

SENATE SUBSTITUTE  
FOR  
SENATE COMMITTEE SUBSTITUTE  
FOR  
HOUSE COMMITTEE SUBSTITUTE  
FOR  
HOUSE BILL NO. 1403

AN ACT

To amend chapter 436, RSMo, by adding thereto thirteen new sections relating to retainage in private building contracts.

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI,  
AS FOLLOWS:

1           Section A. Chapter 436, RSMo, is amended by adding thereto  
2 thirteen new sections, to be known as sections 436.300, 436.303,  
3 436.306, 436.309, 436.312, 436.315, 436.318, 436.321, 436.324,  
4 436.327, 436.330, 436.333, and 436.336, to read as follows:

5           436.300. Notwithstanding any other law to the contrary, all  
6 parties to any contract or agreement for private construction  
7 work that is between any owner and any contractor, or between any  
8 contractor and any subcontractor, or between any subcontractor  
9 and any sub-subcontractor, or any supplier at whatever tier for  
10 construction, reconstruction, maintenance, alteration, or repair  
11 for a private owner of any building, improvement, structure,  
12 private road, appurtenance, or appliance, including moving,  
13 demolition, or any excavating connected therewith, shall make  
14 payment in accordance with the terms of such contract or

1 agreement, provided such terms are not inconsistent with the  
2 provisions of sections 436.300 to 436.336.

3 436.303. A contract or agreement may include a provision  
4 for the retainage of a portion of any payment due from the owner  
5 to the contractor, not to exceed ten percent of the amount of  
6 such payment due pursuant to the contract or agreement, to ensure  
7 the proper performance of the contract or agreement, provided  
8 that the contract may provide that if the contractor's  
9 performance is not in accordance with the terms of the contract  
10 or agreement, the owner may retain additional sums to protect the  
11 owner's interest in satisfactory performance of the contract or  
12 agreement. The amount or amounts so retained by the owner shall  
13 be referred to in sections 436.300 to 436.336 as "retainage", and  
14 shall be held by the owner in trust for the benefit of the  
15 contractor and contractor's subcontractors, sub-subcontractors,  
16 and suppliers at whatever tier who are not in default, in  
17 proportion to their respective interests. Such retainage shall  
18 be subject to the conditions and limitations listed in section  
19 436.300 to 436.336.

20 436.306. 1. The contractor may tender to the owner  
21 acceptable substitute security as set forth in section 436.312  
22 with a written request for release of retainage in the amount of  
23 the substitute security. The contractor shall thereupon either:

24 (1) Be entitled to receive cash payment of retainage  
25 pursuant to this section; or

26 (2) Not be subject to the withholding of retainage, in  
27 either case, to the extent of the security tendered, provided  
28 that the contractor is not in default of its agreement with the

1 owner.

2 2. If the tender described in subsection 1 of this section  
3 is made after retainage has been withheld, the owner shall,  
4 within five working days after receipt of the tender, pay to the  
5 contractor the withheld retainage to the extent of the substitute  
6 security. If the tender described in subsection 1 of this  
7 section is made before retainage has been withheld, the owner  
8 shall, to the extent of the substitute security, refrain from  
9 withholding any retainage from the future payments.

10 436.309. A subcontractor of the contractor may tender to  
11 the contractor acceptable substitute security as set forth in  
12 section 436.312 with a written request for release of retainage  
13 in the amount of the substitute security. The contractor shall  
14 tender the subcontractor's substitute security to the owner with  
15 a like request, pursuant to the provisions of section 436.306.  
16 Provided that the subcontractor is not in default of its  
17 agreement with the contractor, the contractor shall pay over to  
18 the subcontractor, within five working days after receipt, any  
19 accumulated retainage paid by the owner to the contractor on  
20 account of substitute security tendered by the subcontractor,  
21 except that the contractor shall not be required to pay over  
22 retainage in excess of the amount properly attributable to work  
23 completed by the subcontractor at the time of payment. Provided  
24 that the subcontractor is not in default of its agreement with  
25 the contractor, the contractor shall refrain from withholding  
26 retainage from payments to the subcontractor to the extent the  
27 owner has refrained from withholding retainage from payments to  
28 the contractor on account of the subcontractor's substituted

1 security. The subcontractor shall be entitled to receive, upon  
2 receipt by the contractor, all income received by the contractor  
3 from the owner on account of income producing securities  
4 deposited by the subcontractor as substitute security. Except as  
5 otherwise provided in this section, the contractor shall have no  
6 obligation to collect or pay to a subcontractor retainage on  
7 account of substitute security tendered by the subcontractor.

8 436.312. 1. The following shall constitute acceptable  
9 substitute security for purposes of sections 436.306 and 436.309:

10 (1) Certificates of deposit drawn and issued by a national  
11 banking association located in this state or by any banking  
12 corporation incorporated pursuant to the laws of this state; and  
13 mutually agreeable to the project owner and the contractor or  
14 subcontractor, in the amount of the retainage released. If the  
15 letter of credit is not renewed at least sixty days before the  
16 expiration of the letter of credit, the owner may draw upon the  
17 letter of credit regardless of the contractor's or  
18 subcontractor's performance for an amount equal to or no greater  
19 than the value of the amount of work remaining to be performed by  
20 the contractor or subcontractor.

21 (2) A retainage bond naming the owner as obligee issued by  
22 any surety company authorized to issue surety bonds in this state  
23 in the amount of the retainage released; or

24 (3) An irrevocable and unconditional letter of credit in  
25 favor of the owner, issued by a national banking association  
26 located in this state or by any banking corporation incorporated  
27 pursuant to the laws of this state, in the amount of the  
28 retainage released.

1           2. The contractor shall be entitled to receive, in all  
2 events, all interest and income earned on any securities  
3 deposited by the contractor in substitution for retainage.

4           436.315. A contractor shall not withhold from any  
5 subcontractor any retainage in excess of the retainage withheld  
6 from the contractor by the owner for the subcontractor's work,  
7 unless the subcontractor's performance is not in accordance with  
8 the terms of the subcontract, in which case, subject to the terms  
9 of the subcontract, the contractor may retain additional sums to  
10 ensure the subcontractor's satisfactory performance of the  
11 subcontract.

12           436.318. Upon the release of retainage by the owner to the  
13 contractor, other than for substituted security pursuant to  
14 sections 436.306 and 436.312, the contractor shall pay to each  
15 subcontractor the subcontractor's ratable share of the retainage  
16 released, provided that all conditions of the subcontract for  
17 release of retainage to the subcontractor have been satisfied.

18           436.321. If it is determined that a subcontractor's  
19 performance has been satisfactorily completed and the  
20 subcontractor can be released prior to substantial completion of  
21 the entire project without risk to the owner involving the  
22 subcontractor's work, the contractor shall request such  
23 adjustment in retainage, if any, from the owner as necessary to  
24 enable the contractor to pay the subcontractor in full, and the  
25 owner shall as part of the next contractual payment cycle release  
26 the subcontractor's retainage to the contractor, who shall in  
27 turn as part of the next contractual payment cycle release such  
28 retainage as is due the subcontractor.

1           436.324. Within thirty days of the project reaching  
2 substantial completion, as defined in section 436.327, all  
3 retainage or substitute security shall be released by the owner  
4 to the contractor less an amount equal to one hundred fifty  
5 percent of the costs to complete any remaining items. Upon  
6 receipt of such retainage from the owner, the contractor shall  
7 within seven days release to each subcontractor that  
8 subcontractor's share of the retainage.

9           436.327. The project shall be deemed to have reached  
10 substantial completion upon the occurrence of the earlier of one  
11 of the following events:

12           (1) The architect or engineer issues a certificate of  
13 substantial completion;

14           (2) The applicable governmental agency issues a use or  
15 occupancy permit; or

16           (3) The owner begins to use or could have begun to use the  
17 project for its intended purpose.

18           436.330. Subcontractors and sub-subcontractors of every  
19 tier shall comply with the provisions of sections 436.300 to  
20 436.336 in their relations with their sub-subcontractors and  
21 suppliers and shall be bound by the same obligations to their  
22 sub-subcontractors and suppliers as contractors are to their  
23 subcontractors.

24           436.333. A contract or agreement formed after August 28,  
25 2002, shall be unenforceable to the extent that its provisions  
26 are inconsistent with sections 436.300 to 436.336. If retainage  
27 is withheld in violation of sections 436.300 to 436.360, a court  
28 may, in addition to any other award for damages, award interest

1 at the rate of up to one and one-half percent per month from the  
2 date of such wrongful or improper withholding of retainage. In  
3 any action brought to enforce sections 436.300 to 436.336, a  
4 court may award reasonable attorney's fees to the prevailing  
5 party. If the parties elect to resolve the dispute by  
6 arbitration pursuant to section 436.350, the arbitrator may award  
7 any remedy that a court is authorized to award.

8 436.336. Sections 436.300 to 436.336 shall apply to  
9 contracts and agreements entered into after August 28, 2002.  
10 Sections 436.300 to 436.336 shall apply to all private  
11 construction projects, except single-family residential  
12 construction and other residential construction consisting of  
13 four or fewer units.