

First Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 13-0361.01 Jery Payne x2157

HOUSE BILL 13-1090

HOUSE SPONSORSHIP

Fischer,

SENATE SPONSORSHIP

Tochtrop,

House Committees

Business, Labor, Economic, & Workforce Development

Senate Committees

A BILL FOR AN ACT

101 CONCERNING PAYMENT OF AMOUNTS DUE UNDER A CONSTRUCTION
102 AGREEMENT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billssummaries>.)

The bill sets the following requirements for both private and public construction contracts:

- ! The owner and contractor must make regular progress payments approximately every 30 days to contractors and subcontractors for work actually performed.

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

- ! To receive the progress payments, the contractor and subcontractor must submit a progress payment invoice plus any required documents.
- ! A contractor must pass on the progress payment to the subcontractor within 5 days or by the end of the billing cycle.
- ! Interest accrues on unpaid progress payments.
- ! A contract may extend a billing cycle to 60 days, but the contract must duly warn of this.
- ! An owner or contractor may only retain 5% of each progress payment to ensure work is done properly.
- ! If a subcontractor's work is done before the whole project is done, the subcontractor may apply to be paid the retained 5%. The owner and contractor must pay the retainage if the work is done correctly and the subcontractor gives waivers and the proper documents.
- ! A person who retains from a payment must give the contractor or subcontractor a chance to cure the default.
- ! The owner and contractor must pay for changes made to the contract. If they cannot agree on the price, the person doing the work may bill monthly at cost plus 15% or terminate performance.
- ! A contractor or subcontractor is authorized to suspend performance after 15 days notice if the owner or contractor fails to make progress payments.
- ! After suspending performance, the contractor or subcontractor is obliged to resume work after being paid for the work and reasonable costs and interest.
- ! A contractor or subcontractor may not suspend performance if the failure to make a payment is due to a failure of the contractor or subcontractor or a dispute about the construction.

The bill voids any provision in a construction contract that does not comply with these requirements.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **add** article 10.5 to
 3 title 8 as follows:

4 **ARTICLE 10.5**

5 **Construction Prompt Payment Reform Act**

1 **8-10.5-101. Short title.** THIS ARTICLE SHALL BE KNOWN AND MAY
2 BE CITED AS THE "CONSTRUCTION PROMPT PAYMENT REFORM ACT OF
3 2012".

4 **8-10.5-102. Legislative declaration.** (1) THE GENERAL
5 ASSEMBLY HEREBY FINDS AND DECLARES THAT THE TIMELY PAYMENT FOR
6 PROPERLY COMPLETED WORK UNDER PRIVATE CONSTRUCTION
7 AGREEMENTS IN COLORADO IS A MATTER OF STATEWIDE CONCERN.

8 (2) THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT
9 THE CONSTRUCTION INDUSTRY IS A SIGNIFICANT PART OF THE STATE'S
10 ECONOMY, THAT THERE IS A SUBSTANTIAL STATEWIDE INTEREST IN
11 FOSTERING THE GROWTH AND STABILITY OF THE CONSTRUCTION INDUSTRY
12 AND IN ENSURING THAT IT REMAINS ECONOMICALLY VIABLE, AND THAT
13 STANDARD PAYMENT AND RETENTION PROVISIONS ASSIST PARTIES TO
14 CONSTRUCTION AGREEMENTS IN MANAGING THEIR OPERATIONS.

15 **8-10.5-103. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
16 CONTEXT OTHERWISE REQUIRES:

17 (1) "CHANGE DIRECTIVE" MEANS ADDITIONAL WORK REQUESTED
18 BY AN OWNER FROM A CONTRACTOR, OR BY A CONTRACTOR FROM A
19 SUBCONTRACTOR, UNDER THE TERMS OF A CONSTRUCTION AGREEMENT
20 THAT REQUIRES THE WORK TO BE PERFORMED WITHOUT PRIOR AGREEMENT
21 TO THE COST OF THE ADDITIONAL WORK.

22 (2) "CONSTRUCTION AGREEMENT" MEANS A CONTRACT,
23 SUBCONTRACT, OR AGREEMENT FOR MATERIALS OR LABOR FOR THE
24 CONSTRUCTION, ALTERATION, RENOVATION, OR REPAIR OF AN OWNER'S
25 BUILDING, BUILDING SITE, STRUCTURE, HIGHWAY, STREET, ROADWAY,
26 BRIDGE, VIADUCT, WATER OR SEWER SYSTEM, GAS OR OTHER
27 DISTRIBUTION SYSTEM, OR OTHER WORK DEALING WITH CONSTRUCTION.

1 "CONSTRUCTION AGREEMENT" INCLUDES ANY MOVING, DEMOLITION, OR
2 EXCAVATION CONNECTED WITH THE CONSTRUCTION. "CONSTRUCTION
3 AGREEMENT" DOES NOT INCLUDE:

4 (a) A CONTRACT, SUBCONTRACT, OR AGREEMENT THAT CONCERNS
5 PROPERTY OWNED OR OPERATED BY A FEDERALLY REGULATED RAILROAD;

6 (b) A REAL PROPERTY LEASE OR RENTAL AGREEMENT BETWEEN A
7 LANDLORD AND A TENANT, EVEN IF A PROVISION OF THE LEASE OR RENTAL
8 AGREEMENT CONCERNS CONSTRUCTION, ALTERATION, IMPROVEMENT, OR
9 MAINTENANCE OF REAL PROPERTY;

10 (c) A CONTRACT FOR THE CONSTRUCTION, IMPROVEMENT,
11 ALTERATION, MOVING, OR DEMOLITION OF A SINGLE-FAMILY DWELLING OR
12 MULTI-FAMILY DWELLING WITH NO MORE THAN TWO UNITS; OR

13 (d) A CONTRACT BETWEEN AN OWNER AND A CONTRACTOR OF AN
14 AMOUNT LESS THAN ONE HUNDRED THOUSAND DOLLARS.

15 (3) "CONSTRUCTION PROJECT" MEANS A PROJECT THAT IS THE
16 SUBJECT OF A CONSTRUCTION AGREEMENT.

17 (4) "CONTRACTOR" MEANS A PERSON THAT HAS A DIRECT
18 CONTRACT WITH AN OWNER TO PERFORM WORK UNDER A CONSTRUCTION
19 AGREEMENT.

20 (5) "DAY" MEANS A CALENDAR DAY.

21 (6) "MATERIAL SUPPLIER" MEANS A PERSON THAT HAS A
22 CONTRACT WITH AN OWNER, CONTRACTOR, OR SUBCONTRACTOR FOR THE
23 PROVISION OF CONSTRUCTION MATERIALS OR EQUIPMENT ACTUALLY USED
24 TO COMPLETE A CONSTRUCTION AGREEMENT.

25 (7) "OWNER" MEANS A PERSON THAT HOLDS AN INTEREST IN REAL
26 PROPERTY AND CAUSES A BUILDING, STRUCTURE, OR IMPROVEMENT ON
27 REAL PROPERTY TO BE CONSTRUCTED, ALTERED, MOVED, OR DEMOLISHED

1 OR THAT CAUSES LAND TO BE EXCAVATED OR OTHERWISE DEVELOPED OR
2 IMPROVED, INCLUDING A LESSEE OR A VENDEE UNDER A CONTRACT TO
3 PURCHASE "OWNER" DOES NOT INCLUDE A PUBLIC ENTITY AS DEFINED IN
4 SECTION 24-91-102 (10), C.R.S.

5 (8) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
6 ACTUALLY PERFORMED UNDER A CONSTRUCTION AGREEMENT BEFORE THE
7 ENTIRE CONTRACTUAL OBLIGATION HAS BEEN MET.

8 (9) "PROGRESS PAYMENT INVOICE" MEANS A BILL SUBMITTED BY
9 A CONTRACTOR OR SUBCONTRACTOR FOR WORK COMPLETED IN THE MOST
10 RECENT BILLING CYCLE OR FOR WORK PERFORMED DURING THE PERIOD
11 COVERED BY THE BILL OR A PAYMENT ESTIMATE. "PROGRESS PAYMENT
12 INVOICE" INCLUDES REQUESTS FOR PAYMENT FOR WORK PERFORMED AS A
13 RESULT OF A CHANGE DIRECTIVE.

14 (10) "RETAINAGE" MEANS A PERCENTAGE WITHHELD FROM ANY
15 PROGRESS PAYMENT TO A CONTRACTOR OR SUBCONTRACTOR UNDER A
16 CONSTRUCTION AGREEMENT.

17 (11) "SUBCONTRACTOR" MEANS A PERSON THAT HAS A DIRECT
18 CONTRACT WITH A CONTRACTOR OR ANOTHER SUBCONTRACTOR TO
19 PERFORM A PORTION OF THE WORK UNDER A CONSTRUCTION AGREEMENT.

20 **8-10.5-104. Billing cycles and progress payments.** (1) IN A
21 CONSTRUCTION AGREEMENT TAKING MORE THAN ONE MONTH TO
22 COMPLETE, THE OWNER AND CONTRACTOR SHALL INCLUDE A
23 REQUIREMENT THAT REGULAR PROGRESS PAYMENTS BE MADE TO THE
24 CONTRACTOR AND EACH SUBCONTRACTOR BASED UPON A BILLING CYCLE
25 SET FORTH IN THE AGREEMENT. THIS REQUIREMENT DOES NOT APPLY TO
26 A SINGLE-PAYMENT CONTRACT, UNIT-PRICE CONTRACT, OR CONTRACT
27 PAYABLE IN INSTALLMENTS OR ON COMPLETION.

1 (2) EXCEPT AS PROVIDED IN THIS ARTICLE, A SUBCONTRACTOR
2 SHALL SUBMIT TO THE CONTRACTOR, ON A MONTHLY BASIS, A PROGRESS
3 PAYMENT INVOICE FOR WORK ACTUALLY PERFORMED AND MATERIAL
4 ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING CYCLE. UPON
5 RECEIPT OF A PROGRESS PAYMENT INVOICE AND ALL CONTRACTUALLY
6 REQUIRED DOCUMENTATION FROM THE SUBCONTRACTOR, THE
7 CONTRACTOR SHALL APPROVE OR DISAPPROVE ALL OR A PORTION OF THE
8 PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS. IN ORDER TO DENY ALL
9 OR A PORTION OF THE PROGRESS PAYMENT, THE CONTRACTOR MUST GIVE
10 THE REASONS FOR ANY DISAPPROVAL TO THE SUBCONTRACTOR IN
11 WRITING. A CONTRACTOR SHALL NOT UNREASONABLY WITHHOLD
12 APPROVAL OF AN INVOICE.

13 (3) A CONTRACTOR SHALL SUBMIT TO THE OWNER OR TO THE
14 OWNER'S REPRESENTATIVE A PROGRESS PAYMENT INVOICE WITH ALL
15 DOCUMENTATION REQUIRED BY THE CONSTRUCTION AGREEMENT AT THE
16 END OF EACH BILLING CYCLE FOR WORK ACTUALLY PERFORMED AND
17 MATERIAL ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING CYCLE.
18 UPON RECEIPT OF A PROGRESS PAYMENT INVOICE AND ALL
19 CONTRACTUALLY REQUIRED DOCUMENTATION FROM THE CONTRACTOR,
20 THE OWNER SHALL APPROVE OR DISAPPROVE ALL OR A PORTION OF THE
21 PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS. IN ORDER TO DENY ALL
22 OR A PORTION OF THE PROGRESS PAYMENT, THE OWNER MUST GIVE THE
23 REASONS FOR ANY DISAPPROVAL TO THE CONTRACTOR IN WRITING. AN
24 OWNER SHALL NOT UNREASONABLY WITHHOLD APPROVAL OF AN INVOICE.

25 (4) FAILING TO DISAPPROVE OR APPROVING ALL OR PART OF A
26 PROGRESS PAYMENT INVOICE BY A CONTRACTOR OR OWNER IS NOT:

27 (a) A WAIVER OF ANY CLAIM FOR WORK NOT IN CONFORMANCE

1 WITH THE CONSTRUCTION AGREEMENT; OR

2 (b) A WAIVER OF CLAIMS FOR BREACH OF THE CONSTRUCTION
3 AGREEMENT.

4 (5) EXCEPT AS AUTHORIZED BY THIS SECTION OR SECTION
5 8-10.5-105, AN OWNER SHALL PAY A PROGRESS PAYMENT INVOICE TO THE
6 CONTRACTOR NO LATER THAN:

7 (a) TWENTY-FIVE DAYS AFTER RECEIPT OF THE PROGRESS
8 PAYMENT INVOICE BY THE OWNER OR THE OWNER'S REPRESENTATIVE IF
9 THE CONTRACTOR USED A SUBCONTRACTOR;

10 (b) THIRTY DAYS AFTER RECEIPT OF THE PROGRESS PAYMENT
11 INVOICE BY THE OWNER OR THE OWNER'S REPRESENTATIVE IF THE
12 CONTRACTOR DID NOT USE A SUBCONTRACTOR.

13 (6) IF A CONTRACTOR RECEIVES A PROGRESS PAYMENT FROM AN
14 OWNER, THE CONTRACTOR SHALL PAY EACH SUBCONTRACTOR ANY
15 AMOUNTS ACTUALLY RECEIVED FOR THE SUBCONTRACTOR'S WORK. THE
16 CONTRACTOR SHALL PAY THE SUBCONTRACTORS WITHIN THE THIRTY-DAY
17 BILLING CYCLE OR WITHIN FIVE DAYS AFTER RECEIPT OF THE PROGRESS
18 PAYMENT FROM THE OWNER FOR THE WORK, WHICHEVER OCCURS FIRST.

19 (7) IF AN OWNER DOES NOT PAY THE APPROVED PORTION OF THE
20 PROGRESS PAYMENT TO A CONTRACTOR WHEN DUE, THE OWNER SHALL
21 PAY THE CONTRACTOR INTEREST ON THE UNPAID AMOUNT FROM THE DATE
22 THE PAYMENT WAS DUE AT THE GREATER OF THE RATE OF TWELVE
23 PERCENT PER ANNUM OR THE RATE SPECIFIED IN THE CONSTRUCTION
24 AGREEMENT. THE CONTRACTOR SHALL PAY THE INTEREST RECEIVED TO
25 EACH SUBCONTRACTOR OR MATERIAL SUPPLIER FOR THE PORTION OF THE
26 PROGRESS PAYMENT PAID FOR THE SUBCONTRACTOR'S WORK.

27 (8) IF A CONTRACTOR WHO RECEIVED A PROGRESS PAYMENT FROM

1 AN OWNER FAILS TO MAKE PAYMENTS REQUIRED BY THIS ARTICLE TO A
2 SUBCONTRACTOR, THE CONTRACTOR SHALL PAY THE SUBCONTRACTOR
3 INTEREST ON THE UNPAID AMOUNT FROM THE DATE THE PAYMENT WAS
4 DUE AT THE GREATER OF THE RATE OF TWELVE PERCENT PER ANNUM OR
5 THE RATE SPECIFIED IN THE CONSTRUCTION AGREEMENT.

6 (9) NOTHING IN THIS ARTICLE PROHIBITS AN OWNER, CONTRACTOR,
7 SUBCONTRACTOR, OR MATERIAL SUPPLIER FROM EXCLUDING, DEDUCTING,
8 OR OFFSETTING FROM PAYMENT AMOUNTS PERMITTED BY THE
9 CONSTRUCTION AGREEMENT OR BY LAW.

10 (10) THE PERSON EXCLUDING, DEDUCTING, OR OFFSETTING
11 AMOUNTS FROM THE PAYMENT SHALL PROVIDE THE PARTY REQUESTING
12 PAYMENT WITH WRITTEN NOTICE OF THE REASONS FOR THE EXCLUSION,
13 DEDUCTION, OR OFFSET AND SHALL AFFORD THE PARTY A REASONABLE
14 TIME OR THE TIME PERMITTED BY THE CONSTRUCTION AGREEMENT TO
15 CURE THE DEFAULT.

16 **8-10.5-105. Extended progress payment time.** (1) AN OWNER
17 MAY MAKE PROGRESS PAYMENTS TO A CONTRACTOR MORE THAN
18 TWENTY-FIVE DAYS, BUT NO MORE THAN SIXTY DAYS, AFTER RECEIPT OF
19 A PROGRESS PAYMENT INVOICE IF:

20 (a) THE CONSTRUCTION AGREEMENT ON ITS FACE SPECIFICALLY
21 PROVIDES, IN AT LEAST FOURTEEN-POINT, BOLD-FACED TYPE, FOR A LATER
22 PAYMENT DATE DEFINED BY A SPECIFIED NUMBER OF DAYS AFTER RECEIPT
23 OF A PROGRESS PAYMENT INVOICE; AND

24 (b) THE FOLLOWING NOTICE, OR A SUBSTANTIALLY SIMILAR
25 NOTICE, SPECIFYING THE NUMBER OF DAYS FOR PAYMENT APPEARS IN AT
26 LEAST FOURTEEN-POINT, BOLD-FACED TYPE, ON EACH PAGE OF EACH SET
27 OF PLANS FOR THE CONSTRUCTION PROJECT, INCLUDING BID PLANS AND

1 CONTRACT PLANS; EACH PAGE OF THE CONSTRUCTION PROJECT'S
2 SPECIFICATIONS; AND THE COVER SHEET OF EACH BID PROPOSAL OR
3 REQUEST FOR PROPOSAL:

4 **NOTICE OF EXTENDED PAYMENT PROVISION:**
5 **THIS CONTRACT ALLOWS THE OWNER TO**
6 **MAKE PAYMENT TO THE GENERAL**
7 **CONTRACTOR WITHIN () DAYS AFTER**
8 **RECEIPT OF A PROGRESS PAYMENT INVOICE**
9 **FROM THE CONTRACTOR TO THE OWNER.**

10 **8-10.5-106. Retainage.** (1) SUBJECT TO SUBSECTION (2) OF THIS
11 SECTION, A CONSTRUCTION AGREEMENT MAY PROVIDE FOR RETAINAGE.

12 (2) (a) AN OWNER SHALL PAY TO THE CONTRACTOR AT LEAST
13 NINETY-FIVE PERCENT OF THE VALUE OF COMPLETED WORK ON EACH
14 PROGRESS PAYMENT INVOICE REQUIRED BY THE CONSTRUCTION
15 AGREEMENT.

16 (b) A CONTRACTOR SHALL PAY TO EACH SUBCONTRACTOR AT
17 LEAST NINETY-FIVE PERCENT OF THE VALUE OF COMPLETED WORK ON
18 EACH PROGRESS PAYMENT INVOICE REQUIRED BY THE CONSTRUCTION
19 AGREEMENT.

20 (3) IF THE WORK OF A SUBCONTRACTOR UNDER A CONSTRUCTION
21 AGREEMENT HAS BEEN COMPLETED BEFORE SUBSTANTIAL COMPLETION OF
22 THE ENTIRE CONSTRUCTION PROJECT, THE SUBCONTRACTOR MAY APPLY
23 FOR PAYMENT OF RETAINAGE PRIOR TO SUBSTANTIAL COMPLETION OF THE
24 ENTIRE CONSTRUCTION PROJECT. IF THE SUBCONTRACTOR APPLIES FOR
25 PAYMENT OF RETAINAGE, THE OWNER SHALL RELEASE RETAINAGE TO THE
26 CONTRACTOR WITHIN NINETY DAYS AFTER THE SUBCONTRACTOR
27 COMPLIES WITH THE FOLLOWING:

1 (a) ALL WORK BY THE SUBCONTRACTOR IS COMPLETE AND IN
2 SUBSTANTIAL COMPLIANCE WITH THE SUBCONTRACT DOCUMENTS AND THE
3 CONSTRUCTION AGREEMENT;

4 (b) THE SUBCONTRACTOR HAS PROVIDED THE CONTRACTOR AND
5 THE OWNER WITH CONDITIONAL PAYMENT LIEN WAIVERS AND RELEASES
6 FROM ANY SUB-SUBCONTRACTOR, VENDOR, OR MATERIAL SUPPLIER FOR
7 THE WORK PERFORMED BY THE SUBCONTRACTOR, TOGETHER WITH ALL
8 DOCUMENTS, INSTRUCTIONS, WARRANTIES, AND OTHER ITEMS REQUIRED
9 BY THE CONSTRUCTION AGREEMENT; AND

10 (c) THE WORK OF THE SUBCONTRACTOR HAS BEEN APPROVED AND
11 ACCEPTED BY THE OWNER AND ANY PUBLIC ENTITY WHOSE ACCEPTANCE
12 OR APPROVAL OF THE WORK IS REQUIRED UNDER THE CONSTRUCTION
13 AGREEMENT OR BY LAW.

14 (4) THE RELEASE OF RETAINAGE TO A CONTRACTOR OR
15 SUBCONTRACTOR IS NOT A WAIVER OR RELEASE OF ANY CLAIMS FOR
16 DAMAGES OR LOSS DUE TO ANY LATER-DISCOVERED INCOMPLETE WORK OR
17 DEFECT IN THE CONTRACTOR'S OR SUBCONTRACTOR'S WORK.

18 (5) WITHIN SEVEN DAYS AFTER RECEIPT OF THE RETAINAGE, THE
19 CONTRACTOR SHALL PAY THE SUBCONTRACTOR THE RETAINAGE PAID BY
20 THE OWNER AND ANY INTEREST THEREON FOR WORK COMPLETED BY THE
21 SUBCONTRACTOR.

22 **8-10.5-107. Change directives.** (1) UNTIL A WRITTEN
23 AGREEMENT IS REACHED ON THE COST OF A CHANGE DIRECTIVE, AN
24 OWNER OR CONTRACTOR SHALL PAY A CONTRACTOR OR SUBCONTRACTOR
25 MONTHLY FOR ANY COMPLETED ADDITIONAL WORK REQUESTED BY A
26 CHANGE DIRECTIVE AT THE ACTUAL COST LESS RETAINAGE.

27 (2) IF THE PARTIES TO THE CHANGE DIRECTIVE HAVE NOT REACHED

1 A WRITTEN AGREEMENT AS TO ITS COST WITHIN TWO MONTHS AFTER THE
2 COMMENCEMENT OF THE ADDITIONAL WORK AND THE OWNER OR
3 CONTRACTOR DIRECTING THE ADDITIONAL WORK HAS NOT TERMINATED
4 PERFORMANCE OF THE ADDITIONAL WORK, THE PARTY PERFORMING THE
5 ADDITIONAL WORK MAY EITHER:

6 (a) BILL MONTHLY FOR THE COST OF THE ADDITIONAL WORK
7 PREVIOUSLY PERFORMED PLUS OVERHEAD AT TEN PERCENT AND PROFIT AT
8 FIVE PERCENT, AND THE PERSON DIRECTING THE WORK SHALL PAY THE
9 INVOICE; OR

10 (b) AT LEAST SEVEN DAYS AFTER PROVIDING WRITTEN NOTICE TO
11 THE OWNER AND CONTRACTOR, CEASE PERFORMING THE ADDITIONAL
12 WORK UNTIL A WRITTEN AGREEMENT IS REACHED WITHOUT CAUSING A
13 BREACH OF THE CONSTRUCTION AGREEMENT.

14 (3) THIS SECTION DOES NOT PROHIBIT THE OWNER OR CONTRACTOR
15 ISSUING A CHANGE DIRECTIVE FROM ORDERING OR REQUIRING THE
16 CESSATION OF THE ADDITIONAL WORK PRIOR TO REACHING A WRITTEN
17 AGREEMENT ON THE COST, BUT THE OWNER OR CONTRACTOR SHALL PAY
18 FOR THE ACTUAL COST OF THE COMPLETED WORK PLUS OVERHEAD AT TEN
19 PERCENT AND PROFIT AT FIVE PERCENT.

20 **8-10.5-108. Suspension of performance.** (1) A CONTRACTOR OR
21 SUBCONTRACTOR MAY SUSPEND PERFORMANCE WITHOUT BREACHING A
22 CONSTRUCTION AGREEMENT FOR FAILURE BY THE OWNER OR CONTRACTOR
23 TO MAKE TIMELY PAYMENT OF THE APPROVED PORTION OF A PROGRESS
24 PAYMENT INVOICE. A CONTRACTOR OR SUBCONTRACTOR SHALL PROVIDE
25 WRITTEN NOTICE TO THE OWNER OR CONTRACTOR AT LEAST FIFTEEN DAYS
26 BEFORE THE CONTRACTOR'S OR SUBCONTRACTOR'S INTENDED SUSPENSION
27 UNLESS THE CONSTRUCTION AGREEMENT GRANTS A SHORTER NOTICE

1 PERIOD.

2 (2) AFTER SUSPENDING PERFORMANCE, THE CONTRACTOR OR
3 SUBCONTRACTOR SHALL RESUME WORK WITHIN THIRTY DAYS AFTER
4 RECEIVING PAYMENT FOR CERTIFIED AND APPROVED WORK PLUS
5 REASONABLE COSTS OF SHUTDOWN, DEMOBILIZATION, REMOBILIZATION,
6 AND INTEREST ON UNPAID AMOUNTS.

7 (3) A CONTRACTOR OR SUBCONTRACTOR SHALL NOT SUSPEND
8 PERFORMANCE OF THE WORK UNDER A CONSTRUCTION AGREEMENT IF THE
9 FAILURE TO PAY ANY PART OF THE PROGRESS PAYMENT IS BECAUSE OF THE
10 FOLLOWING:

11 (a) DEFECTIVE CONSTRUCTION WORK OR MATERIALS NOT
12 REMEDIED;

13 (b) FAILURE OF THE CONTRACTOR OR SUBCONTRACTOR TO COMPLY
14 WITH MATERIAL PROVISIONS OF THE CONSTRUCTION AGREEMENT;

15 (c) THIRD-PARTY CLAIMS FILED OR REASONABLY EXPECTED TO BE
16 FILED;

17 (d) FAILURE OF THE CONTRACTOR OR SUBCONTRACTOR TO MAKE
18 TIMELY PAYMENTS FOR LABOR, EQUIPMENT, OR MATERIALS; OR

19 (e) A GOOD-FAITH DISPUTE REGARDING WHETHER THE WORK WAS
20 INCLUDED IN THE CONSTRUCTION AGREEMENT.

21 **8-10.5-109. Written notice.** WRITTEN NOTICE REQUIRED BY THIS
22 ARTICLE IS DEEMED TO HAVE BEEN PROVIDED IF THE WRITTEN NOTICE IS
23 DELIVERED PERSONALLY OR BY ANY RECOGNIZED METHOD OF DELIVERY
24 THAT PROVIDES CONFIRMATION OF THE DELIVERY TO THE RECIPIENT, THE
25 REGISTERED AGENT OF THE RECIPIENT, OR ANY PERSON DESIGNATED IN
26 THE CONSTRUCTION AGREEMENT FOR THIS PURPOSE.

27 **8-10.5-110. Public policy.** ANY PROVISION IN A CONSTRUCTION

1 AGREEMENT THAT SETS PAYMENT TERMS IN VIOLATION OF THIS ARTICLE
2 IS UNENFORCEABLE AND VOID AS AGAINST PUBLIC POLICY.

3 **8-10.5-111. Choice of law.** NOTWITHSTANDING ANY
4 CONTRACTUAL PROVISION TO THE CONTRARY, THE LAWS OF THE STATE OF
5 COLORADO APPLY TO AND GOVERN EVERY CONSTRUCTION AGREEMENT
6 AFFECTING IMPROVEMENTS TO REAL PROPERTY WITHIN COLORADO.

7 **SECTION 2.** In Colorado Revised Statutes, **amend** 24-91-102 as
8 follows:

9 **24-91-102. Definitions.** As used in this article, unless the context
10 otherwise requires:

11 (1) "Acceptable securities" means:

12 (a) United States bonds, United States treasury notes, or United
13 States treasury bills;

14 (b) General obligation or revenue bonds of this state;

15 (c) General obligation or revenue bonds of any political
16 subdivision of this state;

17 (d) Certificates of deposit from a state or national bank or a
18 savings and loan association insured by the federal deposit insurance
19 corporation or its successor and having its principal office in this state.

20 (2) "CHANGE DIRECTIVE" MEANS ADDITIONAL WORK REQUESTED
21 BY A PUBLIC ENTITY FROM A CONTRACTOR, OR BY A CONTRACTOR FROM
22 A SUBCONTRACTOR, UNDER THE TERMS OF A CONSTRUCTION AGREEMENT
23 THAT REQUIRES THE WORK TO BE PERFORMED WITHOUT PRIOR AGREEMENT
24 TO THE COST OF THE ADDITIONAL WORK.

25 (3) "CONSTRUCTION AGREEMENT" MEANS A CONTRACT,
26 SUBCONTRACT, OR AGREEMENT FOR MATERIALS OR LABOR FOR THE
27 CONSTRUCTION, ALTERATION, RENOVATION, OR REPAIR OF A PUBLIC

1 ENTITY'S BUILDING, BUILDING SITE, STRUCTURE, HIGHWAY, STREET,
2 ROADWAY, BRIDGE, VIADUCT, WATER OR SEWER SYSTEM, GAS OR OTHER
3 DISTRIBUTION SYSTEM, OR OTHER WORK DEALING WITH CONSTRUCTION.

4 "CONSTRUCTION AGREEMENT" INCLUDES ANY MOVING, DEMOLITION, OR
5 EXCAVATION CONNECTED WITH THE CONSTRUCTION. "CONSTRUCTION
6 AGREEMENT" DOES NOT INCLUDE:

7 (a) A CONTRACT, SUBCONTRACT, OR AGREEMENT THAT CONCERNS
8 PROPERTY OWNED OR OPERATED BY A FEDERALLY REGULATED RAILROAD;

9 (b) A REAL PROPERTY LEASE OR RENTAL AGREEMENT BETWEEN A
10 LANDLORD AND A TENANT, EVEN IF A PROVISION OF THE LEASE OR RENTAL
11 AGREEMENT CONCERNS CONSTRUCTION, ALTERATION, IMPROVEMENT, OR
12 MAINTENANCE OF REAL PROPERTY;

13 (c) A CONTRACT FOR THE CONSTRUCTION, IMPROVEMENT,
14 ALTERATION, MOVING, OR DEMOLITION OF A SINGLE-FAMILY DWELLING OR
15 MULTI-FAMILY DWELLING WITH NO MORE THAN TWO UNITS; OR

16 (d) A CONTRACT BETWEEN A PUBLIC ENTITY AND A CONTRACTOR
17 OF AN AMOUNT LESS THAN ONE HUNDRED THOUSAND DOLLARS.

18 (4) "CONSTRUCTION PROJECT" MEANS A PROJECT THAT IS THE
19 SUBJECT OF A CONSTRUCTION AGREEMENT.

20 ~~(2)~~ (5) "Contractor" means ~~any person, company, firm, or~~
21 ~~corporation which is a party to a contract with a public entity to construct,~~
22 ~~erect, alter, install, or repair any highway, public building, public work,~~
23 ~~or public improvement, structure, or system~~ A PERSON THAT HAS A DIRECT
24 CONTRACT WITH A PUBLIC ENTITY TO PERFORM WORK UNDER A
25 CONSTRUCTION AGREEMENT.

26 (6) "DAY" MEANS A CALENDAR DAY.

27 (7) "MATERIAL SUPPLIER" MEANS A PERSON THAT HAS A

1 CONTRACT WITH A PUBLIC ENTITY, CONTRACTOR, OR SUBCONTRACTOR FOR
2 THE PROVISION OF CONSTRUCTION MATERIALS OR EQUIPMENT ACTUALLY
3 USED TO COMPLETE A CONSTRUCTION AGREEMENT.

4 (8) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
5 ACTUALLY PERFORMED UNDER A CONSTRUCTION AGREEMENT BEFORE THE
6 ENTIRE CONTRACTUAL OBLIGATION HAS BEEN MET.

7 (9) "PROGRESS PAYMENT INVOICE" MEANS A BILL SUBMITTED BY
8 A CONTRACTOR OR SUBCONTRACTOR FOR WORK COMPLETED IN THE MOST
9 RECENT BILLING CYCLE OR FOR WORK PERFORMED DURING THE PERIOD
10 COVERED BY THE BILL OR A PAYMENT ESTIMATE. "PROGRESS PAYMENT
11 INVOICE" INCLUDES REQUESTS FOR PAYMENT FOR WORK PERFORMED AS A
12 RESULT OF A CHANGE DIRECTIVE.

13 ~~(3)~~ (10) "Public entity" means this state or a county, city, city and
14 county, town, or district, including any political subdivision thereof.

15 (11) "RETAINAGE" MEANS A PERCENTAGE WITHHELD FROM ANY
16 PROGRESS PAYMENT TO A CONTRACTOR OR SUBCONTRACTOR UNDER A
17 CONSTRUCTION AGREEMENT.

18 ~~(4)~~ (12) "Subcontractor" means ~~and includes any person,~~
19 ~~company, firm, or corporation which is a party to a contract with a~~
20 ~~contractor to construct, erect, alter, install, or repair any highway, public~~
21 ~~building, public work, or public improvement, structure, or system and~~
22 ~~which, in connection therewith, furnishes and performs on-site labor with~~
23 ~~or without furnishing materials~~ A PERSON THAT HAS A DIRECT CONTRACT
24 WITH A CONTRACTOR OR ANOTHER SUBCONTRACTOR TO PERFORM A
25 PORTION OF THE WORK UNDER A CONSTRUCTION AGREEMENT.

26 ~~(5)~~ (13) "Substantial completion" means the date when the
27 construction is sufficiently complete, in accordance with the contract

1 documents, as modified by any change orders agreed to by the parties, so
2 that the work or designated portion thereof is available for use by the
3 owner.

4 **SECTION 3.** In Colorado Revised Statutes, **amend** 24-91-103 as
5 follows:

6 **24-91-103. Public entity - contracts - partial payments.**

7 (1) **Progress payments.** ~~(a) A public entity awarding a contract~~
8 ~~exceeding one hundred fifty thousand dollars for the construction,~~
9 ~~alteration, or repair of any highway, public building, public work, or~~
10 ~~public improvement, structure, or system shall authorize partial payments~~
11 ~~of the amount due under such contract at the end of each calendar month,~~
12 ~~or as soon thereafter as practicable, to the contractor, if the contractor is~~
13 ~~satisfactorily performing the contract. The public entity shall pay at least~~
14 ~~ninety-five percent of the calculated value of completed work. The~~
15 ~~withheld percentage of the contract price of any contracted work,~~
16 ~~improvement, or construction may be retained until the contract is~~
17 ~~completed satisfactorily and finally accepted by the public entity. IN A~~
18 ~~CONSTRUCTION AGREEMENT TAKING MORE THAN ONE MONTH TO~~
19 ~~COMPLETE, THE PUBLIC ENTITY AND CONTRACTOR SHALL INCLUDE A~~
20 ~~REQUIREMENT THAT REGULAR PROGRESS PAYMENTS BE MADE TO THE~~
21 ~~CONTRACTOR AND SUBCONTRACTOR BASED UPON A BILLING CYCLE SET~~
22 ~~FORTH IN THE AGREEMENT. THIS REQUIREMENT DOES NOT APPLY TO A~~
23 ~~SINGLE-PAYMENT CONTRACT, UNIT-PRICE CONTRACT, OR CONTRACT~~
24 ~~PAYABLE IN INSTALLMENTS OR ON COMPLETION.~~

25 ~~(b) The public entity shall make a final settlement in accordance~~
26 ~~with section 38-26-107, C.R.S., within sixty days after the contract is~~
27 ~~completed satisfactorily and finally accepted by the public entity.~~

1 ~~(c) If the public entity finds that satisfactory progress is being~~
2 ~~made in any phase of the contract, it may, upon written request by the~~
3 ~~contractor, authorize final payment from the withheld percentage to the~~
4 ~~contractor or subcontractors who have completed their work in a manner~~
5 ~~finally acceptable to the public entity. Before the payment is made, the~~
6 ~~public entity shall determine that satisfactory and substantial reasons exist~~
7 ~~for the payment and shall require written approval from any surety~~
8 ~~furnishing bonds for the contract work.~~

9 ~~(2) (a) Whenever a contractor receives payment pursuant to this~~
10 ~~section, the contractor shall make payments to each of his subcontractors~~
11 ~~of any amounts actually received which were included in the contractor's~~
12 ~~request for payment to the public entity for such subcontracts. The~~
13 ~~contractor shall make such payments within seven calendar days of~~
14 ~~receipt of payment from the public entity in the same manner as the~~
15 ~~public entity is required to pay the contractor under this section if the~~
16 ~~subcontractor is satisfactorily performing under his contract with the~~
17 ~~contractor. The subcontractor shall pay all suppliers, sub-subcontractors,~~
18 ~~laborers, and any other persons who provide goods, materials, labor, or~~
19 ~~equipment to the subcontractor any amounts actually received which were~~
20 ~~included in the subcontractor's request for payment to the contractor for~~
21 ~~such persons, in the same manner set forth in this subsection (2) regarding~~
22 ~~payments by the contractor to the subcontractor. If the subcontractor fails~~
23 ~~to make such payments in the required manner, the subcontractor shall~~
24 ~~pay said suppliers, sub-subcontractors, and laborers interest in the same~~
25 ~~manner set forth in this subsection (2) regarding payments by the~~
26 ~~contractor to the subcontractor. At the time the subcontractor submits a~~
27 ~~request for payment to the contractor, the subcontractor shall also submit~~

1 to the contractor a list of the subcontractor's suppliers, sub-subcontractors,
2 and laborers. The contractor shall be relieved of the requirements of this
3 subsection (2) regarding payment in seven days and interest payment until
4 the subcontractor submits such list. If the contractor fails to make timely
5 payments to the subcontractor as required by this section, the contractor
6 shall pay the subcontractor interest as specified by contract or at the rate
7 of fifteen percent per annum whichever is higher, on the amount of the
8 payment which was not made in a timely manner. The interest shall
9 accrue for the period from the required payment date to the date on which
10 payment is made. Nothing in this subsection (2) shall be construed to
11 affect the retention provisions of any contract. EXCEPT AS PROVIDED IN
12 THIS ARTICLE, A SUBCONTRACTOR SHALL SUBMIT TO THE CONTRACTOR, ON
13 A MONTHLY BASIS, A PROGRESS PAYMENT INVOICE FOR WORK ACTUALLY
14 PERFORMED AND MATERIAL ACTUALLY SUPPLIED DURING THE MOST
15 RECENT BILLING CYCLE. UPON RECEIPT OF A PROGRESS PAYMENT INVOICE
16 AND ALL CONTRACTUALLY REQUIRED DOCUMENTATION FROM THE
17 SUBCONTRACTOR, THE CONTRACTOR SHALL APPROVE OR DISAPPROVE ALL
18 OR A PORTION OF THE PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS.
19 IN ORDER TO DENY ALL OR A PORTION OF THE PROGRESS PAYMENT, THE
20 CONTRACTOR MUST GIVE THE REASONS FOR ANY DISAPPROVAL TO THE
21 SUBCONTRACTOR IN WRITING. A CONTRACTOR SHALL NOT UNREASONABLY
22 WITHHOLD APPROVAL OF AN INVOICE.

23 (b) A CONTRACTOR SHALL SUBMIT TO THE PUBLIC ENTITY OR TO
24 THE PUBLIC ENTITY'S REPRESENTATIVE A PROGRESS PAYMENT INVOICE
25 WITH ALL DOCUMENTATION REQUIRED BY THE CONSTRUCTION AGREEMENT
26 AT THE END OF EACH BILLING CYCLE FOR WORK ACTUALLY PERFORMED
27 AND MATERIAL ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING

1 CYCLE. UPON RECEIPT OF A PROGRESS PAYMENT INVOICE AND ALL
2 CONTRACTUALLY REQUIRED DOCUMENTATION FROM THE CONTRACTOR,
3 THE PUBLIC ENTITY SHALL APPROVE OR DISAPPROVE ALL OR A PORTION OF
4 THE PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS. IN ORDER TO DENY
5 ALL OR A PORTION OF THE PROGRESS PAYMENT, THE PUBLIC ENTITY MUST
6 GIVE THE REASONS FOR ANY DISAPPROVAL TO THE CONTRACTOR IN
7 WRITING. A PUBLIC ENTITY SHALL NOT UNREASONABLY WITHHOLD
8 APPROVAL OF AN INVOICE.

9 (c) FAILING TO DISAPPROVE OR APPROVING ALL OR PART OF A
10 PROGRESS PAYMENT INVOICE BY A CONTRACTOR OR PUBLIC ENTITY IS NOT:

11 (I) A WAIVER OF ANY CLAIM FOR WORK NOT IN CONFORMANCE
12 WITH THE CONSTRUCTION AGREEMENT; OR

13 (II) A WAIVER OF CLAIMS FOR BREACH OF THE CONSTRUCTION
14 AGREEMENT.

15 (d) EXCEPT AS AUTHORIZED BY THIS SECTION, A PUBLIC ENTITY
16 SHALL PAY A PROGRESS PAYMENT INVOICE TO THE CONTRACTOR NO LATER
17 THAN:

18 (I) TWENTY-FIVE DAYS AFTER RECEIPT OF THE PROGRESS PAYMENT
19 INVOICE BY THE PUBLIC ENTITY OR THE PUBLIC ENTITY'S REPRESENTATIVE
20 IF THE CONTRACTOR USED A SUBCONTRACTOR;

21 (II) THIRTY DAYS AFTER RECEIPT OF THE PROGRESS PAYMENT
22 INVOICE BY THE PUBLIC ENTITY OR THE PUBLIC ENTITY'S REPRESENTATIVE
23 IF THE CONTRACTOR DID NOT USE A SUBCONTRACTOR.

24 (e) IF A CONTRACTOR RECEIVES A PROGRESS PAYMENT FROM A
25 PUBLIC ENTITY, THE CONTRACTOR SHALL PAY EACH SUBCONTRACTOR ANY
26 AMOUNTS ACTUALLY RECEIVED FOR THE SUBCONTRACTOR'S WORK. THE
27 CONTRACTOR SHALL PAY THE SUBCONTRACTORS WITHIN THE THIRTY-DAY

1 BILLING CYCLE OR WITHIN FIVE DAYS AFTER RECEIPT OF THE PROGRESS
2 PAYMENT FROM THE PUBLIC ENTITY FOR THE WORK, WHICHEVER OCCURS
3 FIRST.

4 (f) IF A PUBLIC ENTITY DOES NOT PAY THE APPROVED PORTION OF
5 THE PROGRESS PAYMENT TO A CONTRACTOR WHEN DUE, THE PUBLIC
6 ENTITY SHALL PAY THE CONTRACTOR INTEREST ON THE UNPAID AMOUNT
7 FROM THE DATE THE PAYMENT WAS DUE AT THE GREATER OF THE RATE OF
8 TWELVE PERCENT PER ANNUM OR THE RATE SPECIFIED IN THE
9 CONSTRUCTION AGREEMENT. THE CONTRACTOR SHALL PAY THE INTEREST
10 RECEIVED TO EACH SUBCONTRACTOR OR MATERIAL SUPPLIER FOR THE
11 PORTION OF THE PROGRESS PAYMENT PAID FOR THE SUBCONTRACTOR'S
12 WORK.

13 (g) IF A CONTRACTOR WHO RECEIVED A PROGRESS PAYMENT FROM
14 A PUBLIC ENTITY FAILS TO MAKE PAYMENTS REQUIRED BY THIS ARTICLE
15 TO A SUBCONTRACTOR, THE CONTRACTOR SHALL PAY THE
16 SUBCONTRACTOR INTEREST ON THE UNPAID AMOUNT FROM THE DATE THE
17 PAYMENT WAS DUE AT THE GREATER OF THE RATE OF TWELVE PERCENT
18 PER ANNUM OR THE RATE SPECIFIED IN THE CONSTRUCTION AGREEMENT.

19 (h) NOTHING IN THIS ARTICLE PROHIBITS A PUBLIC ENTITY,
20 CONTRACTOR, SUBCONTRACTOR, OR MATERIAL SUPPLIER FROM
21 EXCLUDING, DEDUCTING, OR OFFSETTING FROM PAYMENT AMOUNTS
22 PERMITTED BY THE CONSTRUCTION AGREEMENT OR BY LAW.

23 (i) THE PERSON EXCLUDING, DEDUCTING, OR OFFSETTING
24 AMOUNTS FROM THE PAYMENT SHALL PROVIDE THE PARTY REQUESTING
25 PAYMENT WITH WRITTEN NOTICE OF THE REASONS FOR THE EXCLUSION,
26 DEDUCTION, OR OFFSET AND SHALL AFFORD THE PARTY A REASONABLE
27 TIME OR THE TIME PERMITTED BY THE CONSTRUCTION AGREEMENT TO

1 CURE THE DEFAULT.

2 (3) **Extended progress payment time.** (~~Deleted by amendment,~~
3 ~~L. 2011, (HB 11-1115), ch. 211, p. 912, § 2, effective August 10, 2011.)~~

4 A PUBLIC ENTITY MAY MAKE PROGRESS PAYMENTS TO A CONTRACTOR
5 MORE THAN TWENTY-FIVE DAYS, BUT NO MORE THAN SIXTY DAYS, AFTER
6 RECEIPT OF A PROGRESS PAYMENT INVOICE IF:

7 (a) THE CONSTRUCTION AGREEMENT ON ITS FACE SPECIFICALLY
8 PROVIDES, IN AT LEAST FOURTEEN-POINT, BOLD-FACED TYPE, FOR A LATER
9 PAYMENT DATE DEFINED BY A SPECIFIED NUMBER OF DAYS AFTER RECEIPT
10 OF A PROGRESS PAYMENT INVOICE; AND

11 (II) THE FOLLOWING NOTICE, OR A SUBSTANTIALLY SIMILAR
12 NOTICE, SPECIFYING THE NUMBER OF DAYS FOR PAYMENT APPEARS IN AT
13 LEAST FOURTEEN-POINT, BOLD-FACED TYPE, ON EACH PAGE OF EACH SET
14 OF PLANS FOR THE CONSTRUCTION PROJECT, INCLUDING BID PLANS AND
15 CONTRACT PLANS; EACH PAGE OF THE CONSTRUCTION PROJECT'S
16 SPECIFICATIONS; AND THE COVER SHEET OF EACH BID PROPOSAL OR
17 REQUEST FOR PROPOSAL:

18 **NOTICE OF EXTENDED PAYMENT PROVISION:**
19 **THIS CONTRACT ALLOWS THE PUBLIC ENTITY**
20 **TO MAKE PAYMENT TO THE GENERAL**
21 **CONTRACTOR WITHIN () DAYS AFTER**
22 **RECEIPT OF A PROGRESS PAYMENT INVOICE**
23 **FROM THE CONTRACTOR TO THE PUBLIC**
24 **ENTITY.**

25 (4) **Retainage.** (a) SUBJECT TO PARAGRAPH (b) OF THIS
26 SUBSECTION (4), A CONSTRUCTION AGREEMENT MAY PROVIDE FOR
27 RETAINAGE.

1 (b) (I) A PUBLIC ENTITY SHALL PAY TO THE CONTRACTOR AT LEAST
2 NINETY-FIVE PERCENT OF THE VALUE OF COMPLETED WORK ON EACH
3 PROGRESS PAYMENT INVOICE REQUIRED BY THE CONSTRUCTION
4 AGREEMENT.

5 (II) A CONTRACTOR SHALL PAY TO EACH SUBCONTRACTOR AT
6 LEAST NINETY-FIVE PERCENT OF THE VALUE OF COMPLETED WORK ON
7 EACH PROGRESS PAYMENT INVOICE REQUIRED BY THE CONSTRUCTION
8 AGREEMENT.

9 (c) IF THE WORK OF A SUBCONTRACTOR UNDER A CONSTRUCTION
10 AGREEMENT HAS BEEN COMPLETED BEFORE SUBSTANTIAL COMPLETION OF
11 THE ENTIRE CONSTRUCTION PROJECT, THE SUBCONTRACTOR MAY APPLY
12 FOR PAYMENT OF RETAINAGE PRIOR TO SUBSTANTIAL COMPLETION OF THE
13 ENTIRE CONSTRUCTION PROJECT. IF THE SUBCONTRACTOR APPLIES FOR
14 PAYMENT OF RETAINAGE, THE PUBLIC ENTITY SHALL SEEK WRITTEN
15 APPROVAL FROM ANY SURETY FURNISHING A BOND FOR THE CONTRACT
16 WORK. UPON OBTAINING THE APPROVAL, THE PUBLIC ENTITY SHALL
17 RELEASE THE RETAINAGE TO THE CONTRACTOR WITHIN NINETY DAYS
18 AFTER THE SUBCONTRACTOR COMPLIES WITH THE FOLLOWING:

19 (I) ALL WORK BY THE SUBCONTRACTOR IS COMPLETE AND IN
20 SUBSTANTIAL COMPLIANCE WITH THE SUBCONTRACT DOCUMENTS AND THE
21 CONSTRUCTION AGREEMENT;

22 (II) THE SUBCONTRACTOR HAS PROVIDED THE CONTRACTOR AND
23 THE PUBLIC ENTITY WITH CONDITIONAL PAYMENT LIEN WAIVERS AND
24 RELEASES FROM ANY SUB-SUBCONTRACTOR, VENDOR, OR MATERIAL
25 SUPPLIER FOR THE WORK PERFORMED BY THE SUBCONTRACTOR, TOGETHER
26 WITH ALL DOCUMENTS, INSTRUCTIONS, WARRANTIES, AND OTHER ITEMS
27 REQUIRED BY THE CONSTRUCTION AGREEMENT; AND

1 (III) THE WORK OF THE SUBCONTRACTOR HAS BEEN APPROVED
2 AND ACCEPTED BY THE PUBLIC ENTITY AND ANY OTHER PUBLIC ENTITY
3 WHOSE ACCEPTANCE OR APPROVAL OF THE WORK IS REQUIRED UNDER THE
4 CONSTRUCTION AGREEMENT OR BY LAW.

5 (d) THE RELEASE OF RETAINAGE TO A CONTRACTOR OR
6 SUBCONTRACTOR IS NOT A WAIVER OR RELEASE OF ANY CLAIMS FOR
7 DAMAGES OR LOSS DUE TO ANY LATER-DISCOVERED INCOMPLETE WORK OR
8 DEFECT IN THE CONTRACTOR'S OR SUBCONTRACTOR'S WORK.

9 (e) WITHIN SEVEN DAYS AFTER RECEIPT OF THE RETAINAGE, THE
10 CONTRACTOR SHALL PAY THE SUBCONTRACTOR THE RETAINAGE PAID BY
11 THE PUBLIC ENTITY AND ANY INTEREST THEREON FOR WORK COMPLETED
12 BY THE SUBCONTRACTOR.

13 (5) **Final settlement.** THE PUBLIC ENTITY SHALL MAKE A FINAL
14 SETTLEMENT IN ACCORDANCE WITH SECTION 38-26-107, C.R.S., WITHIN
15 SIXTY DAYS AFTER THE CONTRACT IS COMPLETED SATISFACTORILY AND
16 FINALLY ACCEPTED BY THE PUBLIC ENTITY.

17 **SECTION 4.** In Colorado Revised Statutes, **add** 24-91-103.7,
18 24-91-103.8, and 24-91-103.9 as follows:

19 **24-91-103.7. Change directives.** (1) UNTIL A WRITTEN
20 AGREEMENT IS REACHED ON THE COST OF A CHANGE DIRECTIVE, A PUBLIC
21 ENTITY OR CONTRACTOR SHALL PAY A CONTRACTOR OR SUBCONTRACTOR
22 MONTHLY FOR ANY COMPLETED ADDITIONAL WORK REQUESTED BY A
23 CHANGE DIRECTIVE AT THE ACTUAL COST LESS RETAINAGE.

24 (2) IF THE PARTIES TO THE CHANGE DIRECTIVE HAVE NOT REACHED
25 A WRITTEN AGREEMENT AS TO ITS COST WITHIN TWO MONTHS AFTER THE
26 COMMENCEMENT OF THE ADDITIONAL WORK AND THE PUBLIC ENTITY OR
27 CONTRACTOR DIRECTING THE ADDITIONAL WORK HAS NOT TERMINATED

1 PERFORMANCE OF THE ADDITIONAL WORK, THE PARTY PERFORMING THE
2 ADDITIONAL WORK MAY EITHER:

3 (a) BILL MONTHLY FOR THE COST OF THE ADDITIONAL WORK
4 PREVIOUSLY PERFORMED PLUS OVERHEAD AT TEN PERCENT AND PROFIT AT
5 FIVE PERCENT, AND THE PERSON DIRECTING THE WORK SHALL PAY THE
6 INVOICE; OR

7 (b) AT LEAST SEVEN DAYS AFTER PROVIDING WRITTEN NOTICE TO
8 THE PUBLIC ENTITY AND CONTRACTOR, CEASE PERFORMING THE
9 ADDITIONAL WORK UNTIL A WRITTEN AGREEMENT IS REACHED WITHOUT
10 CAUSING A BREACH OF THE CONSTRUCTION AGREEMENT.

11 (3) THIS SECTION DOES NOT PROHIBIT THE PUBLIC ENTITY OR
12 CONTRACTOR ISSUING A CHANGE DIRECTIVE FROM ORDERING OR
13 REQUIRING THE CESSATION OF THE ADDITIONAL WORK PRIOR TO REACHING
14 A WRITTEN AGREEMENT ON THE COST, BUT THE PUBLIC ENTITY OR
15 CONTRACTOR SHALL PAY FOR THE ACTUAL COST OF THE COMPLETED WORK
16 PLUS OVERHEAD AT TEN PERCENT AND PROFIT AT FIVE PERCENT.

17 **24-91-103.8. Suspension of performance.** (1) A CONTRACTOR
18 OR SUBCONTRACTOR MAY SUSPEND PERFORMANCE WITHOUT BREACHING
19 A CONSTRUCTION AGREEMENT FOR FAILURE BY THE PUBLIC ENTITY OR
20 CONTRACTOR TO MAKE TIMELY PAYMENT OF THE APPROVED PORTION OF
21 A PROGRESS PAYMENT INVOICE. A CONTRACTOR OR SUBCONTRACTOR
22 SHALL PROVIDE WRITTEN NOTICE TO THE PUBLIC ENTITY OR CONTRACTOR
23 AT LEAST FIFTEEN DAYS BEFORE THE CONTRACTOR'S OR
24 SUBCONTRACTOR'S INTENDED SUSPENSION UNLESS THE CONSTRUCTION
25 AGREEMENT GRANTS A SHORTER NOTICE PERIOD.

26 (2) AFTER SUSPENDING PERFORMANCE, THE CONTRACTOR OR
27 SUBCONTRACTOR SHALL RESUME WORK WITHIN THIRTY DAYS AFTER

1 RECEIVING PAYMENT FOR CERTIFIED AND APPROVED WORK PLUS
2 REASONABLE COSTS OF SHUTDOWN, DEMOBILIZATION, REMOBILIZATION,
3 AND INTEREST ON UNPAID AMOUNTS.

4 (3) A CONTRACTOR OR SUBCONTRACTOR SHALL NOT SUSPEND
5 PERFORMANCE OF THE WORK UNDER A CONSTRUCTION AGREEMENT IF THE
6 FAILURE TO PAY ANY PART OF THE PROGRESS PAYMENT IS BECAUSE OF THE
7 FOLLOWING:

8 (a) DEFECTIVE CONSTRUCTION WORK OR MATERIALS NOT
9 REMEDIED;

10 (b) FAILURE OF THE CONTRACTOR OR SUBCONTRACTOR TO COMPLY
11 WITH MATERIAL PROVISIONS OF THE CONSTRUCTION AGREEMENT;

12 (c) THIRD-PARTY CLAIMS FILED OR REASONABLY EXPECTED TO BE
13 FILED;

14 (d) FAILURE OF THE CONTRACTOR OR SUBCONTRACTOR TO MAKE
15 TIMELY PAYMENTS FOR LABOR, EQUIPMENT, OR MATERIALS; OR

16 (e) A GOOD-FAITH DISPUTE REGARDING WHETHER THE WORK WAS
17 INCLUDED IN THE CONSTRUCTION AGREEMENT.

18 **24-91-103.9. Public policy.** ANY PROVISION IN A CONSTRUCTION
19 AGREEMENT THAT SETS PAYMENT TERMS IN VIOLATION OF SECTIONS
20 24-91-103 TO 24-91-103.8 IS UNENFORCEABLE AND VOID AS AGAINST
21 PUBLIC POLICY.

22 **SECTION 5. Effective date - applicability.** This act takes effect
23 July 1, 2013, and applies to construction agreements made on or after said
24 date.

25 **SECTION 6. Safety clause.** The general assembly hereby finds,
26 determines, and declares that this act is necessary for the immediate
27 preservation of the public peace, health, and safety.