

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE BILL 1245*

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

Sponsors: Senators Jenkins; Atwater, Bingham, Hoyle, Jones, and Malone.

Referred to: Commerce, Small Business and Entrepreneurship.

March 26, 2007

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE LAWS RELATED TO RETAINAGE PAYMENTS ON
3 CONSTRUCTION CONTRACTS.

4 The General Assembly of North Carolina enacts:

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

6 "§ 143-134.1. Interest on final payments due to prime contractors; payments to
7 subcontractors.

8 (a) On all public construction contracts requiring the estimated expenditure of
9 public money in an amount equal to or greater than three hundred thousand dollars
10 (\$300,000) which are let by a board or governing body of the State government or any
11 political subdivision thereof, except contracts let by the Department of Transportation
12 pursuant to G.S. 136-28.1, the balance due prime contractors shall be paid in full within
13 45 days after respective prime contracts of the project have been accepted by the owner,
14 certified by the architect, engineer or designer to be completed in accordance with terms
15 of the plans and specifications, or occupied by the owner and used for the purpose for
16 which the project was constructed, whichever occurs first. ~~Provided, however, that~~
17 ~~whenever~~ However, when the architect or consulting engineer in charge of the project
18 determines that delay in completion of the project in accordance with terms of the plans
19 and specifications is the fault of the contractor, the project may be occupied and used
20 for the purposes for which it was constructed without payment of any punitive interest
21 on amounts withheld past the 45 day limit. No payment shall be delayed because of the
22 failure of another prime contractor on ~~such the~~ project to complete his contract. Should
23 final payment to any prime contractor beyond the date ~~such the~~ contracts have been
24 certified to be completed by the designer or architect, accepted by the owner, or
25 occupied by the owner and used for the purposes for which the project was constructed,
26 be delayed by more than 45 days, ~~said the~~ prime contractor shall be paid interest,
27 beginning on the 46th day, at the rate of ~~one percent (1%) per month or fraction thereof~~
28 ~~one and one-half percent (1½%) per month,~~ unless a lower rate is agreed upon on ~~such~~
29 ~~the unpaid~~ balance as may be due. In addition to the above final payment provisions,

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

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

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

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

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

39 (3) When the project is fifty percent (50%) complete, the owner shall not
40 retain any further retainage from periodic payments due the contractor
41 if the contractor continues to perform satisfactorily. If the owner
42 determines the contractor's performance is unsatisfactory, the owner
43 may reinstate retainage for each subsequent periodic payment
44 application as authorized in this subsection up to the maximum amount

1 of five percent (5%). The project shall be deemed fifty percent (50%)
2 complete when the contractor's gross project invoice equals or exceeds
3 fifty percent (50%) of the value of the contract.

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

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

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

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

37 (b2) Upon the completion and acceptance of each separate building, public work,
38 or other item of work on which a price is stated separately in the contract or can be
39 separately ascertained, payment shall be made in full, including any retainage on
40 payments, less any authorized deductions. However, full payment shall only be made
41 for those trades, including structural steel, piling, caisson, demolition, rough grading,
42 and utility first-tier subcontractors, that have reached one hundred percent (100%)
43 completion of their contract by or before the project is fifty percent (50%) complete.
44 Each bid document shall identify any other trades not listed in this subsection that are

1 also allowed line-item release of retained funds. Each bid document shall also list the
2 inspections required by the owner before accepting the work and any financial
3 information required by the owner to release payment to the trades.

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

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

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

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

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

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

1 last offer or is an offeror against whom judgment is rendered in an amount less
2 favorable than the last offer."

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