

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

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SENATE BILL 1245*
Commerce, Small Business and Entrepreneurship Committee Substitute Adopted
5/1/07

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

Sponsors:

Referred to:

March 26, 2007

1 A BILL TO BE ENTITLED
2 AN ACT INCREASING THE BIDDING THRESHOLD FOR PUBLIC
3 CONSTRUCTION CONTRACTS AND AMENDING THE LAWS RELATED TO
4 RETAINAGE PAYMENTS ON CONSTRUCTION CONTRACTS.

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** G.S. 143-129(a) reads as rewritten:

7 "(a) Bidding Required. – No construction or repair work requiring the estimated
8 expenditure of public money in an amount equal to or more than ~~three hundred thousand~~
9 ~~dollars (\$300,000)~~ five hundred thousand dollars (\$500,000) or purchase of apparatus,
10 supplies, materials, or equipment requiring an estimated expenditure of public money in
11 an amount equal to or more than ninety thousand dollars (\$90,000) may be performed,
12 nor may any contract be awarded therefor, by any board or governing body of the State,
13 or of any institution of the State government, or of any political subdivision of the State,
14 unless the provisions of this section are complied with.

15 For purchases of apparatus, supplies, materials, or equipment, the governing body of
16 any political subdivision of the State may, subject to any restriction as to dollar amount,
17 or other conditions that the governing body elects to impose, delegate to the manager,
18 school superintendent, chief purchasing official, or other employee the authority to
19 award contracts, reject bids, or readvertise to receive bids on behalf of the unit. Any
20 person to whom authority is delegated under this subsection shall comply with the
21 requirements of this Article that would otherwise apply to the governing body."

22 **SECTION 2.** G.S. 143-134.1 reads as rewritten:

23 "**§ 143-134.1. Interest on final payments due to prime contractors; payments to**
24 **subcontractors.**

25 (a) On all public construction contracts requiring the estimated expenditure of
26 public money in an amount equal to or greater than three hundred thousand dollars
27 (\$300,000) which are let by a board or governing body of the State government or any
28 political subdivision thereof, except contracts let by the Department of Transportation

1 pursuant to G.S. 136-28.1, the balance due prime contractors shall be paid in full within
2 45 days after respective prime contracts of the project have been accepted by the owner,
3 certified by the architect, engineer or designer to be completed in accordance with terms
4 of the plans and specifications, or occupied by the owner and used for the purpose for
5 which the project was constructed, whichever occurs first. ~~Provided, however, that~~
6 ~~whenever~~ However, when the architect or consulting engineer in charge of the project
7 determines that delay in completion of the project in accordance with terms of the plans
8 and specifications is the fault of the contractor, the project may be occupied and used
9 for the purposes for which it was constructed without payment of any interest on
10 amounts withheld past the 45 day limit. No payment shall be delayed because of the
11 failure of another prime contractor on ~~such~~ the project to complete his contract. Should
12 final payment to any prime contractor beyond the date ~~such~~ the contracts have been
13 certified to be completed by the designer or architect, accepted by the owner, or
14 occupied by the owner and used for the purposes for which the project was constructed,
15 be delayed by more than 45 days, ~~said~~ the prime contractor shall be paid interest,
16 beginning on the 46th day, at the rate of one percent (1%) per month or fraction thereof
17 unless a lower rate is agreed upon on ~~such~~ the unpaid balance as may be due. In
18 addition to the above final payment provisions, periodic payments due a prime
19 contractor during construction shall be paid in accordance with the provisions of this
20 section and the payment provisions of the contract documents that do not conflict with
21 this section, or ~~said~~ the prime contractor shall be paid interest on any ~~such~~ unpaid
22 amount at the rate stipulated above for delayed final payments. ~~Such~~ The interest shall
23 begin on the date the payment is due and continue until the date on which payment is
24 made. ~~Such~~ The due date may be established by the terms of the contract. Funds for
25 payment of ~~such~~ the interest on state-owned projects shall be obtained from the current
26 budget of the owning department, institution, or agency. Where a conditional
27 acceptance of a contract exists, and where the owner is retaining a reasonable sum
28 pending correction of ~~such~~ the conditions, interest on ~~such~~ the reasonable sum shall not
29 apply.

30 (b) Within seven days of receipt by the prime contractor of each periodic or final
31 payment, the prime contractor shall pay the subcontractor based on work completed or
32 service provided under the subcontract. ~~Should~~ If any periodic or final payment to the
33 subcontractor ~~be~~ is delayed by more than seven days after receipt of periodic or final
34 payment by the prime contractor, the prime contractor shall pay the subcontractor
35 interest, beginning on the eighth day, at the rate of one percent (1%) per month or
36 fraction thereof on ~~such~~ the unpaid balance as may be due.

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

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

1 (2) When the project is fifty percent (50%) complete, the owner shall not
2 retain any further retainage from periodic payments due the contractor
3 if the contractor continues to perform satisfactorily. If the owner
4 determines the contractor's performance is unsatisfactory, the owner
5 may reinstate retainage for each subsequent periodic payment
6 application as authorized in this subsection up to the maximum amount
7 of five percent (5%). The project shall be deemed fifty percent (50%)
8 complete when the contractor's gross project invoices equal or exceed
9 fifty percent (50%) of the value of the contract.

10 (3) A subcontract on a contract governed by this section may include a
11 provision for the retainage on periodic payments made by the prime
12 contractor to the subcontractor. However, the percentage of the
13 payment retained: (i) shall be paid to the subcontractor under the same
14 terms and conditions as provided in subdivision (2) of this subsection,
15 and (ii) shall not exceed the percentage of retainage on payments made
16 by the owner to the prime contractor. Any percentage of retainage on
17 payments made by the prime contractor to the subcontractor that
18 exceeds the percentage of retainage on payments made by the owner to
19 the prime contractor shall be subject to interest to be paid by the prime
20 contractor to the subcontractor at the rate of one percent (1%) per
21 month or fraction thereof.

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

34 (5) 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 and public
38 work, payment shall be made in full, including any retainage on payments, less any
39 authorized deductions. Full payment, including any retainage on payments, less
40 authorized deductions, shall also be made for those trades that have reached one
41 hundred percent (100%) completion of their contract by or before the project is fifty
42 percent (50%) complete. Payments under this subsection shall be made within forty 45
43 days following receipt of the subcontractor's request or receipt of the surety's consent,
44 whichever occurs first. Trades under this subsection shall include structural steel, piling,

1 caisson, demolition, rough grading, and utility first-tier subcontractors, and each bid
2 document or contract 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's release of retainage on payments as part of a payment in full on a
7 line item of work under subsection (b2) of this section shall not affect any applicable
8 warranties or statutes of limitations on work done by the contractor or subcontractor,
9 and the warranties and statutes of limitations shall not begin to run until the owner
10 receives a certificate of substantial completion from the architect, engineer, or designer
11 in charge of the project, a certificate of occupancy is issued for the project, or the owner
12 receives beneficial occupancy as defined in the contract documents.

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

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

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

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

43 **SECTION 3.** The Secretary of the Department of Administration shall study
44 the use of interest-bearing escrow accounts in other states to gain information on

1 precedents for use in conjunction with retainage from payment on public construction
2 projects. After the study, the Secretary shall adopt rules for State agencies and The
3 University of North Carolina and community colleges for retainage on public
4 construction projects and shall adopt guidelines for local government units for retainage
5 on public construction projects.

6 **SECTION 4.** This act becomes effective October 1, 2007, and applies to
7 contracts entered into on or after that date.