

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 85th General Assembly
3 Regular Session, 2005

A Bill

SENATE BILL 555

4
5 By: Senator Bisbee
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For An Act To Be Entitled

8
9 AN ACT PERTAINING TO THE RETAINAGE OF FUNDS IN
10 CONSTRUCTION CONTRACTS; AND FOR OTHER PURPOSES.
11

Subtitle

12
13 AN ACT PERTAINING TO THE RETAINAGE OF
14 FUNDS IN CONSTRUCTION CONTRACTS.
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17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
18

19 SECTION 1. Arkansas Code Title 4 is amended to add a new chapter to read as
20 follows:

21 4-61-101. Definitions.

22 As used in this chapter:

23 (1) "Construction contract" means a contract relating to the
24 construction, alteration, repair, maintenance, moving, or demolition of any
25 building, structure, or improvement or relating to the excavation of or other
26 development or improvement to land;

27 (2) "Contractor" means a person performing construction through a
28 contract with an owner;

29 (3) "Owner" means a person or public agency other than the Arkansas
30 State Highway and Transportation Department;

31 (4) "Person" means an individual, corporation, business trust, estate,
32 trust, partnership, limited liability company, association, joint venture, or
33 similar legal entity;

34 (5) "Public agency" means the State of Arkansas or any of its
35 agencies, departments, or institutions, any political subdivision of the
36 state, or any other taxing unit, and includes any nonprofit corporation or



1 association receiving public funds including grants, loans, and subsidies;

2 (6) "Retainage" means money payable to the contractor or subcontractor
3 that has been withheld by the owner conditioned on substantial completion of
4 all work in connection with a construction contract;

5 (7) "Subcontractor" means a person performing construction for the
6 owner not through a contract with the owner; and

7 (8) "Substantial completion" means a certificate of substantial
8 completion issued by the architect or engineer in accordance with the terms
9 of the construction contract or the owner accepting the performance of the
10 full contract, whichever is earlier.

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12 4-61-102. Applicability.

13 This chapter does not apply to construction contracts for residential
14 property containing four (4) or fewer dwelling units.

15
16 4-61-103. Retainage.

17 (a)(1) Retainage may be withheld on construction contracts in this
18 state if an escrow arrangement is used.

19 (2) Securities may be offered by a contractor or subcontractor
20 in lieu of retaining funds.

21 (b)(1) A public agency may provide in its bidding documents the manner
22 in which retainage is to be held.

23 (2) Retainage by a public agency shall be in an interest-bearing
24 account.

25 (3) A public agency may combine retainage from more than one (1)
26 project into a single account, and the interest shall be allocated to the
27 contractors and subcontractors in proportion to each project's retainage.

28
29 4-61-104. Payment.

30 (a)(1) Except as provided in subsection (b) of this section, all
31 construction contracts shall provide that, except for retainage, payment for
32 amounts due shall be paid within twenty-one (21) days after the owner
33 receives an undisputed request for payment.

34 (2) Payment by the owner to the contractor of the undisputed
35 amount of a payment request based on work completed or service provided under
36 the contract may be made by:

1 (A) First-class mailing;

2 (B) Electronic funds transfer; or

3 (C) Hand delivery.

4 (3) If the owner fails to pay the contractor within twenty-one
 5 (21) days after receipt of an undisputed request for payment, the owner shall
 6 pay interest to the contractor beginning on the twenty-second day after
 7 payment was due, computed at one and one-half percent (1.5%) of the
 8 undisputed amount per month or fraction of a month until the payment is
 9 issued.

10 (4) If an owner receives an improperly completed invoice, the
 11 owner shall notify the sender of the invoice within seven (7) days of receipt
 12 that the invoice is improperly completed, and the owner has no further duty
 13 to pay on the improperly completed invoice until it is resubmitted as
 14 complete.

15 (b) A public agency may make payment within forty-five (45) days after
 16 submission of an undisputed request for payment when grant money is a source
 17 of funding, if:

18 (1) The construction contract specifically provides in a clear
 19 and conspicuous manner for a payment later than twenty-one (21) days after
 20 submission of an undisputed request for payment; and

21 (2) The following legend or substantially similar language
 22 setting forth the specified number of days appears in clear and conspicuous
 23 type on each page of the plans, including bid plans and construction plans:

24 "Notice of Extended Payment Provision

25 This contract allows the owner to make payment within days after
 26 submission of an undisputed request for payment."

27 (c)(1) All construction contracts shall provide that contractors and
 28 subcontractors make prompt payment to its subcontractors and suppliers for
 29 amounts owed for work performed on the construction project within seven (7)
 30 days after receipt of payment from the owner, contractor, or subcontractor.

31 (2) If the contractor or subcontractor fails to pay the
 32 subcontractors and suppliers by first-class mail or hand delivery within
 33 seven (7) days of receipt of payment, the contractor or subcontractor shall
 34 pay interest to the subcontractors and suppliers beginning on the eighth day
 35 after payment was due computed at one and one-half percent (1.5%) of the
 36 undisputed amount per month or fraction of a month until payment is issued.

1 (3) The payment provisions in this subsection shall apply to all
2 tiers of contractors, subcontractors, and suppliers.

3 (d) A creditor shall not collect, enforce a security interest against,
4 garnish, or levy execution on the retainage, progress payments, or other
5 payments that are owed by an owner, contractor, or subcontractor to a person
6 or its surety that has furnished labor or material pursuant to a construction
7 contract.

8 (e)(1) When making payments, the owner shall retain no more than five
9 percent (5%) of the cost of estimated work done and the value of the
10 materials stored on the site or suitably stored and insured off-site.

11 (2) When the project is substantially complete, no further
12 retainage may be withheld.

13 (3) A contractor shall retain no more than five percent (5%)
14 retainage, regardless of whether retainage is withheld by the owner.

15 (f) The retainage may be held until substantial completion of each
16 separate building, public work, or other division of the contract on which a
17 price is stated separately in the contract or that can be separately
18 ascertained from the contractor's schedule of values if the escrow
19 arrangement under § 4-61-105 is used.

20
21 4-61-105. Escrow accounts.

22 An escrow account established pursuant to an escrow agreement is
23 subject to the following conditions:

24 (1) Only state or national banks chartered within the State of
25 Arkansas or savings and loan associations domiciled in the state may serve as
26 escrow agents;

27 (2) The escrow agency shall limit the investment of funds held
28 in escrow as retainage to:

29 (A) Certificates of deposit or similar time deposit
30 investments;

31 (B) United States treasury bonds;

32 (C) United States treasurer notes;

33 (D) United States treasurer certificates of indebtedness;

34 (E) United States treasury bills; or

35 (F) Bonds or notes of the state or a political subdivision
36 of the state;

1 (3) As interest on all investments held in escrow becomes due,
2 it shall be collected by the escrow agent and paid to the contractor. The
3 contractor and its subcontractors shall pay interest as it is received pro
4 rata to its subcontractors;

5 (4) The escrow agent shall provide monthly reports to the owner,
6 the contractor, and the subcontractor as to the amount and value of the
7 escrow account held by the escrow agent and any additions to the escrow
8 account. Withdrawals from the escrow account shall be made only subject to
9 approval of the owner;

10 (5) If the owner has entered into more than one (1) construction
11 contract allowing for the maintenance of escrow accounts, the owner may elect
12 to combine the amounts held as retainage under each contract into one (1) or
13 more escrow accounts or may establish a separate escrow account for each
14 contract;

15 (6) The escrow account may be terminated upon completion and
16 acceptance of the contract as provided in this chapter;

17 (7) All fees and expenses of the escrow agent shall be paid by
18 the owner;

19 (8) The escrow account constitutes a specific pledge to the
20 owner, and the contractor or subcontractor shall not, except to its surety,
21 otherwise assign, pledge, discount, sell, or transfer its interest in the
22 escrow account, and money in the escrow account is not subject to levy,
23 garnishment, attachment, or other process;

24 (9) The form and provisions of the escrow agreement shall be
25 included in all solicitations for construction services and shall be given to
26 the contractor and subcontractor prior to entering into a contract;

27 (10) The owner is not liable to the contractor, subcontractor,
28 or its sureties for the failure of the escrow agent to perform under the
29 escrow agreement or for the failure of a financial institution to honor
30 investments issued by it that are held in the escrow account; and

31 (11) An escrow agent is not liable to a party to the escrow
32 agreement unless the escrow agent is found by the circuit court to have
33 breached his or her fiduciary duty to a beneficiary of the escrow agreement.

34
35 4-61-106. Duty to care and protect property.

36 (a) All material and work covered by partial payments become the

1 property of the owner, but the contractor and subcontractor are not relieved
2 from the sole responsibility for the care and protection of materials and
3 work for which payments have been made.

4 (b) However, the contractor and subcontractor have no duty for the
5 care and protection of materials and work after the owner has assumed
6 occupancy or use of the work.

7
8 4-61-107. Payment upon completion.

9 Ten (10) days after certification of completion, any amounts remaining
10 due the contractor or subcontractor under the terms of the contract shall be
11 paid upon the presentation of the following:

12 (1) A properly executed release and certified voucher for
13 payment;

14 (2) A release, if required, of all claims and claims of lien
15 against the owner arising under and by virtue of the contract other than such
16 claims of the contractor, if any, as may be specifically excepted by the
17 contractor or subcontractor from the operation of the release in stated
18 amounts to be set forth in the release; and

19 (3) Proof of completion.

20
21 4-61-108. Disputes between parties.

22 (a)(1) If a dispute arises between the owner and the contractor or
23 subcontractor as to work performed or materials supplied, the owner is only
24 entitled to retain the amount that is reasonably calculated to cover the cost
25 to correct a deficiency in the work or materials supplied.

26 (2) All other money due to the contractor or subcontractor
27 pursuant to this chapter shall be paid as provided in this chapter.

28 (3) The money retained by the owner under this section shall be
29 deposited in the escrow account for the benefit of the contractor or
30 subcontractor but shall not be paid to the contractor or subcontractor until
31 the dispute has been resolved.

32 (b) If an owner fails to deposit retainage that is withheld or to
33 release retainage as required by this chapter, the owner shall pay an
34 additional one and one-half percent (1.5%) of the amount not deposited or
35 released for each month or part of a month until retainage is paid.

36

1 SECTION 2. Arkansas Code Title 22, Chapter 9, Subchapter 6 is
2 repealed.

3 ~~22-9-601. Definitions.~~

4 ~~As used in this subchapter:~~

5 (1) ~~"Construction contract" means a contract between a public~~
6 ~~agency and a prime contractor which obligates the prime contractor to~~
7 ~~construct, repair, replace, or maintain improvements for the public agency;~~

8 (2) ~~"Cost of the project" means the sum the public agency~~
9 ~~originally agrees to pay the prime contractor for performance of the contract~~
10 ~~plus any other sums the public agency agrees to pay the prime contractor for~~
11 ~~extra cost items included in the construction project which were not included~~
12 ~~in the original contract;~~

13 (3) ~~"Prime contractor" means the party which, individually or in~~
14 ~~concert with other prime contractors, establishes a direct contractual~~
15 ~~relationship with the public agency obligating the prime contractor to~~
16 ~~construct improvements for the public agency. Where applicable under the law,~~
17 ~~the prime contractor shall be a contractor licensed and in compliance with~~
18 ~~Arkansas law;~~

19 (4) ~~"Progress payments" means the monthly estimates submitted by~~
20 ~~the prime contractor to the public agency for payment of that portion of the~~
21 ~~work completed, including stored materials and equipment purchased; and~~

22 (5) ~~"Public agency" means the State of Arkansas or any of its~~
23 ~~agencies, departments, or institutions or any political subdivision of the~~
24 ~~state, or taxing unit, and includes any nonprofit corporation or association~~
25 ~~receiving public funds in whatever form, including grants, loans, and~~
26 ~~subsidies.~~

27
28 ~~22-9-602. Exception.~~

29 ~~The provisions of this subchapter shall not be applicable to contracts~~
30 ~~entered into by the State Highway Commission for the construction or~~
31 ~~maintenance of public highways, roads, or streets.~~

32
33 ~~22-9-603. Waiver.~~

34 ~~The parties to a construction contract to which this subchapter is~~
35 ~~applicable shall have no authority to vary or waive the provisions of this~~
36 ~~subchapter by agreement of the parties.~~

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~~22-9-604. Procedure.~~

~~(a)(1) In case of a construction contract entered into between a public agency and a contractor who is required to furnish a performance bond, the contractor shall be entitled to payment of ninety percent (90%) of the earned progress payments when due, with the public agency retaining ten percent (10%) to assure faithful performance of the contract.~~

~~(2) Upon certification by the project architect or engineer that the construction contract is fifty percent (50%) complete, no further retainage will be withheld from the monthly estimates.~~

~~(b) All sums withheld by the public agency shall be held in escrow and shall be paid to the contractor within thirty (30) days after the contract has been substantially completed.~~

~~(c) In the event the construction contract requires the contractor to purchase and furnish materials or equipment that will be stored on the job site or in a bonded warehouse by the contractor and used in the job as required by the construction contract, no retainage will be withheld on that amount of the submitted progress payment pertaining to the cost of these stored materials or equipment.~~