

VIRGINIA ACTS OF ASSEMBLY -- 2022 RECONVENED SESSION

CHAPTER 727

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

[S 550]

Approved April 27, 2022

Be it enacted by the General Assembly of Virginia:

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

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

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

1. *A payment clause that obligates a contractor on a construction contract to be liable for the entire amount owed to any subcontractor with which it contracts. Such contractor shall not be liable for amounts otherwise reducible due to the subcontractor's noncompliance with the terms of the contract. However, in the event that the contractor withholds all or a part of the amount promised to the subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor. Any provision in a contract contrary to this section shall be unenforceable.*

2. *A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:*

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

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

~~2.~~ 3. *A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.*

~~3.~~ 4. *An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 4 2.*

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

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

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

§ 11-4.6. Liability of contractor for wages of subcontractor's employees.

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

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

"General contractor" and "subcontractor" have the meanings ascribed thereto in § 43-1, except that those terms shall not include persons solely furnishing materials.

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

B. *In any construction contract between an owner and a general contractor, the parties shall include a provision that requires the owner to pay such general contractor within 60 days of the receipt of an invoice following satisfactory completion of the portion of the work for which the general contractor has invoiced. An owner shall not be required to pay amounts invoiced that are subject to withholding pursuant to the contract for the general contractor's noncompliance with the terms of the contract.*

However, in the event that an owner withholds all or a part of the amount invoiced by the general contractor under the terms of the contract, the owner shall notify the general contractor, in writing and with reasonable specificity, of his intention to withhold all or part of the general contractor's payment with the reason for nonpayment. Failure of an owner to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

C. Any contract in which there is at least one general contractor and one subcontractor shall be deemed to include a provision under which any higher-tier contractor is liable to any lower-tier subcontractor with whom the higher-tier contractor contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such higher-tier contractor to pay such lower-tier subcontractor within the earlier of (i) 60 days of the satisfactory completion of the portion of the work for which the subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general contractor or by the higher-tier contractor to the lower-tier contractor for work performed by a subcontractor pursuant to the terms of the contract. Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor. However, in the event that a contractor withholds all or a part of the amount invoiced by any lower-tier subcontractor under the contract, the contractor shall notify the subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any lower-tier subcontractor, regardless of that contractor receiving payment for amounts owed to that contractor, unless the party contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment as provided in this subsection shall result in interest penalties consistent with § 2.2-4355. Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

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

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

D. F. Except as otherwise provided in a contract between the general contractor and the subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest, penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the subcontractor's employees as provided in subsection B D, unless the subcontractor's failure to pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in accordance with the terms of their construction contract.

E. G. The provisions of this section shall only apply if (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due, (ii) the construction contract is related to a project other than a single family residential project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than \$500,000. As evidence a general contractor may offer a written certification, under oath, from the subcontractor in direct privity of contract with the general contractor stating that (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages. Any person who falsely signs such certification shall be personally liable to the general contractor for fraud and any damages the general contractor may incur.

2. That the Department of General Services shall convene the Public Body Procurement Workgroup (the Workgroup) to review whether the issue of nonpayment between general contractors and subcontractors necessitates legislative corrective action. The Workgroup shall report its findings and any legislative recommendations to the General Assembly on or before December 1, 2022.

3. That the provisions of the first enactment of this act shall become effective on January 1, 2023,

and shall apply to construction contracts executed on or after January 1, 2023.