

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE DRS75306-LM-109* (03/06)

Short Title: Retainage Payments/Construction Contracts. (Public)

Sponsors: Senator Jenkins.

Referred to:

A BILL TO BE ENTITLED

AN ACT AMENDING THE LAWS RELATED TO RETAINAGE PAYMENTS ON
CONSTRUCTION CONTRACTS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-134.1 reads as rewritten:

"§ 143-134.1. Interest on final payments due to prime contractors; payments to subcontractors.

(a) On all public construction contracts requiring the estimated expenditure of public money in an amount equal to or greater than three hundred thousand dollars (\$300,000) which are let by a board or governing body of the State government or any political subdivision thereof, except contracts let by the Department of Transportation pursuant to G.S. 136-28.1, the balance due prime contractors shall be paid in full within 45 days after respective prime contracts of the project have been accepted by the owner, certified by the architect, engineer or designer to be completed in accordance with terms of the plans and specifications, or occupied by the owner and used for the purpose for which the project was constructed, whichever occurs first. ~~Provided, however, that whenever~~ However, when the architect or consulting engineer in charge of the project determines that delay in completion of the project in accordance with terms of the plans and specifications is the fault of the contractor, the project may be occupied and used for the purposes for which it was constructed without payment of any punitive interest on amounts withheld past the 45 day limit. No payment shall be delayed because of the failure of another prime contractor on ~~such the~~ project to complete his contract. Should final payment to any prime contractor beyond the date ~~such the~~ contracts have been certified to be completed by the designer or architect, accepted by the owner, or occupied by the owner and used for the purposes for which the project was constructed, be delayed by more than 45 days, ~~said the~~ prime contractor shall be paid interest, beginning on the 46th day, at the rate of ~~one percent (1%) per month or fraction thereof~~

1 one and one-half percent (1½%) per month, unless a lower rate is agreed upon on such
2 the unpaid balance as may be due. In addition to the above final payment provisions,
3 periodic payments due a prime contractor during construction shall be paid in
4 accordance with the provisions of this section and the payment provisions of the
5 contract documents that do not conflict with this section, or said the prime contractor
6 shall be paid interest on any such unpaid amount at the rate stipulated above for
7 delayed final payments. Such The interest shall begin on the date the payment is due
8 and continue until the date on which payment is made. Such The due date may be
9 established by the terms of the contract. Funds for payment of such the interest on
10 state-owned projects shall be obtained from the current budget of the owning
11 department, institution, or agency. Where a conditional acceptance of a contract exists,
12 and where the owner is retaining a reasonable sum pending correction of such the
13 conditions, punitive interest on such the reasonable sum shall not apply.

14 (b) Within seven days of receipt by the prime contractor of each periodic or final
15 payment, the prime contractor shall pay the subcontractor based on work completed or
16 service provided under the subcontract. ~~Should If~~ any periodic or final payment to the
17 subcontractor ~~be is~~ delayed by more than seven days after receipt of periodic or final
18 payment by the prime contractor, the prime contractor shall pay the subcontractor
19 interest, beginning on the eighth day, at the rate of ~~one percent (1%)~~ one and one-half
20 percent (1½%) per month or fraction thereof on such unpaid balance as may be
21 due month, unless a lower rate is agreed upon on the unpaid balance as may be due.

22 (b1) No retainage on periodic or final payments made by the owner or prime
23 contractor shall be allowed on public construction contracts in which the total project
24 costs are less than three hundred thousand dollars (\$300,000). Retainage on periodic or
25 final payments on public construction contracts in which the total project costs are equal
26 to or greater than three hundred thousand dollars (\$300,000) is allowed as follows:

27 (1) The owner shall not retain more than five percent (5%) of any periodic
28 payment due a prime contractor.

29 (2) Upon the contractor's satisfactory completion of fifty percent (50%) of
30 the project on schedule, and with the approval of the owner and the
31 architect, engineer, or designer in charge of the project, and the written
32 consent of the contractor's surety, the owner shall, upon the written
33 request of the contractor, release to the contractor one-half (1/2) of the
34 retainage withheld on periodic payments within 15 days of the receipt
35 of the request or receipt of the surety's consent, whichever occurs last.
36 If payment is delayed by more than 15 days, the contractor shall be
37 paid interest, beginning on the 16th day, at the rate of one and one-half
38 percent (1½%) per month, unless a lower rate is agreed upon on the
39 unpaid balance as may be due. No party shall unreasonably withhold
40 consent in any instance where consent is required under this section.

41 (3) When the project is fifty percent (50%) complete, the owner shall not
42 retain any further retainage from periodic payments due the contractor
43 if the contractor continues to perform satisfactorily. If the owner
44 determines the contractor's performance is unsatisfactory, the owner

1 may reinstate retainage for each subsequent periodic payment
2 application as authorized in this subsection up to the maximum amount
3 of five percent (5%). The project shall be deemed fifty percent (50%)
4 complete when the contractor's gross project invoice equals or exceeds
5 fifty percent (50%) of the value of the contract.

6 (4) A subcontract on a contract governed by this section may include a
7 provision for the retainage on periodic payments made by the prime
8 contractor to the subcontractor. However, the percentage of the
9 payment retained: (i) shall be paid to the subcontractor under the same
10 terms and conditions as provided in subdivisions (2) and (3) of this
11 subsection, and (ii) shall not exceed the percentage of retainage on
12 payments made by the owner to the prime contractor. Any percentage
13 of retainage on payments made by the prime contractor to the
14 subcontractor that exceeds the percentage of retainage on payments
15 made by the owner to the prime contractor shall be subject to interest
16 to be paid by the prime contractor to the subcontractor at the rate of
17 one and one-half percent (1½%) per month, unless a lower rate is
18 agreed upon on the unpaid balance as may be due.

19 (5) Within 45 days after any of the following occur, the owner shall
20 release to the contractor all retainage on payments held by the owner:
21 (i) the owner receives a certificate of substantial completion from the
22 architect, engineer, or designer in charge of the project; (ii) a
23 certificate of occupancy is issued; (iii) the owner receives beneficial
24 occupancy of the project as defined in the contract documents; or (iv) a
25 separate usable phase of the project is available for use. However, the
26 owner may retain sufficient funds to secure completion of the project
27 or corrections on any work. If the owner retains funds, the amount
28 retained shall not exceed one and one-half (1½) times the estimated
29 value of the work to be completed or corrected. Any reduction in the
30 amount of the retainage on payments shall be with the consent of the
31 contractor's surety.

32 (6) Any retainage on payments withheld by the owner or contractor shall
33 be deposited in an interest-bearing account and shall be paid to the
34 contractor or subcontractor whose funds have been retained as
35 provided in this section.

36 (7) The existence of any claims against the contractor or any change
37 orders shall not be a basis for delaying the release of any retainage on
38 payments.

39 (b2) Upon the completion and acceptance of each separate building, public work,
40 or other item of work on which a price is stated separately in the contract or can be
41 separately ascertained, payment shall be made in full, including any retainage on
42 payments, less any authorized deductions. However, full payment shall only be made
43 for those trades, including structural steel, piling, caisson, demolition, rough grading,
44 and utility first-tier subcontractors, that have reached one hundred percent (100%)

1 completion of their contract by or before the project is fifty percent (50%) complete.
2 Each bid document shall identify any other trades not listed in this subsection that are
3 also allowed line-item release of retained funds. Each bid document shall also list the
4 inspections required by the owner before accepting the work and any financial
5 information required by the owner to release payment to the trades.

6 (b3) An owner, contractor, or subcontractor's release of retainage on payments as
7 part of a payment in full on a line item of work under subsection (b2) of this section
8 shall not affect any applicable warranties or statutes of limitations on work done by the
9 contractor or subcontractor, and the warranties and statutes of limitations shall not begin
10 to run until the owner receives a certificate of substantial completion from the architect,
11 engineer, or designer in charge of the project, a certificate of occupancy is issued for the
12 project, or the owner receives beneficial occupancy as defined in the contract
13 documents.

14 (b4) The State or any political subdivision of the State may allow contractors to
15 bid on bonded projects with and without retainage on payments.

16 (e) ~~The percentage of retainage on payments made by the prime contractor to the~~
17 ~~subcontractor shall not exceed the percentage of retainage on payments made by the~~
18 ~~owner to the prime contractor. Any percentage of retainage on payments made by the~~
19 ~~prime contractor to the subcontractor that exceeds the percentage of retainage on~~
20 ~~payments made by the owner to the prime contractor shall be subject to interest to be~~
21 ~~paid by the prime contractor to the subcontractor at the rate of one percent (1%) per~~
22 ~~month or fraction thereof.~~

23 (d) Nothing in this section shall prevent the prime contractor at the time of
24 application and certification to the owner from withholding application and certification
25 to the owner for payment to the subcontractor for unsatisfactory job progress; defective
26 construction not remedied; disputed work; third party claims filed or reasonable
27 evidence that claim will be filed; failure of subcontractor to make timely payments for
28 labor, equipment, and materials; damage to prime contractor or another subcontractor;
29 reasonable evidence that subcontract cannot be completed for the unpaid balance of the
30 subcontract sum; or a reasonable amount for retainage not to exceed the initial
31 percentage retained by the owner.

32 (e) The terms of a construction contract under this Article shall not materially
33 alter the rights of a contractor, subcontractor, or a material supplier to receive prompt
34 and timely payment as provided in this section and in G.S. 22C-3.

35 (f) In any suit brought or defended under this section or G.S. 22-3, the presiding
36 judge may award reasonable attorneys' fees to the attorney representing the prevailing
37 party. Attorneys' fees shall be taxed as part of the court costs and shall be payable to the
38 prevailing party upon a finding that payments were retained in violation of this section.
39 For purposes of this section, the term 'prevailing party' means a party plaintiff or a third-
40 party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary
41 amount sought in the claim or is a party defendant or third-party defendant against
42 whom a claim is asserted that results in a judgment of less than fifty percent (50%) of
43 the amount sought in the claim. Notwithstanding the provisions of this subsection, if an
44 offer of judgment is served in accordance with G.S. 1A-1, Rule 68, the term 'prevailing

1 party' means an offeree who obtains a judgment in an amount more favorable than the
2 last offer or is an offeror against whom judgment is rendered in an amount less
3 favorable than the last offer."

4 **SECTION 2.** This act is effective when it becomes law.