

23104170D

SENATE BILL NO. 1313

Offered January 11, 2023

Prefiled January 10, 2023

A BILL to amend and reenact §§ 2.2-4301, 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.

 Patron—Bell

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4301, 2.2-4347, 2.2-4354, and 11-4.6 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-4301. Definitions.

As used in this chapter:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Competitive negotiation" is the method of contractor selection set forth in § 2.2-4302.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 2.2-4302.1.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"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.

"Construction management contract" means the same as that term is defined in § 2.2-4379.

"Design-build contract" means the same as that term is defined in § 2.2-4379.

"Employment services organization" means an organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Job order contracting" means a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in § 2.2-4303.2.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror," for the purposes of §§ 2.2-4360 and 2.2-4364, means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the

INTRODUCED

SB1313

59 contract, and who at such time is eligible and qualified in all respects to perform that contract, and who
60 would have been eligible and qualified to submit a bid or proposal had the contract been procured
61 through competitive sealed bidding or competitive negotiation.

62 "Professional services" means work performed by an independent contractor within the scope of the
63 practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,
64 dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also
65 include the services of an economist procured by the State Corporation Commission.

66 "Public body" means any legislative, executive or judicial body, agency, office, department, authority,
67 post, commission, committee, institution, board or political subdivision created by law to exercise some
68 sovereign power or to perform some governmental duty, and empowered by law to undertake the
69 activities described in this chapter. "Public body" shall include (i) any independent agency of the
70 Commonwealth, and (ii) any metropolitan planning organization or planning district commission which
71 operates exclusively within the Commonwealth of Virginia.

72 "Public contract" means an agreement between a public body and a nongovernmental source that is
73 enforceable in a court of law.

74 "Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform
75 fully the contract requirements and the moral and business integrity and reliability that will assure good
76 faith performance, and who has been prequalified, if required.

77 "Responsive bidder" means a person who has submitted a bid that conforms in all material respects
78 to the Invitation to Bid.

79 "Reverse auctioning" means a procurement method wherein bidders are invited to bid on specified
80 goods or nonprofessional services through real-time electronic bidding, with the award being made to
81 the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed
82 and bidders shall have the opportunity to modify their bid prices for the duration of the time period
83 established for bid opening.

84 "Services" means any work performed by an independent contractor wherein the service rendered
85 does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials
86 and supplies.

87 § 2.2-4347. Definitions.

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

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

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

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

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

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

105 § 2.2-4354. Payment clauses to be included in contracts.

106 Any contract awarded by any state agency, or any contract awarded by any agency of local
107 government in accordance with § 2.2-4352, *except for contracts awarded solely for professional services*
108 *as that term is defined in § 2.2-4301 where the public body is contracting directly with an architectural*
109 *and engineering firm*, shall include:

110 1. *A In the case of a construction contract, a payment clause that obligates a contractor on a*
111 *construction contract to be liable for the entire amount owed to any subcontractor with which it*
112 *contracts to be paid within 60 days of the receipt of an invoice following satisfactory completion of the*
113 *work for which the subcontractor has invoiced.* Such contractor shall not be liable for amounts otherwise
114 reducible due to the subcontractor's noncompliance with the terms of the contract. However, in the event
115 that the contractor withholds all or a part of the amount ~~promised to~~ *invoiced by the subcontractor under*
116 *the terms of the contract, the contractor shall notify the subcontractor within 45 days of the receipt of*
117 *such invoice, in writing, of his intention to withhold all or a part of the subcontractor's payment with the*
118 *reason for nonpayment, specifically identifying the contractual noncompliance, the dollar amount being*
119 *withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.* Payment by
120 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 construction contract contrary to this section shall be unenforceable. *Nothing in this subdivision shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.*

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 the same as that term is defined in § 2.2-4301, except that the term shall not include contracts awarded solely for professional services as defined in § 2.2-4301.~~

"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 otherwise reducible 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 *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, the dollar amount being withheld, and the lower-tier subcontractor responsible for the contractual noncompliance.* 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

182 *receipt of an invoice following* satisfactory completion of the portion of the work for which the
183 subcontractor has invoiced or (ii) seven days after receipt of amounts paid by the owner to the general
184 contractor or by the ~~higher-tier~~ contractor to the ~~lower-tier contractor~~ subcontractor for work performed
185 by a subcontractor pursuant to the terms of the contract. Such contractors shall not be liable for amounts
186 otherwise reducible ~~pursuant to a breach of contract by~~ *due to the subcontractor subcontractor's*
187 *noncompliance with the terms of the contract.* However, in the event that a contractor withholds all or a
188 part of the amount invoiced by any ~~lower-tier~~ subcontractor under the contract, the contractor shall
189 notify the subcontractor *within 45 days of the receipt of such invoice*, in writing, of his intention to
190 withhold all or a part of the subcontractor's payment with the reason for nonpayment, specifically
191 identifying the contractual noncompliance, the dollar amount being withheld, and the ~~lower-tier~~
192 subcontractor responsible for the contractual noncompliance. Payment by the party contracting with the
193 contractor shall not be a condition precedent to payment to any ~~lower-tier~~ subcontractor, regardless of
194 that contractor receiving payment for amounts owed to that contractor, unless the party contracting with
195 the contractor is insolvent or a debtor in bankruptcy as defined in § 50-73.79. Any provision in a
196 contract contrary to this section shall be unenforceable. Failure of a contractor to make timely payment
197 as provided in this ~~subsection~~ *subdivision* shall result in interest penalties consistent with § 2.2-4355.
198 Nothing in this ~~subsection~~ *subdivision* shall be construed to apply to or prohibit the inclusion of any
199 retainage provisions in a construction contract.

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

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

216 ~~F.~~ *3.* Except as otherwise provided in a contract between the general contractor and the
217 subcontractor, the subcontractor shall indemnify the general contractor for any wages, damages, interest,
218 penalties, or attorney fees owed as a result of the subcontractor's failure to pay wages to the
219 subcontractor's employees as provided in ~~subsection~~ *subdivision 1*, unless the subcontractor's failure to
220 pay the wages was due to the general contractor's failure to pay moneys due to the subcontractor in
221 accordance with the terms of their construction contract.

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

234 *D.* Any such contract awarded shall further require the contractor to include in each of its
235 subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same
236 payment and interest requirements with respect to each additional subcontractor.