

REFERENCE TITLE: **contractors; retention monies; interest accounts**

State of Arizona
House of Representatives
Forty-eighth Legislature
First Regular Session
2007

HB 2406

Introduced by
Representatives Reagan, Rios P: Clark, Konopnicki, Weiers JP, Yarbrough

AN ACT

AMENDING SECTIONS 32-1129.01, 32-1129.02 AND 32-1129.06, ARIZONA REVISED STATUTES; AMENDING TITLE 32, CHAPTER 10, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 32-1129.07; RELATING TO CONTRACTORS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 32-1129.01, Arizona Revised Statutes, is amended to
3 read:

4 32-1129.01. Progress payments by owner; conditions; interest

5 A. By mutual agreement with a contractor, an owner may make progress
6 payments on construction contracts of less than sixty days. An owner shall
7 make progress payments to a contractor on all other construction contracts.
8 Progress payments shall be made on the basis of a duly certified and approved
9 billing or estimate of the work performed and the materials supplied during
10 the preceding thirty day billing cycle, or such other billing cycle as stated
11 in the construction contract. If billings or estimates are to be submitted
12 in other than thirty day billing cycles, the construction contract and each
13 page of the plans, including bid plans and construction plans, shall
14 specifically identify such other billing cycle in a clear and conspicuous
15 manner as prescribed in subsection B. Except as provided in subsection C,
16 the owner shall make progress payments to the contractor within seven days
17 after the date the billing or estimate is certified and approved pursuant to
18 subsection D.

19 B. A construction contract may provide for a billing cycle other than
20 a thirty day billing cycle if the construction contract specifically sets
21 forth such other billing cycle and either of the following applies:

22 1. The following legend or substantially similar language setting
23 forth the other billing cycle appears in clear and conspicuous type on each
24 page of the plans, including bid plans and construction plans:

25 Notice of Alternate Billing Cycle

26 This contract allows the owner to require the submission
27 of billings or estimates in billing cycles other than thirty
28 days. Billings or estimates for this contract shall be
29 submitted as follows:

30 _____
31 _____
32 _____

33 2. The following legend or substantially similar language setting
34 forth the other billing cycle appears in clear and conspicuous type on each
35 page of the plans, including bid plans and construction plans:

36 Notice of Alternate Billing Cycle

37 This contract allows the owner to require the submission
38 of billings or estimates in billing cycles other than thirty
39 days. A written description of such other billing cycle
40 applicable to the project is available from the owner or the
41 owner's designated agent at (telephone number or address, or
42 both), and the owner or its designated agent shall provide this
43 written description on request.

1 C. An owner may make progress payments later than seven days after the
2 date the billing or estimate is certified and approved if both:

3 1. The construction contract in a clear and conspicuous manner
4 specifically provides for a later payment defined by a specified number of
5 days after certification and approval.

6 2. The following legend or substantially similar language setting
7 forth the specified number of days appears in clear and conspicuous type on
8 each page of the plans, including bid plans and construction plans:

9 Notice of Extended Payment Provision
10 This contract allows the owner to make payment within ____
11 days after certification and approval of billings and estimates.

12 D. A billing or estimate shall be deemed approved and certified
13 fourteen days after the owner receives the billing or estimate, unless before
14 that time the owner or the owner's agent prepares and issues a written
15 statement detailing those items in the billing or estimate that are not
16 approved and certified. An owner may decline to approve and certify a
17 billing or estimate or portion of a billing or estimate for unsatisfactory
18 job progress, defective construction work or materials not remedied, disputed
19 work or materials, failure to comply with other material provisions of the
20 construction contract, third party claims filed or reasonable evidence that a
21 claim will be filed, failure of the contractor or a subcontractor to make
22 timely payments for labor, equipment and materials, damage to the owner, ~~OR~~
23 reasonable evidence that the construction contract cannot be completed for
24 the unpaid balance of the construction contract sum ~~or a reasonable amount~~
25 ~~for retention~~. The owner is deemed to have received the billing or estimate
26 when the billing or estimate is submitted to any person designated by the
27 owner for the receipt of these submissions or for review or approval of the
28 billing or estimate.

29 E. An owner may withhold from a progress payment only an amount that
30 is sufficient to pay the direct expenses the owner reasonably expects to
31 incur to correct any items set forth in writing pursuant to subsection D.

32 F. An owner may extend the period within which the billing or estimate
33 is certified and approved if both:

34 1. The construction contract in a clear and conspicuous manner
35 specifically provides for an extended time period within which a billing or
36 estimate shall be certified and approved defined by a specified number of
37 days after the owner has received the billing or estimate.

38 2. The following legend or substantially similar language, setting
39 forth the specified number of days, appears in clear and conspicuous type on
40 each page of the plans, including bid plans and construction plans:

41 Notice of Extended Certification and
42 Approval Period Provision

43 This contract allows the owner to certify and approve
44 billings and estimates within ____ days after the billings and
45 estimates are received from the contractor.

1 G. After the effective date of a construction contract, an owner and
2 contractor may change the number of specified days after certification and
3 approval for the owner to make payment to the contractor or within which a
4 billing or estimate must be certified and approved. Any contractor or
5 subcontractor that does not provide written consent to the change will
6 continue to be paid as previously agreed.

7 H. When a contractor completes and an owner approves and certifies all
8 work under a construction contract, the owner shall make payment in full on
9 the construction contract within seven days. When a contractor completes and
10 an owner approves and certifies all work under a portion of a construction
11 contract for which the contract states a separate price, the owner shall make
12 payment in full on that portion of the construction contract within seven
13 days. On projects that require a federal agency's final approval or
14 certification, the owner shall make payment in full on the construction
15 contract within seven days of the federal agency's final approval or
16 certification.

17 I. Payment shall not be required pursuant to this section unless the
18 contractor provides the owner with a billing or estimate for the work
19 performed or the material supplied in accordance with the terms of the
20 construction contract between the parties.

21 J. A construction contract shall not alter the rights of any
22 contractor, subcontractor or material supplier to receive prompt and timely
23 progress payments as provided under this article.

24 K. If an owner or a third party designated by an owner as the person
25 responsible for making progress payments on a construction contract does not
26 make a timely payment pursuant to this section, the owner shall pay the
27 contractor interest at the rate of one and one-half per cent a month or
28 fraction of a month on the unpaid balance, or at a higher rate as the parties
29 to the construction contract agree.

30 L. On the written request of a subcontractor, the owner shall notify
31 the subcontractor within five days after the issuance of a progress payment
32 to the contractor. On the written request of a subcontractor, the owner
33 shall notify the subcontractor within five days after the owner makes the
34 final payment to the contractor on the construction contract.

35 M. In any action or arbitration brought to collect payments or
36 interest pursuant to this section, the successful party shall be awarded
37 costs and attorney fees in a reasonable amount.

38 N. If the owner and contractor are a single entity, that entity shall
39 pay its subcontractors or material suppliers within fourteen days after the
40 billing or estimate is certified and approved unless the deadlines for
41 approval and certification or for payment have been modified pursuant to
42 subsection C or F.

1 Sec. 2. Section 32-1129.02, Arizona Revised Statutes, is amended to
2 read:

3 32-1129.02. Performance and payment by contractor,
4 subcontractor or material supplier; conditions:
5 interest

6 A. Notwithstanding the other provisions of this section, performance
7 by a contractor, subcontractor or material supplier in accordance with the
8 provisions of a construction contract entitles the contractor, subcontractor
9 or material supplier to payment from the party with whom the contractor,
10 subcontractor or material supplier contracts.

11 B. If a subcontractor or material supplier has performed in accordance
12 with the provisions of a construction contract, the contractor shall pay to
13 its subcontractors or material suppliers and each subcontractor shall pay to
14 its subcontractors or material suppliers, within seven days of receipt by the
15 contractor or subcontractor of each progress payment or final payment, the
16 full amount received for such subcontractor's work and materials supplied
17 based on work completed or materials supplied under the subcontract. Payment
18 shall not be required pursuant to this subsection unless the subcontractor or
19 material supplier provides to the contractor or subcontractor a billing or
20 invoice for the work performed or material supplied in compliance with the
21 terms of the contract between the parties. Each subcontractor or material
22 supplier shall provide a waiver of any mechanic's or materialman's lien
23 conditioned upon payment for the work completed or material supplied. The
24 contractor or subcontractor may require that such conditional waivers of lien
25 be notarized. Any diversion by the contractor or subcontractor of payments
26 received for work performed pursuant to a contract, or failure to reasonably
27 account for the application or use of such payments, constitutes grounds for
28 disciplinary action by the registrar of contractors. Violations of this
29 section shall be grounds for suspension or revocation of a license or other
30 disciplinary action by the registrar pursuant to section 32-1154, subsections
31 B, C and D. The subcontractor or material supplier may notify the registrar
32 of contractors and the owner in writing of any payment less than the amount
33 or percentage approved for the class or item of work as set forth in this
34 section.

35 C. Nothing in this section prevents the contractor or subcontractor,
36 at the time of application or certification to the owner or contractor, from
37 withholding such application or certification to the owner or contractor for
38 payment to the subcontractor or material supplier for unsatisfactory job
39 progress, defective construction work or ~~material~~ MATERIALS not remedied,
40 disputed work, failure to comply with other material provisions of the
41 construction contract, third party claims filed or reasonable evidence that a
42 claim will be filed, failure of the subcontractor to make timely payments for
43 labor, equipment and materials, damage to a contractor or another
44 subcontractor or material supplier, ~~OR~~ OR reasonable evidence that the
45 subcontract cannot be completed for the unpaid balance of the subcontract sum

1 ~~or a reasonable amount for retention that does not exceed the actual~~
2 ~~percentage retained by the owner.~~

3 D. If a periodic or final payment to a subcontractor or material
4 supplier is delayed by more than seven days after receipt of periodic or
5 final payment by the contractor or subcontractor, the contractor or
6 subcontractor shall pay its subcontractor or material supplier interest,
7 except for periods of time during which payment is withheld pursuant to
8 subsection C of this section, beginning on the eighth day, at the rate of one
9 and one-half per cent per month or a fraction of a month on the unpaid
10 balance or at such higher rate as the parties agree.

11 E. Any licensed contractor, licensed subcontractor or material
12 supplier who files a complaint with the registrar of contractors under this
13 section shall be required to post a surety bond or cash deposit of five
14 hundred dollars or one-half of the amount due, whichever is less, with the
15 registrar to secure the payment of claims under this section. If the
16 complaint is determined by the registrar to be without merit and frivolous,
17 the registrar shall order the person who filed the complaint to pay one-half
18 of the amount of the required surety bond or cash deposit to the respondent
19 and one-half to the registrar for deposit into the state general fund. If no
20 claim may be made under this section against the surety bond or cash deposit,
21 the surety bond or cash deposit shall be returned to the complainant. The
22 surety bond or cash deposit shall be in the name of the licensee or material
23 supplier who files the complaint and shall be subject to claims by the
24 registrar of contractors and the respondent licensee as provided in this
25 section. The surety bond or cash deposit shall be conditioned upon and
26 provide for payment upon the presentation of a certified copy of the order of
27 the registrar and a certification by the complainant of nonpayment within
28 thirty days after the order becomes final. The surety bond shall be executed
29 by the complainant as principal with a corporation duly authorized to
30 transact surety business in this state. Evidence of the surety bond shall be
31 submitted to the registrar in a form acceptable to the registrar. The cash
32 deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the
33 registrar in the contractors prompt pay complaint fund and shall be held for
34 the payment of claims.

35 F. In any action or arbitration brought to collect payments or
36 interest pursuant to this section, the successful party shall be awarded
37 costs and attorney fees in a reasonable amount.

38 Sec. 3. Section 32-1129.06, Arizona Revised Statutes, is amended to
39 read:

40 32-1129.06. Applicability to state and political subdivisions

41 Sections 32-1129.01, 32-1129.02, 32-1129.04, ~~and~~ 32-1129.05 **AND**
42 **32-1129.07** do not apply to this state or political subdivisions of this
43 state.

1 Sec. 4. Title 32, chapter 10, article 2, Arizona Revised Statutes, is
2 amended by adding section 32-1129.07, to read:

3 32-1129.07. Project monies deposited into account; interest
4 accrual

5 A. IF RETENTION IS HELD IN A CONTRACTED COMMERCIAL PROJECT, AN OWNER
6 SHALL RETAIN ONLY FIVE PER CENT OF THE CONTRACT AMOUNT IN AN INTEREST BEARING
7 ESCROW ACCOUNT. INTEREST ACCRUES ON A PRO RATA BASIS FOR THE PARTY TO WHOM
8 IT IS OWED. AFTER SUBSTANTIAL COMPLETION OF EACH SEPARATE COMMERCIAL
9 BUILDING, PUBLIC WORK OR OTHER DIVISION OF THE CONTRACT, THE RETENTION MONIES
10 SHALL BE RELEASED ON A LINE ITEM BASIS. THE MONIES SHALL BE RELEASED FROM
11 THE INTEREST BEARING ESCROW ACCOUNT FOURTEEN DAYS AFTER CERTIFICATION OF
12 PROJECT COMPLETION.

13 B. A GENERAL CONTRACTOR MAY NOT HOLD RETENTION MONIES IF THE OWNER
14 DOES NOT HOLD RETENTION MONIES PURSUANT TO SUBSECTION A.