

First Regular Session
Sixty-sixth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 07-0361.01 Karen Epps

HOUSE BILL 07-1115

HOUSE SPONSORSHIP

Riesberg,

SENATE SPONSORSHIP

Tapia,

House Committees

Business Affairs and Labor

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 necessarily reflect any amendments that may be subsequently adopted.)

Requires an owner to provide evidence, before and at all times during a construction project, to a contractor and subcontractor that moneys are available for payment to the contractor and subcontractor when due.

Requires a contractor and any subcontractors to submit monthly progress payment requests that include all work that was performed on the project during the previous month to the owner or the owner's

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.

designated representative. Allows for the following remedies, if payment is not made within the prescribed period:

- Suspension of performance by the contractor;
- An increase in the time allowed the contractor to complete the contractor's work;
- Reasonable and necessary demobilization and remobilization costs; and
- Interest and attorney fees.

Prohibits withholding retainage from a contractor, subcontractor, or second-tier contractor.

Establishes that the venue for any suit, arbitration, or other proceeding brought shall be in the state of Colorado.

Exempts any construction or improvement to a single-family dwelling or a multi-family dwelling with no more than 2 units.

Allows for freedom to contract; except that the obligations of good faith and fair dealing may not be disclaimed by contract. Voids a contract that attempts to include a provision or clause stating that a party to a construction contract cannot suspend performance under the contract.

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

2 **SECTION 1.** Title 8, Colorado Revised Statutes, is amended BY
3 THE ADDITION OF A NEW ARTICLE to read:

4 **ARTICLE 10.5**

5 **Construction Payment**

6 **8-10.5-101. Short title.** THIS ARTICLE SHALL BE KNOWN AND MAY
7 BE CITED AS THE "CONSTRUCTION PAYMENT REFORM ACT OF 2007".

8 **8-10.5-102. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
9 CONTEXT OTHERWISE REQUIRES:

10 (1) "CHANGE ORDER" MEANS A WRITTEN AUTHORIZATION FOR
11 CHANGES IN WORK, ISSUED AFTER THE EXECUTION OF A CONSTRUCTION
12 CONTRACT AND SIGNED BY AN OWNER, AN AUTHORIZED REPRESENTATIVE
13 OF A GENERAL CONTRACTOR, OR AN OFFICER OF A GENERAL CONTRACTOR.

14 (2) "CHANGES IN WORK" MEANS WORK REQUESTS ORDERED BY AN
15 OWNER AND CONSISTING OF ADDITIONS, DELETIONS, OR OTHER REVISIONS

1 TO A CONSTRUCTION CONTRACT. CHANGES IN WORK MAY INCLUDE, BUT
2 ARE NOT LIMITED TO, CHANGES TO THE DOLLAR AMOUNTS AND TIME
3 PERIODS SET FORTH IN THE CONTRACT.

4 (3) "CONSTRUCTION CONTRACT" MEANS AN AGREEMENT TO CARRY
5 OUT ALL OR PART OF A CONSTRUCTION PROJECT.

6 (4) "CONSTRUCTION PROJECT" MEANS THE CONSTRUCTION,
7 ALTERATION, REPAIR, DEMOLITION, OR MAINTENANCE OF ANY REAL
8 PROPERTY OR IMPROVEMENT TO REAL PROPERTY, INCLUDING ANY
9 BUILDING, STRUCTURE, PUBLIC WORK, SYSTEM, OR TELECOMMUNICATION
10 FACILITY.

11 (5) "CONTRACTOR" MEANS ANY PERSON, COMPANY, FIRM,
12 CORPORATION, OR OTHER ENTITY THAT IS A PARTY TO A CONSTRUCTION
13 CONTRACT WITH AN OWNER.

14 (6) "LATE PAYMENT COSTS AND FEES" MEANS ALL REASONABLE
15 AND NECESSARY DEMOBILIZATION AND REMOBILIZATION COSTS, INTEREST
16 AT THE RATE OF FIFTEEN PERCENT PER ANNUM ON ALL LATE PAYMENTS,
17 AND REASONABLE ATTORNEY FEES INCURRED TO SECURE PAYMENT.

18 (7) "OWNER" MEANS:

19 (a) AN ARCHITECT'S OR ENGINEER'S CLIENT;

20 (b) THE LEGAL OWNER OF A PROJECT, INCLUDING, BUT NOT
21 LIMITED TO, A GOVERNMENT AGENCY OR NATURAL PERSON; OR

22 (c) AN ENTITY WITH WHICH A CONSTRUCTION CONTRACT HAS BEEN
23 ENTERED INTO AND THAT WILL BE RESPONSIBLE FOR PAYMENT FOR WORK
24 PERFORMED UNDER THE CONSTRUCTION CONTRACT.

25 (8) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
26 PERFORMED UNDER A CONSTRUCTION CONTRACT PRIOR TO COMPLETION,
27 CALCULATED BY MEASURING THE WORK IN PLACE AND APPLYING A

1 PREVIOUSLY AGREED-UPON SCHEDULE OF VALUES TO THE MEASURED
2 AMOUNT TO DETERMINE THE AMOUNT DUE AT THAT POINT.

3 (9) "RETAINAGE" MEANS A SUM WITHHELD FROM ANY PAYMENTS
4 TO A CONTRACTOR, SUBCONTRACTOR, OR SECOND-TIER SUBCONTRACTOR,
5 TO BE PAID WHEN A CONSTRUCTION PROJECT IS COMPLETED.

6 (10) "SECOND-TIER SUBCONTRACTOR" MEANS ANY PERSON,
7 COMPANY, FIRM, CORPORATION, OR OTHER ENTITY THAT IS A PARTY TO A
8 CONSTRUCTION CONTRACT WITH A SUBCONTRACTOR ON A CONSTRUCTION
9 PROJECT AND THAT FURNISHES OR PERFORMS ON-SITE LABOR, EITHER WITH
10 OR WITHOUT FURNISHING MATERIALS.

11 (11) "SUBCONTRACTOR" MEANS ANY PERSON, COMPANY, FIRM,
12 CORPORATION, OR OTHER ENTITY THAT IS A PARTY TO A CONSTRUCTION
13 CONTRACT WITH A CONTRACTOR ON A CONSTRUCTION PROJECT AND THAT
14 FURNISHES OR PERFORMS ON-SITE LABOR, EITHER WITH OR WITHOUT
15 FURNISHING MATERIALS.

16 (12) "WRITTEN NOTICE" MEANS EITHER:

17 (a) WRITTEN NOTICE DELIVERED IN PERSON TO AN INDIVIDUAL, AN
18 AUTHORIZED REPRESENTATIVE OF AN ENTITY OTHER THAN A
19 CORPORATION, OR TO AN OFFICE OF A CORPORATION; OR

20 (b) WRITTEN NOTICE DELIVERED OR SENT BY ANY MEANS THAT
21 PROVIDES WRITTEN, THIRD-PARTY VERIFICATION OF DELIVERY TO THE
22 LAST-KNOWN ADDRESS OF THE PARTY FOR WHICH THE NOTICE WAS
23 INTENDED.

24 **8-10.5-103. Payment of contractors.** (1) BEFORE THE
25 COMMENCEMENT OF, AND AT ALL TIMES DURING, A CONSTRUCTION
26 PROJECT, AN OWNER SHALL PROVIDE EVIDENCE TO THE CONTRACTOR AND
27 SUBCONTRACTOR THAT AN AMOUNT SUFFICIENT TO SATISFY ALL KNOWN

1 EXPENDITURES, INCLUDING, BUT NOT LIMITED TO, A CHANGE ORDER, OF
2 ALL CONTRACTORS AND SUBCONTRACTORS IN CONNECTION WITH THE
3 COMPLETION OF THE OWNER'S CONSTRUCTION PROJECT HAS BEEN
4 OBTAINED AND WILL BE AVAILABLE FOR PAYMENT TO THE CONTRACTOR
5 AND SUBCONTRACTOR WHEN DUE. IF THE OWNER'S EVIDENCE OF HIS OR
6 HER ABILITY TO PAY SUCH EXPENDITURES IS DETERMINED BY THE
7 CONTRACTOR OR SUBCONTRACTOR TO BE INSUFFICIENT TO PAY THE TOTAL
8 AMOUNT OF THE CONSTRUCTION CONTRACT WHEN DUE, THE CONTRACTOR
9 OR SUBCONTRACTOR MAY SUSPEND CONSTRUCTION UNTIL THE OWNER
10 PRODUCES EVIDENCE THAT THE OWNER WILL BE ABLE TO PAY FOR THE
11 TOTAL COSTS OF THE CONSTRUCTION PROJECT WHEN DUE. ANY SUCH
12 SUSPENSION SHALL NOT BE CONSIDERED A MATERIAL BREACH OF THE
13 CONSTRUCTION CONTRACT.

14 (2) (a) EACH MONTH, ON OR BEFORE THE FIRST OR ANOTHER DATE
15 SPECIFIED FOR SUCH PURPOSE IN THE CONSTRUCTION CONTRACT, THE
16 CONTRACTOR SHALL SUBMIT PROGRESS PAYMENT REQUESTS TO THE
17 OWNER OR THE OWNER'S DESIGNATED REPRESENTATIVE. SUCH PROGRESS
18 PAYMENT REQUESTS SHALL INCLUDE ALL WORK THAT WAS PERFORMED ON
19 THE PROJECT DURING THE PREVIOUS MONTH. ALL PROGRESS PAYMENT
20 REQUESTS SHALL BE DEEMED APPROVED UNLESS, WITHIN TEN DAYS AFTER
21 THE PROGRESS PAYMENT REQUEST IS SENT BY FIRST-CLASS MAIL OR
22 HAND-DELIVERED, THE OWNER OR THE OWNER'S DESIGNATED
23 REPRESENTATIVE ISSUES A WRITTEN STATEMENT CONTESTING THE
24 PROGRESS PAYMENT REQUEST AND STATING IN DETAIL THE SPECIFIC WORK
25 THAT IS NOT APPROVED, AND THE REASONS THAT PART OF THE PROGRESS
26 PAYMENT IS WITHHELD. THE WORK THAT IS NOT APPROVED SHALL BE
27 CORRECTED AND INCLUDED IN THE PROGRESS PAYMENT REQUEST FOR THE

1 FOLLOWING MONTH. ALL ITEMS NOT CONTESTED IN THE WRITTEN
2 STATEMENT SHALL BE DEEMED APPROVED. PAYMENT FOR SUCH ITEMS
3 SHALL BE DUE WITHIN A SPECIFIED PERIOD AFTER RECEIPT OF THE
4 PROGRESS PAYMENT REQUEST, AS ESTABLISHED IN THE CONSTRUCTION
5 CONTRACT BUT NOT TO EXCEED THIRTY DAYS.

6 (b) IF THE OWNER FAILS TO MAKE PAYMENT WITHIN THE PERIOD
7 PRESCRIBED UNDER PARAGRAPH (a) OF THIS SUBSECTION (2), THE
8 CONTRACTOR MAY SUBMIT TO THE OWNER OR THE OWNER'S DESIGNATED
9 REPRESENTATIVE A WRITTEN NOTICE, NO LATER THAN SEVEN DAYS AFTER
10 PAYMENT WAS DUE, STATING THAT THE PROGRESS PAYMENT IS PAST DUE
11 AND THAT THE CONTRACTOR, IN ADDITION TO PAYMENT, MAY BE ENTITLED
12 TO ANY OF THE FOLLOWING REMEDIES:

13 (I) SUSPENSION OF PERFORMANCE, WHICH SHALL NOT BE DEEMED
14 A MATERIAL BREACH OF THE CONTRACT;

15 (II) AN INCREASE IN THE TIME ALLOWED TO THE CONTRACTOR TO
16 COMPLETE THE CONTRACTOR'S WORK, EQUAL TO THE NUMBER OF DAYS
17 PERFORMANCE WAS SUSPENDED IN ACCORDANCE WITH SUBPARAGRAPH (I)
18 OF THIS PARAGRAPH (b) PLUS THE NUMBER OF DAYS REQUIRED FOR
19 REMOBILIZATION, IF ANY;

20 (III) REASONABLE AND NECESSARY DEMOBILIZATION AND
21 REMOBILIZATION COSTS; AND

22 (IV) LATE PAYMENT COSTS AND FEES.

23 (3) (a) ALL PROVISIONS OF SUBSECTION (2) OF THIS SECTION SHALL
24 APPLY TO PAYMENTS DUE FROM A CONTRACTOR TO A SUBCONTRACTOR
25 AND FROM A SUBCONTRACTOR TO A SECOND-TIER SUBCONTRACTOR OR
26 SUPPLIER. THE DATES FOR REQUIRED PAYMENTS SHALL BE THOSE
27 ESTABLISHED IN THE CONTRACT BETWEEN THE CONTRACTOR AND THE

1 SUBCONTRACTOR OR IN THE CONTRACT BETWEEN THE SUBCONTRACTOR
2 AND SECOND-TIER SUBCONTRACTOR OR SUPPLIER, NOT TO EXCEED THIRTY
3 DAYS FROM THE DATE THE PROGRESS PAYMENT REQUEST WAS SUBMITTED
4 BY THE SUBCONTRACTOR OR THE SECOND-TIER SUBCONTRACTOR OR
5 SUPPLIER. THE SUBCONTRACTOR MAY SEND NOTICE TO THE CONTRACTOR,
6 AND THE SECOND-TIER SUBCONTRACTOR AND SUPPLIER MAY SEND NOTICE
7 TO THE SUBCONTRACTOR AS DESCRIBED IN PARAGRAPH (b) OF SUBSECTION
8 (2) OF THIS SECTION AND THE SUPPLIER SHALL BE ENTITLED TO THE
9 REMEDIES PROVIDED IN PARAGRAPH (b) OF SUBSECTION (2) OF THIS
10 SECTION.

11 (b) IF THE OWNER FAILS TO MAKE PAYMENT TO THE CONTRACTOR
12 WITHIN THE PERIOD PRESCRIBED PURSUANT TO PARAGRAPH (a) OF
13 SUBSECTION (2) OF THIS SECTION AND, AS A RESULT, THE CONTRACTOR IS
14 UNABLE TO MAKE PAYMENT TO THE SUBCONTRACTOR, THE
15 SUBCONTRACTOR MAY SUBMIT TO THE OWNER A WRITTEN NOTICE, NO
16 LATER THAN SEVEN DAYS AFTER THE DATE PAYMENT WAS DUE, STATING
17 THAT THE PROGRESS PAYMENT IS PAST DUE AND THAT THE
18 SUBCONTRACTOR, IN ADDITION TO PAYMENT, MAY BE ENTITLED TO ANY OF
19 THE FOLLOWING REMEDIES FROM THE OWNER:

20 (I) AN INCREASE IN THE TIME ALLOWED TO THE CONTRACTOR TO
21 COMPLETE THE CONTRACTOR'S WORK, EQUAL TO THE NUMBER OF DAYS
22 PERFORMANCE WAS SUSPENDED IN ACCORDANCE WITH SUBSECTION (2) OF
23 THIS SECTION PLUS THE NUMBER OF DAYS REQUIRED FOR REMOBILIZATION,
24 IF ANY;

25 (II) REASONABLE AND NECESSARY DEMOBILIZATION AND
26 REMOBILIZATION COSTS; AND

27 (III) LATE PAYMENT COSTS AND FEES.

1 (c) THE SUBCONTRACTOR MAY REQUEST FROM THE CONTRACTOR
2 OR THE OWNER A LIST OF THE DATES ON WHICH THE OWNER MADE
3 PAYMENT TO THE CONTRACTOR. IF THE CONTRACTOR FAILS TO PROVIDE
4 THE LIST, THE CONTRACTOR SHALL BE DEEMED TO HAVE COMMITTED A
5 MATERIAL BREACH OF THE SUBCONTRACT, AND THE SUBCONTRACTOR MAY
6 EXERCISE ALL REMEDIES PROVIDED BY LAW FOR A MATERIAL BREACH.

7 **8-10.5-104. Retainage.** NO RETAINAGE MAY BE WITHHELD FROM
8 A CONTRACTOR BY AN OWNER, FROM A SUBCONTRACTOR BY A
9 CONTRACTOR, OR FROM A SECOND-TIER SUBCONTRACTOR OR A SUPPLIER
10 BY A SUBCONTRACTOR.

11 **8-10.5-105. Choice of law - venue.** NOTWITHSTANDING ANY
12 CONTRACTUAL PROVISIONS TO THE CONTRARY, ANY SUIT, ARBITRATION,
13 OR OTHER PROCEEDING FOR THE RESOLUTION OF A DISPUTE IN ANY
14 CONSTRUCTION CONTRACT FOR IMPROVEMENTS TO REAL PROPERTY
15 LOCATED IN COLORADO SHALL BE BROUGHT IN COLORADO AND
16 GOVERNED BY THE LAWS OF COLORADO. VENUE SHALL BE PROPER IN THE
17 JUDICIAL DISTRICT IN WHICH THE REAL PROPERTY IS SITUATED OR IN
18 WHICH THE DEFENDANT RESIDES.

19 **8-10.5-106. Limitation of article.** THIS ARTICLE SHALL NOT
20 APPLY TO ANY CONSTRUCTION OR IMPROVEMENT TO A SINGLE-FAMILY
21 DWELLING OR A MULTI-FAMILY DWELLING WITH NO MORE THAN TWO
22 UNITS.

23 **8-10.5-107. Freedom to contract.** (1) SUBJECT ONLY TO THE
24 LATEST TIME ALLOWED FOR PAYMENT UNDER THIS ARTICLE, WHICH
25 CANNOT BE EXTENDED OR MODIFIED BY CONTRACT OR OTHERWISE, THE
26 PARTIES TO A CONSTRUCTION CONTRACT MAY ENTER INTO SUCH TERMS
27 AND CONDITIONS AS MUTUALLY AGREED UPON; EXCEPT THAT THE

1 OBLIGATIONS OF GOOD FAITH AND FAIR DEALING MAY NOT BE DISCLAIMED
2 BY AGREEMENT.

3 (2) NOTHING IN THIS SECTION SHALL ALTER OR AMEND ANY TERMS
4 OR CONDITIONS OF A SUPPLIER'S PURCHASE ORDER OR PAYMENT
5 PROVISIONS INTO WHICH THE SUPPLIER AND THE SUPPLIER'S CUSTOMER
6 ENTER.

7 **8-10.5-108. Void contracts.** ANY PROVISION, COVENANT,
8 CLAUSE, OR UNDERSTANDING IN, COLLATERAL TO, OR AFFECTING A
9 CONSTRUCTION CONTRACT OR SUBCONTRACT STATING THAT A PARTY
10 THERETO CANNOT SUSPEND PERFORMANCE UNDER THE CONTRACT IF
11 ANOTHER PARTY FAILS TO MAKE PROMPT PAYMENTS PURSUANT TO THIS
12 ARTICLE IS HEREBY DECLARED CONTRARY TO PUBLIC POLICY AND SHALL
13 BE VOID AND UNENFORCEABLE.

14 **SECTION 2. Effective date - applicability.** (1) This act shall
15 take effect September 1, 2007.

16 (2) However, if a referendum petition is filed against this act or
17 an item, section, or part of this act during the 90-day period after final
18 adjournment of the general assembly that is allowed for submitting a
19 referendum petition pursuant to article V, section 1 (3) of the state
20 constitution, then the act, item, section, or part, shall not take effect unless
21 approved by the people at a biennial regular general election and shall
22 take effect on the date specified in subsection (1) or on the date of the
23 official declaration of the vote thereon by proclamation of the governor,
24 whichever is later.

25 (3) The provisions of this act shall apply to construction contracts
26 entered into on or after the applicable effective date of this act.