

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: November 15, 2022

SUBJECT: Report on Bill 24-251, the “Contractor Indemnity and Subcontractor Prompt Payment Amendment Act of 2022”

The Committee of the Whole, to which Bill 24-251, the “Contractor Indemnity and Subcontractor Prompt Payment Amendment Act of 2022” was referred, reports favorably thereon with technical amendments and recommends approval by the Council.

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I. BACKGROUND AND NEED

On May 19, 2021, Bill 24-251, the “Contractor Indemnity Act of 2021” was introduced by Councilmembers Anita Bonds, Brianne Nadeau, Brooke Pinto, and Mary Cheh. The bill would prohibit an owner or contractor from requiring subcontractors to indemnify a contractor or owner for damages arising out of bodily injury or destruction of property caused by the contractor or owner’s negligence. At the same time, Councilmembers Anita Bonds, Brianne Nadeau, and Mary Cheh introduced Bill 24-252, the “Subcontractor Prompt Payment Amendment Act of 2021.” Bill 24-252 would amend the Private Contractor and Subcontractor Prompt Payment Act of 2013 to prohibit a contractor from withholding payment to subcontractors for work performed and completed on one job to offset losses, damages, or payments at another.

Subcontractors, Construction Contracts, and Indemnification

For construction projects, developers and general contractors routinely hire subcontractors to perform specific, specialized construction work for the project. In fact, subcontractors often perform most of the construction work on a project. For instance, the National Association of Home Builders found that developers use an average of 22 subcontractors to build a home and that the subcontracted work accounted for 75% of total construction costs.¹ These subcontractors often have specialized experience and expertise in carpentry, electrical, excavation, roofing, plumbing, or masonry. In the District, nearly 10,000 people are employed in these specialty trades, working on everything from small construction maintenance projects to major commercial construction projects worth millions of dollars.² Over 60% of the people working in these specialty trades are District residents. Demographics of District residents employed in specialty construction trades in the District are shown in Table 1 below.

Table 1. Demographics of District Residents Employed in Specialty Construction Trades³

	Percent
White	56.5%
Black	40.4%
Other	3.1%
Not Hispanic/Latino	58.6%
Hispanic/Latino	41.4%
18 to 29 years old	18.1%
30 to 39 years old	31.8%
40 to 49 years old	26.7%
50 years old and above	23.4%
Highschool or less	61.3%
Some college	17.9%
Bachelor’s degree	15.9%
Graduate or professional degree	4.9%

Note: Columns for each demographic category add up to 100%.

When a general contractor (and/or owner) hires a subcontractor, he or she will sign and execute a contract with the subcontractor that establishes the scope of work, payment terms, change orders terms and processes, licensing and insurance coverage requirements, dispute resolution

¹ Paul Emrath, “It Takes 22 Subcontractors to Build the Average Home,” National Association of Home Builders, Eye on Housing (<https://eyeonhousing.org/2015/12/top-posts-of-2015-it-takes-22-subcontractors-to-build-the-average-home/>).

² Data on employment from the Bureau of Labor Statistic’s Quarterly Census of Employment and Wages, Private, All Establishments, 2022 First Quarter, District of Columbia.

³ Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles and J. Robert Warren. Integrated Public Use Microdata Series, Current Population Survey: Version 7.0 [dataset]. Minneapolis, MN: IPUMS, 2019. Weights for pooled data were calculated by multiplying the original sample weight (sw) by the number of observations by year (oy) divided by the total number of observations (t), or $sw \times \frac{oy}{t}$ expressed as an equation.

terms and processes, and other necessary contract provisions. Among the many standard provisions in a construction contract is what is known as an “indemnity clause.” Indemnity clauses transfer risk from one party to another. In layman’s terms, and as applied to construction contracts, an indemnity clause means that a subcontractor would agree to pay a contractor or owner for injuries or property damage caused by the subcontractor’s construction work.

In contracts, there are generally three types of indemnity clauses: broad form, intermediate form, and limited form.⁴ Under a broad form clause, the subcontractor would hold harmless the contractor or owner for any damages, losses, etc., arising out of the subcontractor’s work, regardless of who is at fault. Under an intermediate form indemnity clause, a subcontractor holds a contractor or owner harmless for the subcontractor’s negligence but may only be required to pay partial damages depending on how fault is determined and calculated. If, for instance, a contractor is 40% at fault for damage to a roof, the subcontractor would be responsible for paying 60% of the damages. Finally, under a limited form indemnity clause, the subcontractor only holds harmless the contractor for the subcontractor’s negligence. There is no partial indemnity under a limited form clause.

Bill 24-251

Currently, District law does not prohibit broad-form indemnity clauses, which means a subcontractor may have to pay for damages, losses, or expenses caused solely by the general contractor or owner. Such clauses could lead to a subcontractor paying tens of thousands or hundreds of thousands of dollars for damages or losses they did not cause. This is an untenable situation. Bill 24-251 would rectify this by prohibiting a contractor from requiring a subcontractor to hold harmless a contractor or owner for a contractor or owner’s negligence. As of December 2021, 19 states prohibit broad-form indemnity provisions in construction contracts.⁵ Those states are listed in Table 2 below. Only Louisiana restricts the broad form prohibition to public construction contracts, and only Nevada restricts the broad form prohibition to residential construction contracts.

Table 2. States with Broad Form Indemnity Clause Prohibitions in Construction Contracts

State	Applicability	Citation
Alaska	Construction contracts	Alaska Stat. § 45.45.900
Arizona	Construction, architect, or engineering contracts (private)	A.R.S. §§ 32-1159, 34- 226, 41-2586
Arkansas	Construction contracts	Ark. Code §§ 4-56- 104; 22-9-214
California	Construction contracts	Cal. Civ. Code § 2782
Colorado	Construction contracts	Colo. Rev. Stat. §§ 13-50.5-102; 13-21-111.5
Georgia	Construction contracts	Ga. Code § 13-8-2
Hawaii	Construction contracts	Hawaii Rev. Stat. § 431:10-222

⁴ Tyler, R. J. (2002). Clause for concern. *ASHRAE journal*, 44(2), 42.

⁵ Other states have similar provision in their code but apply it to “indemnification agreements.” See, for instance, Minn. Stat. §§ 337.01; 337.02

Idaho	Construction contracts	Idaho Rev. Stat. § 29-114
Indiana	Construction contracts	Ind. Code § 26-2-5
Louisiana	Construction contracts (public)	LSA §38:2216(G)
Maryland	Construction contracts	Md. Code Ann., Cts. & Jud. Proc. 5-401
Massachusetts	Construction contracts	Mass. Gen. Laws, Ch. 149 § 29C
Nevada	Construction contracts (residential)	N.R.S. § AB 125, § 2
New Jersey	Construction contracts	N.J. Stat. § 2A:40A-1
South Carolina	Construction contracts	S.C. Code § 32-2-10
South Dakota	Construction contracts	S.D. Codified Laws § 56-3-18
Tennessee	Construction contracts	Tenn. Code § 62-6-123
Virginia	Construction contracts	Va. Code § 11-4.1
West Virginia	Construction contracts	W. Va. Code § 55-8-14

The Print retains language from the introduced version, which ensures that the prohibition against broad-form indemnity clauses in construction contracts would not affect the validity of insurance contracts or workers’ compensation agreements. Identical or nearly identical language can be found in statutes in Georgia, Hawaii, Maryland, New Jersey, and Virginia. The Print also retains language prohibiting contractors or owners from requiring subcontractors to purchase additional insurance coverage or including provisions in their insurance policies that would violate the prohibition against broad-form indemnity clauses. This is an important protection for subcontractors, as subcontractors are often required to make an owner or contractor an insured party under their liability policies. In some instances, insurance policy provisions can be constructed in such a way that they have the same effect as a broad-form indemnity clause, thereby creating a loophole around the prohibition against such indemnity clauses in construction contracts.⁶

The Print makes one substantive change to the introduced version by providing a date certain at which the prohibition against broad form indemnity clauses in construction projects would apply. In the introduced version, the prohibition would apply to contracts executed 30 days after the act’s effective date. This approach does not provide certainty to contractors or subcontractors. As such, the Print would make the prohibition applicable to construction contracts executed on or after April 1, 2023.

Subcontractors, Prompt Payments, and Bill 24-252

Two other issues that subcontractors frequently experience are not addressed in Bill 24-251 but in a separate bill, the “Subcontractor Prompt Payment Amendment Act of 2021.” First, in construction contracts between general contractors and subcontractors, there is generally a “setoff clause” that allows the general contractor to withhold payment or deduct charges for liability or

⁶ Matthiesen, Wickert & Lehrer, S.C., Anti-Indemnity Clauses in All 50 States, December 21, 2021 (<https://www.mwl-law.com/wp-content/uploads/2013/03/Anti-Indemnity-Statutes-In-All-50-States-00131938.pdf>).

costs that the contractor has incurred because of the subcontractor's actions.⁷ Sometimes these setoff clauses allow the general contractor to withhold payment or deduct charges under the specific subcontract in question and "any other agreement between the parties."⁸ For example, say a subcontractor has two contracts with a general contractor on the same project. One contract is for electrical work, and the other is for plumbing. During the electrical work, the subcontractor caused damage to the property, costing the general contractor \$3,000. With a broad setoff clause, the general contractor could deduct or withhold the \$3,000 in payments to the subcontractor on the plumbing work, even though the costs to the general contractor were incurred under the contract for electrical work. District law does not currently prohibit this practice.

Second, subcontractors frequently receive late payments for completed work, which can negatively impact the business's financial health. For instance, a survey of over 500 construction companies by Levelset found that general contractors were four times more likely than subcontractors to report receiving payments on time.⁹ District law currently requires prompt payment between contractors and subcontractors and first-tier and second-tier subcontractors. The statute defines "prompt payment" as payment occurring within "7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials."¹⁰

As introduced, Bill 24-252 would address both of these issues. First, it would prohibit broad setoff clauses allowing a contractor to deduct or withhold payment on one contract for damages or losses incurred on another contract with the same subcontractor. Second, it would require contractors and subcontractors to provide payment to subcontractors within 7 days of completion of the subcontractor's work.

The Committee is concerned with the prompt payment language in the introduced version of Bill 24-252. As drafted, it would insert a new subsection (d)(1) in D.C. Official Code § 27-132 that conflicts with the existing language in subsection (a), which would create significant confusion for contractors and subcontractors. Additionally, the language does not consider circumstances in which an owner has yet to pay a contractor. For example, say an owner hires a contractor for a residential construction project. The contractor then hires a subcontractor to perform masonry work. Under the language in Bill 24-252, the contractor would have to pay the subcontractor within 7 days of the completion of their work even *if* the owner has not paid the contractor. This would undoubtedly harm the contractor. The Committee is also unaware of any jurisdiction in the country with a prompt payment that would require payment 7 days after a subcontractor completes their work.¹¹ In fact, most jurisdictions mirror our current law, requiring payment from a contractor to a subcontractor within 7 days of the contractor receiving payment

⁷ Kenneth Rubinstein and Nicholas Dube, "What If We Just Call It Even?: The Right to Offset Debts from One Project Against Monies Owed on Another," Forum on Construction Law - Under Construction (American Bar Association), September 20, 2021 (See [here](#)).

⁸ Lauren McLaughlin and Raziye Andican, "Battling the General Contractor's Right to Offset in Virginia, Maryland, and the District of Columbia: A scorecard for the subcontractor community," SmithCurrie, May 2020.

⁹ Levelset, 2022 Construction Cash Flow and Payment Report (https://www.levelset.com/tools/2022-construction-cash-flow-payment-report/?utm_source=gmail&utm_medium=pr&utm_campaign=2022-cash-flow-report).

¹⁰ D.C. Official Code § 27-132.

¹¹ Foundation of the American Subcontractors Association, Inc., Prompt Payment Laws in the 50 States – 2019 (<https://www.keglerbrown.com/content/uploads/2018/09/Prompt-Payment-Laws-in-the-50-States-2019.pdf>).

from the owner.¹² Given this, the Committee Print strikes this language from the introduced version. Instead, it amends D.C. Official Code §§ 27-134 and 27-135 to ensure that our existing prompt payment law applies to all contracts, including contracts between subcontractors below the second tier.

The Committee believes the prohibition against broad setoff clauses is desirable and necessary to protect subcontractors from potential financial distress. As such, the Print for Bill 24-251 includes this prohibition but makes one substantive change. As introduced, the bill would prohibit broad setoff clauses in contracts after the effective date of Bill 24-252. The Print amends this to a date certain of after March 31, 2023, consistent with the date certain for prohibiting broad form indemnity clauses.

Conclusion

Currently, District law does not protect subcontractors against two types of unjust contract provisions: Setoff clauses that allow contractors to withhold payments on one project for damages or losses incurred on another project, and broad form indemnity clauses that make subcontractors liable for the negligence of owners or contractors. Either of these clauses can have disastrous financial effects on subcontractors. The Committee Print for Bill 24-251 would prohibit such provisions in construction contracts, thereby protecting the thousands of subcontractors in the District who perform critical work in the construction industry. As such, the Committee recommends the Council approve the Committee Print for Bill 24-251.

II. LEGISLATIVE CHRONOLOGY

May 19, 2021	Bill 24-251, the “Contractor Indemnity Act of 2021” is introduced by Councilmembers Anita Bonds, Brianne Nadeau, Brooke Pinto, and Mary Cheh.
May 19, 2021	Bill 24-252, the “Subcontractor Prompt Payment Amendment Act of 2021” is introduced by Councilmembers Anita Bonds, Brianne Nadeau, and Mary Cheh.
May 28, 2021	Notices of Intent to Act on Bill 24-251 and Bill 24-252 are published in the <i>District of Columbia Register</i> .
June 1, 2021	Bill 24-251 and Bill 24-252 are officially read at the regularly scheduled meeting of the Committee of the Whole and referred to the Committee of the Whole.
August 12, 2022	Notice of a public hearing is published in the <i>District of Columbia Register</i> .

¹² *Id.*

October 19, 2022 The Committee of the Whole holds a public hearing on Bill 24-251 and Bill 24-252.

November 15, 2022 The Committee of the Whole marks up Bill 24-251.

III. POSITION OF THE EXECUTIVE

The Committee received no testimony or comments from the Executive regarding this bill.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions regarding this bill.

V. SUMMARY OF TESTIMONY

The Committee held a public hearing on Bills 24-251 and 24-252 on October 19, 2022. Copies of written testimony are attached to this report.

Ike Casey, Executive Director of the American Subcontractors Association of Metropolitan Washington, testified in support of Bills 24-251 and 24-252. Mr. Casey testified that passing these bills will ensure that contractors receive payment on time and are not burdened by unfair contract provisions.

Cindy Athey, President of Precision Wall Tech Inc., testified in support of Bills 24-251 and 24-252. Ms. Athey noted that she has seen broad-form indemnity clauses in subcontracts in the District and that these clauses are unfair because they make subcontractors liable for the negligence of others.

Fred Coddling, Executive Vice President of the Iron Workers Employers Association of Washington, D.C., testified in support of Bills 24-251 and 24-252. Mr. Coddling testified that a vast majority of jurisdictions prohibit broad-form indemnity clauses in construction contracts.

In addition to the testimony summarized above, the Committee received comments in writing from the *Independent Electrical Contractors (IEC) Chesapeake*. In their testimony, IEC Chesapeake notes that Bill 24-251 would ensure that subcontractors do not bear an unfair financial burden for damages they did not cause, and Bill 24-252 would ensure that subcontractors are able to maintain adequate cash flow.

VI. IMPACT ON EXISTING LAW

Bill 24-251 would prohibit an owner or contractor from requiring subcontractors to indemnify a contractor or owner for damages arising out of bodily injury or destruction of property that is caused by the contractor or owner's negligence. The provisions of the bill would not affect insurance contracts, workers' compensation, or other agreements issued by an insurer. The act

would apply to any contract executed before April 1, 2023. Bill 24-251 would also prohibit a contractor or subcontractor from deducting or withholding a subcontractor's or lower-tiered subcontractor's payment for the purpose of offsetting any other contractual obligation or work to be completed. This prohibition would apply to contracts executed after March 31, 2023.

VII. FISCAL IMPACT

The attached November 8, 2022 fiscal impact statement from the District's Chief Financial Officer states that funds are sufficient in the fiscal year 2023 through fiscal year 2026 budget and financial plan.

VIII. RACIAL EQUITY IMPACT ASSESSMENT

The attached November 15, 2022 Racial Equity Impact Assessment (REIA) from the Council Office of Racial Equity concludes that the bill will likely improve economic outcomes for Black and Hispanic subcontractors in the District of Columbia.

IX. SECTION-BY-SECTION ANALYSIS

<u>Section 2</u>	Definitions
<u>Section 3</u>	Prohibits provisions in a subcontractor's construction contract that purport to indemnify or hold harmless contractors or owners for certain damages caused by a contractor or owner's negligence.
<u>Section 4</u>	Amends D.C. Official Code § 27-134(a) to apply prompt payment provisions to all construction contracts between contractors and subcontractors and between higher-tier subcontractors and lower-tier subcontractors and adds a new subsection (d) to prohibit setoff clauses in construction contracts executed after March 31, 2023.
<u>Section 5</u>	Fiscal impact statement.
<u>Section 6</u>	Effective date.

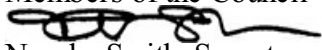
X. COMMITTEE ACTION

IX. ATTACHMENTS

1. Bill 24-251 as introduced.
2. Written Testimony.
3. Fiscal Impact Statement for Bill 24-251.
4. Legal Sufficiency Determination for Bill 24-251.
5. Racial Equity Impact Assessment for Bill 24-251.
6. Comparative Print for Bill 24-251.
7. Committee Print for Bill 24-251.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council
Date : Monday, May 24, 2021
Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, May 19, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Contractor Indemnity Act of 2021", B24-0251

INTRODUCED BY: Councilmembers Bonds, Pinto, Nadeau, and Cheh

The Chairman is referring this legislation to Committee of the Whole with comments from the Committee on Business and Economic Development.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Brianne K. Nadeau

Councilmember Brianne K. Nadeau

ANB

Councilmember Anita Bonds

Mary M. Cheh

Councilmember Mary M. Cheh

BE PINTO

Councilmember Brooke Pinto

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To prohibit a contractor from requiring a subcontractor to indemnify the contractor as to the negligence of the contractor.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Contractor Indemnity Act of 2021".

Sec. 2. Definitions.

(1) 'Construction contract' means an agreement of any kind of nature, express or implied, to provide labor or materials, or both, for demolition, building, renovation, alteration, or maintenance of buildings, roadways, appurtenances. and structures.

(2) "'Contractor'" means a person, entity, or business that has a construction contract with the owner of the property subject to the construction contract.

(3)(A) "Owner" means:

(i) An owner of the property subject to the construction contract; or

18 (ii) A tenant of a property subject to the construction contract; provided, that the tenant
19 enters into the construction contract with a contractor.

20 (B) The term "owner" does not include a District agency as that term is defined in section
21 2(3) of the District of Columbia Quick Payment Act of 1984, effective March 15, 1985
22 (D.C. Law 5-164; D.C. Official codes 2-221.01(3)).

23 (4) "Subcontractor" means:

24 (A) A person, entity, or business that has a construction contract with a contractor;

25 (B) A person, entity, or business that has a construction contract with another
26 subcontractor; or (C) A person, entity, or business that performs work on a construction site for a
27 contractor or another subcontractor or that fabricates materials off-site, from plans and
28 specifications for the project, for installation on the construction site.

29 Sec. 3. Certain indemnification in construction contracts declared void.

30 (a) A provision contained in a construction contract by which the subcontractor purports to
31 indemnify or hold harmless the contractor or the owner against liability for damages caused by or
32 resulting solely from the negligence of the contractor or the owner, or the contractor's or Owner's
33 agents or employees, is against public policy and is void and unenforceable when the liability for
34 damages causes:

35 (1) Bodily injury to persons; or

36 (2) Damage to property suffered in the course of performance of the construction contract.

37 (b) This section shall not affect the validity of any insurance contract, workers' compensation, or

38 other agreement issued by an insurer licensed to do business in the District; provided, that no
39 provision in a construction contract shall require the purchase of additional insured coverage, any
40 coverage endorsement, or provision within an insurance policy providing additional insured
41 coverage if the scope of that coverage would be prohibited under section (a) of this section. .

42 Sec. 4. Applicability.

43 This act shall apply to contracts that are entered into 30 days after the effective date of the act or
44 later.

45 Sec. 5. Fiscal impact statement.

46 The Council of the District of Columbia adopts the fiscal impact statement in the committee report
47 as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of
48 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code 168 301.47a).

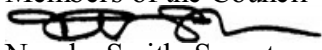
49 Sec. 6. Effective date.

50 This act shall take effect upon its approval by the Mayor (or in the event of veto by the Mayor,
51 action by the Council to override the veto), a 30-day period of congressional review as provided
52 in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973
53 (87 Stat. 813; D.C. Official Code } 1-206.02(c)(1)), and publication in the District of Columbia
54 Register.

55

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council
Date : Monday, May 24, 2021
Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, May 19, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Subcontractor Prompt Payment Amendment Act of 2021", B24-0252

INTRODUCED BY: Councilmembers Bonds, Nadeau, and Cheh

The Chairman is referring this legislation to Committee of the Whole with comments from the Committee on Business and Economic Development.

Attachment
cc: General Counsel
Budget Director
Legislative Services

19 “(2) Not deduct or withhold a subcontractor’s or lower-tiered subcontractor’s
20 payment for the purpose of offsetting any other contractual obligation or work to be completed.

21 “(e) Any contract or subcontract provision in a contract executed after the effective date
22 of the Subcontractor Prompt Payment Amendment Act of 2021, as introduced on DATE, 2021
23 (Bill 24-XXX), that allows a contracting party to withhold funds due under one contract or
24 subcontract for alleged claims or damages due on another contract or subcontract is void as
25 against public policy.”.

26 Sec. 3. Fiscal impact statement.

27 The Council adopts the fiscal impact statement in the committee report as the fiscal
28 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
29 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

30 Sec. 4. Effective date.

31 This act shall take effect following approval by the Mayor (or in the event of veto by the
32 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
33 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
34 24, 1973 (87 Stat. 813; D.C. Official Code§ 1-206.02(c)(1)), and publication in the District of
35 Columbia Register.

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
NOTICE OF PUBLIC HEARING**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

**CHAIRMAN PHIL MENDELSON
COMMITTEE OF THE WHOLE
ANNOUNCES A PUBLIC HEARING**

on

Bill 24-251, Contractor Indemnity Act of 2021

Bill 24-252, Subcontractor Prompt Payment Amendment Act of 2021

on

Wednesday, October 19, 2022 at 1:30 p.m.

**Chairman's Website (www.ChairmanMendelson.com/live)
DC Council Website (www.dccouncil.us)
Council Channel 13 (Cable Television Providers)
Office of Cable Television Website (entertainment.dc.gov)**

Council Chairman Phil Mendelson announces a public hearing before the Committee of the Whole on **Bill 24-251**, the “Contractor Indemnity Act of 2021,” and **Bill 24-252**, the “Subcontractor Prompt Payment Amendment Act of 2021.” The hearing will be held on **1:30 p.m. on Wednesday, October 19, 2022** via Zoom Video Conference Broadcast.

The purpose of Bill 24-251 is to prohibit a contractor from requiring a subcontractor to indemnify the contractor due to the contractor’s negligence. The purpose of Bill 24-252 is to prohibit a general contractor from withholding payments to subcontractors on completed work to offset payments on another job.

Those who wish to testify must register at <http://www.ChairmanMendelson.com/testify> by **5:00 p.m. on Monday, October 17, 2022. Testimony is limited to four minutes.** Witnesses who anticipate needing spoken language interpretation, or require sign language interpretation, are requested to inform the Committee office of the need as soon as possible but no later than five business days before the proceeding. We will make every effort to fulfill timely requests, although alternatives may be offered. Requests received in less than five business days may not be fulfilled. If you have additional questions, please contact Blaine Stum, Senior Policy Advisor, at (202) 724-8092.

The hearing will be conducted virtually on the Internet utilizing Zoom video conference technology. Testimony should be submitted in writing to cow@dccouncil.us in advance of the hearing. Written testimony will be posted publicly to <http://www.chairmanmendelson.com/testimony>. If you are unable to testify at the hearing, written statements are encouraged and will be made a part of the official record. Statements for the record should be submitted to cow@dccouncil.us or left by voicemail by calling (202) 430-6948 (up to 3 minutes which will be transcribed). The record will close at 5:00pm on Wednesday, November 2, 2022.

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
WITNESS LIST**

1350 Pennsylvania Avenue, NW, Washington, DC 20004

**CHAIRMAN PHIL MENDELSON
COMMITTEE OF THE WHOLE
ANNOUNCES A PUBLIC HEARING**

on

Bill 24-251, Contractor Indemnity Act of 2021

Bill 24-924, Subcontractor Prompt Payment Amendment Act of 2021

on

Wednesday, October 19, 2022 at 1:30 p.m.

Chairman's Website (www.ChairmanMendelson.com/live)

DC Council Website (www.dccouncil.us)

Council Channel 13 (Cable Television Providers)

Office of Cable Television Website (entertainment.dc.gov)

PUBLIC WITNESSES

- | | |
|-----------------|---|
| 1. Ike Casey | Executive Director, American Subcontractors
Association of Metropolitan Washington |
| 2. Cindy Athey | President, Precision Wall Tech, Inc. |
| 3. Fred Codding | Executive Vice President, Iron Workers Employers
Association of Washington, D.C. |



Alliance for
Construction Excellence : A Coalition of the Premier Construction Specialty Contractor Associations

ALLIANCE FOR CONSTRUCTION EXCELLENCE

TESTIMONY OF IKE CASEY, EXECUTIVE DIRECTOR, ASA OF METRO WASHINGTON

ON BEHALF OF THE ALLIANCE FOR CONSTRUCTION EXCELLENCE

BEFORE THE COMMITTEE OF THE WHOLE

on

B24-251 the Contractor Indemnity Act of 2021 And B24-252, Subcontractor Prompt Payment Amendment Act of 2021

Submitted on Oct. 19, 2022

The construction subcontracting community in the District and throughout the region applaud your efforts to protect construction subcontractors who employ the trades people who do the electrical, painting, roofing, HVAC, sheet metal workers, iron workers and all the other construction trades in the District. As ACE has stated on several occasions the success of all subcontractors, but particularly, the success of new, small construction subcontractors depends on fair subcontract agreements and timely cash flow.

B24-251, the Contractor Indemnity Act will prevent subcontract terms that would allow a prime contractor to contract away its responsibility for any liability for damages on the construction project. Such a clause would shift all the responsibility for claims to the subcontractor or its insurance company.

According to a 2013 study by the American Subcontractors Association, forty-one states have enacted protections you are offering under this bill. I also “googled” it and found a 2021 study by a national law firm that listed DC along with Alabama, North Dakota, and Vermont as the only jurisdictions without this protection for subcontractors.

Hopefully, you will see why this legislation is needed and will pass it.

B24-252, the bill on Subcontractor Prompt Payment is the law in Maryland and Virginia as well as a majority of other states. It prevents the unfair practice of using payments due to a subcontractor on one project to be “offset” to satisfy a dispute on another project. This type of clause is used by some prime contractors when they have projects in the District even though they eliminate the clause on projects in Maryland and Virginia.



Alliance for

Construction Excellence : A Coalition of the Premier Construction Specialty Contractor Associations

Construction subcontractors are the largest “bank” in the country, financing construction for 30, 60, 90 days, or more after their work is satisfactorily completed and properly invoiced. These firms employ thousands of people within this region and are dependent on being paid in a timely manner to cover payroll, suppliers, landlords, and other overhead. B24-251 and B24-252 will have a positive impact on construction financing.

Passing this legislation will ensure the DC Government and its citizens receive the quality of work they deserve. It will also help maintain a strong network of contractors and workers willing and able to perform the work on future projects.



Precision Wall Tech, Inc.
605 Raleigh Place, SE Washington DC 20032
Cindy Athey, Owner/President 202.330.0955
Email: cathey@precisionwall.com

**TESTIMONY of CINDY ATHEY, PRESIDENT OF PRECISION WALL TECH AND VICE PRESIDENT
OF
ASA OF METRO WASHINGTON**

BEFORE THE COMMITTEE OF THE WHOLE

on

B24-251 the Contractor Indemnity Act of 2021

And

B24-252, Subcontractor Prompt Payment Amendment Act of 2021

Submitted on Oct. 19, 2022

My name is Cindy Athey. I am speaking for the American Subcontractors Association of Metro Washington and as the Owner and President of Precision Wall Tech, Inc., a woman owned CBE small business in the District of Columbia's Ward 8. Precision is a painting, wallcovering and specialty coatings subcontractor established in 1984. Our company is a true example of how initiatives like the CBE program provide opportunities for well-meaning businesses to grow, thrive and prosper and we are very grateful for the success that we have experienced in the 12 years that we have participated in the CBE program. I am passionate about worker's rights and about helping to create a more prosperous, equitable, inclusive and sustainable environment in the District of Columbia. I know that we share this passion and I appreciate the opportunity to testify here today.

First of all, speaking to B24-251, the Contractor Indemnity Act, I see this from time to time in my subcontracts on projects in the District. All of us agree if we are negligent, that we have to suffer the consequences. But if we are not negligent or only partially negligent, why should we be left with all the liability. That is unfair and I am sure you will pass this legislation - as it is the law in most other states in the US.

Speaking to B24-252, the Subcontractor Prompt Payment Amendment Act, this is very much needed because of the abuse in which I have seen it used. Subcontractors have reported to me that these situations are devastating when they do occur. Imagine trying to finance a project without getting paid. Subcontractors are required to pay our workers weekly and our vendors expect to be paid monthly, which has an immediate impact on our cashflow. This is what we face all too frequently and it must be corrected if you really want small business to succeed.

I expect each project to stand on its own. If things are going well on project A for the General Contractor, but they are not going so well on Project B, please do not take the money you owe me on Project A to offset the problems we are having on Project B. As the owner, the District does not want the General Contractor affecting its job if things are not going well on a job for another owner.

Both of these bills are law in most of the country. As a CBE in the District, I need this protection.

Also, I would like to briefly discuss the problems subcontractors like me face in working in the District. I have committed Precision to being a first-class operation that fully supports the First Source, CBE, Apprenticeship and other programs that make DC a city where everyone has a chance for success. However, Subcontractors not only have to negotiate unfair clauses in their contracts, like the ones we are discussing today, but we also have to finance the construction projects for months on end. I am owed money on over 29% of my contracts at this time. This is money that I cannot use to bid additional work, invest in my workers, or improve my company. I am forced to wait too long for payments. This must be changed because I would not have survived if it was this bad when I started my business. Please do all you can to make sure construction subcontractors in the District are not forced to finance construction.



Precision Wall Tech, Inc.
605 Raleigh Place, SE Washington DC 20032
Cindy Athey, Owner/President 202.330.0955
Email: cathey@precisionwall.com

Once again, I want to thank you for your time and for allowing me to share some of my thoughts on these topics of vital interest to our community.

STATEMENT ON
BILL 24-251
CONTRACTOR INDEMNITY ACT OF 2021

BILL 24-252
SUBCONTRACTOR PROMPT PAYMENT AMENDMENT ACT OF 2021

Mr. Chairman and Members of the Committee.

I am Fred Coddling and represent the Iron Workers Employers Association as well as the following organizations included in ACE. Those organizations are Chapters of the National Electrical Contractors, Mechanical Contractors, Sheetmetal Contractors and the American Subcontractors Association. The Iron Workers Employers Association was incorporated in the District in 1959. Those organizations and their members have offices and projects throughout the District.

Members of the Iron Workers Employers Association (IWEA) itself supply and install reinforcing steel, structural steel, window wall, curtainwall and related products on projects throughout the District.

In regards to Bill 24-251, General Contractors in the 1990s began to insert onerous provisions in contracts including those which require subcontractors to indemnify the General for costs resulting from negligence of others on the project. If a subcontractor caused the damages, it should bear that loss. Not losses caused by the General or other subcontractors on the project. Bill 24-251 bars this unlimited liability and joins the vast majority of U. S. jurisdictions in doing so. We request your approval of Bill 24-251.

* * * * *

When members of the IWEA and ACE organizations finish a particular project, they should be paid for their labor and supplies provided on that particular project! General contractors at times offset payments for that project against other projects for alleged claims. Payment on completed District projects should not be withheld because of some dispute on a totally unrelated project. That dispute could even be on a project in North Carolina, West Virginia, Tennessee, Maryland, Virginia or elsewhere. Such offsets have been barred and banned in other jurisdictions. Examples are Texas, South Carolina, Oklahoma, Virginia and Maryland. Bill 24-252 remedies that unfairness. It helps our small businesses and suppliers.

I have submitted Talking Points on Bill 24-252 and we request your approval of Bill 24-252.

Thank you



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8751 Freestate Drive
Suite 250
Laurel, MD 20723

October 19, 2022

To: Council of the District of Columbia Committee of the Whole
From: Independent Electrical Contractors (IEC) Chesapeake
Re: Support for Bill 24-251 – The Contractor Indemnity Act of 2021

Independent Electrical Contractors (IEC) Chesapeake supports Bill 24-251 which is before the Council of the District of Columbia Committee of the Whole and asks for a favorable report.

Independent Electrical Contractors (IEC) Chesapeake is a regional trade association representing approximately 120 merit shop electrical contractors and more than 10,000 electrical workers in Maryland, Delaware, Virginia and the District of Columbia. In addition, IEC Chesapeake has an extensive electrical apprenticeship program with nearly 1000 electrical apprentices. IEC Chesapeake sponsors a pre-apprenticeship program with the District of Columbia Charter Schools and Department of Employment Services (DOES). In addition, IEC Chesapeake is working with community based organizations to train electrical workers. IEC Chesapeake promotes green economic energy by providing education and working with contractor members, industry partners, government policy makers and inspectors to increase the use of renewable energy.

IEC Chesapeake supports Bill 24-251 the "Contractor Indemnity Act of 2021" because it prohibits a prime contractor from contracting away its responsibility for any liability for damages on a construction project. Subcontractors or their insurance companies currently bear the unfair burden of being liable for damages on a construction project. IEC Chesapeake's members are electrical contractors and subcontractors. DC B24-251 would provide assurances that subcontractors would not bear all the financial responsibility for damages on a project if they are not at fault or only partially responsible for damages on a construction project.

Passing Bill 24-251 would be a fair way to ensure that subcontractors do not bear an unfair financial burden for damages on a construction project.

Thank you for your consideration to supporting DC B24-251 the "Contractor Indemnity Act of 2021."

If you have any questions, please contact Grant Shmelzer, Executive Director of IEC Chesapeake, at 1-301-621-9545, extension 114 or at gshmelzer@iec-chesapeake.com or Kevin O'Keeffe at 410-382-7844 or at kevin@kokeeffelaw.com.





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IEC Chesapeake supports Bill 24-252 and requests a favorable report. Subcontractors including IEC Chesapeake's electrical contractors face many challenges in conducting their business operations. One of the biggest challenges is receiving timely payments and maintaining adequate cash flow. Both are critical for subcontractors to survive and flourish in these challenging economic times. Bill 24-252 will assist subcontractors by eliminating a way in which payments are withheld from subcontractors. This legislation would prohibit general contractors from withholding payments to subcontractors on work performed and completed on one job to offset payment on another job. Passing this legislation is about fairness and will create an environment for subcontractors to stay in business and grow their businesses.

Thank you for your consideration to supporting Bill 24-252 the "Subcontractor Prompt Payment Amendment Act of 2021."

If you have any questions, please contact Grant Shmelzer, Executive Director of IEC Chesapeake, at 1-301-621-9545, extension 114 or at gshmelzer@iec-chesapeake.com or Kevin O'Keeffe at 410-382-7844 or at kevin@kokeeffelaw.com.




Government of the District of Columbia
Office of the Chief Financial Officer



Glen Lee
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Glen Lee
Chief Financial Officer 

DATE: November 8, 2022

SUBJECT: Fiscal Impact Statement – Contractor Indemnity and Subcontractor Prompt Payment Amendment Act of 2022

REFERENCE: Bill 24-251, Committee Print as provided to the Office of Revenue Analysis on October 31, 2022

Conclusion

Funds are sufficient in the fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill.

Background

The bill prohibits a contractor from requiring a subcontractor to indemnify (or hold harmless) the contractor against liability for damage arising from the negligence of the contractor or owner.

The bill also prohibits general contractors from withholding payment to subcontractors on work performed and completed to offset payments for a different job. The contractor must pay all undisputed amounts owed to subcontractors.

The prohibitions will apply to contracts executed after March 31, 2023.

Financial Plan Impact

Funds are sufficient in the fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill. The requirements will fall on private contractors and subcontractors and have no cost to the District.



BILL 24-0251

RACIAL EQUITY IMPACT ASSESSMENT CONTRACTOR INDEMNITY AND SUBCONTRACTOR PROMPT PAYMENT AMENDMENT ACT OF 2022

TO: The Honorable Phil Mendelson, Chairman, Council of the District of Columbia
FROM: Namita Mody, Director, Council Office of Racial Equity
DATE: November 15, 2022

COMMITTEE

Committee of the Whole

BILL SUMMARY

Bill 24-0251 protects subcontractors from certain unjust contract provisions and expands protections for prompt payments to all subcontractors.

CONCLUSION

Bill 24-0251 will improve economic outcomes for Black and Hispanic subcontractors in the District of Columbia.

FURTHER CONSIDERATIONS

It is unclear how contractors and subcontractors will be informed and educated about the changes proposed by the bill.

Content Warning: The document you are about to read is a Racial Equity Impact Assessment, a careful and organized examination of how Bill 24-0251 will affect different racial and ethnic groups. We hope that this assessment sparks a conversation that is brave, empathetic, thoughtful, and open-minded.

The following content touches on economic hardship and unjust contracts. Some or all of these issues may trigger a strong emotional response. We encourage you to use this knowledge in the way that is most helpful to you.

BACKGROUND

The following content describes Bill 24-0251 in plain language for the purposes of discussion. This explanation is not a substitute for the bill, or if passed, the law.

FIGURE A RELEVANT TERMS FOR BILL 24-0251

While we do our best to explain (or avoid) government jargon within our Racial Equity Impact Assessments (REIAs), we believe an overview of common terms related to the bill is helpful to understand what the bill and REIA discuss.

TERM	DEFINITION
CONTRACTOR	A person that enters into a construction contract with the owner of a property. (See the Committee Print for Bill 24-0251)
SUBCONTRACTOR	A person, entity, or business that 1) has a contract with a contractor, 2) has a contract with another subcontractor, or 3) performs work on a construction site or builds materials for a project off-site for a contractor or subcontractor (See the Committee Print for Bill 24-0251)
INDEMNITY CLAUSE	<p>A provision of a contract that transfers responsibility for harm or damage from one party to another (source)</p> <p>For the purpose of Bill 24-0251, an indemnity clause would require a subcontractor to take financial responsibility for any loss or damage caused by the negligence of the contractor or owner during the completion of a job. Loss or damage could include bodily injury or property damage.</p>
SETOFF CLAUSE	<p>A provision of a contract that allows the payment for one job to be withheld or deducted to cover the cost or debt of another job (source)</p> <p>For the purpose of Bill 24-0251, consider the following example provided in the Committee Report for the bill: imagine a contractor hires a subcontractor to complete two jobs, resulting in two separate contracts. One job is for electrical work and the other is for plumbing. If the subcontractor damages property while completing the electrical job, the bill prohibits the contractor from refusing to pay the subcontractor for the plumbing job to offset the cost of the damage caused during the electrical job.</p>

Bill 24-0251 aims to protect subcontractors from certain unjust contract provisions and expands protections for prompt payments to all subcontractors. To do so, the bill:

- 1) prohibits certain indemnity clauses in construction contracts,
- 2) prohibits contractors and subcontractors from deducting or withholding payments to subcontractors for one job to offset the costs of another job and prohibits setoff clauses in construction contracts, and
- 3) requires all subcontractors to be compensated for their work within seven days of the contractor receiving payment from an owner for the completion of a job.

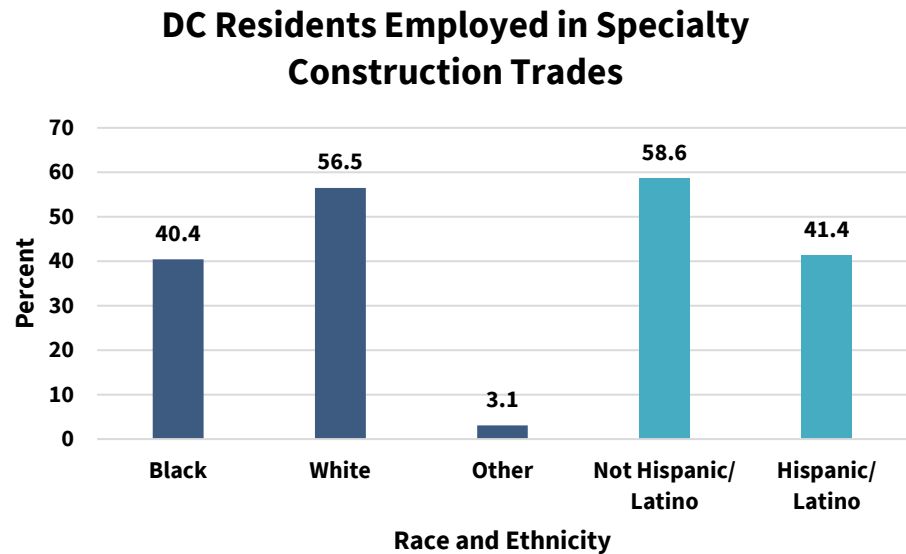
If passed, the bill will go into effect on April 1, 2023. If a contract is drafted after the bill's effective date and it includes one of the prohibited provisions outlined in the bill, the contract would be considered void and the subcontractor could take legal action. Additionally, subcontractors will be able to sue contractors (or other subcontractors) for late payments. If successful, they will be awarded costs (which could include any interest accrued due to the late payment) and reasonable attorney's fees.

Subcontractors in the District

Subcontractors provide a vital service. As pointed out by Ike Casey, Executive Director of American Subcontractors Association of Metro Washington, contractors often hire subcontractors to complete specialized “electrical, painting, roofing, HVAC [work],” and work that requires “sheet metal workers, ironworkers, and other construction trades in the District.”¹ According to a 2015 study by the National Association of Homebuilders (NAHB), “70 percent of builders typically use somewhere between 11 and 30 subcontractors to build a single-family home,” which averages out to be about 22 subcontractors to build a home.²

Of the District residents that are employed in specialty construction trades, 40 percent are Black and 41 percent are Hispanic or Latino (Figure B).³

FIGURE B A significant amount of District residents employed in specialty construction trades are Black and Hispanic/Latino. (Source: Footnote 3)



Unjust Contracts

Contracts between contractors and subcontractors often include indemnity clauses and setoff clauses, both of which are considered unjust. These provisions place undue financial burden on subcontractors. Indemnity clauses make subcontractors responsible for damages and injuries, even in situations caused by the contractor’s or owner’s negligence.

Setoff clauses and delaying payments to subcontractors also cause difficulties for subcontractors. As expressed by Cindy Athey, President of Precision Wall Tech and Vice President of ASA of Metro Washington, “subcontractors are required to pay [their] workers weekly and [their] vendors expect to be paid monthly, which has an immediate impact on [their] cashflow.”⁴ Withholding pay from subcontractors, whether due to a setoff clause or delayed payment, has devastating effects and can impact the ability of small businesses to succeed.

Many jurisdictions have laws prohibiting indemnity and setoff clauses in construction contracts. There are 22 states that prohibit indemnity clauses that make subcontractors responsible for damages or injuries

¹ Ike Casey, Public Hearing Record for Bill 24-0251.

² Paul Emrath, “[It Takes 22 Subcontractors to Build the Average Home](#),” Eye On Housing (National Association of Home Builders), December 28, 2015.

³ Committee Report for Bill 24-0251 via Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles and J. Robert Warren. Integrated Public Use Microdata Series, [Current Population Survey: Version 7.0](#) [dataset]. Minneapolis, MN: IPUMS, 2019.

⁴ Cindy Athey, Public Hearing Record for Bill 24-0251.

caused by the actions of contractors or owners—the type of indemnity clause that the bill proposes to prohibit.⁵ While some states outlaw setoff clauses, others allow them.⁶

RACIAL EQUITY IMPACTS

Bill 24-0251 will improve economic outcomes for Black and Hispanic subcontractors in the District of Columbia. Around 40 percent of subcontractors in the District are Black and around 41 percent are Hispanic or Latino. The bill prohibits contractors from including indemnity and setoff clauses in contracts with subcontractors and extends protections to all subcontractors for delayed payments. These actions will alleviate some of the financial burden and risk placed on subcontractors and their small businesses.

Indemnity clauses can cost subcontractors hundreds of thousands of dollars for damages and injuries that were caused by the negligence of the contractor, adding to the already high financial costs subcontractors face. (Subcontractors are responsible for the costs associated with the work they are contracted to complete. The NAHB reports that 77 percent of construction costs are contracted out.⁷)

In addition, setoff clauses and delayed payment of subcontractors add unnecessary financial challenges to subcontractors. In a statement of support for the bill, Independent Electrical Contractors (IEC) Chesapeake, shared “one of the biggest challenges [to subcontractors] is receiving timely payments and maintaining adequate cash flow. Both are critical for subcontractors to survive and flourish in these challenging economic times.”⁸

FURTHER CONSIDERATIONS

It is unclear how contractors and subcontractors will be informed and educated about the changes proposed by the bill. Without knowledge of their right to prompt payments and newly prohibited contract provisions, subcontractors in the District will remain vulnerable to unjust practices and related economic challenges and contractors may unintentionally break the law.

ASSESSMENT LIMITATIONS

Alongside the analysis provided above, the Council Office of Racial Equity encourages readers to keep the following limitations in mind:

We generally do not provide policy solutions or alternatives to address our racial equity concerns.

While Council Period 24 Rules allow our office to make policy recommendations, we focus on our role as policy analysts—we are not elected policymakers or committee staff. In addition, and more importantly, racially equitable policymaking takes time. Because we only have ten days for our review, we would need more time to ensure comprehensive research and thorough community engagement inform our recommendations.

Assessing legislation’s potential racial equity impacts is a rigorous, analytical, and organized undertaking—but it is also an exercise with constraints. It is impossible for anyone to predict the future, implementation does not always match the intent of the law, critical data may be unavailable, and today’s

⁵ Matthiesen, Wickert, and Lehrer, S.C. Attorneys at Law, “[Anti-Indemnity Statutes in All 50 States](#),” December 22, 2021.

⁶ For examples of how states allow or prohibit setoff clauses and utilize prompt payment provisions, see Kenneth Rubinstein and Nicholas Dube, “[What if We Just Call it Even?: The Right to Offset Debts from One Project Against Monies Owed on Another](#),” American Bar Association, September 20, 2021.

⁷ Paul Emrath, “[It Takes 22 Subcontractors to Build the Average Home](#),” December 28, 2015.

⁸ Independent Electrical Contractors (IEC) Chesapeake, Public Hearing Record for Bill 24-0251.

circumstances may change tomorrow. Our assessment is our most educated and critical hypothesis of the bill's racial equity impacts.

Regardless of the Council Office of Racial Equity's final assessment, the legislation can still pass. This assessment intends to inform the public, Councilmembers, and Council staff about the legislation through a racial equity lens. However, a REIA is not binding.

This assessment aims to be accurate and useful, but omissions may exist. Given the density of racial equity issues, it is unlikely that we will raise *all* relevant racial equity issues present in a bill. In addition, an omission from our assessment should not: 1) be interpreted as a provision having no racial equity impact or 2) invalidate another party's racial equity concern.

**COMMITTEE OF THE WHOLE
COMPARATIVE PRINT
BILL 24-251**

D.C. OFFICIAL CODE § 27–134. PROMPT PAYMENTS TO SUBCONTRACTORS.

(a) If a contract is between a contractor and subcontractor, or between subcontractors a first-tier subcontractor and a second-tier subcontractor, the contractor or subcontractor shall pay undisputed amounts owed to its subcontractor within 7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials.

(b) Notwithstanding subsection (a) of this section, conditions of payment to the subcontractor on receipt by the contractor of payment from the owner may not abrogate or waive the right of the subcontractor to:

- (1) Claim a mechanics' lien; or
- (2) Sue on a contractor's bond.

(c) Any provision of a contract made in violation of subsection (b) of this section is void as against the public policy of the District.

(d)(1) A contractor or subcontractor shall not deduct or withhold a subcontractor's or lower-tiered subcontractor's payment for the purpose of offsetting any other contractual obligation or work to be completed.

(2) Any contract or subcontract provision in a contract executed after March 31, 2023, that allows a contracting party to withhold funds due under one contract or subcontract for alleged claims or damages due on another contract or subcontract is void as against public policy.

* * *

D.C. OFFICIAL CODE § 27–135. FAILURE TO MAKE PROMPT PAYMENTS TO A SUBCONTRACTOR.

If a contractor fails to make prompt payments to a subcontractor as required by § 27-134, ~~or a first-tier subcontractor fails to make prompt payments to a second-tier subcontractor,~~ **or a subcontractor fails to make prompt payments to another subcontractor,** the contractor or subcontractor shall:

(1) Pay interest of 1.5% per month or any part of a month to the subcontractor on any undisputed amount not paid on time to the subcontractor; and

(2) If the subcontractor prevails in a civil action to collect interest penalties from a contractor or **another subcontractor first-tier subcontractor**, the subcontractor shall be awarded its costs and disbursements, including reasonable attorney's fees, incurred in bringing the action.

5
6
7
8 **A BILL**
9

10 _____
11
12 **IN THE COUNCIL OF THE DISTRICT OF COLUMBIA**
13
14 _____
15

16
17 To prohibit a contractor from requiring a subcontractor to indemnify the contractor or owner as
18 to the negligence of the contractor or owner; and to amend the Private Contractor and
19 Subcontractor Prompt Payment Act of 2013 to prohibit a general contractor from
20 withholding payment to subcontractors on work performed and completed on one job to
21 offset payments for another job.
22

23 **BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this**
24 **act may be cited as the “Contractor Indemnity and Subcontractor Prompt Payment Amendment**
25 **Act of 2022”.**

26 **Sec. 2. Definitions.**

27 For purposes of this act, the term:

28 (1) “Construction contract” means an agreement of any kind of nature, express or
29 implied, to provide labor or materials, or both, for demolition, building, renovation, alteration, or
30 maintenance of buildings, roadways, appurtenances. and structures;

31 (2) “Contractor” means a person that enters into a construction contract with the
32 owner of a property that is subject to the construction contract;

33 (3) "Owner" means a person with a legal ownership interest in the property
34 subject to seizure or forfeiture. The term owner shall not include a District agency as defined in §
35 2-221.01(3); and

36 (4) "Subcontractor" means:

37 (A) A person, entity, or business that has a contract with a contractor;

38 (B) A person, entity, or business that has a contract with a subcontractor;

39 or

40 (C) A person, entity, or business that performs work on a construction site,
41 or fabricates or builds materials off-site, from plans and specifications for the project, for a
42 contractor or another subcontractor.

43 Sec. 3. Certain indemnification in construction contracts declared void.

44 (a) Any provision contained in a construction contract by which a subcontractor purports
45 to indemnify or hold harmless the contractor or owner against liability for damage arising out of
46 bodily injury to persons or damage to property suffered in the course of performance of the
47 contract, caused by or resulting solely from the negligence of the contractor or the owner, or the
48 contractor's or owner's agents or employees, is against public policy and is void and
49 unenforceable.

50 (b) Subsection (a) shall not affect the validity of any insurance contract, workers'
51 compensation, or other agreement issued by an insurer licensed to do business in the District;
52 provided, that no provision in a construction contract shall require the purchase of additional
53 insured coverage, coverage endorsement, or provision within an insurance policy, providing
54 additional insured coverage if the scope of said coverage would violation subsection (a).

55 (c) The provisions of this section shall not apply to any provision of any contract entered
56 into prior to April 1, 2023.

57 Sec. 4. The Private Contractor and Subcontractor Prompt Payment Act of 2013, effective
58 November 5, 2013 (D.C. Law 20-34; D.C. Official Code § 27-131 *et seq.*), is amended as
59 follows:

60 (a) Section 5 (D.C. Official Code § 27-134) is amended as follows:

61 (1) Subsection (a) is amended to read as follows:

62 “(a) If a contract is between a contractor and subcontractor, or between subcontractors,
63 the contractor or subcontractor shall pay undisputed amounts owed to its subcontractor within 7
64 days after receipt by the contractor or subcontractor of each payment received for its
65 subcontractors’ work or materials.”.

66 (2) New subsection (d) is added to read as follows:

67 “(d)(1) A contractor or subcontractor shall not deduct or withhold a subcontractor’s or
68 lower-tiered subcontractor’s payment for the purpose of offsetting any other contractual
69 obligation or work to be completed.

70 “(2) Any contract or subcontract provision in a contract executed after March 31,
71 2023, that allows a contracting party to withhold funds due under one contract or subcontract for
72 alleged claims or damages due on another contract or subcontract is void as against public
73 policy.”.

74 (b) Section 6 (D.C. Official Code § 27-135) is amended to read as follows:

75 “If a contractor fails to make prompt payments to a subcontractor as required by § 27-
76 134, or a subcontractor fails to make prompt payments to another subcontractor, the contractor or
77 subcontractor shall:

78 “(1) Pay interest of 1.5% per month or any part of a month to the subcontractor on
79 any undisputed amount not paid on time to the subcontractor; and

80 “(2) If the subcontractor prevails in a civil action to collect interest penalties from
81 a contractor or another subcontractor, the subcontractor shall be awarded its costs and
82 disbursements, including reasonable attorney’s fees, incurred in bringing the action.”.

83 Sec. 5. Fiscal impact statement.

84 The Council adopts the fiscal impact statement in the committee report as the fiscal
85 impact statement required by section 4a of the General Legislative Procedures Act of 1975,
86 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

87 Sec. 6. Effective date.

88 This act shall take effect after approval by the Mayor (or in the event of veto by the
89 Mayor, action by the Council to override the veto), a 30-day period of congressional review as
90 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
91 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of
92 Columbia Register.