

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 676

An Act 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.

[S 1313]

Approved March 26, 2023

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.

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

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

§ 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 the contractor on a construction contract, *in the event that the contractor has not received payment from the state agency or local government for work performed by a subcontractor under such contract*, to be liable for the entire amount owed to ~~any~~ such subcontractor ~~with which it contracts~~ and to pay such subcontractor within 60 days of the receipt of an invoice following satisfactory completion of the work for which the subcontractor has invoiced. 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~~ invoiced by the subcontractor under the terms of the contract, the contractor shall notify the subcontractor within 50 days of the receipt of such invoice, 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~~ contractor's receiving payment for amounts owed to that contractor. Any provision in a construction contract contrary to this section shall be unenforceable. *Nothing in this subdivision shall be construed to (i) apply to or prohibit the inclusion of any retainage provisions in a construction contract or (ii) apply to contracts awarded solely for professional services as that term is defined in § 2.2-4301 where the public body is contracting directly with an architectural and engineering firm.*

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.

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.

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 2.

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. Required contract provisions in construction contracts.

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 a contract for 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, except for contracts awarded solely for professional services as that term is defined in § 2.2-4301.~~

"General Contractor" or "general contractor" and "subcontractor" have the meanings ascribed thereto ~~in § 43-1 means the same as that term is defined in § 54.1-1100,~~ except that ~~those terms~~ such term 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.

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

B. 1. 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 liable for~~ amounts ~~invoiced that are subject to withholding pursuant to the contract for otherwise reducible due to 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 *within 45 days of the receipt of such invoice*, 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, *specifically identifying the contractual noncompliance and the dollar amount being withheld*. Failure of an owner to make timely payment as provided in this ~~subsection~~ subdivision shall result in interest penalties consistent with § 2.2-4355. Nothing in this ~~subsection~~ subdivision shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

C. 2. Any construction 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 general contractor~~ is liable to any ~~lower-tier~~ subcontractor with whom the ~~higher-tier general contractor~~ contracts for satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such ~~higher-tier general contractor~~ to pay such ~~lower-tier~~ subcontractor within the earlier of (i) 60 days of the receipt of an invoice following 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 subcontractor~~ 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 due to the subcontractor subcontractor's noncompliance with the terms of the contract.~~ 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 *within 50 days of the receipt of such invoice*, 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~~ contractor's 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~~ *subdivision* shall result in interest penalties consistent with § 2.2-4355. Nothing in this ~~subsection~~ *subdivision* shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract. *Every subcontract between a subcontractor and a lower-tier subcontractor or supplier, of any tier, shall contain the identical payment, notice, and interest requirements as those provided in this subdivision if (i) such construction contract is related to a project other than a single-family residential project and (ii) the value of the project, or an aggregate of projects under such construction contract, is greater than \$500,000.*

~~D.~~ *C. 1.* Any construction contract between a general contractor and its subcontractor and any lower tier *additional* subcontract entered into on or after July 1, 2020, shall be deemed to include a provision under which the general contractor, its subcontractor, and the *additional* subcontractor at any lower tier are jointly and severally liable to pay the employees of any *additional* subcontractor at any lower tier the greater of (i) all wages due to a subcontractor's employees or to the lower tier 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 or any lower tier 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.).

~~E.~~ *2.* A general contractor shall be deemed to be the employer of a *any* 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.

~~F.~~ *3.* 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 d~~ *subdivision 1*, 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.

~~G.~~ *4.* The provisions of this ~~section~~ *subsection* 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 or *any* subcontractor, ~~regardless of tier,~~ may offer a written certification, under oath, from the subcontractor in direct privity of contract with the general contractor or subcontractor 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 or subcontractor for fraud and any damages the general contractor or subcontractor may incur.