

HOUSE BILL NO. 2500

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on General Laws

on _____)

(Patron Prior to Substitute--Delegate Wiley)

A BILL to amend and reenact §§ 2.2-4347, 2.2-4354, and 11-4.6 of the Code of Virginia, relating to construction contracts; payment clauses to be included; right to payment of subcontractors.

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4347, 2.2-4354, and 11-4.6 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4347. Definitions.

As used in this article, unless the context requires a different meaning:

"Construction contract" means a contract relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance to such building or structure, including moving, demolition, and excavation connected with such building or structure, or any provision contained in any contract relating to the construction of projects other than buildings.

"Contractor" or "general contractor" means the entity that has a direct contract with any "state agency" as defined herein; or any agency of local government as discussed in § 2.2-4352.

"Debtor" means any individual, business, or group having a delinquent debt or account with any state agency that obligation has not been satisfied or set aside by court order or discharged in bankruptcy.

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, (a) ~~thirty~~ 30 days after receipt of a proper invoice by the state agency or its agent or ~~forty-five~~ 45 days after receipt by the local government or its agent responsible under the contract for approval of such invoices for the amount of payment due; or (b) ~~thirty~~ 30 days after receipt of the goods or services by the state agency or ~~forty-five~~ 45 days after receipt by the local government, whichever is later.

27 "State agency" means any authority, board, department, instrumentality, institution, agency, or
28 other unit of state government. ~~The term shall~~ "State agency" does not include any county, city, or town
29 or any local or regional governmental authority.

30 "Subcontractor" means any entity that has a contract to supply labor or materials to the contractor
31 to whom the contract was awarded or to any subcontractor in the performance of the work provided for in
32 such contract.

33 **§ 2.2-4354. Payment clauses to be included in contracts.**

34 Any contract awarded by any state agency, or any contract awarded by any agency of local
35 government in accordance with § 2.2-4352, shall include:

36 1. ~~A~~ In the case of a construction contract, a payment clause that obligates a contractor on a
37 construction contract to be liable for the entire amount owed to any subcontractor with which it contracts
38 to be paid within 60 days of the receipt of an invoice following satisfactory completion of the work for
39 which the subcontractor has invoiced. Such contractor shall not be liable for amounts otherwise reducible
40 due to the subcontractor's noncompliance with the terms of the contract. However, in the event that the
41 contractor withholds all or a part of the amount ~~promised to~~ invoiced by the subcontractor under the terms
42 of the contract, the contractor shall notify the subcontractor within 50 days of the receipt of such invoice,
43 in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for
44 nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld,
45 and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party
46 contracting with the contractor shall not be a condition precedent to payment to any lower-tier
47 subcontractor, regardless of that ~~contractor~~ contractor's receiving payment for amounts owed to that
48 contractor. Any provision in a construction contract contrary to this section shall be unenforceable.
49 Nothing in this subdivision shall be construed to apply to or prohibit the inclusion of any retainage
50 provisions in a construction contract except for contracts awarded solely for professional services as that
51 term is defined in § 2.2-4301 where the public body is contracting directly with an architectural and
52 engineering firm.

53 2. A For contracts other than those subject to subdivision 1, a payment clause that obligates the
54 contractor to take one of the two following actions within seven days after receipt of amounts paid to the
55 contractor by the state agency or local government for work performed by the subcontractor under that
56 contract:

57 a. Pay the subcontractor for the proportionate share of the total payment received from the agency
58 attributable to the work performed by the subcontractor under that contract; or

59 b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the
60 subcontractor's payment with the reason for nonpayment.

61 3. A payment clause that requires (i) individual contractors to provide their social security numbers
62 and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification
63 numbers.

64 4. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts
65 owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment
66 from the state agency or agency of local government for work performed by the subcontractor under that
67 contract, except for amounts withheld as allowed in subdivision 2.

68 5. An interest rate clause stating, "Unless otherwise provided under the terms of this contract,
69 interest shall accrue at the rate of one percent per month."

70 Any such contract awarded shall further require the contractor to include in each of its subcontracts
71 a provision requiring each subcontractor to include or otherwise be subject to the same payment and
72 interest requirements with respect to each lower-tier subcontractor.

73 A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment
74 clause in this section shall not be construed to be an obligation of the state agency or agency of local
75 government. A contract modification shall not be made for the purpose of providing reimbursement for
76 the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the
77 interest charge.

78 **§ 11-4.6. Required contract provisions in construction contracts.**

79 A. As used in this section, unless the context requires a different meaning:

80 "Construction contract" means ~~a contract between a general contractor and a subcontractor relating~~
81 ~~to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto,~~
82 ~~including moving, demolition, and excavation connected therewith, or any provision contained in any~~
83 ~~contract relating to the construction of projects other than buildings~~ a contract for the construction,
84 alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving,
85 demolition, and excavation connected therewith, or any provision contained in any contract relating to the
86 construction of projects other than buildings, except for contracts awarded solely for professional services
87 as that term is defined in § 2.2-4301.

88 "Contractor" ~~and "subcontractor" have the meanings ascribed thereto in § 43-1~~ or "general
89 contractor" means the same as that term is defined in § 54.1-1100, except that these terms such term shall
90 not include persons solely furnishing materials.

91 "Owner" means a person or entity, other than a public body as defined in § 2.2-4301, responsible
92 for contracting with a general contractor for the procurement of a construction contract.

93 "Subcontractor" means the same as that term is defined in § 2.2-4347.

94 B. 1. In any construction contract between an owner and a general contractor, the parties shall
95 include a provision that requires the owner to pay such general contractor within 60 days of the receipt of
96 an invoice following satisfactory completion of the portion of the work for which the general contractor
97 has invoiced. An owner shall not be ~~required to pay~~ liable for amounts ~~invoiced that are subject to~~
98 ~~withholding pursuant to the contract for~~ otherwise reducible due to the general contractor's noncompliance
99 with the terms of the contract. However, in the event that an owner withholds all or a part of the amount
100 invoiced by the general contractor under the terms of the contract, the owner shall notify the general
101 contractor within 45 days of the receipt of such invoice, in writing ~~and with reasonable specificity~~, of his
102 intention to withhold all or part of the general contractor's payment with the reason for nonpayment,
103 specifically identifying the contractual noncompliance, the dollar amount being withheld. Failure of an
104 owner to make timely payment as provided in this ~~subsection~~ subdivision shall result in interest penalties
105 consistent with § 2.2-4355. Nothing in this ~~subsection~~ subdivision shall be construed to apply to or prohibit
106 the inclusion of any retainage provisions in a construction contract.

107 ~~C-2.~~ Any construction contract in which there is at least one general contractor and one
108 subcontractor shall be deemed to include a provision under which any ~~higher-tier general~~ contractor is
109 liable to any ~~lower-tier~~ subcontractor with whom the ~~higher-tier general~~ contractor contracts for
110 satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such
111 ~~higher-tier general~~ contractor to pay such ~~lower-tier~~ subcontractor within the earlier of (i) 60 days of the
112 receipt of an invoice following satisfactory completion of the portion of the work for which the
113 subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general
114 contractor or by the ~~higher-tier~~ contractor to the ~~lower-tier contractor~~ subcontractor for work performed
115 by a subcontractor pursuant to the terms of the contract. Such contractors shall not be liable for amounts
116 otherwise reducible ~~pursuant to a breach of contract by~~ due to the subcontractor subcontractor's
117 noncompliance with the terms of the contract. However, in the event that a contractor withholds all or a
118 part of the amount invoiced by any ~~lower-tier~~ subcontractor under the contract, the contractor shall notify
119 the subcontractor within 50 days of the receipt of such invoice, in writing, of his intention to withhold all
120 or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the
121 contractual noncompliance, the dollar amount being withheld, and the ~~lower-tier~~ subcontractor responsible
122 for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a
123 condition precedent to payment to any ~~lower-tier~~ subcontractor, regardless of that ~~contractor~~ contractor's
124 receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is
125 insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this
126 section shall be unenforceable. Failure of a contractor to make timely payment as provided in this
127 ~~subsection~~ subdivision shall result in interest penalties consistent with § 2.2-4355. Nothing in this
128 ~~subsection~~ subdivision shall be construed to apply to or prohibit the inclusion of any retainage provisions
129 in a construction contract. Every subcontract between a subcontractor and a lower-tier subcontractor or
130 supplier, of any tier, shall contain the identical payment, notice, and interest requirements as those
131 provided in this subsection if (i) such construction contract is related to a project other than a single-family
132 residential project and (ii) the value of the project, or an aggregate of projects under such construction
133 contract, is greater than \$500,000.

134 ~~D.~~C. 1. Any construction contract between a general contractor and its subcontractor and any
135 lower tier additional subcontract entered into on or after July 1, 2020, shall be deemed to include a
136 provision under which the general contractor, its subcontractor, and the additional subcontractor at any
137 lower tier are jointly and severally liable to pay the employees of any additional subcontractor at any lower
138 tier the greater of (i) all wages due to a subcontractor's employees or to the lower tier subcontractor's
139 employees at such rate and upon such terms as shall be provided in the employment agreement between
140 the subcontractor and its employees or (ii) the amount of wages that the subcontractor or any lower tier
141 subcontractor is required to pay to its employees under the provisions of applicable law, including the
142 provisions of the Virginia Minimum Wage Act (§ 40.1-28.8 et seq.) and the federal Fair Labor Standards
143 Act (29 U.S.C. § 201 et seq.).

144 ~~E.~~2. A general contractor shall be deemed to be the employer of ~~a~~ any subcontractor's employees
145 ~~at any tier~~ for purposes of § 40.1-29. If the wages due to the subcontractor's employees under the terms of
146 the employment agreement between a subcontractor and its employees are not paid, the general contractor
147 shall be subject to all penalties, criminal and civil, to which an employer that fails or refuses to pay wages
148 is subject under § 40.1-29. Any liability of a general contractor pursuant to § 40.1-29 shall be joint and
149 several with the subcontractor that failed or refused to pay the wages to its employees.

150 ~~F.~~3. Except as otherwise provided in a contract between the general contractor and the
151 subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest,
152 penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's
153 employees as provided in ~~subsection d~~ subdivision 1, unless the subcontractor's failure to pay the wages
154 was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the
155 terms of their construction contract.

156 ~~G.~~4. The provisions of this ~~section~~ subsection shall only apply if (i) it can be demonstrated that
157 the general contractor knew or should have known that the subcontractor was not paying his employees
158 all wages due, (ii) the construction contract is related to a project other than a single family residential
159 project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is
160 greater than \$500,000. As evidence a general contractor or any subcontractor, ~~regardless of tier~~, may offer

161 a written certification, under oath, from the subcontractor in direct privity of contract with the general
162 contractor or subcontractor stating that (a) the subcontractor and each of his sub-subcontractors has paid
163 all employees all wages due for the period during which the wages are claimed for the work performed on
164 the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor,
165 ~~regardless of tier,~~ have similarly paid their employees all such wages. Any person who falsely signs such
166 certification shall be personally liable to the general contractor or subcontractor for fraud and any damages
167 the general contractor or subcontractor may incur.

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