

**Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO**

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 10-0089.01 Jery Payne

HOUSE BILL 10-1162

HOUSE SPONSORSHIP

Soper,

SENATE SPONSORSHIP

Bacon,

House Committees

Business Affairs and Labor
Appropriations

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING PAYMENT OF AMOUNTS DUE UNDER A CONSTRUCTION**
102 **CONTRACT.**

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/billsummaries>.)

The bill prohibits retaining more than 5% of the payments due to a contractor to ensure that work is satisfactorily completed (retainage) for the first 50% of a construction project. For the remaining 50% of the work, the bill prohibits retainage of more than 2.5%. More retainage may be withheld for work that is unsatisfactorily completed.

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.*

A building client is required to deposit retainage in an interest-bearing escrow account that the contractor may access with an arbitration or court order. The bill sets standards for the account. If the building client fails to deposit the money in an account, the building client is required to pay the contractor 15% interest on the retainage.

The bill requires a contractor to forward payment to a subcontractor for work the subcontractor performed within 7 days. The building client is required to pay the contractor retainage within 30 days after substantial completion of the construction project. A violator is required to pay interest plus a penalty of 15% interest.

Contractors are authorized to give the building client a substitute security and have retainage paid. Standards are set for the security.

Failure to pay interest subjects the property to a lien.

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

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 hereby finds and declares that:

4 (a) The construction industry is a significant component of the
5 state's economy;

6 (b) There is a substantial statewide interest in fostering the growth
7 and stability of the construction industry and ensuring that it remains
8 economically viable;

9 (c) The ability of construction and design enterprises to obtain and
10 satisfactorily perform projects in the private and public sectors affects the
11 construction industry as a whole;

12 (d) Clauses in construction contracts that allow builders to not
13 fully fund changes to contracts prior to performance of such work and to
14 pay for such work in a timely fashion have ruinous financial
15 consequences for the affected contractors and subcontractors; and

16 (e) There is a substantial statewide interest in ensuring that the
17 policy underlying the efficient expenditure of funds is balanced with the
18 policy of fostering a healthy and viable Colorado construction industry.

1 (2) The general assembly hereby declares that:

2 (a) The practice of withholding earned revenue through
3 construction contracts is a matter of statewide concern and is affected
4 with a public interest; and

5 (b) It is within the police power of the state to protect the health,
6 peace, safety, and welfare of the people of the state.

7 **SECTION 2.** Title 38, Colorado Revised Statutes, is amended BY
8 THE ADDITION OF A NEW ARTICLE to read:

9 **ARTICLE 15**

10 **Retainage in Commercial Construction Contracts**

11 **38-15-101. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
12 CONTEXT OTHERWISE REQUIRES:

13 (1) "BUILDING CLIENT" MEANS A PERSON WHO OWNS, MANAGES,
14 OR LEASES REAL PROPERTY AND WHO CAUSES A BUILDING, STRUCTURE, OR
15 IMPROVEMENT ON REAL PROPERTY TO BE CONSTRUCTED, ALTERED,
16 MOVED, OR DEMOLISHED OR WHO CAUSES LAND TO BE EXCAVATED OR
17 OTHERWISE DEVELOPED OR IMPROVED. "BUILDING CLIENT" DOES NOT
18 INCLUDE A PUBLIC ENTITY.

19 (2) "CONSTRUCTION PROJECT" MEANS A PROJECT THAT IS THE
20 SUBJECT OF A CONTRACT.

21 (3) "CONTRACT" MEANS AN AGREEMENT OR SUBCONTRACT FOR
22 MATERIALS OR LABOR FOR THE CONSTRUCTION, ALTERATION,
23 RENOVATION, OR REPAIR OF A BUILDING, BUILDING SITE, STRUCTURE,
24 HIGHWAY, STREET, ROADWAY, BRIDGE, VIADUCT, WATER OR SEWER
25 SYSTEM, GAS OR OTHER DISTRIBUTION SYSTEM, OR OTHER WORK DEALING
26 WITH CONSTRUCTION OR FOR ANY MOVING, DEMOLITION, OR EXCAVATION
27 CONNECTED WITH THE CONSTRUCTION. FOR THE PURPOSES OF THIS

1 ARTICLE, "CONTRACT" DOES NOT INCLUDE:

2 (a) ANY REAL PROPERTY LEASE OR RENTAL AGREEMENT BETWEEN
3 A LANDLORD AND A TENANT, REGARDLESS OF WHETHER ANY PROVISION
4 OF THE LEASE OR RENTAL AGREEMENT CONCERNS CONSTRUCTION,
5 ALTERATION, IMPROVEMENT, OR MAINTENANCE OF REAL PROPERTY;

6 (b) AN AGREEMENT FOR THE CONSTRUCTION, IMPROVEMENT,
7 ALTERATION, MOVING, OR DEMOLITION OF A SINGLE-FAMILY DWELLING OR
8 MULTI-FAMILY DWELLING WITH NO MORE THAN TWO UNITS; OR

9 (c) A CONTRACT BETWEEN A BUILDING CLIENT AND A CONTRACTOR
10 IN AN AMOUNT LESS THAN ONE HUNDRED FIFTY THOUSAND DOLLARS.

11 (4) "CONTRACTOR" MEANS A PERSON WHO ENTERS INTO A
12 CONTRACT WITH A BUILDING CLIENT.

13 (5) "FINAL COMPLETION" MEANS THE STAGE OF A PROJECT AT
14 WHICH ALL CONDITIONS FOR FINAL PAYMENT AND RELEASE OF RETAINAGE
15 CONTAINED IN THE CONTRACT HAVE BEEN SATISFIED.

16 (6) "RETAINAGE" MEANS MONEY WITHHELD FROM A CONTRACTOR
17 OR SUBCONTRACTOR UNDER A CONTRACT UNTIL THE WORK IS
18 SATISFACTORILY COMPLETED.

19 (7) "SUBCONTRACTOR" MEANS A PERSON WHO, FOR PROFIT,
20 ENTERS INTO A SUBCONTRACT WITH A CONTRACTOR OR SUBCONTRACTOR
21 TO PERFORM A PORTION OF THE WORK UNDER A CONTRACT WITH A
22 BUILDING CLIENT.

23 **38-15-102. Retainage limits.** (1) EXCEPT AS PROVIDED IN
24 SUBSECTIONS (2) AND (3) OF THIS SECTION, A BUILDING CLIENT OR
25 CONTRACTOR SHALL PAY AT LEAST NINETY-FIVE PERCENT OF THE
26 CALCULATED VALUE OF SATISFACTORILY COMPLETED WORK UNDER THE
27 CONTRACT OR A SUBCONTRACT THEREOF.

1 (2) IF WORK HAS BEEN UNSATISFACTORILY COMPLETED OR IS NOT
2 COMPLETED ON TIME, THE BUILDING CLIENT OR CONTRACTOR MAY
3 WITHHOLD PAYMENT FOR SUCH WORK BEYOND THE AMOUNT AUTHORIZED
4 IN SUBSECTION (1) OF THIS SECTION IN ACCORDANCE WITH THE CONTRACT
5 OR EQUAL TO THE VALUE OF THE DELAYED OR UNSATISFACTORILY
6 COMPLETED PORTION OF THE CONTRACT UNTIL IT IS SATISFACTORILY
7 COMPLETED.

8 (3) THE BUILDING CLIENT MAY WITHHOLD A RETAINAGE PAYMENT
9 TO COMPLY WITH SECTION 38-26-107.

10 (4) RETAINAGE SHALL NOT BE WITHHELD FOR THE PORTION OF A
11 CONTRACT PRICE THAT COVERS THE COST OF STORING MATERIALS OR
12 EQUIPMENT AT THE CONSTRUCTION SITE.

13 **38-15-103. Payment required.** (1) WHEN A CONTRACTOR OR
14 SUBCONTRACTOR RECEIVES A PAYMENT FOR THE WORK OF A
15 SUBCONTRACTOR, THE CONTRACTOR OR SUBCONTRACTOR SHALL
16 FORWARD THE PAYMENT TO THE SUBCONTRACTOR WHO PERFORMED THE
17 WORK WITHIN SEVEN DAYS.

18 (2) EXCEPT AS PROVIDED IN SECTION 38-15-102 (2), THE BUILDING
19 CLIENT SHALL PAY TO THE CONTRACTOR THE BALANCE OF THE UNPAID
20 CONTRACT PRICE WITHIN THIRTY DAYS AFTER THE EARLIER OF THE
21 BUILDING BEING APPROVED FOR OCCUPANCY OR RECEIVING NOTICE OF
22 FINAL COMPLETION.

23 (3) IF THE CONTRACTOR DETERMINES THAT A SUBCONTRACTOR'S
24 PERFORMANCE HAS BEEN SATISFACTORILY COMPLETED AND THE
25 SUBCONTRACTOR CAN BE RELEASED PRIOR TO FINAL COMPLETION OF THE
26 ENTIRE PROJECT WITHOUT RISK TO THE BUILDING CLIENT FROM THE
27 SUBCONTRACTOR'S WORK, THE CONTRACTOR SHALL REQUEST AN

1 ADJUSTMENT IN RETAINAGE FROM THE OWNER AS NECESSARY TO ENABLE
2 THE CONTRACTOR TO PAY THE SUBCONTRACTOR IN FULL, AND THE
3 BUILDING CLIENT SHALL RELEASE THE SUBCONTRACTOR'S RETAINAGE TO
4 THE CONTRACTOR AS PART OF THE NEXT CONTRACTUAL PAYMENT CYCLE.

5 **38-15-104. Substitute securities.** (1) THE CONTRACTOR MAY
6 TENDER TO THE BUILDING CLIENT ACCEPTABLE SUBSTITUTE SECURITY
7 WITH A WRITTEN REQUEST FOR RELEASE OF RETAINAGE IN THE AMOUNT OF
8 THE SUBSTITUTE SECURITY. UPON RECEIVING SUCH A REQUEST AND
9 ACCEPTABLE SECURITY, THE BUILDING CLIENT SHALL EITHER:

10 (a) PAY THE RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE
11 SECURITY WITHIN SEVEN DAYS AFTER RECEIVING THE SUBSTITUTE
12 SECURITY IF THE RETAINAGE COVERED BY THE SECURITY HAS ALREADY
13 BEEN WITHHELD; OR

14 (b) DISCONTINUE WITHHOLDING RETAINAGE UNTIL THE AMOUNT
15 NOT WITHHELD EQUALS THE SUBSTITUTE SECURITY IF THE RETAINAGE HAS
16 NOT BEEN WITHHELD.

17 (2) THE SUBCONTRACTOR MAY TENDER TO THE CONTRACTOR
18 ACCEPTABLE SUBSTITUTE SECURITY WITH A WRITTEN REQUEST FOR
19 RELEASE OF RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE SECURITY.
20 UPON RECEIVING SUCH A REQUEST AND ACCEPTABLE SUBSTITUTE
21 SECURITY, THE CONTRACTOR SHALL TENDER THE SUBSTITUTE SECURITY
22 TO THE BUILDING CLIENT WITH A REQUEST FOR THE RELEASE OF THE
23 RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE SECURITY.

24 (3) FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING
25 CONSTITUTE ACCEPTABLE SUBSTITUTE SECURITY IN THE AMOUNT OF THE
26 RETAINAGE RELEASED:

27 (a) AN IRREVOCABLE AND UNCONDITIONAL LETTER OF CREDIT IN

1 FAVOR OF THE BUILDING CLIENT, ISSUED BY A NATIONAL BANK OR
2 BUILDING AND LOAN ASSOCIATION LOCATED IN COLORADO OR BY A BANK
3 INCORPORATED UNDER THE LAWS OF COLORADO;

4 (b) RETAINAGE BONDS NAMING THE BUILDING CLIENT AS OBLIGEE,
5 ISSUED BY A SURETY COMPANY AUTHORIZED TO ISSUE BONDS IN
6 COLORADO; AND

7 (c) CERTIFICATES OF DEPOSIT DRAWN AND ISSUED BY A NATIONAL
8 BANK OR BUILDING AND LOAN ASSOCIATION LOCATED IN COLORADO OR BY
9 A BANK INCORPORATED UNDER THE LAWS OF COLORADO.

10 **38-15-105. Violations.** A BUILDING CLIENT, CONTRACTOR, OR
11 SUBCONTRACTOR WHO VIOLATES THIS ARTICLE BY FAILING TO MAKE A
12 PAYMENT REQUIRED BY SECTION 38-15-103 SHALL BE LIABLE FOR THE
13 PAYMENT PLUS INTEREST AND A PENALTY TO ANY PERSON SUFFERING
14 DAMAGES ON ACCOUNT OF THE VIOLATION. THE PENALTY IS FIFTEEN
15 PERCENT INTEREST PER ANNUM, COMPOUNDED DAILY.

16 **SECTION 3.** 24-91-102, Colorado Revised Statutes, is amended
17 BY THE ADDITION OF A NEW SUBSECTION to read:

18 **24-91-102. Definitions.** As used in this article, unless the context
19 otherwise requires:

20 (3.5) "RETAINAGE" MEANS MONEY WITHHELD FROM A
21 CONTRACTOR OR SUBCONTRACTOR UNDER A CONSTRUCTION CONTRACT
22 UNTIL THE WORK IS SATISFACTORILY COMPLETED.

23 **SECTION 4.** 24-91-103 (1) and (3), Colorado Revised Statutes,
24 are amended to read:

25 **24-91-103. Public entity - contracts - partial payments.**
26 (1) (a) A public entity awarding a contract exceeding one hundred fifty
27 thousand dollars for the construction, alteration, or repair of any highway,

1 public building, public work, or public improvement, structure, or system
2 shall authorize partial payments of the amount due under such contract at
3 the end of each calendar month, or as soon thereafter as practicable, to the
4 contractor, if the contractor is satisfactorily performing the contract.
5 EXCEPT AS PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (1), THE
6 PUBLIC ENTITY SHALL PAY at least ~~ninety~~ NINETY-FIVE percent of the
7 calculated value of any work THE completed shall be paid until fifty
8 percent of the work required by the contract has been performed.
9 Thereafter, the public entity shall pay any of the remaining installments
10 without retaining additional funds if, in the opinion of the public entity,
11 satisfactory progress is being made in the work.

12 (b) (I) The withheld percentage of the contract price of any such
13 CONTRACTED work, improvement, or construction shall be retained until
14 the contract is completed satisfactorily and finally accepted by the public
15 entity. If the public entity finds that satisfactory progress is being made
16 in ~~all~~ ANY phases of the contract, it may, upon written request by the
17 contractor, authorize final payment from the withheld percentage to the
18 contractor or subcontractors who have completed their work in a manner
19 finally acceptable to the public entity. Before such payment is made, the
20 public entity shall determine that satisfactory and substantial reasons exist
21 for the payment and shall require written approval from any surety
22 furnishing bonds for the contract work.

23 (II) THE PUBLIC ENTITY MAY WITHHOLD A RETAINAGE TO COMPLY
24 WITH SECTION 38-26-107.

25 (3) The provisions of this section shall apply to contracts between
26 contractors and subcontractors entered into on or after July 1, 1991.

27 SECTION 5. 24-91-103.6 (2) (b), Colorado Revised Statutes, is

1 amended to read:

2 **24-91-103.6. Public entity - contracts - appropriations - change**
3 **orders - severability.** (2) Every public works contract, as defined in
4 section 24-91-103.5 (1) (b), shall contain the following:

5 (b) A clause ~~which~~ THAT prohibits the issuance of any change
6 order or other form of order or directive by the public entity requiring
7 additional compensable work to be performed, which work causes the
8 aggregate amount payable under the contract to exceed the amount
9 appropriated for the original contract, unless:

10 (I) The contractor is given written assurance by the public entity
11 that lawful appropriations to cover the costs of the additional work have
12 been made AND THE APPROPRIATIONS ARE AVAILABLE BEFORE
13 PERFORMANCE OF THE ADDITIONAL WORK; or ~~unless such~~

14 (II) THE work is covered under a remedy-granting provision in the
15 contract.

16 **SECTION 6.** Article 91 of title 24, Colorado Revised Statutes, is
17 amended BY THE ADDITION OF THE FOLLOWING NEW
18 SECTIONS to read:

19 **24-91-111. Substitute securities.** (1) THE CONTRACTOR MAY
20 TENDER TO THE PUBLIC ENTITY ACCEPTABLE SUBSTITUTE SECURITY WITH
21 A WRITTEN REQUEST FOR RELEASE OF RETAINAGE IN THE AMOUNT OF THE
22 SUBSTITUTE SECURITY. UPON RECEIVING SUCH A REQUEST AND
23 ACCEPTABLE SUBSTITUTE SECURITY, THE PUBLIC ENTITY SHALL EITHER:

24 (a) PAY THE RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE
25 SECURITY WITHIN SEVEN DAYS AFTER RECEIVING THE SUBSTITUTE
26 SECURITY IF THE RETAINAGE COVERED BY THE SECURITY HAS ALREADY
27 BEEN WITHHELD; OR

1 (b) DISCONTINUE WITHHOLDING RETAINAGE UNTIL THE AMOUNT
2 NOT WITHHELD EQUALS THE SUBSTITUTE SECURITY IF THE RETAINAGE HAS
3 NOT BEEN WITHHELD.

4 (2) THE SUBCONTRACTOR MAY TENDER TO THE CONTRACTOR
5 ACCEPTABLE SUBSTITUTE SECURITY WITH A WRITTEN REQUEST FOR
6 RELEASE OF RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE SECURITY.
7 UPON RECEIVING SUCH A REQUEST AND ACCEPTABLE SUBSTITUTE
8 SECURITY, THE CONTRACTOR SHALL TENDER THE SUBSTITUTE SECURITY
9 TO THE PUBLIC ENTITY WITH A REQUEST FOR THE RELEASE OF THE
10 RETAINAGE IN THE AMOUNT OF THE SUBSTITUTE SECURITY.

11 (3) FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING
12 CONSTITUTE ACCEPTABLE SUBSTITUTE SECURITY IN THE AMOUNT OF THE
13 RETAINAGE RELEASED:

14 (a) AN IRREVOCABLE AND UNCONDITIONAL LETTER OF CREDIT, IN
15 FAVOR OF THE PUBLIC ENTITY, ISSUED BY A NATIONAL BANK OR BUILDING
16 AND LOAN ASSOCIATION LOCATED IN COLORADO OR BY A BANK
17 INCORPORATED UNDER THE LAWS OF COLORADO;

18 (b) RETAINAGE BONDS NAMING THE PUBLIC ENTITY AS OBLIGEE,
19 ISSUED BY A SURETY COMPANY AUTHORIZED TO ISSUE BONDS IN
20 COLORADO; AND

21 (c) CERTIFICATES OF DEPOSIT DRAWN AND ISSUED BY A NATIONAL
22 BANK OR BUILDING AND LOAN ASSOCIATION LOCATED IN COLORADO OR BY
23 A BANK INCORPORATED UNDER THE LAWS OF COLORADO.

24 **24-91-112. Violations.** A PUBLIC ENTITY, CONTRACTOR, OR
25 SUBCONTRACTOR WHO VIOLATES THIS ARTICLE BY FAILING TO MAKE A
26 PAYMENT REQUIRED BY SECTION 24-91-103 SHALL BE LIABLE FOR THE
27 PAYMENT PLUS INTEREST AND A PENALTY TO ANY PERSON SUFFERING

1 DAMAGES ON ACCOUNT OF THE VIOLATION. THE PENALTY IS FIFTEEN
2 PERCENT INTEREST PER ANNUM COMPOUNDED DAILY.

3 **SECTION 7. Act subject to petition - effective date.** This act
4 shall take effect at 12:01 a.m. on the day following the expiration of the
5 ninety-day period after final adjournment of the general assembly (August
6 11, 2010, if adjournment sine die is on May 12, 2010); except that, if a
7 referendum petition is filed pursuant to section 1 (3) of article V of the
8 state constitution against this act or an item, section, or part of this act
9 within such period, then the act, item, section, or part shall not take effect
10 unless approved by the people at the general election to be held in
11 November 2010 and shall take effect on the date of the official
12 declaration of the vote thereon by the governor.