

SECOND REGULAR SESSION

SENATE BILL NO. 911

91ST GENERAL ASSEMBLY

INTRODUCED BY SENATORS FOSTER, STOLL, KLINDT, SCHNEIDER AND GIBBONS.

Read 1st time January 9, 2002, and 1,000 copies ordered printed.

TERRY L. SPIELER, Secretary.

3533S.011

AN ACT

To amend chapter 436, RSMo, by adding thereto thirteen new sections relating to retainage in private building contracts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 436, RSMo, is amended by adding thereto thirteen new sections, to be known as sections 436.300, 436.303, 436.306, 436.309, 436.312, 436.315, 436.318, 436.321, 436.324, 436.327, 436.330, 436.333 and 436.336, to read as follows:

436.300. Notwithstanding any other law to the contrary, all parties to any contract or agreement between any private owner and any contractor or between any contractor and subcontractor or any supplier at whatever tier for construction, reconstruction, maintenance, alteration or repair for a private owner of any building, improvement, structure, private road, appurtenance or appliance, including moving, demolition or any excavating connected therewith, shall make payment in accordance to the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

436.303. A contract or agreement may include a provision for the retainage of a portion of any payment due from the owner to the contractor, not to exceed five percent of the amount of such payment due pursuant to the contract or agreement, to ensure the proper performance of the contract or agreement; provided that the contract may provide that if the contractor's performance is not in accordance with the terms of the contract or agreement, the owner may retain additional sums to protect the owner's interest in satisfactory performance of the contract or agreement. The amount or amounts so retained by the owner shall be referred to in

sections 436.300 to 436.336 as "retainage", and shall be held by the owner in trust for the benefit of the contractor and the contractor's subcontractors, sub-subcontractors and suppliers at whatever tier who are not in default, in proportion to their respective interests. Such retainage shall be subject to the conditions and limitations listed in sections 436.306 to 436.336.

436.306. 1. The contractor may tender to the owner acceptable substitute security with a written request for release of retainage in the amount of the substitute security. The contractor shall thereupon either:

(1) Be entitled to receive cash payment of retainage pursuant to this section;

or

(2) Not be subject to the withholding of retainage, in either case, to the extent of the security tendered, provided that the contractor is not in default of its agreement with the owner.

2. If the tender described in subsection 1 of this section is made after retainage has been withheld, the owner shall, within five working days after receipt of the tender, pay over to the contractor the withheld retainage to the extent of the substitute security. If the tender described in subsection 1 of this section is made before retainage has been withheld, the owner shall, to the extent of the substitute security, refrain from withholding any retainage from future payments.

436.309. A subcontractor of the contractor may tender to the contractor acceptable substitute security with a written request for release of retainage in the amount of the substitute security. The contractor shall tender the subcontractor's substitute security to the owner with a like request, pursuant to the provisions of section 436.306. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall pay over to the subcontractor, within five working days after receipt, any accumulated retainage paid by the owner to the contractor on account of substitute security tendered by the subcontractor; except that, the contractor shall not be required to pay over retainage in excess of the amount properly attributable to work completed by the subcontractor at the time of payment. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall refrain from withholding retainage from payments to the subcontractor to the extent that the owner has refrained from withholding retainage from payments to the contractor on account of the subcontractor's substituted security. The subcontractor shall be entitled to receive, upon receipt by the contractor, all income received by the contractor from the owner on account of income-producing securities deposited by the subcontractor as substitute security. Except as otherwise provided in this section, the contractor shall have no

obligation to collect or pay to a subcontractor retainage on account of substitute security tendered by the subcontractor.

436.312. 1. The following shall constitute acceptable substitute security for purposes of sections 436.306 and 436.309:

(1) Certificates of deposit drawn and issued by a national banking association located in the state of Missouri or by any banking corporation incorporated pursuant to the laws of the state of Missouri;

(2) A retainage bond naming the owner as obligee issued by any surety company authorized to issue surety bonds in the state of Missouri in the amount of the retainage released; or

(3) An irrevocable and unconditional letter of credit in favor of the owner, issued by a national banking association located in the state of Missouri or by any banking corporation incorporated pursuant to the laws of the state of Missouri, in the amount of the retainage released.

2. The contractor shall be entitled to receive, in all events, all interest and income earned on any securities deposited by the contractor in substitution for retainage.

436.315. A contractor shall not withhold from any subcontractor any retainage in excess of the retainage withheld from the contractor by the owner for the subcontractor's work, unless the subcontractor's performance is not in accordance with the terms of the subcontract, in which case, subject to the terms of the subcontract, the contractor may retain additional sums in any amount to ensure the subcontractor's satisfactory performance of the subcontract.

436.318. Upon the release of retainage by the owner to the contractor, other than for substituted security pursuant to sections 436.306 to 436.312, the contractor shall pay to each subcontractor the subcontractor's ratable share of the retainage released, provided that all conditions of the subcontract for release of retainage to the subcontractor have been satisfied.

436.321. If it is determined that a subcontractor's performance has been satisfactorily completed, and the subcontractor can be released prior to substantial completion of the entire project without risk to the owner involving the subcontractor's work, the contractor shall request such adjustment in retainage, if any, from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall as part of the next contractual payment cycle release the subcontractor's retainage to the contractor, who shall in turn as part of the next contractual payment cycle release such retainage as is due the subcontractor.

436.324. Within thirty days of the project reaching substantial completion, as

defined herein, all retainage or substitute security shall be released by the owner to the contractor less an amount equal to one hundred and fifty percent of the costs to complete any remaining items. Upon receipt of such retainage from the owner, the contractor shall within seven days release to each subcontractor that subcontractor's share of the retainage.

436.327. The project shall be deemed to have reached substantial completion upon the occurrence of the earlier of one of the following events:

- (1) The architect or engineer issues a certificate of substantial completion; or
- (2) The applicable governmental agency issues a use or occupancy permit; or
- (3) The owner begins to use or could have begun to use the project for its

intended purpose.

436.330. Contractors and subcontractors shall comply with the provisions of sections 436.300 to 436.336 in their relations with subcontractors, sub-subcontractors or suppliers of whatever tier, and shall be bound by the same obligations as owners are to contractors except as specifically provided herein.

436.333. A contract or agreement formed after August 28, 2002, shall be unenforceable to the extent that its provisions are inconsistent with sections 436.300 to 436.336. If retainage is withheld in violation of sections 436.300 to 436.336, a court may, in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the date of such wrongful or improper withholdings of retainage. In any action brought to enforce sections 436.300 to 436.336, a court may award reasonable attorney's fees to the prevailing party. If the parties elect to resolve the dispute by arbitration pursuant to section 435.350, RSMo, the arbitrator may award any remedy that a court is authorized to award.

436.336. Sections 436.300 to 436.333 shall apply to contracts and agreements between owner and contractors entered into after August 28, 2002. Sections 436.336 to 436.333 shall apply to all private construction projects, except owner-occupied single family residential construction and other owner-occupied residential construction consisting of four or fewer units.