

State of Arizona
Senate
Fifty-fourth Legislature
Second Regular Session
2020

CHAPTER 87
SENATE BILL 1510

AN ACT

AMENDING SECTION 34-221, ARIZONA REVISED STATUTES; RELATING TO PUBLIC CONTRACTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 34-221, Arizona Revised Statutes, is amended to
3 read:

4 34-221. Contract with successful bidder; payments to
5 contractor and design professional; security;
6 recovery of damages for delay; progress payments;
7 definitions

8 A. The agent shall enter into a contract with the lowest
9 responsible bidder whose proposal is satisfactory, except that in
10 determining the lowest responsible bidder under this section, the board of
11 supervisors may consider, for no more than five projects, the time of
12 completion proposed by the bidder, the value over time of completed
13 services and facilities and the value over time of interrupted services if
14 the board determines that this procedure will serve the public interest by
15 providing a substantial fiscal benefit or that the use of the traditional
16 awarding of contracts is not practicable for meeting desired construction
17 standards or delivery schedules and if the formula for considering the
18 time of completion is specifically stated in the bidding information.

19 B. In determining the lowest responsible bidder for a horizontal
20 construction project using the design-bid-build project delivery method,
21 an agent may consider the time of completion proposed by the bidder if the
22 agent determines that this procedure will serve the public interest by
23 providing a substantial fiscal benefit or that the use of the traditional
24 awarding of contracts is not practicable for meeting desired construction
25 standards or delivery schedules and if the formula for considering the
26 time of completion is specifically stated in the bidding information.

27 C. The terms of a contract entered into pursuant to subsection A of
28 this section shall include the following items:

29 1. A surety company bond or bonds as required under this article.

30 2. The owner by mutual agreement may make progress payments on
31 contracts of less than ninety days and shall make monthly progress
32 payments on all other contracts as provided for in this paragraph.
33 Payment to the contractor on the basis of a duly certified and approved
34 estimate of the work performed during the preceding calendar month under
35 such contract may include payment for material and equipment, but to
36 ensure the proper performance of such contract, the owner shall retain ten
37 percent of the amount of each estimate until final completion and
38 acceptance of all material, equipment and work covered by the contract.
39 An estimate of the work submitted shall be deemed approved and certified
40 for payment ~~after~~ seven days ~~from~~ AFTER the date of submission unless
41 before that time the owner or owner's agent prepares and issues a specific
42 written finding setting forth those items in detail in the estimate of the
43 work that are not approved for payment under the contract. The owner may
44 withhold an amount from the progress payment sufficient to pay the
45 expenses the owner reasonably expects to incur in correcting the

1 deficiency set forth in the written finding. The progress payments shall
2 be paid on or before fourteen days after the estimate of the work is
3 certified and approved. The estimate of the work shall be deemed received
4 by the owner on submission to any person designated by the owner for the
5 submission, review or approval of the estimate of the work.

6 3. When the contract is fifty percent completed, one-half of the
7 amount retained, including any securities substituted under paragraph 5 of
8 this subsection, shall be paid to the contractor ~~upon~~ ON the contractor's
9 request if the contractor is making satisfactory progress on the contract
10 and there is no specific cause or claim requiring a greater amount to be
11 retained. After the contract is fifty percent completed, ~~no~~ NOT more than
12 five percent of the amount of any subsequent progress payments made under
13 the contract may be retained if the contractor is making satisfactory
14 progress on the project, except that if at any time the owner determines
15 satisfactory progress is not being made, ten percent retention shall be
16 reinstated for all progress payments made under the contract subsequent to
17 the determination.

18 4. ~~Upon~~ ON completion and acceptance of each separate building,
19 public work or other division of the contract on which the price is stated
20 separately in the contract, except as qualified in paragraph 5 of this
21 subsection, payment may be made in full, including retained percentages
22 thereon, ~~less~~ MINUS authorized deductions. In preparing estimates, the
23 material and equipment delivered on the site to be incorporated in the job
24 shall be taken into consideration in determining the estimated value by
25 the architect or engineer.

26 5. Ten percent of all estimates shall be retained by the agent as a
27 guarantee for complete performance of the contract, to be paid to the
28 contractor within sixty days after completion or filing notice of
29 completion of the contract. Retention of payments by a purchasing agency
30 longer than sixty days after final completion and acceptance requires a
31 specific written finding by the purchasing agency of the reasons
32 justifying the delay in payment. ~~No~~ A purchasing agency may NOT retain
33 any monies after sixty days that are in excess of the amount necessary to
34 pay the expenses the purchasing agency reasonably expects to incur in
35 order to pay or discharge the expenses determined by the purchasing agency
36 in the finding justifying the retention of monies. In lieu of the
37 retention provided in this section, the agent, at the option of the
38 contractor, shall accept as a substitute an assignment of MONEY MARKET
39 ACCOUNTS, DEMAND DEPOSIT ACCOUNTS, time certificates of deposit of banks
40 licensed by this state, securities of or guaranteed by the United States
41 of America, securities of this state, securities of counties,
42 municipalities and school districts within this state or shares of savings
43 and loan associations authorized to transact business in this state, in an
44 amount equal to ten percent of all estimates, which shall be retained by
45 the agent as a guarantee for complete performance of the contract. ~~in the~~

1 ~~event the agent accepts substitute security~~ IF THE CONTRACTOR OPTS FOR
2 SUBSTITUTE SECURITY as described in this paragraph for the ten percent
3 retention, the contractor ~~shall be~~ IS entitled to receive all interest or
4 income earned by such security as it accrues, and all such security in
5 lieu of retention shall be returned to the contractor by the agent within
6 sixty days after final completion and acceptance of all material,
7 equipment and work covered by the contract if the contractor has furnished
8 the agent satisfactory receipts for all labor and material billed and
9 waivers of liens from any and all persons holding claims against the
10 work. ~~In no event shall~~ The agent MAY NOT accept a MONEY MARKET ACCOUNT,
11 DEMAND DEPOSIT ACCOUNT, time certificate of deposit of a bank or shares of
12 a savings and loan association in lieu of the retention specified unless
13 accompanied by a signed and acknowledged waiver of the bank or savings and
14 loan association of any right or power to setoff against either the agent
15 or the contractor in relationship to the certificates or shares
16 assigned. THE AMOUNT DEPOSITED IN A MONEY MARKET ACCOUNT OR DEMAND
17 DEPOSIT ACCOUNT IN LIEU OF THE RETENTION PROVIDED IN THIS SECTION SHALL
18 NOT BE RELEASED BY THE FINANCIAL INSTITUTION TO THE CONTRACTOR EXCEPT ON
19 WRITTEN AUTHORIZATION OF THE AGENT.

20 6. ~~In any instance where~~ IF the agent has accepted substitute
21 security as provided in paragraph 5 of this subsection, any subcontractor
22 undertaking to perform any part of such public work ~~shall be~~ IS entitled
23 to provide substitute security to the contractor ~~upon~~ ON terms and
24 conditions similar to those described in paragraph 5 of this subsection,
25 and such security ~~shall be~~ IS in lieu of any retention under the
26 subcontract.

27 D. ~~No~~ A contract for construction or design professional services
28 may NOT materially alter the rights of any contractor, subcontractor,
29 design professional or material supplier to receive prompt and timely
30 payment required to be included in the contract under subsection C of this
31 section.

32 E. The contract shall be signed by the agent and the contractor.

33 F. A contract for the procurement of construction shall include a
34 provision that provides for negotiations between the agent and the
35 contractor for the recovery of damages related to expenses incurred by the
36 contractor for a delay for which the agent is responsible, which is
37 unreasonable under the circumstances and which was not within the
38 contemplation of the parties to the contract. This section ~~shall~~ DOES not
39 ~~be construed to~~ void any provision in the contract that requires notice of
40 delays or provides for arbitration or other procedure for settlement or
41 provides for liquidated damages.

42 G. The contractor shall pay to the contractor's subcontractors,
43 design professionals or material suppliers and each subcontractor shall
44 pay to the subcontractor's subcontractor, design professional or material
45 supplier, within seven days ~~of~~ AFTER receipt of each progress payment,

1 unless otherwise agreed in writing by the parties, the respective amounts
2 allowed the contractor, subcontractor or design professional on account of
3 the work performed by subordinate subcontractors or design professionals,
4 to the extent of each such subcontractor's or design professional's
5 interest therein, except that ~~no~~ A contract for construction may NOT
6 materially alter the rights of any contractor, subcontractor, design
7 professional or material supplier to receive prompt and timely payment as
8 provided under this section. Such payments to subcontractors, design
9 professionals or material suppliers shall be based on payments received
10 pursuant to this section. Any diversion by the contractor or
11 subcontractor of payments received for work performed on a contract, or
12 failure to reasonably account for the application or use of such payments,
13 constitutes grounds for disciplinary action by the registrar of
14 contractors. The subcontractor or material supplier shall notify the
15 registrar of contractors and the purchasing agency in writing of any
16 payment THAT IS less than the amount or percentage approved for the class
17 or item of work as set forth in this section.

18 H. A subcontractor or design professional may notify the purchasing
19 agency in writing requesting that the subcontractor or design professional
20 be notified by the purchasing agency in writing within five days ~~from~~
21 AFTER payment of each progress payment made to the contractor. The
22 subcontractor's or design professional's request remains in effect for the
23 duration of the subcontractor's or design professional's work on the
24 project.

25 I. ~~Nothing in~~ This chapter ~~prevents~~ DOES NOT PREVENT the contractor
26 or subcontractor, at the time of application and certification to the
27 owner or contractor, from withholding such application and certification
28 to the owner or contractor for payment to the subcontractor, design
29 professional or material supplier for unsatisfactory job progress,
30 defective design professional services or construction work or materials
31 not remedied, disputed design professional services, work or materials,
32 third-party claims filed or reasonable evidence that a claim will be
33 filed, failure of a subcontractor or design professional to make timely
34 payments for design professional services, labor, equipment and materials,
35 damage to the contractor or another subcontractor or design professional,
36 reasonable evidence that the subcontract or design professional service
37 contract cannot be completed for the unpaid balance of the subcontract or
38 design professional service contract sum or a reasonable amount for
39 retention that does not exceed the actual percentage retained by the
40 owner.

41 J. If any payment to a contractor is delayed after the date due,
42 interest shall be paid at the rate of one percent per month or fraction of
43 a month on such unpaid balance as may be due.

44 K. If any periodic or final payment to a subcontractor or design
45 professional is delayed by more than seven days after receipt of the

1 periodic or final payment by the contractor or subcontractor, the
2 contractor or subcontractor shall pay a subordinate subcontractor, design
3 professional or material supplier interest, beginning on the eighth day,
4 at the rate of one percent per month or a fraction of a month on such
5 unpaid balance as may be due.

6 L. For the purposes of this section:

7 1. "Design professional service contract" means a written agreement
8 relating to the planning, design, construction administration, study,
9 evaluation, consulting, inspection, surveying, mapping, material sampling,
10 testing or other professional, scientific or technical services furnished
11 in connection with any actual or proposed study, planning, survey,
12 environmental remediation, construction, improvement, alteration, repair,
13 maintenance, relocation, moving, demolition or excavation of a structure,
14 street or roadway, appurtenance, facility, development or other
15 improvement to land.

16 2. "Design professional services" means architect services,
17 engineer services, land surveying services, geologist services or
18 landscape architect services or any combination of those services
19 performed by or under the supervision of a design professional or an
20 employee or subconsultant of the design professional.

21 3. "Subconsultant" means any person, firm, partnership,
22 corporation, association or other organization, or a combination of any of
23 them, that has a direct contract with a design professional or another
24 subconsultant to perform a portion of the work under a design professional
25 service contract.

APPROVED BY THE GOVERNOR JUNE 5, 2020.

FILED IN THE OFFICE OF THE SECRETARY OF STATE JUNE 5, 2020.