

JAN 20 2012

A BILL FOR AN ACT

RELATING TO CONTRACTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Act 291, Session Laws of Hawaii 2006, addressed
2 the problem of delayed payments to subcontractors and
3 materialmen on government projects, by providing for the prompt
4 payment of subcontractors and materialmen upon the completion of
5 their work or furnishing of materials on government projects.
6 However, the legislature finds that subcontractors and
7 materialmen are still experiencing delays in payment and that
8 further action is needed to ensure that subcontractors and
9 materialmen obtain timely payment upon completion of their work,
10 not only on government projects, but on private sector projects
11 as well.

12 The purpose of this Act is to provide for the prompt
13 payment of subcontractors and materialmen on government and
14 nongovernment projects.

15 SECTION 2. Chapter 444, Hawaii Revised Statutes, is
16 amended by adding a new section to read as follows:

17 "§444-A Performance bond. (a) Except as otherwise
18 provided by law, a contractor or subcontractor may execute and



1 deliver to the owner, contractor, or subcontractor, before the
2 commencement of construction that the contractor or
3 subcontractor will be responsible for performing, a good and
4 sufficient bond in a sum equal to the contract price for the
5 faithful performance of the contract. The term of the bond
6 under this subsection shall extend to include the period during
7 which claims of lien or notices of other encumbrances based on
8 the construction performed under the contract may be filed under
9 applicable law. The bond shall be approved by the owner,
10 contractor, or subcontractor entitled to withhold retainage.

11 A faithful performance bond delivered under this section
12 shall require that:

13 (1) The obligations of the contract shall be faithfully
14 performed;

15 (2) Payment shall be made promptly to all persons
16 supplying labor or material to the contractor or
17 subcontractor for prosecution of the work provided in
18 the contract;

19 (3) All contributions due under state law from the
20 contractor or subcontractor in connection with the
21 performance of the contract shall be made promptly;

22 and



1 (4) All sums required to be deducted and retained from the
2 wages of employees of the contractor or subcontractor
3 pursuant to state law shall be paid over to the
4 department of taxation.

5 (b) If a contractor or subcontractor does not obtain the
6 bond described in subsection (a), the owner, contractor, or
7 subcontractor may withhold the percentage of the contract price
8 of the work completed as retainage as agreed by the parties to
9 the contract. The owner, contractor, or subcontractor shall pay
10 interest at the rate of one and one-half per cent per month on
11 the final payment due a contractor or subcontractor who did not
12 obtain the bond described in subsection (a). The interest shall
13 commence ten days after the date on which claims of lien or
14 notices of other encumbrances based on the construction
15 performed under the contract are required to be filed under
16 applicable law.

17 For purposes of this subsection, "final payment due a
18 contractor or subcontractor" means the amount withheld as
19 retainage less the total monetary amount of liens and other
20 encumbrances resulting from the failure of the contractor or
21 subcontractor to faithfully perform the obligations of the

1 contract and properly filed within the time required under
2 applicable law."

3 SECTION 3. Section 103-10.5, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "**§103-10.5 Prompt payment.** (a) Any money paid to a
6 contractor shall be disbursed to subcontractors within [~~ten~~]
7 seven days after receipt of the money in accordance with the
8 terms of the subcontract; provided that the subcontractor has
9 met all the terms and conditions of the subcontract and there
10 are no bona fide disputes on which the procurement officer has
11 withheld payment.

12 (b) Upon final payment to the contractor, full payment to
13 the subcontractor, including retainage, shall be made within
14 [~~ten~~] seven days after receipt of the money; provided there are
15 no bona fide disputes over the subcontractor's performance under
16 the subcontract.

17 (c) If any periodic or final payment to a subcontractor
18 under subsection (a) or (b) is delayed by more than seven days
19 after receipt of a periodic or final payment by the contractor,
20 and there are no bona fide disputes over the subcontractor's
21 performance under the subcontract, the contractor shall pay the

1 subcontractor interest, beginning on the eighth day, at the rate
2 of one and one-half per cent per month.

3 (d) Full payment, less authorized deductions, shall be
4 made to subcontractors that have completed one hundred per cent
5 of their contract by or before the project is fifty per cent
6 complete if the subcontractor has performed satisfactorily.

7 Payment to the early finishing subcontractors shall be
8 contingent upon compliance with subsection (e).

9 Early finishing subcontractors under this subsection shall
10 include structural steel, piling, caisson, rebar steel, and
11 demolition. The early finishing subcontractors for which line-
12 item release of retained funds is required shall not be
13 construed to prevent the procurement officer from identifying
14 any other subcontractors not listed in this subsection that are
15 also allowed line-item release of retained funds. If the
16 procurement officer identifies any other subcontractors to be
17 allowed line-item release of retainage, those subcontractors
18 shall be listed in the original bid documents.

19 [~~(e)~~] (e) Where a subcontractor has provided evidence to
20 the contractor of satisfactorily completing all work under their
21 subcontract and has provided a properly documented final payment
22 request as described in subsection [~~(d) of this section,~~] (g),



1 and:

2 (1) Has provided to the contractor an acceptable
3 performance and payment bond for the project executed
4 by a surety company authorized to do business in the
5 State, as provided in section 103-32.1; or

6 (2) The following has occurred:

7 (A) A period of ninety days after the day on which
8 the last of the labor was done or performed and
9 the last of the material was furnished or
10 supplied has elapsed without written notice of a
11 claim given to the contractor and the surety, as
12 provided for in section 103D-324; and

13 (B) The subcontractor has provided to the contractor:

14 (i) An acceptable release of retainage bond,
15 executed by a surety company authorized to
16 do business in the State, in an amount [øf]
17 not more than two times the amount being
18 retained or withheld by the contractor;

19 (ii) Any other bond acceptable to the contractor;

20 or

21 (iii) Any other form of mutually acceptable
22 collateral,



1 all sums retained or withheld from a subcontractor and otherwise
2 due to the subcontractor for satisfactory performance under the
3 subcontract shall be paid by the procurement officer to the
4 contractor and subsequently, upon receipt from the procurement
5 officer, by the contractor to the subcontractor within the
6 applicable time periods specified in subsection (a) or (b) and
7 section 103-10.

8 (f) If the procurement officer or the contractor fails to
9 pay in accordance with this section, a penalty of one and one-
10 half per cent per month shall be imposed upon the outstanding
11 amounts due that were not timely paid by the responsible party.
12 The penalty may be withheld from future payment due to the
13 contractor, if the contractor was the responsible party. If a
14 contractor [~~has violated~~] violates subsection (b) three or more
15 times within two years of the first violation, the contractor
16 shall be referred by the procurement officer to the [~~contractor~~]
17 contractors license board for action under section 444-17(14).

18 [~~(d)~~] (g) A properly documented final payment request from
19 a subcontractor, as required by subsection [~~(e)~~] (e), shall
20 include:

21 (1) Substantiation of the amounts requested;



- 1 (2) A certification by the subcontractor, to the best of
2 the subcontractor's knowledge and belief, that:
- 3 (A) The amounts requested are only for performance in
4 accordance with the specifications, terms, and
5 conditions of the subcontract;
- 6 (B) The subcontractor has made payments due to its
7 subcontractors and suppliers from previous
8 payments received under the subcontract and will
9 make timely payments from the proceeds of the
10 payment covered by the certification, in
11 accordance with their subcontract agreements and
12 the requirements of this section; and
- 13 (C) The payment request does not include any amounts
14 that the subcontractor intends to withhold or
15 retain from a subcontractor or supplier in
16 accordance with the terms and conditions of their
17 subcontract; and
- 18 (3) The submission of documentation confirming that all
19 other terms and conditions required under the
20 subcontract agreement have been fully satisfied.



1 The procurement officer shall return any final payment
2 request that is defective to the contractor within seven days
3 after receipt, with a statement identifying the defect.

4 [~~(e)~~] (h) In the case of a construction contract, a
5 payment request made by a contractor to the procurement officer
6 that includes a request for sums that were withheld or retained
7 from a subcontractor and are due to a subcontractor may not be
8 approved under subsection [~~(e)~~] (e) unless the payment request
9 includes:

- 10 (1) Substantiation of the amounts requested; and
- 11 (2) A certification by the contractor, to the best of the
12 contractor's knowledge and belief, that:
 - 13 (A) The amounts requested are only for performance in
14 accordance with the specifications, terms, and
15 conditions of the contract;
 - 16 (B) The subcontractor has made payments due to its
17 subcontractors and suppliers from previous
18 payments received under the contract and will
19 make timely payments from the proceeds of the
20 payment covered by the certification, in
21 accordance with their subcontract agreements and
22 the requirements of this section; and

1 (C) The payment request does not include any amounts
 2 that the contractor intends to withhold or retain
 3 from a subcontractor or supplier in accordance
 4 with the terms and conditions of their
 5 subcontract.

6 The procurement officer shall return any final payment request
 7 that is defective to the contractor within seven days after
 8 receipt, with a statement identifying the defect.

9 ~~[(f)]~~ (i) This section shall not be construed to impair
 10 the right of a contractor or a subcontractor at any tier to
 11 negotiate and to include in their respective subcontracts
 12 provisions that provide for additional terms and conditions that
 13 are requested to be met before the subcontractor shall be
 14 entitled to receive final payment under subsection ~~[(e) of this~~
 15 ~~section];~~ (d) or (e); provided that any ~~[such]~~ payments withheld
 16 shall be withheld by the procurement officer."

17 SECTION 4. Section 103-32.1, Hawaii Revised Statutes, is
 18 amended by amending subsection (d) to read as follows:

19 "(d) Where a subcontractor has provided evidence to the
 20 contractor of:

- 21 (1) A valid performance and a payment bond for the project
- 22 that is acceptable to the contractor and executed by a

1 surety company authorized to do business in this
2 State;
3 (2) Any other bond acceptable to the contractor; or
4 (3) Any other form of collateral acceptable to the
5 contractor,
6 the retention amount withheld by the contractor from its
7 subcontractor shall be not more than the same percentage of
8 retainage as that of the contractor. This subsection shall also
9 apply to the subcontractors who subcontract work to other
10 subcontractors. Any percentage of retainage on payments made by
11 the contractor to the subcontractor that exceeds the percentage
12 of retainage on payments made by the procurement officer to the
13 contractor shall be subject to interest to be paid by the
14 contractor to the subcontractor at the rate of one and one-half
15 per cent per month commencing from the thirtieth day after the
16 difference in retainage percentages persist."

17 SECTION 5. Section 444-25, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "**§444-25 Payment for goods and services.** [~~A contractor~~
20 ~~shall pay the contractor's subcontractor for any goods and~~
21 ~~services rendered within sixty days after receipt of a proper~~
22 ~~statement by the subcontractor that the goods have been~~



1 ~~delivered or services have been performed. The subcontractor~~
2 ~~shall be entitled to receive interest on the unpaid principal~~
3 ~~amount at the rate of one per cent per month commencing on the~~
4 ~~sixtieth day following receipt of the statement by the~~
5 ~~contractor, provided that this section shall not apply if the~~
6 ~~delay in payment is due to a bona fide dispute between the~~
7 ~~contractor and the subcontractor concerning the goods and~~
8 ~~services contracted for. If there is no bona fide dispute~~
9 ~~between the subcontractor and the contractor concerning the~~
10 ~~goods or services contracted for, the subcontractor shall be~~
11 ~~entitled to payment for goods and services under this section.]~~

12 (a) Partial payment is allowed and may be made on contracts
13 under this chapter. Except as otherwise provided by law, an
14 owner, contractor, or subcontractor may withhold as retainage an
15 amount equal to not more than five per cent of the contract
16 price of the work completed. Partial payment allowed under this
17 subsection shall not constitute acceptance or approval of some
18 of the work or a waiver of defects in the work.

19 (b) The owner, contractor, or subcontractor shall pay
20 interest at the rate of one and one-half per cent per month on
21 the final payment due the contractor or subcontractor. Except
22 as otherwise provided by law, the interest shall commence thirty



1 days after the contractor or subcontractor has completed and the
2 owner has accepted the work under the contract for construction
3 for which the final payment is due. The interest shall run
4 until the date when final payment is tendered to the contractor
5 or subcontractor.

6 When the contractor or subcontractor considers the work
7 that the contractor or subcontractor is contracted to perform to
8 be complete, the contractor or subcontractor shall notify the
9 party to whom the contractor or subcontractor is responsible
10 under the contract. Within fifteen days after receiving the
11 notice, the party shall accept the work or notify the contractor
12 or subcontractor of work yet to be performed under the contract.
13 If the party does not accept the work or does not notify the
14 contractor or subcontractor of work yet to be performed within
15 the time allowed, the interest required under this subsection
16 shall commence thirty days after the end of the fifteen-day
17 period.

18 (c) When a contractor pays a subcontractor in full,
19 including the amount the contractor withheld as retainage, the
20 owner with whom the contractor has the contract shall pay the
21 contractor a sum equal to the amount of retainage that the
22 contractor paid the subcontractor, out of the amount that the



1 owner withheld from the contractor as retainage. The contractor
2 shall notify the owner when the contractor pays a subcontractor
3 in full under this section and, within fifteen days after
4 receiving the notice, the owner shall pay the contractor the
5 amount due the contractor under this subsection. Interest on
6 the amount due the contractor at the rate of one and one-half
7 per cent per month shall commence thirty days after the owner
8 receives notice of full payment to the subcontractor.

9 (d) If payment is contingent upon receipt of funds held in
10 escrow or trust, the contractor shall clearly state this fact in
11 the contractor's solicitation of bids. If the solicitation for
12 bids contains the statement that the time of payment is
13 contingent upon the receipt of funds held in escrow or trust and
14 a contract is awarded in response to the solicitation, interest
15 will not begin to accrue upon any unpaid balance until the
16 sixtieth day following receipt by the contractor of the
17 subcontractor's statement or the thirtieth day following receipt
18 of the escrow or trust funds, whichever occurs later."

19 SECTION 6. Section 507-43, Hawaii Revised Statutes, is
20 amended by amending subsection (f) to read as follows:

21 "(f) Date of completion, notice of. The term "date of
22 completion" as used in this section means the time when the



1 owner or the general contractor for the improvement completes
2 the publication of a notice that the improvement has been
3 completed or has been abandoned and an affidavit of the
4 publication, together with a copy of the notice has been filed
5 in the office of the clerk of the circuit court where the
6 property involved is situated; provided that notice of
7 completion shall not be effective for any purpose unless prior
8 to the notice there has been substantial completion of the
9 improvement and the owner, developer, or government agency has
10 accepted the project or the improvement has been actually
11 abandoned; and provided further that the notice shall not be
12 published by the contractor until after the contractor has first
13 made written demand upon the owner to publish the notice and the
14 owner has failed to publish the notice within five days from the
15 date of the demand. The publication of the notice by the
16 contractor or the owner shall not be construed as an admission
17 by either that the improvement has been satisfactorily
18 completed. The notice required herein shall be published twice,
19 seven days apart, in a newspaper of general circulation, printed
20 and published in the county in which the property involved is
21 situated, and the publishing newspaper shall promptly file the
22 affidavit of publication above mentioned in the office of the



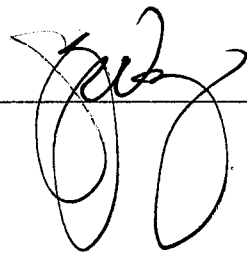
1 clerk. If the general contractor publishes the notice of
2 completion, the general contractor shall provide the owner and
3 the subcontractors and architects involved with the project with
4 a copy of the notice of completion no later than three days
5 after the date that the notice is first published."


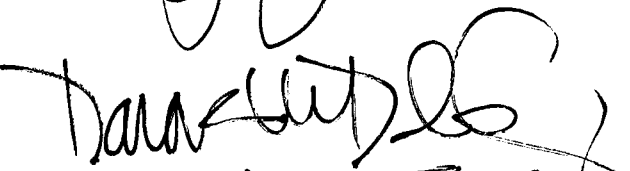
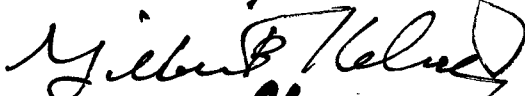

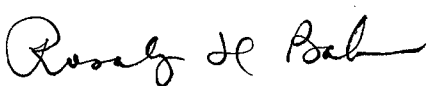


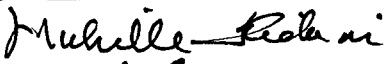
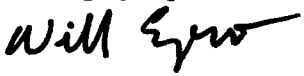
6 SECTION 7. This Act does not affect rights and duties that
7 matured, penalties that were incurred, and proceedings that were
8 begun before its effective date.

9 SECTION 8. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 9. This Act shall take effect upon its approval.

12

INTRODUCED BY: 

S.B. NO. 2412

Report Title:

Construction Contracts; Subcontractors and Materialmen; Payments

Description:

Shortens the time by which subcontractors are to receive progress and final payments from contractors on government and private construction projects. Provides interest penalties for late payments.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

