

SENATE COMMITTEE SUBSTITUTE

FOR

SENATE BILL NO. 1452

AN ACT

To repeal sections 431.180, 436.300, and 436.303, RSMo, and to enact in lieu thereof two new sections relating to construction contracts.

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

Section A. Sections 431.180, 436.300, and 436.303, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 436.300 and 436.303, to read as follows:

436.300. 1. As used in sections 436.300 to 436.336, the following terms mean:

(1) "Construction", furnishing labor, equipment, material, or supplies used, leased, or consumed for the design, construction, alteration, renovation, repair, or maintenance of a building, structure, access, road, bridge, all utilities' lines including, but not limited to, water lines, sewer lines, oil lines, gas lines, and fiber optic lines, appurtenance or other improvement to real property including any moving, demolition, design, or excavation;

(2) "Contract", a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor;

(3) "Contractor", a person performing construction and having a contract with an owner or tenant of the real property;

(4) "Owner", any person or entity holding a record ownership or beneficial interest in real property at the time any contractor, subcontractor or materialman agrees or is requested to furnish any work, labor, material, fixture,

engine, boiler, or machinery, who contracts for improvements or knowingly permits a third party to contract for improvements, on the real property;

(5) "Residential real property":

(a) Shall include:

a. Any parcel of real estate improved or unimproved that is intended to be used or is used for the construction of residential structures and related improvements which support the residential use of the land where such residential structures are intended, upon completion, to be occupied or sold. Such residential structures shall include any residential dwelling consisting of sixteen units or less, including condominiums, townhouses, or cooperatives; and

b. Any improvements, including streets, sidewalks, utility services, improved common areas, or other facilities, which are constructed within the defined residential use structures, or are serving such defined residential use structures, or are located on or within any common ground, common elements, or the separate and identifiable parcels identified for residential use;

(b) Shall not include:

a. Any mixed use or planned unit developments except to the extent that any residential uses of such developments are, or will be, located on separate, identifiable parcels from the nonresidential uses and this exception shall only apply to those residential uses; or

b. Multifamily rental, student housing or dormitories, or assisted living, skilled nursing, or similar facilities;

(6) "Subcontractor", any person of every tier performing construction covered by a contract between an owner and a contractor but not having a contract with the owner;

(7) "Substantial completion", the same meaning as such term is described in section 436.327.

2. For the purposes of sections 436.300 to 436.336, design or construction work shall include design, construction, alteration, repair, or maintenance of any building, roadway, or other structure or improvement to real property, or demolition or excavation connected therewith, and shall include the furnishing of surveying, architectural, engineering or landscape design, planning or management services, labor or materials, in connection with such work.

3. Notwithstanding any other law to the contrary, all parties to any contract or agreement for private construction work that is between any owner and any contractor, or between any contractor and any subcontractor, or between any subcontractor and any sub-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 with the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

4. (1) An owner shall make progress payments to the contractor and any professional engineer, architect, landscape architect, or land surveyor on at least a monthly basis, or on a milestone basis as the work progresses, or on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum and milestone contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered or purchased and stored for the project per the requirements of

the contract documents. Retainage withheld on any construction contract or subcontract for private construction projects shall comply with the requirements set forth in section 436.303.

(2) Payments shall be considered received within the context of this section when the funds are:

(a) Physically delivered;

(b) Posted at the post office or mailed by registered mail;

(c) Mailed by certified mail with return receipt requested or a certificate of mailing; or

(d) Electronically transferred.

(3) If in the discretion of the owner and when applicable under the contract, the project architect or engineer, and the contractor, it is determined that a subcontractor's performance has been completed and the subcontractor can be released prior to substantial completion of the contract without risk to the owner, 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. The owner may reduce or eliminate retainage on any contract payment if in the owner's opinion the work is proceeding satisfactorily. The contractor shall have no obligation to release retainage to a subcontractor unless and until the contractor has received corresponding retainage from the owner for that subcontractor's work. If retainage is released and there are any remaining minor items to be completed, an amount equal to one hundred fifty percent of the value of each item as determined by the owner's duly authorized representatives shall be withheld until such item or items are completed.

(4) Upon substantial completion, the owner shall pay at least ninety-eight percent of the retainage, less any

offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor. The contractor shall pay the subcontractor or supplier after substantial completion of the contract work and acceptance by the owner's authorized contract representative. Such payment shall be made within thirty days after acceptance and the invoice and all other appropriate documentation and certifications in complete and acceptable form are provided, as may be required by the contract documents. If the owner or the owner's representative determines the work is not substantially completed and accepted, the owner or the owner's representative shall provide a written explanation of why the work is not considered substantially completed and accepted within fourteen calendar days to the contractor, who shall then provide such notice to the subcontractor or suppliers responsible for such work. If such written explanation is not given by the owner, the owner shall pay at least ninety-eight percent of the retainage within thirty calendar days. If at that time there are any remaining minor items to be completed, an amount equal to one hundred fifty percent of the value of each item as determined by the owner or owner's representative shall be withheld until such items are completed.

(5) All estimates or invoices for supplies and services purchased, approved, and processed or final payments shall be paid promptly and shall be subject to late payment charges as provided in this section. Except as provided in subdivision (4) of this subsection, if the contractor has not been paid within thirty days as set forth in this section, the owner shall pay the contractor, in addition to the payment due to the contractor, interest at the rate of one and one half percent per month calculated

from the expiration of the thirty-day period until fully paid. Any person who has not been paid may bring an action in a court of competent jurisdiction against a person who has failed to pay. The 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 payment was due under the terms of the contract and reasonable attorney's fees to the prevailing party. If the parties elect to resolve the dispute by arbitration under section 435.350, or the corresponding provisions of the Federal Arbitration Act, the arbitrator may award any remedy that a court is authorized to award hereunder.

(6) Within two business days after payment from the owner to the contractor for one or more subcontractors' work, the owner shall notify each subcontractor in writing or electronically. When a contractor receives any payment, the contractor shall pay each subcontractor and material supplier in proportion to the work completed by each subcontractor and material supplier their application less any retainage as set forth in section 436.303. If the contractor receives less than the full payment due under the construction contract, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors, and material suppliers each receiving a prorated portion based on the amount of payment. When, however, the owner does not release the full payment due under the contract because there are specific areas of work or materials the owner is rejecting or because the owner has otherwise determined such areas are not suitable for payment, those specific subcontractors or suppliers involved shall not be paid for that portion of the work rejected or deemed not suitable for payment, provided the owner, or the owner's representative, gives a written

explanation to the contractor, subcontractor, or supplier involved as to why the work or supplies were rejected or deemed not suitable for payment, and all other subcontractors and suppliers shall be paid in full.

(7) If the contractor, without reasonable cause, fails to make any payment to his or her subcontractors and material suppliers within fifteen days after receipt of payment under the construction contract, the contractor shall pay to his or her subcontractors and material suppliers, in addition to the payment due to them, interest in the amount of one and one-half percent per month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also apply to any payments made by subcontractors and material suppliers to their subcontractors and material suppliers and to all payments made to lower-tier subcontractors and material suppliers throughout the contracting chain.

(8) The owner shall make final payment of all moneys owed to the contractor, including any retainage withheld under subdivision (4) of this subsection, less any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final payment shall be considered due upon the earliest of the following events:

(a) Completion of the project and filing with the owner of all required documentation and certifications, in complete and acceptable form, in accordance with the terms and conditions of the contract; or

(b) The project reaches substantial completion.

5. Nothing in this section shall prevent the contractor or subcontractor, at the time of application or certification to the owner or contractor, from withholding such applications or certifications to the owner or

contractor for payment to the subcontractor or material supplier. Amounts intended to be withheld shall not be included in such applications or certifications to the owner or contractor. Reasons for withholding such applications or certifications shall include, but not be limited to, the following:

(1) Unsatisfactory job progress;

(2) Defective construction work or material not remedied;

(3) Disputed work;

(4) Failure to comply with other material provisions of the contract or other specific contractual condition to payment;

(5) Third-party claims filed or reasonable evidence that a claim will be filed;

(6) Failure of the subcontractor to make timely payments for labor, equipment, and materials;

(7) Damage to a contractor or another subcontractor or material supplier; or

(8) Reasonable evidence that the contract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner.

6. If the contractor determines, after application or certification has been made and after payment has been received from the owner, or after payment has been received by a contractor based upon the owner's estimate of materials in place and work performed as provided by contract, that all or a portion of the moneys needs to be withheld from a specific subcontractor or material supplier for any of the reasons enumerated in this section, and such moneys are withheld from such subcontractor or material supplier, such undistributed amounts shall be specifically identified in

writing and deducted from the next application or certification made to the owner or from the next estimate by the owner of payment due to the contractor until a resolution of the matter has been achieved. Disputes shall be resolved in accordance with the terms of the contract documents. Upon such resolution the amounts withheld by the contractor from the subcontractor or material supplier shall be included in the next application or certification made to the owner or the next estimate by the owner and shall be paid promptly in accordance with the provisions of this section. This subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

7. For contracts that provide for payments to the contractor based upon the owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the owner, the amount due less a retainage as set forth in section 436.303. All such estimates by the owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the owner, the owner shall pay the contractor, in addition to the payment due to the contractor, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

8. The owner shall pay or cause to be paid to any professional engineer, architect, landscape architect, or land surveyor the amount due within thirty days following

the receipt of an invoice prepared and submitted in accordance with the contract terms. In addition to the payment due, the owner shall pay interest at the rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

9. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to:

(1) Liquidated damages;

(2) Unsatisfactory job progress;

(3) Defective construction work or material not remedied;

(4) Disputed work;

(5) Failure to comply with any material provision of the contract or other specific contractual condition for payment;

(6) Third-party claims filed or reasonable evidence that a claim will be filed;

(7) Failure to make timely payments for labor, equipment, or materials;

(8) Damage to a contractor, subcontractor, or material supplier;

(9) Reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or

(10) Citation by the enforcing authority for acts of the contractor or subcontractor that do not comply with any material provision of the contract and that result in a violation of any federal, state, or local law, regulation,

or ordinance applicable to that project causing additional costs or damages to the owner.

10. In addition to contractor's rights under subsection 5 of this section, subcontractors, whether or not specifically required in the contract, specifically grant the contractor the right to hold future payments until lien waivers are provided and until the contractor receives confirmation of account status from any of the parties previously noted. The contractor shall have the right to remedy unpaid balances associated with the subcontractors' obligations through all legal means noted in the contract including, but not limited to, issuing joint checks between the subcontractor and third party vendors. In the event that the contractor is required to issue a payment in the form of a joint check, a processing fee shall be charged to the subcontractor not exceeding two hundred fifty dollars and withheld from future payments.

11. Nothing in this section shall be construed to require direct payment by an owner to a subcontractor or supplier.

12. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments that are withheld in good faith for reasonable cause under subsections 6, 9, and 10 of this section. If it is determined by a court of competent jurisdiction that a payment that was withheld under subsections 6, 9, and 10 of this section was not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney's fees to the prevailing party. In any civil action or part of a civil action brought under this section, if a court determines

after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney's fees.

13. Nothing in this section shall be construed to prevent any person who has not been paid in accordance with this section from bringing an action in a court of competent jurisdiction against a person who has failed to pay.

14. The provisions of this section shall not apply to contracts for construction or design work on residential real property.

436.303. A contract or agreement for private design or construction work may include a provision for the retainage of a portion of any payment due from the owner to the contractor, not to exceed ten 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. There shall be no retainage if the contractor and each subcontractor at any tier are bonded for both payment and performance. 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 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 436.300 to 436.336.

[431.180. 1. All persons who enter into a contract for private design or construction work after August 28, 1995, shall make all scheduled payments pursuant to the terms of the contract.

2. Any person who has not been paid in accordance with subsection 1 of this section may bring an action in a court of competent jurisdiction against a person who has failed to pay. The 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 payment was due pursuant to the terms of the contract, and reasonable attorney fees, to the prevailing party. If the parties elect to resolve the dispute by arbitration pursuant to section 435.350, the arbitrator may award any remedy that a court is authorized to award hereunder.

3. The provisions of this section shall not apply to contracts for private construction work for the building, improvement, repair or remodeling of owner-occupied residential property of four units or less.

4. For purposes of this section, design or construction work shall include design, construction, alteration, repair or maintenance of any building, roadway or other structure or improvement to real property, or demolition or excavation connected therewith, and shall include the furnishing of surveying, architectural, engineering or landscape design, planning or management services, labor or materials, in connection with such work.]