

As Passed by the House

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H. B. No. 68

Representatives Cross, Sweeney

**Cosponsors: Representatives Miller, J., Crossman, Weinstein, Riedel, Young, T.,
Troy, Cutrona, Baldrige, Boggs, Brent, Crawley, Galonski, Ghanbari, Hicks-
Hudson, Householder, Ingram, Jarrells, Jones, Lepore-Hagan, Lightbody,
Miranda, O'Brien, Patton, Robinson, Russo, Sheehy, Skindell, Smith, M., Sobecki,
West, Wiggam**

A BILL

To amend section 4113.61 of the Revised Code to
require owners of private construction projects
to timely pay a contractor.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 4113.61 of the Revised Code be
amended to read as follows:

Sec. 4113.61. (A) (1) If a contractor submits a written
request for payment to a private owner for an amount that is
allowed to the contractor for properly performed work or
furnished materials, performed or furnished under a contract
with that private owner that was created after this amendment's
effective date, the private owner shall pay the amount to the
contractor, less any amount withheld as authorized by law, as
follows:

(a) For work performed or materials furnished pursuant to
plans, drawings, specifications, or data submitted for approval

to a municipal, township, or county building department, or to 16
the superintendent of industrial compliance, pursuant to section 17
3791.04 of the Revised Code and requiring the seal of an 18
architect registered under Chapter 4703. of the Revised Code or 19
an engineer registered under Chapter 4733. of the Revised Code, 20
thirty days after the work performed or materials furnished are 21
certified as complying with the approved plans, drawings, 22
specifications, or data by an architect registered under Chapter 23
4703. of the Revised Code or an engineer registered under 24
Chapter 4733. of the Revised Code, or thirty days after 25
receiving the request, whichever is later; 26

(b) For all other work performed or materials furnished, 27
thirty days after receiving the request. 28

The private owner may reduce the amount paid by any 29
retainage provision contained in the contract, invoice, or 30
purchase order between the private owner and contractor, and may 31
withhold amounts that may be necessary to resolve disputed liens 32
or claims involving the work or labor performed or material 33
furnished by the contractor. 34

If the private owner fails to comply with division (A)(1) 35
of this section, the private owner shall pay the contractor, in 36
addition to the payment due, interest in the amount of eighteen 37
per cent per annum of the payment due, beginning on the thirty- 38
first day following the receipt of the payment request from the 39
contractor to the private owner ending on the date of full 40
payment of the payment due plus interest to the contractor. 41

(2) If a subcontractor or material supplier submits an 42
application or request for payment or an invoice for materials 43
to a contractor in sufficient time to allow the contractor to 44
include the application, request, or invoice in the contractor's 45

own pay request submitted to an owner, the contractor, within 46
ten calendar days after receipt of payment from the owner for 47
improvements to property, shall pay to the: 48

(a) Subcontractor, an amount that is equal to the 49
percentage of completion of the subcontractor's contract allowed 50
by the owner for the amount of labor or work performed; 51

(b) Material supplier, an amount that is equal to all or 52
that portion of the invoice for materials which represents the 53
materials furnished by the material supplier. 54

The contractor may reduce the amount paid by any retainage 55
provision contained in the contract, invoice, or purchase order 56
between the contractor and the subcontractor or material 57
supplier, and may withhold amounts that may be necessary to 58
resolve disputed liens or claims involving the work or labor 59
performed or material furnished by the subcontractor or material 60
supplier. 61

If the contractor fails to comply with division (A) ~~(1)~~ (2) 62
of this section, the contractor shall pay the subcontractor or 63
material supplier, in addition to the payment due, interest in 64
the amount of eighteen per cent per annum of the payment due, 65
beginning on the eleventh day following the receipt of payment 66
from the owner and ending on the date of full payment of the 67
payment due plus interest to the subcontractor or material 68
supplier. 69

~~(2)~~ (3) If a lower tier subcontractor or lower tier 70
material supplier submits an application or request for payment 71
or an invoice for materials to a subcontractor, material 72
supplier, or other lower tier subcontractor or lower tier 73
material supplier in sufficient time to allow the subcontractor, 74

material supplier, or other lower tier subcontractor or lower 75
tier material supplier to include the application, request, or 76
invoice in the subcontractor's, material supplier's, or other 77
lower tier subcontractor's or lower tier material supplier's own 78
pay request submitted to a contractor, other subcontractor, 79
material supplier, lower tier subcontractor, or lower tier 80
material supplier, the subcontractor, material supplier, or 81
other lower tier subcontractor or lower tier material supplier, 82
within ten calendar days after receipt of payment from the 83
contractor, other subcontractor, material supplier, lower tier 84
subcontractor, or lower tier material supplier for improvements 85
to property, shall pay to the: 86

(a) Lower tier subcontractor, an amount that is equal to 87
the percentage of completion of the lower tier subcontractor's 88
contract allowed by the owner for the amount of labor or work 89
performed; 90

(b) Lower tier material supplier, an amount that is equal 91
to all or that portion of the invoice for materials which 92
represents the materials furnished by the lower tier material 93
supplier. 94

The subcontractor, material supplier, lower tier 95
subcontractor, or lower tier material supplier may reduce the 96
amount paid by any retainage provision contained in the 97
contract, invoice, or purchase order between the subcontractor, 98
material supplier, lower tier subcontractor, or lower tier 99
material supplier and the lower tier subcontractor or lower tier 100
material supplier, and may withhold amounts that may be 101
necessary to resolve disputed liens or claims involving the work 102
or labor performed or material furnished by the lower tier 103
subcontractor or lower tier material supplier. 104

If the subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier fails to comply with division (A) ~~(2)~~ (3) of this section, the subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier shall pay the lower tier subcontractor or lower tier material supplier, in addition to the payment due, interest in the amount of eighteen per cent per annum of the payment due, beginning on the eleventh day following the receipt of payment from the contractor, other subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier and ending on the date of full payment of the payment due plus interest to the lower tier subcontractor or lower tier material supplier.

~~(3)~~ (4) If a contractor receives any final retainage from the owner for improvements to property, the contractor shall pay from that retainage each subcontractor and material supplier the subcontractor's or material supplier's proportion of the retainage, within ten calendar days after receipt of the retainage from the owner, or within the time period provided in a contract, invoice, or purchase order between the contractor and the subcontractor or material supplier, whichever time period is shorter, provided that the contractor has determined that the subcontractor's or material supplier's work, labor, and materials have been satisfactorily performed or furnished and that the owner has approved the subcontractor's or material supplier's work, labor, and materials.

If the contractor fails to pay a subcontractor or material supplier within the appropriate time period, the contractor shall pay the subcontractor or material supplier, in addition to the retainage due, interest in the amount of eighteen per cent per annum of the retainage due, beginning on the eleventh day

following the receipt of the retainage from the owner and ending 136
on the date of full payment of the retainage due plus interest 137
to the subcontractor or material supplier. 138

~~(4)~~ (5) If a subcontractor, material supplier, lower tier 139
subcontractor, or lower tier material supplier receives any 140
final retainage from the contractor or other subcontractor, 141
lower tier subcontractor, or lower tier material supplier for 142
improvements to property, the subcontractor, material supplier, 143
lower tier subcontractor, or lower tier material supplier shall 144
pay from that retainage each lower tier subcontractor or lower 145
tier the lower tier subcontractor's or lower tier material 146
supplier's proportion of the retainage, within ten calendar days 147
after receipt of payment from the contractor or other 148
subcontractor, lower tier subcontractor, or lower tier material 149
supplier, or within the time period provided in a contract, 150
invoice, or purchase order between the subcontractor, material 151
supplier, lower tier subcontractor, or lower tier material 152
supplier and the lower tier subcontractor or lower tier material 153
supplier, whichever time period is shorter, provided that the 154
subcontractor, material supplier, lower tier subcontractor, or 155
lower tier material supplier has determined that the lower tier 156
subcontractor's or lower tier material supplier's work, labor, 157
and materials have been satisfactorily performed or furnished 158
and that the owner has approved the lower tier subcontractor's 159
or lower tier material supplier's work, labor, and materials. 160

If the subcontractor, material supplier, lower tier 161
subcontractor, or lower tier material supplier fails to pay the 162
lower tier subcontractor or lower tier material supplier within 163
the appropriate time period, the subcontractor, material 164
supplier, lower tier subcontractor, or lower tier material 165
supplier shall pay the lower tier subcontractor or lower tier 166

material supplier, in addition to the retainage due, interest in 167
the amount of eighteen per cent per annum of the retainage due, 168
beginning on the eleventh day following the receipt of the 169
retainage from the contractor or other subcontractor, lower tier 170
subcontractor, or lower tier material supplier and ending on the 171
date of full payment of the retainage due plus interest to the 172
lower tier subcontractor or lower tier material supplier. 173

~~(5)~~ (6) A contractor, subcontractor, or lower tier 174
subcontractor shall pay a laborer wages due within ten days of 175
payment of any application or request for payment or the receipt 176
of any retainage from an owner, contractor, subcontractor, or 177
lower tier subcontractor. 178

If the contractor, subcontractor, or lower tier 179
subcontractor fails to pay the laborer wages due within the 180
appropriate time period, the contractor, subcontractor, or lower 181
tier subcontractor shall pay the laborer, in addition to the 182
wages due, interest in the amount of eighteen per cent per annum 183
of the wages due, beginning on the eleventh day following the 184
receipt of payment from the owner, contractor, subcontractor, or 185
lower tier subcontractor and ending on the date of full payment 186
of the wages due plus interest to the laborer. 187

(B) (1) If a ~~contractor, subcontractor, material supplier,~~ 188
~~lower tier subcontractor, or lower tier material supplier person~~ 189
owing payment under division (A) of this section has not made 190
payment in compliance with that division ~~(A) (1), (2), (3), (4),~~ 191
~~or (5) of this section~~ within thirty days after payment is due, 192
~~a subcontractor, material supplier, lower tier subcontractor,~~ 193
~~lower tier material supplier, or laborer~~ the person owed payment 194
may file a civil action to recover the amount due plus ~~the~~ 195
interest ~~provided in those divisions~~. If the court finds in the 196

civil action that ~~a contractor, subcontractor, material~~ 197
~~supplier, lower tier subcontractor, or lower tier material~~ 198
~~supplier~~ the person owing payment has not made payment in 199
compliance with ~~those divisions~~ division (A) of this section, 200
the court shall award the interest specified in ~~those~~ 201
~~divisions~~ that division, in addition to the amount due. Except as 202
provided in division (B) (3) of this section, the court shall 203
award the prevailing party reasonable attorney fees and court 204
costs. 205

(2) In making a determination to award attorney fees under 206
division (B) (1) of this section, the court shall consider all 207
relevant factors, including but not limited to the following: 208

(a) The presence or absence of good faith allegations or 209
defenses asserted by the parties; 210

(b) The proportion of the amount of recovery as it relates 211
to the amount demanded; 212

(c) The nature of the services rendered and the time 213
expended in rendering the services. 214

(3) The court shall not award attorney fees under division 215
(B) (1) of this section if the court determines, following a 216
hearing on the payment of attorney fees, that the payment of 217
attorney fees to the prevailing party would be inequitable. 218

(C) This section does not apply to any construction or 219
improvement of any single-, two-, or three-family detached 220
dwelling houses. 221

(D) (1) No provision of this section regarding entitlement 222
to interest, attorney fees, or court costs may be waived by 223
agreement and any such term in any contract or agreement is void 224
and unenforceable as against public policy. 225

(2) ~~This~~ (a) Subject to division (D) (2) (b) of this 226
section, this section shall not be construed as impairing or 227
affecting, in any way, the terms and conditions of any contract, 228
invoice, purchase order, or any other agreement between ~~a~~ any of 229
the following: 230

(i) An owner and a contractor; 231

(ii) A contractor and a subcontractor or a material 232
supplier ~~or between a~~; 233

(iii) A subcontractor and another subcontractor, a 234
material supplier, a lower tier subcontractor, or a lower tier 235
material supplier, ~~except that if such~~. 236

(b) If terms and conditions described in division (D) (2) 237
(a) of this section contain time periods ~~which~~ that are longer 238
than any of the time periods specified in divisions (A) (1), (2), 239
(3), (4), ~~and~~ (5), and (6) of this section or interest at a 240
percentage less than the interest stated in those divisions, 241
then the provisions of this section shall prevail over such 242
terms and conditions. 243

(E) Notwithstanding the definition of lower tier material 244
supplier in this section, a person is not a lower tier material 245
supplier unless the materials supplied by the person are: 246

(1) Furnished with the intent, as evidenced by the 247
contract of sale, the delivery order, delivery to the site, or 248
by other evidence that the materials are to be used on a 249
particular structure or improvement; 250

(2) Incorporated in the improvement or consumed as normal 251
wastage in the course of the improvement; or 252

(3) Specifically fabricated for incorporation in the 253

improvement and not readily resalable in the ordinary course of 254
the fabricator's business even if not actually incorporated in 255
the improvement. 256

(F) As used in this section: 257

(1) "Contractor" means any person who undertakes to 258
construct, alter, erect, improve, repair, demolish, remove, dig, 259
or drill any part of a structure or improvement under a contract 260
with an owner, a "construction manager" or "construction manager 261
at risk" as those terms are defined in section 9.33 of the 262
Revised Code, or a "design-build firm" as that term is defined 263
in section 153.65 of the Revised Code. 264

(2) "Laborer," "material supplier," "subcontractor," and 265
"wages" have the same meanings as in section 1311.01 of the 266
Revised Code. 267

(3) "Lower tier subcontractor" means a subcontractor who 268
is not in privity of contract with a contractor but is in 269
privity of contract with another subcontractor. 270

(4) "Lower tier material supplier" means a material 271
supplier who is not in privity of contract with a contractor but 272
is in privity of contract with another subcontractor or a 273
material supplier. 274

(5) "Owner" means the holder of any right, title, or 275
interest, either legal or equitable, in the real estate upon 276
which improvements are made, including interests held under a 277
contract of purchase, whether in writing or otherwise. 278

(6) "Private owner" means an owner that is not a public 279
owner. 280

(7) "Public owner" means an owner that is the state, or a 281

county, township, municipal corporation, school district, or 282
other political subdivision of the state, or any public agency, 283
authority, board, commission, instrumentality, or special 284
district of or in the state, and any officer or agent thereof. 285

(8) "Wages due" means the wages due to a laborer as of the 286
date a contractor or subcontractor receives payment for any 287
application or request for payment or retainage from any owner, 288
contractor, or subcontractor. 289

~~(6) "Owner" includes the state, and a county, township,~~ 290
~~municipal corporation, school district, or other political~~ 291
~~subdivision of the state, and any public agency, authority,~~ 292
~~board, commission, instrumentality, or special district of or in~~ 293
~~the state or a county, township, municipal corporation, school~~ 294
~~district, or other political subdivision of the state, and any~~ 295
~~officer or agent thereof and relates to all the interests either~~ 296
~~legal or equitable, which a person may have in the real estate~~ 297
~~upon which improvements are made, including interests held by~~ 298
~~any person under contracts of purchase, whether in writing or~~ 299
~~otherwise.~~ 300

Section 2. That existing section 4113.61 of the Revised 301
Code is hereby repealed. 302