

HOUSE BILL No. 6175

May 22, 2008, Introduced by Rep. Farrah and referred to the Committee on Regulatory Reform.

A bill to amend 1980 PA 524, entitled

"An act to provide for the terms of certain construction contracts with certain public agencies; to regulate the payment and retainage of payments on construction contracts with certain public agencies; and to provide for the resolution of certain disputes,"

by amending sections 1, 2, 3, and 4 (MCL 125.1561, 125.1562, 125.1563, and 125.1564); and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. As used in this act:

2 ~~—— (a) "Agent" means the person or persons agreed to or selected~~
3 ~~by the contractor and the public agency pursuant to section 4(2).~~

4 (A) ~~(b)~~ "Architect or professional engineer" means an
5 architect or professional engineer licensed under ~~Act No. 299 of~~
6 ~~the Public Acts of 1980, being sections 339.101 to 339.2601 of the~~
7 ~~Michigan Compiled Laws~~ **ARTICLE 20 OF THE OCCUPATIONAL CODE, 1980 PA**

1 299, MCL 339.2001 TO 339.2014, and designated by a public agency in
2 a construction contract to recommend progress payments.

3 (B) "ASSESSMENT DISTRICT" MEANS THE REAL PROPERTY WITHIN A
4 DISTINCT AREA UPON WHICH SPECIAL ASSESSMENTS ARE LEVIED OR IMPOSED
5 FOR THE CONSTRUCTION, RECONSTRUCTION, BETTERMENT, REPLACEMENT, OR
6 REPAIR OF A FACILITY TO BE PAID FOR BY FUNDS DERIVED FROM THOSE
7 SPECIAL ASSESSMENTS IMPOSED OR LEVIED ON THE BENEFITED REAL
8 PROPERTY.

9 (c) "Construction contract" or "contract" means a written
10 agreement between a contractor and a public agency OR BETWEEN A
11 CONTRACTOR AND A CONSTRUCTION MANAGER ACTING FOR OR ON BEHALF OF A
12 PUBLIC AGENCY for the construction, alteration, demolition, or
13 repair of a facility, other than a contract having a dollar value
14 of less than \$30,000.00 or a contract that provides for 3 or fewer
15 payments.

16 (D) "CONSTRUCTION MANAGER" MEANS AN INDIVIDUAL, SOLE
17 PROPRIETORSHIP, PARTNERSHIP, CORPORATION, LIMITED LIABILITY
18 COMPANY, OR JOINT VENTURE, OR OTHER LEGAL ENTITY THAT, PURSUANT TO
19 AN ENGAGEMENT BY A PUBLIC AGENCY AND ACTING PRIMARILY IN AN
20 ADMINISTRATIVE OR MANAGERIAL CAPACITY, PROCURES AND ENTERS INTO 1
21 OR MORE CONTRACTS FOR THE CONSTRUCTION, ALTERATION, DEMOLITION, OR
22 REPAIR OF A FACILITY.

23 (E) ~~(d)~~ "Contract documents" means the construction contract;
24 instructions to bidders; proposal; conditions of the contract;
25 performance bond; labor and material bond; drawings;
26 specifications; all addenda issued before execution of the
27 construction contract and all modifications issued subsequently.

(F) ~~(e)~~—"Contractor" means an individual, sole proprietorship, partnership, corporation, or joint venture, that is a party to a construction contract with a public agency **OR WITH A CONSTRUCTION MANAGER.**

(G) ~~(f)~~—"Facility" means a building, utility, road, street, boulevard, parkway, bridge, ditch, drain, levee, dike, sewer, park, playground, **SCHOOL**, or other structure or work that is paid for with public funds or a special assessment.

(H) **"MEDIATOR" MEANS THE PERSON OR PERSONS AGREED TO OR SELECTED TO RESOLVE DISPUTES, PURSUANT TO SECTION 4(2), THAT IS NOT AN EMPLOYEE, AGENT, OR REPRESENTATIVE OF THE PUBLIC AGENCY, CONSTRUCTION MANAGER, CONTRACTOR, OR ANY SUBCONTRACTOR.**

(I) ~~(g)~~—"Progress payment" means a payment by a public agency **OR CONSTRUCTION MANAGER** to a contractor for work **OR MATERIALS** in place under the terms of a construction contract, **INCLUDING THE FINAL PROGRESS PAYMENT.**

(J) ~~(h)~~—"Public agency" means this state ~~—~~or a county, city, township, village, assessment district, **SCHOOL DISTRICT, STATE INSTITUTION OF HIGHER EDUCATION**, or other political subdivision, corporation, commission, agency, or authority created by law. However, public agency does not include the state transportation department, ~~a school district, junior or community college, the Michigan state housing development authority created in Act No. 346 of the Public Acts of 1966, as amended, being sections 125.1401 to 125.1496 of the Michigan Compiled Laws~~ **UNDER THE MICHIGAN HOUSING DEVELOPMENT AUTHORITY ACT OF 1966, 1966 PA 346, MCL 125.1401 TO 125.1499C**, and a municipal electric utility or agency. ~~"Assessment~~

~~district" means the real property within a distinct area upon which special assessments are levied or imposed for the construction, reconstruction, betterment, replacement, or repair of a facility to be paid for by funds derived from those special assessments imposed or levied on the benefited real property.~~

(K) ~~(i)~~—"Retainage" or "retained funds" means the amount withheld from a progress payment to a contractor pursuant to section 3.

(I) "STATE INSTITUTION OF HIGHER EDUCATION" MEANS A PUBLIC COMMUNITY OR JUNIOR COLLEGE ESTABLISHED UNDER SECTION 7 OF ARTICLE VIII OF THE STATE CONSTITUTION OF 1963 OR PART 25 OF THE REVISED SCHOOL CODE, 1976 PA 451, MCL 380.1601 TO 380.1607, OR A STATE UNIVERSITY DESCRIBED IN SECTION 4, 5, OR 6 OF ARTICLE VIII OF THE STATE CONSTITUTION OF 1963.

(M) "SUBCONTRACTOR" MEANS A PERSON, OTHER THAN A LABORER OR SUPPLIER, WHO, PURSUANT TO A CONTRACT BETWEEN HIMSELF OR HERSELF AND A PERSON OTHER THAN THE PUBLIC AGENCY, PERFORMS ANY PART OF THE CONSTRUCTION CONTRACT.

Sec. 2. (1) The construction contract **FOR A FACILITY** shall designate a person representing the contractor who will submit written requests for progress payments, and a person representing the public agency **OR CONSTRUCTION MANAGER** to whom ~~request~~ **REQUESTS** for progress payments are to be submitted. The written requests for progress payments shall be submitted to the designated person in a manner and at such times as provided in the construction contract. **ON CONTRACTS WHERE THE PUBLIC AGENCY HAS ENGAGED A CONSTRUCTION MANAGER TO ENTER INTO CONTRACTS WITH CONTRACTORS, THE CONSTRUCTION**

1 **MANAGER SHALL SUBMIT THE CONTRACTOR'S PAYMENT REQUEST TO THE PUBLIC**
2 **AGENCY FOR PAYMENT WITHIN THE TIME SPECIFIED IN THE CONSTRUCTION**
3 **CONTRACT OR WITHIN 15 DAYS OF RECEIPT OF THE CONTRACTOR'S PAYMENT**
4 **REQUEST, WHICHEVER IS THE EARLIER TO OCCUR.**

5 (2) The processing of progress payments **ON A CONSTRUCTION**
6 **CONTRACT** by the public agency may be deferred by the public agency
7 **OR CONSTRUCTION MANAGER** until work having a prior sequence, as
8 provided in the contract documents, is in place and is approved.

9 (3) Each **REQUEST FOR A** progress payment ~~requested ON A~~
10 **CONSTRUCTION CONTRACT**, including ~~reasonable~~ interest if requested
11 under subsection (4), shall be paid **BY THE PUBLIC AGENCY** within 1
12 of the following time periods, whichever is later:

13 (a) Thirty days after the architect, ~~or~~ professional engineer,
14 **CONSTRUCTION MANAGER, OR OTHER DESIGNATED AGENT OF THE PUBLIC**
15 **AGENCY** has certified to the public agency that work is in place in
16 the portion of the facility covered by the applicable request for
17 payment in accordance with the contract documents, **REGARDLESS OF**
18 **WHETHER THE PUBLIC AGENCY ISSUES PAYMENT TO THE CONSTRUCTION**
19 **MANAGER OR DIRECTLY TO THE CONTRACTOR.**

20 (b) Fifteen days after the public agency has received the
21 funds with which to make the progress payment from a department or
22 agency of the federal or state government, if any funds are to come
23 from either of those sources.

24 (4) Upon failure of a public agency **OR CONSTRUCTION MANAGER** to
25 make a timely progress payment pursuant to this section, the ~~person~~
26 ~~designated to submit requests for progress payments may include~~
27 ~~reasonable interest on amounts past due in the next request for~~

~~payment~~ PUBLIC AGENCY OR CONSTRUCTION MANAGER SHALL PAY INTEREST ON AMOUNTS PAST DUE AT THE SAME RATE PAYABLE ON MONEY JUDGMENTS PURSUANT TO SECTION 6013(8) OF THE REVISED JUDICATURE ACT OF 1961, 1961 PA 236, MCL 600.6013, ON AMOUNTS PAST DUE WITH THE NEXT PAYMENT.

Sec. 3. (1) To assure proper performance of a construction contract by the contractor, a public agency **OR CONSTRUCTION MANAGER** may retain a portion of each progress payment otherwise due as provided in this section.

(2) The retainage shall be limited to the following:

(a) Not more than ~~10%~~ 5% of the dollar value of all work in place. ~~until work is 50% in place.~~

(b) After the work is ~~50%~~ 90% in place, ~~additional RETAINAGE SHALL BE REDUCED TO NOT MORE THAN 1% OF THE DOLLAR VALUE OF ALL WORK IN PLACE.~~ ADDITIONAL retainage shall not be withheld unless the public agency **OR CONSTRUCTION MANAGER** determines that the contractor is not making satisfactory progress, or for other specific cause relating to the contractor's performance under the contract. If the public agency **OR CONSTRUCTION MANAGER** so determines, ~~the public agency~~ IT may retain not more than ~~10%~~ 5% of the dollar value of work ~~more than 50%~~ in place.

(C) THE 5% MAXIMUM RETAINAGE SPECIFIED IN SUBDIVISIONS (A) AND (B) MAY NOT BE INCREASED, EITHER DIRECTLY OR INDIRECTLY, THROUGH THE USE OF CONTRACT PROVISIONS OR PROCEDURES THAT DEFER ALL OR ANY PORTION OF A PAYMENT FOR WORK IN PLACE BEYOND THE TIME FOR PAYMENT PROVIDED IN SUBSECTION (2) OR BY REQUIRING THE CONTRACTOR TO FURNISH ADDITIONAL SECURITY FOR COMPLETION OF THE WORK BEYOND THE

1 ASSURANCE PROVIDED BY THE RETAINAGE SPECIFIED IN THIS ACT AND THE
2 CONTRACTOR'S PERFORMANCE BOND.

3 (3) The retained funds shall not exceed the pro rata share of
4 the public agency's **OR CONSTRUCTION MANAGER'S** matching requirement
5 under the construction contract and shall not be commingled with
6 other funds of the public agency **OR CONSTRUCTION MANAGER** and shall
7 be deposited in an interest bearing account in a regulated
8 financial institution in this state wherein all such retained funds
9 are kept by the public agency ~~which~~ **OR CONSTRUCTION MANAGER THAT**
10 shall account for both retainage and interest on each construction
11 contract separately. A public agency **OR CONSTRUCTION MANAGER** is not
12 required to deposit retained funds in an interest bearing account
13 if the retained funds are to be provided under a state or federal
14 grant and the retained funds have not been paid to the public
15 agency **OR CONSTRUCTION MANAGER**.

16 (4) Except as provided in section 4(7) and (8), retainage and
17 interest earned on retainage shall be released to a contractor
18 together with the final progress payment.

19 ~~—— (5) At any time after 94% of work under the contract is in~~
20 ~~place and at the request of the original contractor, the public~~
21 ~~agency shall release the retainage plus interest to the original~~
22 ~~contractor only if the original contractor provides to the public~~
23 ~~agency an irrevocable letter of credit in the amount of the~~
24 ~~retainage plus interest, issued by a bank authorized to do business~~
25 ~~in this state, containing terms mutually acceptable to the~~
26 ~~contractor and the public agency.~~

27 **(5) UPON THE FAILURE OR REFUSAL OF A PUBLIC AGENCY TO COMPLY**

1 WITH THE PROVISIONS OF SUBSECTIONS (3) AND (4), THE CONTRACTOR
2 SHALL BE ENTITLED TO RECOVER INTEREST ON THE RETAINED FUNDS AT THE
3 RATE OF 2 TIMES THE RATE PAYABLE ON MONEY JUDGMENTS PURSUANT TO
4 SECTION 6013(8) OF THE REVISED JUDICATURE ACT OF 1961, 1961 PA 236,
5 MCL 600.6013, UNTIL SUCH RETAINED FUNDS, INCLUSIVE OF ACCRUED
6 INTEREST, ARE FULLY PAID. A CONTRACTOR SHALL NOT BE REQUIRED TO,
7 BUT MAY AT ITS OPTION, UTILIZE THE DISPUTE RESOLUTION PROCEDURE
8 PROVIDED IN SECTION 4 TO SEEK ENFORCEMENT OF THE PROVISIONS OF THIS
9 SUBSECTION AND TO SEEK PAYMENT OF THE RETAINAGE DUE PLUS INTEREST
10 ACCRUED PURSUANT TO THIS SUBSECTION. IN ANY PROCEEDING TO ENFORCE
11 THE PROVISIONS OF THIS SUBSECTION, A PREVAILING CONTRACTOR SHALL BE
12 ENTITLED TO RECOVER THE SUM OF \$500.00 OR THE REASONABLE ACTUAL
13 AMOUNT OF COSTS AND ATTORNEY FEES INCURRED IN THAT PROCEEDING,
14 WHICHEVER IS THE GREATER.

15 (6) EXCEPT AS PROVIDED IN SECTION 4(7) AND (8), AND SUBJECT TO
16 SUBSECTION (5), THE CONTRACTOR SHALL PAY ITS SUBCONTRACTORS THE PRO
17 RATA SHARE OF ANY INTEREST PAID BY THE PUBLIC AGENCY OR
18 CONSTRUCTION MANAGER WITHIN 7 DAYS OF RECEIPT BY THE CONTRACTOR.

19 (7) THE PROVISIONS IN SUBSECTION (6) REGARDING PRO RATA
20 DISTRIBUTION OF INTEREST PAID BY THE PUBLIC AGENCY SHALL NOT
21 OTHERWISE APPLY TO OR REGULATE THE TERMS AND CONDITIONS OF
22 CONTRACTS BETWEEN A CONTRACTOR AND A SUBCONTRACTOR OR SUPPLIER, OR
23 ANY OTHER LOWER-TIER AGREEMENTS.

24 Sec. 4. (1) The construction contract shall contain an
25 agreement to submit those matters described in subsection (3) to
26 the decision of ~~an agent~~ **A MEDIATOR** at the option of the public
27 agency.

1 (2) If a dispute regarding a matter described in subsection
2 (3) arises, the contractor and the public agency **OR CONSTRUCTION**
3 **MANAGER** shall designate ~~an agent~~ **A MEDIATOR** who has background,
4 training, and experience in the construction of facilities similar
5 to that which is the subject of the contract, as follows:

6 (a) In an agreement reached within 10 days after a dispute
7 arises.

8 (b) If an agreement cannot be reached within 10 days after a
9 dispute arises, the public agency **OR CONSTRUCTION MANAGER** shall
10 designate ~~an agent~~ **A MEDIATOR** who has background, training, and
11 experience in the construction of facilities similar to that which
12 is the subject of the contract. ~~and who is not an employee of the~~
13 ~~agency.~~

14 (3) The public agency **OR CONSTRUCTION MANAGER** may request
15 dispute resolution by the ~~agent~~ **MEDIATOR** regarding the following:

16 (a) At any time during the term of the contract, to determine
17 whether there has been a delay for reasons that were within the
18 control of the contractor, and the period of time that delay has
19 been caused, continued, or aggravated by actions of the contractor.

20 (b) At any time after 94% of work under the contract is in
21 place, whether there has been an unacceptable delay by the
22 contractor in the performance of the remaining 6% of work under the
23 contract. The ~~agent~~ **MEDIATOR** shall consider the terms of the
24 contract and the procedures normally followed in the industry and
25 shall determine whether the delay was for failure to follow
26 reasonable and prudent practices in the industry for completion of
27 the project.

1 (4) This dispute resolution process shall be used only for the
2 purpose of determining the rights of the parties to retained funds
3 and interest earned on retained funds and is not intended to alter,
4 abrogate, or limit any rights with respect to remedies that are
5 available to enforce or compel performance of the terms of the
6 contract by either party.

7 (5) The ~~agent~~**MEDIATOR** may request and shall receive all
8 pertinent information from the parties and shall provide an
9 opportunity for an informal meeting to receive comments, documents,
10 and other relevant information in order to resolve the dispute. The
11 ~~agent~~**MEDIATOR** shall determine the time, place, and procedure for
12 the informal meeting. A written decision and reasons for the
13 decision shall be given to the parties within 14 days after the
14 meeting.

15 (6) The decision of the ~~agent~~**MEDIATOR** shall be final and
16 binding upon all parties. Upon application of either party, the
17 decision of the ~~agent~~**MEDIATOR** may be vacated by order of the
18 circuit court only upon a finding by the court that the decision **IS**
19 **CLEARLY ERRONEOUS OR** was procured by fraud, duress, or other
20 illegal means. **IN ANY CIRCUIT COURT PROCEEDING PURSUANT TO THE**
21 **PROVISIONS OF THIS SUBSECTION, THE PREVAILING PARTY IS ENTITLED TO**
22 **RECOVER FROM THE NONPREVAILING PARTY ITS REASONABLE COSTS AND**
23 **ATTORNEY FEES INCURRED IN CONNECTION WITH THE PROCEEDING.**

24 (7) If the dispute resolution results in a decision ÷
25 ~~—(a) That~~**THAT** there has been a delay as described in
26 subsection (3)(a), all interest earned on retained funds during the
27 period of delay shall become the property of the public agency **OR**

1 **CONSTRUCTION MANAGER.**

2 ~~—— (b) That~~ **IF THE DISPUTE RESOLUTION RESULTS IN A DECISION THAT**
 3 there has been unacceptable delay as described in subsection
 4 (3)(b), the public agency **OR CONSTRUCTION MANAGER** may contract with
 5 a subsequent contractor to complete the remaining 6% of work under
 6 the contract, and interest earned on retained funds shall become
 7 the property of the public agency **OR CONSTRUCTION MANAGER**. A
 8 subsequent contractor under this ~~subdivision~~ **SUBSECTION** shall be
 9 paid by the public agency **OR CONSTRUCTION MANAGER** from the
 10 following sources until each source is depleted, in the order
 11 listed below:

12 (A) ~~(i)~~ The dollar value of the original contract, less the
 13 dollar value of funds already paid to the original contractor and
 14 the dollar value of work in place for which the original contractor
 15 has not received payment.

16 (B) ~~(ii)~~ Retainage from the original contractor. ~~, or funds~~
 17 ~~made available under a letter of credit provided under section~~
 18 ~~3(5).~~

19 (C) ~~(iii)~~ Interest earned on retainage from the original
 20 contractor. ~~, or funds made available under a letter of credit~~
 21 ~~provided under section 3(5).~~

22 (8) If the public agency **OR CONSTRUCTION MANAGER** contracts
 23 with a subsequent contractor as provided in subsection ~~(7)(b)~~ **(7)**,
 24 the final progress payment shall be payable to the original
 25 contractor within the time period specified in section 2(3). The
 26 amount of the final progress payment to the original contractor
 27 shall not include interest earned on retained funds. The public

1 agency **OR CONSTRUCTION MANAGER** may deduct from the final progress
2 payment all expenses of contracting with the subsequent contractor.
3 This act shall not impair the right of the public agency **OR**
4 **CONSTRUCTION MANAGER** to bring an action or to otherwise enforce a
5 performance bond to complete work under a construction contract.

6 Enacting section 1. (1) This amendatory act takes effect
7 January 1, 2009.

8 (2) This amendatory act applies to any contracts entered into
9 on or after January 1, 2009.

10 Enacting section 2. This amendatory act does not take effect
11 unless all of the following bills of the 94th Legislature are
12 enacted into law:

13 (a) Senate Bill No.____ or House Bill No. 6176(request no.
14 04828'07).

15 (b) Senate Bill No.____ or House Bill No. 6174(request no.
16 04830'07).

17 (c) Senate Bill No.____ or House Bill No. 6173(request no.
18 04831'07).

19 Enacting section 3. Sections 5 and 6 of 1980 PA 524, MCL
20 125.1565 and 125.1566, are repealed effective January 1, 2009.