

Senate Engrossed

FILED

**KEN BENNETT
SECRETARY OF STATE**

State of Arizona
Senate
Fiftieth Legislature
First Regular Session
2011

CHAPTER 62

SENATE BILL 1085

AN ACT

AMENDING SECTIONS 32-1129.01 AND 32-1129.02, ARIZONA REVISED STATUTES;
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 of this section. If any work is
16 performed during the preceding billing cycle, a contractor shall timely
17 submit a billing or estimate to the owner covering the work performed during
18 that billing cycle. Except as provided in subsection C of this section, the
19 owner shall make progress payments to the contractor within seven days after
20 the date the billing or estimate is certified and approved pursuant to
21 subsection D of this section. Except as provided in subsection C of this
22 section, an owner shall release retention to the contractor within seven days
23 after the date the billing or estimate for release of retention is certified
24 and approved pursuant to subsection ~~I~~ H of this section. Except as provided
25 in subsection C of this section, an owner shall make final payment to the
26 contractor within seven days after the billing or estimate for final payment
27 is certified and approved pursuant to subsection ~~L~~ K of this section.

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

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

34 Notice of Alternate Billing Cycle

35 This contract allows the owner to require the submission
36 of billings or estimates in billing cycles other than thirty
37 days. Billings or estimates for this contract shall be
38 submitted as follows:
39
40
41

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

1 Notice of Alternate Billing Cycle

2 This contract allows the owner to require the submission
3 of billings or estimates in billing cycles other than thirty
4 days. A written description of such other billing cycle
5 applicable to the project is available from the owner or the
6 owner's designated agent at (telephone number or address, or
7 both), and the owner or its designated agent shall provide this
8 written description on request.

9 C. An owner may make progress payments, release of retention and final
10 payment later than seven days after the date the billing or estimate is
11 certified and approved if both:

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

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

18 Notice of Extended Payment Provision

19 This contract allows the owner to make payment within ____
20 days after certification and approval of billings and estimates
21 for progress payments, within ____ days after certification and
22 approval of billings and estimates for release of retention and
23 within ____ days after certification and approval of billings
24 and estimates for final payment.

25 D. Except as provided in subsection ~~G~~ F of this section, a billing or
26 estimate for a progress payment shall be deemed certified and approved
27 fourteen days after the owner receives the billing or estimate, unless before
28 that time the owner or the owner's agent prepares and issues a written
29 statement stating in reasonable detail the owner's reasons for not certifying
30 or approving all or a portion of the billing or estimate. The owner is
31 deemed to have received the billing or estimate when the billing or estimate
32 is submitted to any person designated by the owner for receipt or for
33 certification and approval of the billing or estimate. The owner may
34 withhold from a progress payment a reasonable amount for retention. An owner
35 may decline to certify and approve a billing or estimate or portion of a
36 billing or estimate for any of the following reasons:

37 1. Unsatisfactory job progress.

38 2. Defective construction work or materials not remedied.

39 3. Disputed work or materials.

40 4. Failure to comply with other material provisions of the
41 construction contract.

42 5. Third party claims filed or reasonable evidence that a claim will
43 be filed.

44 6. Failure of the contractor or a subcontractor to make timely
45 payments for labor, equipment and materials.

1 7. Damage to the owner.

2 8. Reasonable evidence that the construction contract cannot be
3 completed for the unpaid balance of the construction contract sum.

4 E. An owner may withhold from a progress payment only an amount that
5 is sufficient to pay the direct costs and expenses the owner reasonably
6 expects to incur to protect the owner from loss for which the contractor is
7 responsible and that results from any reasons set forth in writing pursuant
8 to subsection D of this section.

9 F. An owner may extend the period within which the billing or estimate
10 for progress payments, release of retention and final payment is certified
11 and approved if both:

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

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

19 Notice of Extended Certification and
20 Approval Period Provision

21 This contract allows the owner to certify and approve
22 billings and estimates for progress payments within ____ days
23 after the billings and estimates are received from the
24 contractor, for release of retention within ____ days after the
25 billings and estimates are received from the contractor and for
26 final payment within ____ days after the billings and estimates
27 are received from the contractor.

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

34 H. On substantial completion of the work, a contractor shall submit a
35 billing or estimate for release of retention. Except as provided in
36 subsection ~~G~~ F of this section, the billing or estimate for release of
37 retention shall be deemed certified and approved within fourteen days after
38 the owner receives the billing or estimate, unless before that time the owner
39 or the owner's agent issues a written statement stating in reasonable detail
40 the owner's reasons for not certifying or approving all or a portion of the
41 billing or estimate. The owner is deemed to have received the billing or
42 estimate when the billing or estimate is submitted to any person designated
43 by the owner for receipt or for certification and approval of the billing or
44 estimate. The owner may:

1 1. Decline to certify and approve a billing or estimate for release of
2 retention or a portion of a billing or estimate for release of retention for
3 failure of the contractor to complete a material requirement of the
4 construction contract or to complete portions of the work or for any reason
5 permitted under subsection D of this section.

6 2. Withhold from retention to be released only an amount not to exceed
7 one hundred fifty per cent of the direct costs and expenses the owner
8 reasonably expects to incur to protect the owner from loss for which the
9 contractor is responsible and that results from the contractor's failure to
10 complete portions of the work at the time of substantial completion or for
11 any reasons set forth in writing pursuant to this subsection.

12 I. Except as provided in subsections C and ~~I~~ H of this section, the
13 owner shall pay the retention to the contractor within seven days after the
14 date the billing or estimate for release of retention is certified and
15 approved. If the owner has declined to certify or approve a billing or
16 estimate for release of retention or a portion of a billing or estimate for
17 release of retention pursuant to subsection ~~I~~ H of this section, when any
18 reason as stated in the owner's written statement has been removed, the
19 contractor may submit a supplemental billing or estimate for all or a portion
20 of the withheld amounts of retention pursuant to subsection ~~I~~ H of this
21 section. Unless otherwise agreed, the contractor may submit only one billing
22 or estimate during each billing cycle.

23 J. When a contractor substantially completes all work under a portion
24 of a construction contract for which the contract states a separate price,
25 the contractor shall submit a billing or estimate for release of retention on
26 that portion of the construction contract pursuant to subsection ~~I~~ H of this
27 section.

28 K. On final completion of the work, a contractor shall submit a
29 billing or estimate for final payment. Except as provided in subsection ~~G~~ F
30 of this section, a billing or estimate for final payment shall be deemed
31 certified and approved fourteen days after the owner receives the billing or
32 estimate, unless before that time the owner or owner's agent prepares and
33 issues a written statement stating in reasonable detail the reasons the
34 billing or estimate has not been certified or approved. The owner is deemed
35 to have received the billing or estimate for final payment when the billing
36 or estimate is submitted to any person designated by the owner for receipt of
37 or for certification and approval of the billing or estimate. The owner may:

38 1. Decline to certify and approve a billing or estimate for final
39 payment or a portion of a billing or estimate for final payment for failure
40 of the contractor to complete a requirement of the construction contract or
41 to complete portions of the work or for any reason permitted under subsection
42 D of this section.

43 2. Withhold from final payment only an amount not to exceed one
44 hundred fifty per cent of the direct costs and expenses the owner reasonably
45 expects to incur to protect the owner from loss for which the contractor is

1 responsible and that results from any reasons set forth in writing pursuant
2 to this subsection.

3 L. Except as provided in subsection C of this section, the owner shall
4 make final payment to the contractor within seven days after the date the
5 billing or estimate for final payment is certified and approved. If the
6 owner has declined to certify or approve a billing or estimate for final
7 payment or a portion of a billing or estimate for final payment pursuant to
8 subsection ~~L~~ K of this section, when any reason as stated in the owner's
9 written statement has been removed, the contractor may submit a billing or
10 estimate for all or a portion of the withheld amounts of final payment
11 pursuant to subsection ~~L~~ K of this section. Unless otherwise agreed, the
12 contractor may submit only one billing or estimate during each billing cycle.

13 M. Except as provided in subsection C of this section, on projects
14 that require a federal agency's final certification or approval, the owner
15 shall make payment in full on the construction contract within seven days
16 after the federal agency's final certification or approval.

17 N. When a contractor completes all work under a portion of a
18 construction contract for which the contract states a separate price, the
19 contractor may timely submit a billing or estimate for final payment on that
20 portion of the construction contract pursuant to subsection ~~L~~ K of this
21 section.

22 O. Payment shall not be required pursuant to this section unless the
23 contractor provides the owner with a billing or estimate in accordance with
24 the terms of the construction contract between the parties.

25 P. A construction contract shall not alter the rights of any
26 contractor, subcontractor or material supplier to receive prompt and timely
27 payments as provided under this article.

28 Q. If an owner or a third party designated by an owner as the person
29 responsible for making progress payments, releasing retention or making final
30 payment on a construction contract does not make a timely payment on amounts
31 due pursuant to this section, the owner shall pay the contractor interest at
32 the rate of one and one-half per cent a month or fraction of a month on the
33 unpaid balance, or at a higher rate as the parties to the construction
34 contract agree.

35 R. On the written request of a subcontractor, the owner shall notify
36 the subcontractor within five days after the issuance of a progress payment
37 to the contractor. On the written request of a subcontractor, the owner
38 shall notify the subcontractor within five days after the owner releases
39 retention or makes the final payment to the contractor on the construction
40 contract. A subcontractor's request pursuant to this subsection shall remain
41 in effect for the duration of the subcontractor's work on the project.

42 S. In any action or arbitration brought to collect payments or
43 interest pursuant to this section, the successful party shall be awarded
44 costs and attorney fees in a reasonable amount.

1 T. If the owner and contractor are a single entity, that entity shall
2 pay its subcontractors or material suppliers within fourteen days after the
3 billing or estimate is certified and approved unless the deadlines for
4 certification and approval or for payment have been modified pursuant to
5 subsection C or ~~F~~ of this section.

6 U. Notwithstanding anything to the contrary in this section, an owner
7 may define "retention", "substantial completion" and "final completion" to
8 have meanings different than those stated in section 32-1129, if:

9 1. The construction contract in a clear and conspicuous manner defines
10 the terms.

11 2. The legend set forth in subsection ~~X~~ W of this section or
12 substantially similar language appears in clear and conspicuous type on each
13 page of the plans, including bid plans and construction plans.

14 3. The different meanings of "retention", "substantial completion" and
15 "final completion" are set forth in the plans, including on bid plans and
16 construction plans, and the legend required by paragraph 2 of this subsection
17 designates the sheet number of the plans on which the different meanings of
18 the terms can be found.

19 V. Notwithstanding anything to the contrary in this section, an owner
20 may establish different timing and conditions for when the contractor may
21 submit a billing or estimate for release of retention or for final payment
22 and for when such payments shall be due, if:

23 1. The construction contract in a clear and conspicuous manner
24 establishes different timing for when the contractor may submit a billing or
25 estimate for release of retention or for final payment, or both, and for when
26 such payments shall be due.

27 2. The legend set forth in subsection ~~X~~ W of this section or
28 substantially similar language appears in clear and conspicuous type on each
29 page of the plans, including bid plans and construction plans.

30 3. The different timing and conditions for when the contractor may
31 submit a billing or estimate for release of retention or for final payment
32 and for when such payments shall be due are set forth in the plans, including
33 on bid plans and construction plans, and the legend required by paragraph 2
34 of this subsection designates the sheet number of the plans on which the
35 different timing and conditions can be found.

36 W. The legend for making one or more of the modifications set forth in
37 subsections ~~V~~ U and ~~W~~ V of this section shall be as follows:

38 Notice of Alternate Arrangements for
39 Release of Retention and Final Payment

40 This contract allows the owner to make alternate
41 arrangements for the occurrence of substantial completion, the
42 release of retention and making of final payment. Such
43 alternate arrangements are disclosed on sheet no. _____ of these
44 plans.

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

- 40 1. Unsatisfactory job progress.
- 41 2. Defective construction work or materials not remedied.
- 42 3. Disputed work or materials.
- 43 4. Failure to comply with other material provisions of the
44 construction contract.

1 5. Third party claims filed or reasonable evidence that a claim will
2 be filed.

3 6. Failure of the subcontractor to make timely payments for labor,
4 equipment and materials.

5 7. Damage to a contractor or another subcontractor or material
6 supplier.

7 8. Reasonable evidence that the subcontract cannot be completed for
8 the unpaid balance of the subcontract sum.

9 9. The owner has withheld retention from the contractor, in which case
10 the amount of the retention withholding by the contractor shall not exceed
11 the actual amount of the retention retained by the owner pertaining to the
12 subcontractor's work.

13 D. A contractor or subcontractor shall not withhold retention from a
14 subcontractor in an amount greater than the actual amount of the retention
15 retained by the owner pertaining to the work of the subcontractor.

16 E. If the contractor or subcontractor chooses to withhold the
17 application or certification for all or a portion of a subcontractor's or
18 material supplier's billing or estimates as permitted by subsection C of this
19 section, the contractor or subcontractor must prepare and issue a written
20 statement within fourteen days to the applicable subcontractors or material
21 suppliers stating in reasonable detail the contractor's or subcontractor's
22 reasons for withholding the application or certification from the owner or
23 contractor.

24 F. If the owner issues a written statement pursuant to section
25 32-1129.01, subsection D, ~~F~~ H or ~~L~~ K stating that the owner declines to
26 certify or approve all or a portion of the contractor's billing or estimate
27 and if the amounts to be paid from that billing or estimate by the contractor
28 to any subcontractors or material suppliers are affected by the owner's
29 decision not to certify or approve, the contractor shall send a copy of that
30 written statement within seven days after receipt to any affected
31 subcontractors or material suppliers. If the contractor sends a copy of the
32 owner's written statement to a subcontractor and if the amounts to be paid
33 from that billing or estimate by a subcontractor to any of its subcontractors
34 or material suppliers are affected by the owner's decision not to certify or
35 approve, then the subcontractor shall send a copy of that written statement
36 within seven days after receipt to any of its affected subcontractors or
37 material suppliers.

38 G. If the owner issues a written statement pursuant to section
39 32-1129.01, subsection D, ~~F~~ H or ~~L~~ K stating that the owner declines to
40 certify or approve a billing or estimate or a portion of a billing or
41 estimate for defective construction work or materials not remedied and if the
42 contractor as a result does not receive sufficient payment from the owner to
43 pay subcontractors and material suppliers for work included in the
44 contractor's billing or estimate, the contractor shall nevertheless pay any
45 subcontractor or material supplier whose work was not the basis of the

1 owner's withholding for defective construction work or materials not remedied
2 within twenty-one days after payment would otherwise have been made by the
3 owner under section 32-1129.01, subsection A. This subsection does not limit
4 a subcontractor's rights to suspend performance under a construction contract
5 or terminate a construction contract under section 32-1129.04, subsection D.

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

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

39 J. In any action or arbitration brought to collect payments or
40 interest pursuant to this section, the successful party shall be awarded
41 costs and attorney fees in a reasonable amount.

42 Sec. 3. Emergency

43 This act is an emergency measure that is necessary to preserve the
44 public peace, health or safety and is operative immediately as provided by
45 law.

APPROVED BY THE GOVERNOR APRIL 12, 2011.

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FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 12, 2011.

Passed the House April 6, 20 11,

by the following vote: 58 Ayes,

0 Nays, 2 Not Voting
with Emergency

[Signature]
Speaker of the House

Cheryl Laube
Chief Clerk of the House

Passed the Senate February 8, 20 11,

by the following vote: 27 Ayes,

0 Nays, 1 Not Voting
with Emergency

[Signature]
President of the Senate

Charmin Bellington
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill was received by the Governor this
7 day of April, 2011,

at 2:00 o'clock P. M.

[Signature]
Secretary to the Governor

Approved this 12th day of

April, 20 11,

at 10:40 o'clock A. M.

[Signature]
Governor of Arizona

S.B. 1085

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State
this 12th day of April, 20 11,

at 4:01 o'clock P. M.

[Signature]
Secretary of State