

PRIVATE CONSTRUCTION WORK

436.300. Contracts for private construction work—payment

Notwithstanding any other law to the contrary, all parties to any contract or agreement for private construction work that is between any owner and any contractor, or between any contractor and any subcontractor, or between any subcontractor and any sub-subcontractor, or any supplier at whatever tier for construction, reconstruction, maintenance, alteration, or repair for a private owner of any building, improvement, structure, private road, appurtenance, or appliance, including moving, demolition, or any excavating connected therewith, shall make payment in accordance with the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

(L.2002, H.B. No. 1403, § A.)

436.303. Contracts for private construction work—retainage provision

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

(L.2002, H.B. No. 1403, § A.)

Research References**Treatises and Practice Aids**

6A MO Practice Series § 15:79, Partial Payments.

436.306. Contracts for private construction work—contractor request for release of retainage

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

- (1) Be entitled to receive cash payment of retainage pursuant to this section; or
- (2) Not be subject to the withholding of retainage, in either case, to the extent of the security tendered, provided that the contractor is not in default of its agreement with the owner.

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

(L.2002, H.B. No. 1403, § A.)

436.309. Contracts for private construction work—substitute security, subcontractor request for release of retainage

A subcontractor of the contractor may tender to the contractor acceptable substitute security as set forth in section 436.312 with a written request for release of retainage in the

amount of the substitute security. The contractor shall tender the subcontractor's substitute security to the owner with a like request, pursuant to the provisions of section 436.306. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall pay over to the subcontractor, within five working days after receipt, any accumulated retainage paid by the owner to the contractor on account of substitute security tendered by the subcontractor, except that the contractor shall not be required to pay over retainage in excess of the amount properly attributable to work completed by the subcontractor at the time of payment. Provided that the subcontractor is not in default of its agreement with the contractor, the contractor shall refrain from withholding retainage from payments to the subcontractor to the extent the owner has refrained from withholding retainage from payments to the contractor on account of the subcontractor's substituted security. The subcontractor shall be entitled to receive, upon receipt by the contractor, all income received by the contractor from the owner on account of income-producing securities deposited by the subcontractor as substitute security. Except as otherwise provided in this section, the contractor shall have no obligation to collect or pay to a subcontractor retainage on account of substitute security tendered by the subcontractor.

(L.2002, H.B. No. 1403, § A.)

436.312. Contracts for private construction work—substitute security

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

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

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

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

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

(L.2002, H.B. No. 1403, § A.)

436.315. Contracts for private construction work—withholding of retainage from subcontractor

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

(L.2002, H.B. No. 1403, § A.)

436.318. Contracts for private construction work—release of retainage, subcontractor's ratable share

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

(L.2002, H.B. No. 1403, § A.)

436.321. Contracts for private construction work—release of subcontractor's retainage

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

(L.2002, H.B. No. 1403, § A.)

Research References

Treatises and Practice Aids

6A MO Practice Series § 15:152, Subcontract Agreement--With Arbitration Clause.

436.324. Contracts for private construction work—release of retainage to contractor

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

(L.2002, H.B. No. 1403, § A.)

Research References

Treatises and Practice Aids

6A MO Practice Series § 15:42, Contract Between Owner and Contractor for Construction of a Building--Short Form.

6A MO Practice Series § 15:43, Contract Between Owner and Contractor for Construction

of a Dwelling House--Where Architect is Employed.

6A MO Practice Series § 15:80, Final Payment.

6A MO Practice Series § 15:97, Contractor's Guarantee of Work After Completion--Maintenance Bond.

436.327. Contracts for private construction work—substantial completion

The project shall be deemed to have reached substantial completion upon the occurrence of the earlier of the architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract documents or the owner accepting the performance of the full contract.

(L.2002, H.B. No. 1403, § A.)

436.330. Contracts for private construction work—compliance with sections 436.300 to 436.336

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

(L.2002, H.B. No. 1403, § A.)

436.333. Contracts for private construction work—effective date of provisions—violation, damages, arbitration

A contract or agreement formed after August 28, 2002, shall be unenforceable to the extent that its provisions are inconsistent with sections 436.300 to 436.336. If retainage is withheld in violation of sections 436.300 to 436.360, a court may, in addition to any other award for damages, award interest at the rate of up to one and one-half percent per month from the

date of such wrongful or improper withholding of retainage. In any action brought to enforce sections 436.300 to 436.336, a court may award reasonable attorney's fees to the prevailing party. If the parties elect to resolve the dispute by arbitration pursuant to section 435.350,¹ RSMo, the arbitrator may award any remedy that a court is authorized to award.

(L.2002, H.B. No. 1403, § A.)

¹ Revisor's note: Original rolls contained "436.350", a typographical error.

436.336. Contracts for private construction work—applicability of sections 436.300 to 436.336

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

(L.2002, H.B. No. 1403, § A.)

Research References

Treatises and Practice Aids

6A MO Practice Series § 15:97, Contractor's
Guarantee of Work After Completion--Maintenance Bond.