

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 2.2-4347, 2.2-4354, and 11-4.6 of the Code of Virginia, relating to*
 3 *construction contracts; payment clauses to be included; right to payment of subcontractors.*

4 [H 2500]

5 Approved

6 **Be it enacted by the General Assembly of Virginia:**

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

9 **§ 2.2-4347. Definitions.**

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

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

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

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

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

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

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

31 **§ 2.2-4354. Payment clauses to be included in contracts.**

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

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

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

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

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

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

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

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

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

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

76 **§ 11-4.6. Required contract provisions in construction contracts.**

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

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

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

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

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

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

105 C. 2. Any *construction* contract in which there is at least one general contractor and one
106 subcontractor shall be deemed to include a provision under which any ~~higher-tier general~~ contractor is
107 liable to any ~~lower-tier~~ subcontractor with whom the ~~higher-tier general~~ contractor contracts for
108 satisfactory performance of the subcontractor's duties under the contract. Such contract shall require such
109 ~~higher-tier general~~ contractor to pay such ~~lower-tier~~ subcontractor within the earlier of (i) 60 days of the
110 *receipt of an invoice following* satisfactory completion of the portion of the work for which the
111 subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general
112 contractor or by the ~~higher-tier~~ contractor to the ~~lower-tier contractor~~ *subcontractor* for work performed
113 by a subcontractor pursuant to the terms of the contract. Such contractors shall not be liable for amounts
114 otherwise reducible ~~pursuant to a breach of contract by due to the subcontractor~~ *subcontractor's*
115 *noncompliance with the terms of the contract*. However, in the event that a contractor withholds all or a
116 part of the amount invoiced by any ~~lower-tier~~ subcontractor under the contract, the contractor shall
117 notify the subcontractor *within 50 days of the receipt of such invoice*, in writing, of his intention to

118 withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically
 119 identifying the contractual noncompliance, the dollar amount being withheld, and the ~~lower-tier~~
 120 subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the
 121 contractor shall not be a condition precedent to payment to any ~~lower-tier~~ subcontractor, regardless of
 122 that ~~contractor~~ contractor's receiving payment for amounts owed to that contractor, unless the party
 123 contracting with the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any
 124 provision in a contract contrary to this section shall be unenforceable. Failure of a contractor to make
 125 timely payment as provided in this ~~subsection~~ subdivision shall result in interest penalties consistent with
 126 § 2.2-4355. Nothing in this ~~subsection~~ subdivision shall be construed to apply to or prohibit the
 127 inclusion of any retainage provisions in a construction contract. *Every subcontract between a*
 128 *subcontractor and a lower-tier subcontractor or supplier, of any tier, shall contain the identical*
 129 *payment, notice, and interest requirements as those provided in this subdivision if (i) such construction*
 130 *contract is related to a project other than a single-family residential project and (ii) the value of the*
 131 *project, or an aggregate of projects under such construction contract, is greater than \$500,000.*

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

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

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

154 ~~G.~~ 4. The provisions of this ~~section~~ *subsection* shall only apply if (i) it can be demonstrated that the
 155 general contractor knew or should have known that the subcontractor was not paying his employees all
 156 wages due, (ii) the construction contract is related to a project other than a single family residential
 157 project, and (iii) the value of the project, or an aggregate of projects under one construction contract, is
 158 greater than \$500,000. As evidence a general contractor or *any* subcontractor, ~~regardless of tier~~, may
 159 offer a written certification, under oath, from the subcontractor in direct privity of contract with the
 160 general contractor or subcontractor stating that (a) the subcontractor and each of his sub-subcontractors
 161 has paid all employees all wages due for the period during which the wages are claimed for the work
 162 performed on the project and (b) to the subcontractor's knowledge all sub-subcontractors below the
 163 subcontractor, ~~regardless of tier~~, have similarly paid their employees all such wages. Any person who
 164 falsely signs such certification shall be personally liable to the general contractor or subcontractor for
 165 fraud and any damages the general contractor or subcontractor may incur.