 following occurs, as specified in the contract documents, the owner
8 with written consent of the surety shall release to the contractor all
9 retainage on payments held by the owner: (i) the owner receives a
10 certificate of substantial completion from the architect, engineer, or
11 designer in charge of the project; or (ii) the owner receives beneficial
12 occupancy of the project. However, the owner may retain sufficient
13 funds to secure completion of the project or corrections on any work.
14 If the owner retains funds, the amount retained shall not exceed two
15 and one-half times the estimated value of the work to be completed or
16 corrected. Any reduction in the amount of the retainage on payments
17 shall be with the consent of the contractor's surety.

18 (5) The existence of any third-party claims against the contractor or any
19 additive change orders to the construction contract shall not be a basis
20 for delaying the release of any retainage on payments.

21 (b2) Full payment, less authorized deductions, shall also be made for those trades
22 that have reached one hundred percent (100%) completion of their contract by or before
23 the project is fifty percent (50%) complete if the contractor has performed satisfactorily.
24 However, payment to the early finishing trades is contingent upon the owner's receipt of
25 an approval or certification from the architect of record or applicable engineer that the
26 work performed by the subcontractor is acceptable and in accordance with the contract
27 documents. At that time, the owner shall reduce the retainage for such trades to
28 five-tenths percent (0.5%) of the contract. Payments under this subsection shall be made
29 no later than 60 days following receipt of the subcontractor's request or immediately
30 upon receipt of the surety's consent, whichever occurs later. Early finishing trades under
31 this subsection shall include structural steel, piling, caisson, and demolition. The early
32 finishing trades for which line-item release of retained funds is required shall not be
33 construed to prevent an owner or an owner's representative from identifying any other
34 trades not listed in this subsection that are also allowed line-item release of retained
35 funds. Should the owner or owner's representative identify any other trades to be
36 afforded line-item release of retainage, the trade shall be listed in the original bid
37 documents. Each bid document shall list the inspections required by the owner before
38 accepting the work, and any financial information required by the owner to release
39 payment to the trades, except the failure of the bid documents to contain this
40 information shall not obligate the owner to release the retainage if it has not received the
41 required certification from the architect of record or applicable engineer.

42 (b3) Following fifty percent (50%) completion of the project, the owner shall be
43 authorized to withhold additional retainage, not to exceed five percent (5%) as set forth

1 in subsection (b1)(1) of this section, in order to allow the owner to retain two and one-
2 half percent (2.5%) total retainage through the completion of the project.

3 (b4) Neither the owner's nor contractor's release of retainage on payments as part
4 of a payment in full on a line-item of work under subsection (b2) of this section shall
5 affect any applicable warranties on work done by the contractor or subcontractor, and
6 the warranties shall not begin to run any earlier than either the owner's receipt of a
7 certificate of substantial completion from the architect, engineer, or designer in charge
8 of the project, or the owner receives beneficial occupancy.

9 (b5) The State or any political subdivision of the State may allow contractors to
10 bid on bonded projects with and without retainage on payments.

11 (b6) Nothing in subsections (b1), (b2), (b3), and (b4) of this section shall operate
12 to prevent any agency or any political subdivision of the State from complying with the
13 requirements of a federal contract or grant when the requirements of the federal contract
14 or grant conflict with subsection (b1), (b2), (b3), or (b4) of this section. Each bid
15 document must specify when federal preemption of this section shall apply.

16 ~~(e) The percentage of retainage on payments made by the prime contractor to the~~
17 ~~subcontractor shall not exceed the percentage of retainage on payments made by the~~
18 ~~owner to the prime contractor. Any percentage of retainage on payments made by the~~
19 ~~prime contractor to the subcontractor that exceeds the percentage of retainage on~~
20 ~~payments made by the owner to the prime contractor shall be subject to interest to be~~
21 ~~paid by the prime contractor to the subcontractor at the rate of one percent (1%) per~~
22 ~~month or fraction thereof.~~

23 (d) Nothing in this section shall prevent the prime contractor at the time of
24 application and certification to the owner from withholding application and certification
25 to the owner for payment to the subcontractor for unsatisfactory job progress; defective
26 construction not remedied; disputed work; third party claims filed or reasonable
27 evidence that claim will be filed; failure of subcontractor to make timely payments for
28 labor, equipment, and materials; damage to prime contractor or another subcontractor;
29 reasonable evidence that subcontract cannot be completed for the unpaid balance of the
30 subcontract sum; or a reasonable amount for retainage not to exceed the initial
31 percentage retained by the owner.

32 (e) Nothing in this section shall prevent the owner from withholding payment to
33 the contractor in addition to the amounts authorized by this section for unsatisfactory
34 job progress, defective construction not remedied, disputed work, or third-party claims
35 filed against the owner or reasonable evidence that a third-party claim will be filed."

36 **SECTION 2.** This act becomes effective January 1, 2008, and applies to
37 contracts entered into on or after that date.