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HOUSE BILL NO. 2500

Offered January 20, 2023

A *BILL to amend and reenact §§ 2.2-4354 and 11-4.6 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 11-4.1:2, relating to Virginia Public Procurement Act; private contracts; payment of subcontractors.*

Patron—Wiley

Referred to Committee on General Laws

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 and that the Code of Virginia is amended by adding a section numbered 11-4.1:2 as follows:

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

A. 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 pay its subcontractor for the subcontractor's proportionate share of the total payment received from the agency 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 unless the awarded contract is otherwise required to comply with subsection B. However, in the event that the contractor withholds all or a part of the amount promised to its subcontractor under the contract, the contractor shall 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. 2. 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. 3. 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 1.

5. 4. 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.

B. Any contract for construction awarded by any state agency or any agency of local government in accordance with § 2.2-4352 shall include a payment clause that obligates a contractor 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 its subcontractor under the contract, the contractor shall notify the subcontractor, in writing, within a reasonable time, of his intention to withhold all or a part of the subcontractor's payment with the

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reason for nonpayment. Payment by the party contracting with the contractor shall not be a condition precedent to payment to any subcontractor, regardless of that contractor receiving payment for amounts owed to such contractor.

C. Any contract awarded pursuant to this section 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 of its subcontractors. Any provision in a contract contrary to this section shall be unenforceable.

§ 11-4.1:2. Construction contracts; definitions; payment of subcontractors and employees; interest penalties.

A. For purposes of this section, unless the context requires a different meaning:

"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.

"Contractor" means the entity that has a direct contract with any person that is not a public body as defined in § 2.2-4301.

"Offeror" means the entity that initiates performance of construction by directly contracting with a contractor with the intent of providing monetary compensation for the performance of construction and that will not receive compensation from another contractor.

"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.

B. Every construction contract between an offeror and a contractor shall include a payment clause that obligates the offeror to pay the contractor within 60 days of satisfactory performance of such contractor's obligations under the contract.

C. Every construction contract between a contractor and a subcontractor shall include a payment clause that obligates such contractor to be liable for the entire amount owed to such 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, within a reasonable time, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment. Payment by the offeror to the contractor shall not be a condition precedent to payment to any subcontractor.

D. Any construction contract between a contractor and its subcontractor entered into on or after July 1, 2023, shall be deemed to include a provision under which the contractor and the subcontractor are jointly and severally liable to pay the employees of any subcontractor 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.

Any provision in a contract contrary to this section shall be unenforceable.

§ 11-4.6. Payments to subcontractors; employees of subcontractors.

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.

"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.

"Contractor" means the entity that has a direct contract with any person that is not a "state agency" as defined in § 2.2-4352.

"Offeror" means the entity that initiates performance of construction by directly contracting with a contractor with the intent of providing monetary compensation for the performance of construction and that will not receive compensation from another contractor.

"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.

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 the contractor is liable for the entire amount owed to any lower-tier its 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 the contractor to pay such lower-tier its 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 the contractor has received payment for work performed by a the subcontractor pursuant to the terms of the contract.

C. Such contractors shall not be liable for amounts otherwise reducible pursuant to a breach of contract by the subcontractor the 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 its subcontractor under the contract, the contractor shall notify the subcontractor, in writing, within a reasonable time, of his intention to withhold all or a part of the subcontractor's such 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 offeror to 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.

D. Any construction contract between a general contractor and its subcontractor and any lower tier 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 subcontractor at any lower tier are jointly and severally liable to pay the employees of any 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. 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.

F. E. 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, 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. F. 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 or 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 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

182 fraud and any damages the ~~general~~ contractor or subcontractor may incur.