

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

INTRODUCED

LLS NO. 09-0487.01 Jery Payne

SENATE BILL 09-095

SENATE SPONSORSHIP

Tapia,

HOUSE SPONSORSHIP

Riesberg, Benefield

Senate Committees
State, Veterans & Military Affairs

House 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 necessarily reflect any amendments that may be subsequently adopted.)

Enacts the "Construction Prompt Payment Reform Act of 2009".
Authorizes a contractor or subcontractor to request a written statement of a property owner's ability to fulfill contract obligations, and requires the owner to provide the statement. Prohibits the contractor and subcontractor from disclosing the statement. Exempts public entities from this requirement.

Requires, with some exceptions, construction agreements that

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.

require more than one month to complete to provide for progress payments every 30 days upon submission of an invoice. Sets standards and timelines for refusing to pay an invoice and for curing problems. Clarifies that failure to disapprove a progress payment invoice is not a waiver of claims. Requires the owner to pay invoices within 25 days if subcontractors are used or 30 days if subcontractors are not used. Requires the contractor to forward progress payments to the subcontractor within 5 days or the end of the 30-day billing cycle. Requires a subcontractor to submit a list of suppliers of goods and services to the contractor with the invoice. Requires the owner, contractor, or subcontractor to pay at least 12% on unpaid invoices. Clarifies that an owner, contractor, or subcontractor may take offsets for specified appropriate failures of the person submitting the invoice. Sets procedures and timelines for such requirements.

Authorizes the owner to contract for progress payments of greater than 25 days, not to exceed 75 days. Sets procedures for notifying contractors and subcontractors of the extension.

Authorizes retaining a portion of the payment to ensure that the work is properly completed, but limits retaining greater than 10% on the first half of the contract if progress is satisfactory. Authorizes the subcontractor to request release of the retained fees and requires release within 90 days. Sets standards and timelines for the required release.

Requires monthly payment of actual costs on a change directive. Sets standards for calculating actual costs. Authorizes, if an agreement is not reached within 2 months, either actual costs plus 10% overhead and 5% profit or the suspension of work on change directives. Sets standards for suspension of performance under a change directive.

Authorizes a contractor or subcontractor to suspend performance under a construction agreement. Requires a contractor or subcontractor to resume work if the owner pays the amounts due plus the cost of the suspension. Sets standards and timelines for suspension and resumption of performance.

Sets standards for providing notice under the act. Declares agreements in violation of the act void. Prohibits contractual provisions that apply the law of any jurisdiction other than Colorado for real property within the state.

Imposes similar changes to public entity construction contracts, with exceptions for public safety and when required to maintain federal funding. Authorizes a public entity to require an accounting when necessary to implement a prevailing wage ordinance.

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

2 **SECTION 1.** Title 8, Colorado Revised Statutes, is amended BY

1 THE ADDITION OF A NEW ARTICLE to read:

2 **ARTICLE 10.5**

3 **Construction Payment**

4 **8-10.5-101. Short title.** THIS ARTICLE SHALL BE KNOWN AND MAY
5 BE CITED AS THE "CONSTRUCTION PROMPT PAYMENT REFORM ACT OF
6 2009".

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

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

19 **8-10.5-103. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
20 CONTEXT OTHERWISE REQUIRES:

21 (1) "BILLING CYCLE" MEANS THE BILLING CYCLE AS DETERMINED
22 BY THE CONSTRUCTION AGREEMENT BETWEEN AN OWNER AND A
23 CONTRACTOR, OR BETWEEN A CONTRACTOR AND A SUBCONTRACTOR OR
24 A SUBCONTRACTOR AND SUB-SUBCONTRACTOR.

25 (2) "CHANGE DIRECTIVE" MEANS ADDITIONAL WORK REQUESTED
26 BY AN OWNER FROM A CONTRACTOR, OR BY A CONTRACTOR FROM A
27 SUBCONTRACTOR, UNDER THE TERMS OF AN AGREEMENT THAT REQUIRES

1 THE WORK TO BE PERFORMED PRIOR TO AN AGREEMENT AS TO THE COST OF
2 THE ADDITIONAL WORK.

3 (3) "CHANGE ORDER" MEANS A WRITTEN AGREEMENT BETWEEN AN
4 OWNER AND A CONTRACTOR, OR BETWEEN A CONTRACTOR AND A
5 SUBCONTRACTOR, FOR CHANGES IN THE TIMING AND SCOPE OF WORK
6 UNDER A CONSTRUCTION AGREEMENT, AND SIGNED BY THE PARTIES TO
7 THE CHANGE ORDER.

8 (4) "CONSTRUCTION AGREEMENT" MEANS A CONTRACT,
9 SUBCONTRACT, OR AGREEMENT FOR MATERIALS OR LABOR FOR THE
10 CONSTRUCTION, ALTERATION, RENOVATION, OR REPAIR OF ANY BUILDING,
11 BUILDING SITE, STRUCTURE, HIGHWAY, STREET, ROADWAY, BRIDGE,
12 VIADUCT, WATER OR SEWER SYSTEM, GAS OR OTHER DISTRIBUTION
13 SYSTEM, OR OTHER WORK DEALING WITH CONSTRUCTION, OR FOR ANY
14 MOVING, DEMOLITION, OR EXCAVATION CONNECTED WITH THE
15 CONSTRUCTION. FOR THE PURPOSES OF THIS ARTICLE, "CONSTRUCTION
16 AGREEMENT" DOES NOT INCLUDE:

17 (a) A CONTRACT, SUBCONTRACT, OR AGREEMENT THAT CONCERNS
18 OR AFFECTS PROPERTY OWNED OR OPERATED BY A FEDERALLY REGULATED
19 RAILROAD;

20 (b) ANY REAL PROPERTY LEASE OR RENTAL AGREEMENT BETWEEN
21 A LANDLORD AND A TENANT, REGARDLESS OF WHETHER ANY PROVISION
22 OF THE LEASE OR RENTAL AGREEMENT CONCERNS CONSTRUCTION,
23 ALTERATION, IMPROVEMENT, OR MAINTENANCE OF REAL PROPERTY;

24 (c) A CONTRACT FOR THE CONSTRUCTION, IMPROVEMENT,
25 ALTERATION, MOVING, OR DEMOLITION OF SINGLE-FAMILY DWELLINGS OR
26 MULTI-FAMILY DWELLINGS WITH NO MORE THAN TWO UNITS; AND

27 (d) A CONTRACT BETWEEN AN OWNER AND A CONTRACTOR IN AN

1 AMOUNT LESS THAN ONE HUNDRED THOUSAND DOLLARS.

2 (5) "CONSTRUCTION PROJECT" MEANS A PROJECT THAT IS THE
3 SUBJECT OF A CONSTRUCTION AGREEMENT.

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

7 (7) "DAY" MEANS A CALENDAR DAY.

8 (8) "MATERIAL INCREASE IN THE SCOPE OF WORK" MEANS A
9 CHANGE IN THE AMOUNT OR TYPE OF WORK REQUIRED UNDER A
10 CONSTRUCTION AGREEMENT THAT INCREASES THE COST OF A
11 CONTRACTOR'S OR SUBCONTRACTOR'S WORK BY MORE THAN TWENTY
12 PERCENT.

13 (9) "MATERIAL SUPPLIER" MEANS A PERSON THAT HAS A
14 CONTRACT WITH AN OWNER, CONTRACTOR, OR SUBCONTRACTOR FOR THE
15 PROVISION OF CONSTRUCTION MATERIALS OR EQUIPMENT ACTUALLY USED
16 TO COMPLETE A CONSTRUCTION AGREEMENT.

17 (10) "NOTICE OF NONPAYMENT" MEANS A SWORN STATEMENT BY
18 A CONTRACTOR OR SUBCONTRACTOR THAT AN AMOUNT DUE UNDER A
19 PROGRESS PAYMENT INVOICE HAS NOT BEEN PAID TO THE CONTRACTOR OR
20 SUBCONTRACTOR AND THAT NO CAUSE FOR WITHHOLDING THE PAYMENT
21 EXISTS UNDER THE CONSTRUCTION AGREEMENT OR THIS ARTICLE.

22 (11) "OWNER" MEANS ANY PERSON THAT HOLDS AN INTEREST IN
23 REAL PROPERTY AND CAUSES A BUILDING, STRUCTURE, OR IMPROVEMENT
24 ON REAL PROPERTY TO BE CONSTRUCTED, ALTERED, MOVED, OR
25 DEMOLISHED OR THAT CAUSES LAND TO BE EXCAVATED OR OTHERWISE
26 DEVELOPED OR IMPROVED, WHETHER THE INTEREST IS IN FEE OR ANOTHER
27 INTEREST OR ESTATE LESS THAN FEE, INCLUDING, WITHOUT LIMITATION,

1 AS A VENDEE UNDER A CONTRACT TO PURCHASE OR AS A LESSEE.
2 "OWNER" SHALL NOT INCLUDE ANY PUBLIC ENTITY ENTERING INTO A
3 CONSTRUCTION AGREEMENT.

4 (12) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
5 PERFORMED UNDER A CONSTRUCTION AGREEMENT, CALCULATED BY
6 MEASURING THE WORK IN PLACE OR APPLYING A PREVIOUSLY
7 AGREED-UPON SCHEDULE OF VALUES TO THE MEASURED AMOUNT, OR
8 OTHER METHOD AS SET FORTH IN THE CONSTRUCTION AGREEMENT, TO
9 DETERMINE THE AMOUNT DUE UNDER THE CONSTRUCTION AGREEMENT AT
10 THAT TIME.

11 (13) "PROGRESS PAYMENT INVOICE" MEANS A BILL SUBMITTED BY
12 A CONTRACTOR OR SUBCONTRACTOR FOR WORK PERFORMED DURING THE
13 PERIOD COVERED BY THE APPLICATION FOR PAYMENT OR PAYMENT
14 ESTIMATE AS SET FORTH IN THE CONSTRUCTION AGREEMENT AND FOR
15 WORK COMPLETED IN THE MOST RECENT BILLING CYCLE. THE
16 APPLICATION SHALL ALSO INCLUDE REQUESTS FOR PAYMENT FOR WORK
17 PERFORMED PURSUANT TO ANY CHANGE ORDER OR CHANGE DIRECTIVE.

18 (14) "PUBLIC ENTITY" MEANS THIS STATE, A POLITICAL
19 SUBDIVISION OF THIS STATE, OR AN AGENT OR AGENCY THEREOF.

20 (15) "RETAINAGE" MEANS A PREESTABLISHED PERCENTAGE
21 WITHHELD FROM ANY PROGRESS PAYMENT TO A CONTRACTOR OR
22 SUBCONTRACTOR PURSUANT TO A CONSTRUCTION AGREEMENT.

23 (16) "SUBCONTRACTOR" MEANS ANY PERSON THAT HAS A DIRECT
24 CONTRACT WITH A CONTRACTOR OR ANOTHER SUBCONTRACTOR TO
25 PERFORM A PORTION OF THE WORK UNDER A CONSTRUCTION AGREEMENT.

26 **8-10.5-104. Ability to pay.** (1) THIS SECTION SHALL APPLY IF
27 THE CONSTRUCTION AGREEMENT BETWEEN AN OWNER AND A

1 CONTRACTOR PROVIDES FOR PAYMENT IN EXCESS OF TWO HUNDRED FIFTY
2 THOUSAND DOLLARS.

3 (2) (a) AN OWNER SHALL, AT THE WRITTEN REQUEST OF A
4 CONTRACTOR, FURNISH TO THE CONTRACTOR A WRITTEN STATEMENT OF
5 THE OWNER'S ABILITY TO FULFILL THE OWNER'S OBLIGATIONS UNDER THE
6 CONSTRUCTION AGREEMENT.

7 (b) IF THE CONTRACTOR DETERMINES THAT THE STATEMENT IS NOT
8 SATISFACTORY TO THE CONTRACTOR, THE CONTRACTOR MAY DECLINE TO
9 ENTER INTO A CONSTRUCTION AGREEMENT WITH THE OWNER.

10 (3) (a) A SUBCONTRACTOR MAY, BEFORE ENTERING INTO A
11 CONSTRUCTION AGREEMENT WITH A CONTRACTOR, REVIEW THE WRITTEN
12 STATEMENT PROVIDED TO THE CONTRACTOR BY THE OWNER PURSUANT TO
13 SUBSECTION (2) OF THIS SECTION. AT THE WRITTEN REQUEST OF THE
14 SUBCONTRACTOR, THE CONTRACTOR SHALL REQUEST THE WRITTEN
15 STATEMENT ON BEHALF OF THE SUBCONTRACTOR IF THE CONTRACTOR HAS
16 NOT PREVIOUSLY REQUESTED THE WRITTEN STATEMENT.

17 (b) IF THE SUBCONTRACTOR DETERMINES THAT THE WRITTEN
18 STATEMENT IS NOT SATISFACTORY TO THE SUBCONTRACTOR, THE
19 SUBCONTRACTOR MAY DECLINE TO ENTER INTO AN AGREEMENT WITH THE
20 CONTRACTOR.

21 (4) (a) IF A CHANGE ORDER OR CHANGE DIRECTIVE MATERIALLY
22 INCREASES THE TIME OR SCOPE OF THE WORK UNDER A CONSTRUCTION
23 AGREEMENT, THE CONTRACTOR OR SUBCONTRACTOR MAY, PRIOR TO
24 COMMENCING WORK, REQUEST A WRITTEN STATEMENT FROM THE OWNER
25 AS TO THE OWNER'S ABILITY TO FULFILL THE OWNER'S OBLIGATIONS UNDER
26 THE CHANGE ORDER OR CHANGE DIRECTIVE.

27 (b) IF A CONTRACTOR OR SUBCONTRACTOR REASONABLY

1 DETERMINES THAT THE WRITTEN STATEMENT IS NOT SATISFACTORY, THE
2 CONTRACTOR OR SUBCONTRACTOR SHALL NOT BE REQUIRED TO PERFORM
3 WORK UNDER THE CHANGE ORDER OR CHANGE DIRECTIVE. IF THE OWNER
4 PROVIDES REASONABLE EVIDENCE OF THE OWNER'S ABILITY TO FULFILL ITS
5 OBLIGATIONS UNDER THE CHANGE ORDER OR CHANGE DIRECTIVE, THE
6 CONTRACTOR OR SUBCONTRACTOR SHALL COMPLY WITH THE CHANGE
7 ORDER OR CHANGE DIRECTIVE.

8 (5) THE WRITTEN STATEMENT SHALL BE MAINTAINED IN
9 CONFIDENCE BY ANY CONTRACTOR OR SUBCONTRACTOR TO WHOM IT IS
10 PROVIDED AND SHALL NOT BE DISCLOSED TO ANY OTHER PERSON OR
11 ENTITY WITHOUT THE WRITTEN CONSENT OF THE OWNER.

12 **8-10.5-105. Billing cycles and progress payments.** (1) EXCEPT
13 IN THE CASE OF A SINGLE PAYMENT CONTRACT, UNIT-PRICE CONTRACT, OR
14 CONTRACT PAYABLE IN INSTALLMENTS OR ON COMPLETION, A
15 CONSTRUCTION AGREEMENT THAT REQUIRES MORE THAN ONE MONTH TO
16 COMPLETE THE WORK SHALL BE PAYABLE BY THE OWNER TO THE
17 CONTRACTOR, AND BY THE CONTRACTOR TO A SUBCONTRACTOR, IN
18 REGULAR PROGRESS PAYMENTS BASED UPON A BILLING CYCLE SET FORTH
19 IN THE CONSTRUCTION AGREEMENT.

20 (2) EXCEPT AS PROVIDED IN THIS ARTICLE, A SUBCONTRACTOR
21 SHALL SUBMIT TO ITS CONTRACTOR, ON A MONTHLY BASIS, A PROGRESS
22 PAYMENT INVOICE FOR WORK ACTUALLY PERFORMED AND MATERIAL
23 ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING CYCLE. UPON
24 RECEIPT OF A PROGRESS PAYMENT INVOICE AND ALL CONTRACTUALLY
25 REQUIRED DOCUMENTATION FROM THE SUBCONTRACTOR, THE
26 CONTRACTOR SHALL APPROVE OR DISAPPROVE ALL OR A PORTION OF THE
27 PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS. THE REASONS FOR ANY

1 DISAPPROVAL SHALL BE PROVIDED TO THE SUBCONTRACTOR IN WRITING,
2 AND THE SUBCONTRACTOR SHALL HAVE THREE BUSINESS DAYS TO SUBMIT
3 A CORRECTED PROGRESS PAYMENT INVOICE. CONTRACTOR APPROVAL OF
4 INVOICES SHALL NOT BE UNREASONABLY WITHHELD, NOR SHALL A
5 CONTRACTOR DISAPPROVE ALL OR A PORTION OF AN INVOICE IN BAD FAITH.

6 (3) A CONTRACTOR SHALL SUBMIT TO THE OWNER OR TO THE
7 OWNER'S REPRESENTATIVE A PROGRESS PAYMENT INVOICE AT THE END OF
8 THE BILLING CYCLE BETWEEN THE CONTRACTOR AND THE OWNER FOR
9 WORK ACTUALLY PERFORMED AND MATERIAL ACTUALLY SUPPLIED
10 DURING THE MOST RECENT BILLING CYCLE, TOGETHER WITH ALL
11 DOCUMENTATION REQUIRED BY THE CONSTRUCTION AGREEMENT.

12 (4) APPROVAL OF ALL OR PART OF A PROGRESS PAYMENT INVOICE
13 BY A CONTRACTOR OR OWNER, OR THE FAILURE TO DISAPPROVE A
14 PROGRESS PAYMENT INVOICE, SHALL NOT BE DEEMED:

15 (a) A WAIVER OF ANY CLAIM FOR, OR ACCEPTANCE OF, WORK THAT
16 IS NOT IN CONFORMANCE WITH THE CONSTRUCTION AGREEMENT;

17 (b) A WAIVER OF CLAIMS FOR BREACH OF THE CONSTRUCTION
18 AGREEMENT; OR

19 (c) A WAIVER OF CLAIMS ARISING FROM WRONGFUL ACTS OR
20 OMISSIONS OF THE CONTRACTOR OR SUBCONTRACTOR.

21 (5) EXCEPT AS PROVIDED IN SECTIONS 8-10.5-106 AND 38-26-107,
22 C.R.S., IF THE CONTRACTOR USED A SUBCONTRACTOR, PAYMENT OF THE
23 PROGRESS PAYMENT INVOICE MINUS ANY EXCLUSION AUTHORIZED BY THIS
24 SECTION SHALL BE DUE FROM THE OWNER TO THE CONTRACTOR NO LATER
25 THAN TWENTY-FIVE DAYS AFTER RECEIPT BY THE OWNER OR THE OWNER'S
26 REPRESENTATIVE OF THE PROGRESS PAYMENT INVOICE. IF THE
27 CONTRACTOR DID NOT USE A SUBCONTRACTOR, THE APPROVED PORTION

1 OF THE PROGRESS PAYMENT SHALL BE DUE FROM THE OWNER TO THE
2 CONTRACTOR NO LATER THAN THIRTY DAYS AFTER RECEIPT BY THE
3 OWNER OR THE OWNER'S REPRESENTATIVE OF THE PROGRESS PAYMENT
4 INVOICE.

5 (6) IF A CONTRACTOR RECEIVES A PROGRESS PAYMENT FROM AN
6 OWNER, THE CONTRACTOR SHALL PAY EACH SUBCONTRACTOR ANY
7 AMOUNTS ACTUALLY RECEIVED FOR THE SUBCONTRACTOR'S WORK THAT
8 WERE INCLUDED IN THE CONTRACTOR'S PROGRESS PAYMENT INVOICE. THE
9 CONTRACTOR SHALL PAY THE SUBCONTRACTORS WITHIN FIVE DAYS AFTER
10 RECEIPT OF THE PROGRESS PAYMENT FROM THE OWNER FOR THE WORK OR
11 WITHIN THE THIRTY-DAY BILLING CYCLE, WHICHEVER OCCURS FIRST.

12 (7) WHEN A SUBCONTRACTOR SUBMITS A PROGRESS PAYMENT
13 INVOICE TO A CONTRACTOR, THE SUBCONTRACTOR SHALL ALSO SUBMIT
14 WITH THE PROGRESS PAYMENT INVOICE A LIST OF THE SUBCONTRACTOR'S
15 MATERIAL SUPPLIERS AND SUB-SUBCONTRACTORS WHO PERFORMED WORK
16 OR PROVIDED MATERIALS INCLUDED IN THE PROGRESS PAYMENT INVOICE.
17 A CONTRACTOR SHALL SUBMIT THE LIST TO THE OWNER WITH THE
18 PROGRESS PAYMENT INVOICE. THE TIME PERIODS FOR MAKING A PAYMENT
19 SHALL BE SUSPENDED UNTIL THE SUBCONTRACTOR SUBMITS THE LIST.

20 (8) IF AN OWNER DOES NOT PAY THE APPROVED PORTION OF THE
21 PROGRESS PAYMENT TO A CONTRACTOR WHEN DUE, THE OWNER SHALL
22 PAY THE CONTRACTOR INTEREST FROM THE DATE THE PAYMENT WAS DUE
23 AT THE GREATER OF THE RATE OF TWELVE PERCENT PER ANNUM OR THE
24 RATE SPECIFIED IN THE CONSTRUCTION AGREEMENT ON THE UNPAID
25 AMOUNT. THE INTEREST SHALL INURE TO THE BENEFIT OF ANY
26 SUBCONTRACTOR OR MATERIAL SUPPLIER TO THE EXTENT OF THE
27 AMOUNTS DUE TO SUCH SUBCONTRACTOR OR MATERIAL SUPPLIER FROM

1 THE PROGRESS PAYMENT.

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

8 (10) IF A SUBCONTRACTOR WHO RECEIVED A PROGRESS PAYMENT
9 FROM A CONTRACTOR FAILS TO MAKE PAYMENTS REQUIRED BY THIS
10 ARTICLE TO THE MATERIAL SUPPLIERS OR SUB-SUBCONTRACTORS WHO
11 PERFORMED WORK OR PROVIDED MATERIALS INCLUDED IN THE PROGRESS
12 PAYMENT, THE SUBCONTRACTOR SHALL PAY THE MATERIAL SUPPLIERS
13 AND SUB-SUBCONTRACTORS INTEREST FROM THE DATE THE PAYMENT WAS
14 DUE AT THE GREATER OF THE RATE OF TWELVE PERCENT PER ANNUM OR
15 THE RATE SPECIFIED IN THE CONSTRUCTION AGREEMENT OF THE
16 SUBCONTRACTOR WITH THE MATERIAL SUPPLIER OR SUB-SUBCONTRACTOR
17 UNTIL THE AMOUNTS ARE PAID.

18 (11) NOTHING IN THIS ARTICLE SHALL PROHIBIT AN OWNER,
19 CONTRACTOR, SUBCONTRACTOR, OR MATERIAL SUPPLIER FROM
20 EXCLUDING, DEDUCTING, OR OFFSETTING FROM PAYMENT FOR AMOUNTS
21 PERMITTED BY THE CONSTRUCTION AGREEMENT OR BY LAW TO BE
22 EXCLUDED, DEDUCTED, OR OFFSET, OR IF THE CONSTRUCTION AGREEMENT
23 DOES NOT ADDRESS THE FOLLOWING, AMOUNTS DUE TO:

24 (a) FAILURE OF THE PARTY DUE THE PAYMENT TO PERFORM WORK
25 AS REQUIRED BY THE CONSTRUCTION AGREEMENT;

26 (b) LOSS OR DAMAGE ARISING OUT OF THE CONSTRUCTION
27 AGREEMENT AND CAUSED BY THE PARTY DUE THE PAYMENT;

1 (c) FAILURE OF THE PARTY DUE THE PAYMENT TO PROPERLY PAY
2 AMOUNTS DUE TO OTHERS FOR WORK OR MATERIALS ON THE
3 CONSTRUCTION PROJECT;

4 (d) REJECTED, NONCONFORMING, OR DEFECTIVE WORK OF THE
5 PARTY DUE THE PAYMENT;

6 (e) DELAY BY THE PARTY DUE THE PAYMENT IN PERFORMANCE OF
7 THE WORK IF THE WORK WILL NOT BE COMPLETED WITHIN THE TIME
8 REQUIRED BY THE CONSTRUCTION AGREEMENT;

9 (f) THE UNPAID BALANCE OF THE CONSTRUCTION AGREEMENT
10 PRICE WITH THE PARTY DUE THE PAYMENT BEING INSUFFICIENT TO FUND
11 THE COST TO COMPLETE THE WORK;

12 (g) THIRD-PARTY CLAIMS INVOLVING THE PARTY DUE THE
13 PAYMENT OR REASONABLE EVIDENCE THAT THIRD-PARTY CLAIMS ARE
14 LIKELY TO BE FILED, UNLESS AND UNTIL THE CONTRACTOR OR
15 SUBCONTRACTOR HAS PROVIDED THE OWNER WITH ADEQUATE SECURITY
16 IN THE FORM OF A SURETY BOND, LETTER OF CREDIT, OR OTHER
17 COLLATERAL OR COMMITMENT SUFFICIENT TO DISCHARGE THE CLAIMS, IF
18 ESTABLISHED.

19 (12) THE PERSON EXCLUDING, DEDUCTING, OR OFFSETTING
20 AMOUNTS FROM THE PAYMENT SHALL PROVIDE THE PARTY REQUESTING
21 PAYMENT WITH WRITTEN NOTICE OF THE REASONS FOR THE EXCLUSION,
22 DEDUCTION, OR OFFSET AND SHALL AFFORD THE PARTY THE TIME
23 PERMITTED BY THE CONSTRUCTION AGREEMENT TO CURE THE DEFAULT.

24 (13) A SUBCONTRACTOR MAY NOTIFY THE CONTRACTOR THAT
25 PAYMENT HAS NOT BEEN RECEIVED AND REQUEST ACKNOWLEDGMENT OF
26 WHETHER A PROGRESS PAYMENT OR FINAL PAYMENT HAS BEEN MADE FOR
27 THE SUBCONTRACTOR'S WORK. THE SUBCONTRACTOR MAY SEND A COPY

1 OF SUCH NOTIFICATION AND REQUEST TO THE CONTRACTOR OR OWNER.

2 (14) FINAL PAYMENT UNDER A CONSTRUCTION AGREEMENT SHALL
3 BE MADE AS REQUIRED BY THE CONSTRUCTION AGREEMENT, AND IN THE
4 CASE OF A PUBLIC PROJECT, AS REQUIRED BY SECTION 38-26-107, C.R.S.

5 (15) THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT
6 RETAINAGE AUTHORIZED BY SECTION 8-10.5-107.

7 **8-10.5-106. Extended progress payment time.** (1) AN OWNER
8 MAY MAKE PROGRESS PAYMENTS TO A CONTRACTOR MORE THAN
9 TWENTY-FIVE DAYS, BUT NO MORE THAN SEVENTY-FIVE DAYS, AFTER
10 RECEIPT OF A PROGRESS PAYMENT INVOICE IF:

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

15 (b) THE FOLLOWING NOTICE, OR A SUBSTANTIALLY SIMILAR
16 NOTICE, SPECIFYING THE NUMBER OF DAYS FOR PAYMENT APPEARS IN AT
17 LEAST FOURTEEN-POINT, BOLD-FACED TYPE, ON EACH PAGE OF EACH SET
18 OF PLANS FOR THE CONSTRUCTION PROJECT, INCLUDING, WITHOUT
19 LIMITATION, BID PLANS, CONTRACT PLANS, EACH PAGE OF THE
20 CONSTRUCTION PROJECT'S SPECIFICATIONS, AND ON THE COVER SHEET OF
21 EACH BID PROPOSAL OR REQUEST FOR PROPOSAL:

22 **NOTICE OF EXTENDED PAYMENT PROVISION**

23 **THIS CONTRACT ALLOWS THE OWNER TO MAKE PAYMENT**
24 **TO THE GENERAL CONTRACTOR WITHIN _____ DAYS**
25 **AFTER RECEIPT OF A PROGRESS PAYMENT INVOICE FROM**
26 **THE CONTRACTOR TO THE OWNER.**

27 (2) IF THE CONSTRUCTION AGREEMENT PROVIDES FOR AN

1 EXTENDED PROGRESS PAYMENT UNDER THIS SECTION AND A CONTRACTOR
2 RECEIVES A PROGRESS PAYMENT FROM AN OWNER, THE CONTRACTOR
3 SHALL PAY EACH SUBCONTRACTOR ANY AMOUNTS ACTUALLY RECEIVED
4 FOR THE SUBCONTRACTOR'S WORK THAT WERE INCLUDED IN THE
5 CONTRACTOR'S PROGRESS PAYMENT INVOICE. THE CONTRACTOR SHALL
6 PAY THE SUBCONTRACTORS WITHIN FIVE DAYS AFTER RECEIPT OF THE
7 PROGRESS PAYMENT FROM THE OWNER FOR THE WORK OR WITHIN THE
8 EXTENDED BILLING CYCLE, WHICHEVER OCCURS FIRST.

9 **8-10.5-107. Retainage.** (1) SUBJECT TO SUBSECTION (2) OF THIS
10 SECTION, A CONSTRUCTION AGREEMENT MAY PROVIDE FOR RETAINAGE.

11 (2) AT LEAST NINETY PERCENT OF THE CALCULATED VALUE OF
12 COMPLETED WORK SHALL BE PAID UNTIL FIFTY PERCENT OF THE WORK
13 REQUIRED BY THE CONSTRUCTION AGREEMENT HAS BEEN PERFORMED.
14 THEREAFTER, THE REMAINING INSTALLMENTS SHALL BE PAID WITHOUT
15 RETAINING ADDITIONAL FUNDS IF SATISFACTORY PROGRESS IS BEING MADE
16 IN THE WORK.

17 (3) IF THE WORK OF A SUBCONTRACTOR UNDER A CONSTRUCTION
18 AGREEMENT WITH THE CONTRACTOR OR ANOTHER SUBCONTRACTOR HAS
19 BEEN COMPLETED PRIOR TO SUBSTANTIAL COMPLETION OF THE
20 CONSTRUCTION PROJECT OF WHICH THE SUBCONTRACTOR'S WORK IS A
21 PART, THE SUBCONTRACTOR MAY APPLY FOR PAYMENT OF RETAINAGE
22 PRIOR TO SUBSTANTIAL COMPLETION OF THE CONSTRUCTION PROJECT. IF
23 THE SUBCONTRACTOR APPLIES FOR PAYMENT OF RETAINAGE, THE OWNER
24 SHALL RELEASE RETAINAGE TO THE CONTRACTOR WITHIN NINETY DAYS
25 AFTER COMPLIANCE WITH THE FOLLOWING:

26 (a) ALL WORK BY THE SUBCONTRACTOR IS COMPLETE AND IN
27 SUBSTANTIAL COMPLIANCE WITH THE SUBCONTRACT DOCUMENTS AND THE

1 CONSTRUCTION AGREEMENT;

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

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

12 (4) THE RELEASE OF RETAINAGE TO A CONTRACTOR OR
13 SUBCONTRACTOR SHALL NOT BE DEEMED A WAIVER OR RELEASE OF ANY
14 CLAIMS BY THE OWNER OR CONTRACTOR FOR DAMAGES OR LOSS DUE TO
15 ANY LATER-DISCOVERED INCOMPLETE WORK OR DEFECT IN THE
16 CONTRACTOR'S OR SUBCONTRACTOR'S WORK.

17 (5) THE RETAINAGE, AND ANY INTEREST THEREON, PAID TO A
18 CONTRACTOR FOR THE BENEFIT OF A SUBCONTRACTOR SHALL BE PAID BY
19 THE CONTRACTOR TO THE SUBCONTRACTOR ENTITLED TO THE PAYMENT
20 WITHIN SEVEN DAYS AFTER RECEIPT BY THE CONTRACTOR.

21 **8-10.5-108. Change directives.** (1) A CONTRACTOR OR
22 SUBCONTRACTOR DIRECTED TO PERFORM ADDITIONAL WORK SHALL, UNTIL
23 A FORMAL AGREEMENT IS REACHED ON THE COST OF THE ADDITIONAL
24 WORK, BE ENTITLED TO COMPENSATION PAYABLE MONTHLY FROM THE
25 PARTY ISSUING THE CHANGE DIRECTIVE FOR THE ADDITIONAL WORK
26 ACTUALLY PERFORMED AT THE ACTUAL COST LESS RETAINAGE IF:

27 (a) THE ADDITIONAL WORK IS DIRECTED BY AN OWNER OR

1 CONTRACTOR UNDER A CHANGE DIRECTIVE PRIOR TO A CONSTRUCTION
2 AGREEMENT AS TO THE COST OF THE ADDITIONAL WORK; AND

3 (b) THE CONTRACTOR OR SUBCONTRACTOR IS, BY THE TERMS OF
4 THE CONSTRUCTION AGREEMENT, REQUIRED TO COMMENCE THE
5 ADDITIONAL WORK PRIOR TO AN AGREEMENT AS TO THE COST OF THE
6 ADDITIONAL WORK.

7 (2) (a) SUBJECT TO PARAGRAPH (b) OF THIS SUBSECTION (2), IF THE
8 PARTIES TO THE CHANGE DIRECTIVE HAVE NOT REACHED A MUTUAL
9 AGREEMENT AS TO THE COST OF THE ADDITIONAL WORK WITHIN TWO
10 MONTHS AFTER THE COMMENCEMENT OF THE ADDITIONAL WORK, AND THE
11 OWNER OR CONTRACTOR DIRECTING THE ADDITIONAL WORK HAS NOT
12 TERMINATED PERFORMANCE OF THE ADDITIONAL WORK, THE PARTY
13 PERFORMING THE ADDITIONAL WORK MAY EITHER:

14 (I) BILL, ON A MONTHLY BASIS, FOR THE COST OF THE ADDITIONAL
15 WORK PREVIOUSLY PERFORMED PLUS OVERHEAD AT TEN PERCENT AND
16 PROFIT AT FIVE PERCENT, AND THE PARTY DIRECTING THE WORK SHALL
17 PAY THE INVOICE; OR

18 (II) AFTER PROVIDING WRITTEN NOTICE TO THE OWNER OR
19 CONTRACTOR AT LEAST SEVEN DAYS PRIOR TO THE CONTRACTOR'S OR
20 SUBCONTRACTOR'S INTENDED SUSPENSION, CEASE PERFORMING THE
21 ADDITIONAL WORK UNTIL THE AGREEMENT IS REACHED WITHOUT CAUSING
22 A BREACH OF THE CONSTRUCTION AGREEMENT.

23 (b) IF THE CONTRACTOR OR SUBCONTRACTOR ELECTS TO BILL FOR
24 PAYMENTS IN ACCORDANCE WITH SUBPARAGRAPH (I) OF PARAGRAPH (a)
25 OF THIS SUBSECTION (2) AND THE PAYMENTS ARE TIMELY MADE,
26 SUSPENSION OF PERFORMANCE SHALL BE A BREACH OF THE AGREEMENT.

27 (3) THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT THE

1 OWNER OR CONTRACTOR DIRECTING THE PERFORMANCE OF THE
2 ADDITIONAL WORK UNDER A CHANGE DIRECTIVE FROM ORDERING OR
3 REQUIRING THE CESSATION OF THE ADDITIONAL WORK PRIOR TO REACHING
4 AN AGREEMENT ON THE COST OF THE ADDITIONAL WORK; HOWEVER, THE
5 OWNER OR CONTRACTOR SHALL BE REQUIRED TO PAY FOR THE ACTUAL
6 COST OF THE COMPLETED WORK PLUS OVERHEAD AT TEN PERCENT AND
7 PROFIT AT FIVE PERCENT.

8 **8-10.5-109. Suspension of performance.** (1) A CONTRACTOR
9 MAY SUSPEND PERFORMANCE UNDER A CONSTRUCTION AGREEMENT FOR
10 FAILURE BY THE OWNER TO MAKE TIMELY PAYMENT OF THE APPROVED
11 PORTION OF ANY PROGRESS PAYMENT INVOICE. A CONTRACTOR SHALL
12 PROVIDE WRITTEN NOTICE TO THE OWNER AT LEAST FIFTEEN DAYS BEFORE
13 THE CONTRACTOR'S INTENDED SUSPENSION UNLESS A SHORTER NOTICE
14 PERIOD IS PRESCRIBED IN THE CONSTRUCTION AGREEMENT BETWEEN THE
15 OWNER AND THE CONTRACTOR. A CONTRACTOR SHALL NOT BE DEEMED
16 TO BE IN BREACH OF THE CONSTRUCTION AGREEMENT FOR SUSPENDING
17 PERFORMANCE PURSUANT TO THIS SUBSECTION (1).

18 (2) (a) A SUBCONTRACTOR MAY SUSPEND PERFORMANCE UNDER
19 A CONSTRUCTION AGREEMENT IF THE SUBCONTRACTOR DOES NOT RECEIVE
20 TIMELY PAYMENT OF THE APPROVED PORTION OF A PROGRESS PAYMENT
21 INVOICE. A SUBCONTRACTOR SHALL NOTIFY THE CONTRACTOR IN WRITING
22 AT LEAST FIFTEEN DAYS BEFORE SUSPENSION UNLESS A SHORTER NOTICE
23 PERIOD IS PRESCRIBED IN THE CONSTRUCTION AGREEMENT BETWEEN THE
24 CONTRACTOR AND SUBCONTRACTOR; EXCEPT THAT, IF THE CONSTRUCTION
25 AGREEMENT PROVIDES FOR PAYMENT BY AN OWNER TO A CONTRACTOR
26 FOR MORE THAN TWENTY-FIVE DAYS, THE NOTICE SHALL BE SENT AT LEAST
27 FIVE BUSINESS DAYS BEFORE SUSPENSION.

1 (b) A SUBCONTRACTOR SHALL NOT BE DEEMED IN BREACH OF A
2 CONSTRUCTION AGREEMENT FOR SUSPENDING PERFORMANCE PURSUANT
3 TO THIS SUBSECTION (2).

4 (c) THE CONTRACTOR, WHO HAS RECEIVED PAYMENT FROM THE
5 OWNER FOR A SUBCONTRACTOR'S WORK, SHALL BE IN BREACH OF THE
6 CONSTRUCTION AGREEMENT IF THE CONTRACTOR FAILS TO REMIT THE
7 PAYMENT TO THE SUBCONTRACTOR.

8 (3) UNLESS THE OWNER DECLARES THE CONTRACTOR TO BE IN
9 BREACH OF THE CONSTRUCTION AGREEMENT, THE CONTRACTOR OR
10 SUBCONTRACTOR SHALL RESUME WORK WHEN THE CONTRACTOR OR
11 SUBCONTRACTOR THAT HAS SUSPENDED PERFORMANCE RECEIVES
12 PAYMENT OF THE AMOUNT THAT WAS CERTIFIED AND APPROVED PLUS
13 REASONABLE COSTS OF SHUTDOWN, DEMOBILIZATION, REMOBILIZATION,
14 AND INTEREST ON UNPAID AMOUNTS.

15 (4) A CONTRACTOR OR SUBCONTRACTOR WHO HAS SUSPENDED
16 PERFORMANCE IMPROPERLY SHALL BE LIABLE TO THE OWNER OR
17 CONTRACTOR FOR ALL DAMAGES RESULTING FROM OR CAUSED BY THE
18 IMPROPER SUSPENSION.

19 (5) A CONTRACTOR OR SUBCONTRACTOR SHALL NOT SUSPEND
20 PERFORMANCE OF THE WORK UNDER A CONSTRUCTION AGREEMENT IF THE
21 FAILURE TO PAY ANY PART OF THE PROGRESS PAYMENT IS DUE TO THE
22 FOLLOWING:

23 (a) UNSATISFACTORY JOB PROGRESS;

24 (b) DEFECTIVE CONSTRUCTION WORK OR MATERIALS NOT
25 REMEDIED;

26 (c) A DISPUTE CONCERNING WORK OR MATERIALS;

27 (d) FAILURE TO COMPLY WITH OTHER MATERIAL PROVISIONS OF

- 1 THE CONSTRUCTION AGREEMENT;
- 2 (e) THIRD-PARTY CLAIMS FILED OR REASONABLY EXPECTED TO BE
- 3 FILED;
- 4 (f) FAILURE TO MAKE TIMELY PAYMENTS FOR LABOR, EQUIPMENT,
- 5 AND MATERIALS TO THE SUBCONTRACTOR;
- 6 (g) DAMAGES TO THE OWNER;
- 7 (h) INSUFFICIENCY OF THE UNPAID BALANCE UNDER THE
- 8 CONSTRUCTION AGREEMENT TO COMPLETE WORK IF THERE IS REASONABLE
- 9 EVIDENCE OF SUCH INSUFFICIENCY;
- 10 (i) A GOOD-FAITH DISPUTE REGARDING WHETHER THE WORK WAS
- 11 INCLUDED IN THE CONSTRUCTION AGREEMENT;
- 12 (j) THE UNPAID AMOUNT WAS NOT AN APPROVED PORTION OF A
- 13 PROGRESS PAYMENT INVOICE; OR
- 14 (k) THE AMOUNT UNPAID WAS AN EXCLUSION, DEDUCTION, OR
- 15 OFFSET ALLOWED BY THE CONSTRUCTION AGREEMENT OR UNDER SECTION
- 16 8-10.5-105 (11).

17 **8-10.5-110. Written notice.** (1) WRITTEN NOTICE REQUIRED

18 UNDER THIS ARTICLE SHALL BE DEEMED TO HAVE BEEN PROVIDED IF THE

19 WRITTEN NOTICE IS DELIVERED PERSONALLY OR BY ANY RECOGNIZED

20 METHOD OF DELIVERY THAT PROVIDES CONFIRMATION OF THE DELIVERY

21 TO THE FOLLOWING:

- 22 (a) THE INDIVIDUAL RESPONSIBLE TO THE ENTITY FOR THE
- 23 CONSTRUCTION AGREEMENT;
- 24 (b) THE REGISTERED AGENT FOR THE ENTITY; OR
- 25 (c) ANY PERSON DESIGNATED IN THE CONSTRUCTION AGREEMENT
- 26 FOR SUCH PURPOSE.

27 **8-10.5-111. Public policy.** ANY PROVISION IN A CONSTRUCTION

1 AGREEMENT THAT REQUIRES PAYMENT TERMS IN VIOLATION OF THIS
2 ARTICLE SHALL BE UNENFORCEABLE AND VOID AS AGAINST PUBLIC POLICY.

3 **8-10.5-112. Choice of law.** NOTWITHSTANDING ANY
4 CONTRACTUAL PROVISION TO THE CONTRARY, THE LAWS OF THE STATE OF
5 COLORADO SHALL APPLY TO AND GOVERN EVERY CONSTRUCTION
6 AGREEMENT AFFECTING IMPROVEMENTS TO REAL PROPERTY WITHIN THE
7 STATE OF COLORADO.

8 **SECTION 2.** 24-91-102, Colorado Revised Statutes, is amended
9 to read:

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

12 (1) "Acceptable securities" means:

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

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

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

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

21 (2) "BILLING CYCLE" MEANS THE BILLING CYCLE AS DETERMINED
22 BY THE CONSTRUCTION AGREEMENT BETWEEN AN OWNER AND A
23 CONTRACTOR, A CONTRACTOR AND A SUBCONTRACTOR, OR A
24 SUBCONTRACTOR AND SUB-SUBCONTRACTOR.

25 (3) "CHANGE DIRECTIVE" MEANS ADDITIONAL WORK REQUESTED
26 BY AN OWNER FROM A CONTRACTOR, OR BY A CONTRACTOR FROM A
27 SUBCONTRACTOR, UNDER THE TERMS OF AN AGREEMENT THAT REQUIRES

1 THE WORK TO BE PERFORMED PRIOR TO AN AGREEMENT AS TO THE COST OF
2 THE ADDITIONAL WORK.

3 (4) "CHANGE ORDER" MEANS A WRITTEN AGREEMENT BETWEEN AN
4 OWNER AND A CONTRACTOR, OR BETWEEN A CONTRACTOR AND A
5 SUBCONTRACTOR, FOR CHANGES IN THE TIMING AND SCOPE OF WORK
6 UNDER A CONSTRUCTION AGREEMENT, AND SIGNED BY THE PARTIES TO
7 THE CHANGE ORDER.

8 (5) "CONSTRUCTION PROJECT" MEANS A PROJECT THAT IS THE
9 SUBJECT OF A CONSTRUCTION AGREEMENT.

10 ~~(2)~~ (6) "Contractor" means any person, company, firm, or
11 corporation ~~which~~ THAT is a party to a contract with a public entity to
12 construct, erect, alter, install, or repair any highway, public building,
13 public work, or public improvement, structure, or system.

14 (7) "DAY" MEANS A CALENDAR DAY.

15 (8) "MATERIAL INCREASE IN THE SCOPE OF WORK" MEANS A
16 CHANGE IN THE AMOUNT OR TYPE OF WORK REQUIRED UNDER A
17 CONSTRUCTION AGREEMENT THAT INCREASES THE COST OF A
18 CONTRACTOR'S OR SUBCONTRACTOR'S WORK BY MORE THAN TWENTY
19 PERCENT.

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

24 (10) "NOTICE OF NONPAYMENT" MEANS A SWORN STATEMENT BY
25 A CONTRACTOR OR SUBCONTRACTOR THAT AN AMOUNT DUE UNDER A
26 PROGRESS PAYMENT INVOICE HAS NOT BEEN PAID TO THE CONTRACTOR OR
27 SUBCONTRACTOR AND THAT NO CAUSE FOR WITHHOLDING THE PAYMENT

1 EXISTS UNDER THE CONSTRUCTION AGREEMENT OR THIS ARTICLE.

2 (11) "PROGRESS PAYMENT" MEANS A PAYMENT FOR WORK
3 PERFORMED UNDER A CONSTRUCTION AGREEMENT, CALCULATED BY
4 MEASURING THE WORK IN PLACE OR APPLYING A PREVIOUSLY
5 AGREED-UPON SCHEDULE OF VALUES TO THE MEASURED AMOUNT, OR
6 OTHER METHOD AS SET FORTH IN THE CONSTRUCTION AGREEMENT, TO
7 DETERMINE THE AMOUNT DUE UNDER THE CONSTRUCTION AGREEMENT AT
8 THAT TIME.

9 (12) "PROGRESS PAYMENT INVOICE" MEANS A BILL SUBMITTED BY
10 A CONTRACTOR OR SUBCONTRACTOR FOR WORK PERFORMED DURING THE
11 PERIOD COVERED BY THE APPLICATION FOR PAYMENT OR PAYMENT
12 ESTIMATE AS SET FORTH IN THE CONSTRUCTION AGREEMENT AND FOR
13 WORK COMPLETED IN THE MOST RECENT BILLING CYCLE. THE
14 APPLICATION SHALL ALSO INCLUDE REQUESTS FOR PAYMENT FOR WORK
15 PERFORMED PURSUANT TO ANY CHANGE ORDER OR CHANGE DIRECTIVE.

16 ~~(3)~~ (13) "Public entity" means this state or a county, city, city and
17 county, town, or district, including any political subdivision thereof.

18 (14) "RETAINAGE" MEANS A PREESTABLISHED PERCENTAGE
19 WITHHELD FROM ANY PROGRESS PAYMENT TO A CONTRACTOR OR
20 SUBCONTRACTOR PURSUANT TO A CONSTRUCTION AGREEMENT.

21 ~~(4)~~ (15) "Subcontractor" means ~~and includes~~ any person,
22 company, firm, or corporation ~~which~~ THAT is a party to a contract with a
23 contractor to construct, erect, alter, install, or repair any highway, public
24 building, public work, or public improvement, structure, or system and
25 ~~which~~ THAT, in connection therewith, furnishes and performs on-site
26 labor with or without furnishing materials.

27 ~~(5)~~ (16) "Substantial completion" means the date when the

1 construction is sufficiently complete, in accordance with the contract
2 documents, as modified by any change orders agreed to by the parties, so
3 that the work or designated portion thereof is available for use by the
4 owner.

5 **SECTION 3.** 24-91-103, Colorado Revised Statutes, is amended
6 to read:

7 **24-91-103. Public entity - contracts - retainage.** (1) ~~A public~~
8 ~~entity awarding a contract exceeding one hundred fifty thousand dollars~~
9 ~~for the construction, alteration, or repair of any highway, public building,~~
10 ~~public work, or public improvement, structure, or system shall authorize~~
11 ~~partial payments of the amount due under such contract at the end of each~~
12 ~~calendar month, or as soon thereafter as practicable, to the contractor, if~~
13 ~~the contractor is satisfactorily performing the contract.~~ At least ninety
14 percent of the calculated value of any work completed shall be paid until
15 fifty percent of the work required by the contract has been performed.
16 Thereafter, the public entity shall pay any of the remaining installments
17 without retaining additional funds if, in the opinion of the public entity,
18 satisfactory progress is being made in the work. The withheld percentage
19 of the contract price of any such work, improvement, or construction shall
20 be retained until the contract is completed satisfactorily and finally
21 accepted by the public entity. If the public entity finds that satisfactory
22 progress is being made in all phases of the contract, it ~~may~~ SHALL, upon
23 written request by the contractor, authorize final payment from the
24 withheld percentage to the contractor or subcontractors who have
25 completed their work in a manner finally acceptable to the public entity.
26 Before such payment is made, the public entity shall determine that
27 satisfactory and substantial reasons exist for the payment and shall require

1 written approval from any surety furnishing bonds for the contract work.

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

1 ~~payment which was not made in a timely manner. The interest shall~~
2 ~~accrue for the period from the required payment date to the date on which~~
3 ~~payment is made. Nothing in this subsection (2) shall be construed to~~
4 ~~affect the retention provisions of any contract.~~

5 (3) ~~The provisions of This section shall apply to contracts between~~
6 ~~contractors and subcontractors entered into on or after July 1, 1991 THAT~~
7 ~~EXCEED ONE HUNDRED FIFTY THOUSAND DOLLARS.~~

8 **SECTION 4.** Article 91 of title 24, Colorado Revised Statutes, is
9 amended BY THE ADDITION OF THE FOLLOWING NEW
10 SECTIONS to read:

11 **24-91-111. Billing cycles and progress payments.** (1) EXCEPT
12 IN THE CASE OF A SINGLE PAYMENT CONTRACT, UNIT-PRICE CONTRACT, OR
13 CONTRACT PAYABLE IN INSTALLMENTS OR ON COMPLETION, A
14 CONSTRUCTION AGREEMENT THAT REQUIRES MORE THAN ONE MONTH TO
15 COMPLETE THE WORK SHALL BE PAYABLE BY THE PUBLIC ENTITY TO THE
16 CONTRACTOR, AND BY THE CONTRACTOR TO A SUBCONTRACTOR, IN
17 REGULAR PROGRESS PAYMENTS BASED UPON A BILLING CYCLE SET FORTH
18 IN THE CONTRACT.

19 (2) EXCEPT AS PROVIDED IN THIS ARTICLE, A SUBCONTRACTOR
20 SHALL SUBMIT TO ITS CONTRACTOR, ON A MONTHLY BASIS, A PROGRESS
21 PAYMENT INVOICE FOR WORK ACTUALLY PERFORMED AND MATERIAL
22 ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING CYCLE. UPON
23 RECEIPT OF A PROGRESS PAYMENT INVOICE AND ALL CONTRACTUALLY
24 REQUIRED DOCUMENTATION FROM THE SUBCONTRACTOR, THE
25 CONTRACTOR SHALL APPROVE OR DISAPPROVE ALL OR A PORTION OF THE
26 PROGRESS PAYMENT INVOICE WITHIN SEVEN DAYS. THE REASONS FOR ANY
27 DISAPPROVAL SHALL BE PROVIDED TO THE SUBCONTRACTOR IN WRITING,

1 AND THE SUBCONTRACTOR SHALL HAVE THREE BUSINESS DAYS TO SUBMIT
2 A CORRECTED PROGRESS PAYMENT INVOICE. CONTRACTOR APPROVAL OF
3 INVOICES SHALL NOT BE UNREASONABLY WITHHELD, NOR SHALL A
4 CONTRACTOR DISAPPROVE ALL OR A PORTION OF AN INVOICE IN BAD FAITH.

5 (3) A CONTRACTOR SHALL SUBMIT TO THE PUBLIC ENTITY OR TO
6 THE PUBLIC ENTITY'S REPRESENTATIVE A PROGRESS PAYMENT INVOICE AT
7 THE END OF THE BILLING CYCLE BETWEEN THE CONTRACTOR AND THE
8 PUBLIC ENTITY FOR WORK ACTUALLY PERFORMED AND MATERIAL
9 ACTUALLY SUPPLIED DURING THE MOST RECENT BILLING CYCLE,
10 TOGETHER WITH ALL DOCUMENTATION REQUIRED BY THE CONTRACT.

11 (4) APPROVAL OF ALL OR PART OF A PROGRESS PAYMENT INVOICE
12 BY A CONTRACTOR OR PUBLIC ENTITY, OR THE FAILURE TO DISAPPROVE A
13 PROGRESS PAYMENT INVOICE, SHALL NOT BE DEEMED:

14 (a) A WAIVER OF ANY CLAIM FOR, OR ACCEPTANCE OF, WORK THAT
15 IS NOT IN CONFORMANCE WITH THE CONTRACT;

16 (b) A WAIVER OF CLAIMS FOR BREACH OF THE CONTRACT; OR

17 (c) A WAIVER OF CLAIMS ARISING FROM TORTIOUS ACTS OR
18 OMISSIONS OF THE CONTRACTOR OR SUBCONTRACTOR.

19 (5) EXCEPT AS PROVIDED IN SECTIONS 24-91-112 AND 38-26-107,
20 C.R.S., IF THE CONTRACTOR USED A SUBCONTRACTOR, PAYMENT OF THE
21 APPROVED PORTION OF A PROGRESS PAYMENT INVOICE SHALL BE DUE
22 FROM THE PUBLIC ENTITY TO THE CONTRACTOR NO LATER THAN
23 TWENTY-FIVE DAYS AFTER RECEIPT BY THE PUBLIC ENTITY OR THE PUBLIC
24 ENTITY'S REPRESENTATIVE OF THE PROGRESS PAYMENT INVOICE. IF THE
25 CONTRACTOR DID NOT USE A SUBCONTRACTOR, THE APPROVED PORTION
26 OF THE PROGRESS PAYMENT SHALL BE DUE FROM THE PUBLIC ENTITY TO
27 THE CONTRACTOR NO LATER THAN THIRTY DAYS AFTER RECEIPT BY THE

1 PUBLIC ENTITY OR THE PUBLIC ENTITY'S REPRESENTATIVE OF THE
2 PROGRESS PAYMENT INVOICE.

3 (6) IF A CONTRACTOR RECEIVES A PROGRESS PAYMENT FROM A
4 PUBLIC ENTITY, THE CONTRACTOR SHALL PAY EACH SUBCONTRACTOR ANY
5 AMOUNTS ACTUALLY RECEIVED FOR THE SUBCONTRACTOR'S WORK THAT
6 WERE INCLUDED IN THE CONTRACTOR'S PROGRESS PAYMENT INVOICE. THE
7 CONTRACTOR SHALL PAY THE SUBCONTRACTORS WITHIN FIVE DAYS AFTER
8 RECEIPT OF THE PROGRESS PAYMENT FROM THE PUBLIC ENTITY FOR THE
9 WORK OR WITHIN THE THIRTY-DAY BILLING CYCLE, WHICHEVER OCCURS
10 FIRST.

11 (7) WHEN A SUBCONTRACTOR SUBMITS A PROGRESS PAYMENT
12 INVOICE TO A CONTRACTOR, THE SUBCONTRACTOR SHALL ALSO SUBMIT
13 WITH THE PROGRESS PAYMENT INVOICE A LIST OF THE SUBCONTRACTOR'S
14 MATERIAL SUPPLIERS AND SUB-SUBCONTRACTORS WHO PERFORMED WORK
15 OR PROVIDED MATERIALS INCLUDED IN THE PROGRESS PAYMENT INVOICE.
16 A CONTRACTOR SHALL SUBMIT THE LIST TO THE PUBLIC ENTITY WITH THE
17 PROGRESS PAYMENT INVOICE. THE TIME PERIODS FOR MAKING A PAYMENT
18 SHALL BE SUSPENDED UNTIL THE SUBCONTRACTOR SUBMITS THE LIST.

19 (8) IF A PUBLIC ENTITY DOES NOT PAY THE APPROVED PORTION OF
20 THE PROGRESS PAYMENT TO A CONTRACTOR WHEN DUE, THE PUBLIC
21 ENTITY SHALL PAY THE CONTRACTOR INTEREST FROM THE DATE THE
22 PAYMENT WAS DUE AT THE GREATER OF THE RATE OF TWELVE PERCENT
23 PER ANNUM OR THE RATE SPECIFIED IN THE CONTRACT ON THE UNPAID
24 AMOUNT. THE INTEREST SHALL INURE TO THE BENEFIT OF ANY
25 SUBCONTRACTOR OR MATERIAL SUPPLIER TO THE EXTENT OF THE
26 AMOUNTS DUE TO SUCH SUBCONTRACTOR OR MATERIAL SUPPLIER FROM
27 THE PROGRESS PAYMENT.

1 (9) IF A CONTRACTOR WHO RECEIVED A PROGRESS PAYMENT FROM
2 A PUBLIC ENTITY FAILS TO MAKE PAYMENTS REQUIRED BY THIS ARTICLE
3 TO A SUBCONTRACTOR, THE CONTRACTOR SHALL PAY THE
4 SUBCONTRACTOR INTEREST FROM THE DATE THE PAYMENT WAS DUE AT
5 THE GREATER OF THE RATE OF TWELVE PERCENT PER ANNUM OR THE RATE
6 SPECIFIED IN THE CONTRACT ON THE UNPAID AMOUNT.

7 (10) IF A SUBCONTRACTOR WHO RECEIVED A PROGRESS PAYMENT
8 FROM A CONTRACTOR FAILS TO MAKE PAYMENTS REQUIRED BY THIS
9 ARTICLE TO THE MATERIAL SUPPLIERS OR SUB-SUBCONTRACTORS WHO
10 PERFORMED WORK OR PROVIDED MATERIALS INCLUDED IN THE PROGRESS
11 PAYMENT, THE SUBCONTRACTOR SHALL PAY THE MATERIAL SUPPLIERS
12 AND SUB-SUBCONTRACTORS INTEREST FROM THE DATE THE PAYMENT WAS
13 DUE AT THE GREATER OF THE RATE OF TWELVE PERCENT PER ANNUM OR
14 THE RATE SPECIFIED IN THE CONTRACT OF THE SUBCONTRACTOR WITH THE
15 MATERIAL SUPPLIER OR SUB-SUBCONTRACTOR UNTIL THE AMOUNTS ARE
16 PAID.

17 (11) NOTHING IN THIS ARTICLE SHALL PROHIBIT A PUBLIC ENTITY,
18 CONTRACTOR, SUBCONTRACTOR, OR MATERIAL SUPPLIER FROM
19 EXCLUDING, DEDUCTING, OR OFFSETTING FROM PAYMENT FOR AMOUNTS
20 PERMITTED BY THE CONTRACT OR BY LAW TO BE EXCLUDED, DEDUCTED,
21 OR OFFSET, OR IF THE CONTRACT DOES NOT ADDRESS THE FOLLOWING,
22 AMOUNTS DUE TO:

23 (a) FAILURE OF THE PARTY DUE THE PAYMENT TO PERFORM WORK
24 AS REQUIRED BY THE CONTRACT;

25 (b) LOSS OR DAMAGE ARISING OUT OF THE CONTRACT AND CAUSED
26 BY THE PARTY DUE THE PAYMENT;

27 (c) FAILURE OF THE PARTY DUE THE PAYMENT TO PROPERLY PAY

1 AMOUNTS DUE TO OTHERS FOR WORK OR MATERIALS ON THE
2 CONSTRUCTION PROJECT;

3 (d) REJECTED, NONCONFORMING, OR DEFECTIVE WORK OF THE
4 PARTY DUE THE PAYMENT;

5 (e) DELAY BY THE PARTY DUE THE PAYMENT IN PERFORMANCE OF
6 THE WORK IF THE WORK WILL NOT BE COMPLETED WITHIN THE TIME
7 REQUIRED BY THE CONTRACT;

8 (f) THE UNPAID BALANCE OF THE CONTRACT PRICE WITH THE
9 PARTY DUE THE PAYMENT BEING INSUFFICIENT TO FUND THE COST TO
10 COMPLETE THE WORK;

11 (g) THIRD-PARTY CLAIMS INVOLVING THE PARTY DUE THE
12 PAYMENT OR REASONABLE EVIDENCE THAT THIRD-PARTY CLAIMS ARE
13 LIKELY TO BE FILED, UNLESS AND UNTIL THE CONTRACTOR OR
14 SUBCONTRACTOR HAS PROVIDED THE PUBLIC ENTITY WITH ADEQUATE
15 SECURITY IN THE FORM OF A SURETY BOND, LETTER OF CREDIT, OR OTHER
16 COLLATERAL OR COMMITMENT SUFFICIENT TO DISCHARGE THE CLAIMS, IF
17 ESTABLISHED.

18 (12) THE PERSON EXCLUDING, DEDUCTING, OR OFFSETTING
19 AMOUNTS FROM THE PAYMENT SHALL PROVIDE THE PARTY REQUESTING
20 PAYMENT WITH WRITTEN NOTICE OF THE REASONS FOR THE EXCLUSION,
21 DEDUCTION, OR OFFSET AND SHALL AFFORD THE PARTY THE TIME
22 PERMITTED BY THE CONTRACT TO CURE THE DEFAULT.

23 (13) A SUBCONTRACTOR MAY NOTIFY THE CONTRACTOR THAT
24 PAYMENT HAS NOT BEEN RECEIVED AND REQUEST ACKNOWLEDGMENT OF
25 WHETHER A PROGRESS PAYMENT OR FINAL PAYMENT HAS BEEN MADE FOR
26 THE SUBCONTRACTOR'S WORK. THE SUBCONTRACTOR MAY SEND A COPY
27 OF SUCH NOTIFICATION AND REQUEST TO THE CONTRACTOR OR PUBLIC

1 ENTITY.

2 (14) THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT
3 RETAINAGE AUTHORIZED BY SECTION 24-91-103.

4 **24-91-112. Extended progress payment time.** (1) A PUBLIC
5 ENTITY MAY MAKE PROGRESS PAYMENTS TO A CONTRACTOR MORE THAN
6 TWENTY-FIVE DAYS, BUT NO MORE THAN SEVENTY-FIVE DAYS, AFTER
7 RECEIPT OF A PROGRESS PAYMENT INVOICE IF:

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

12 (b) THE FOLLOWING NOTICE, OR A SUBSTANTIALLY SIMILAR
13 NOTICE, SPECIFYING THE NUMBER OF DAYS FOR PAYMENT APPEARS IN AT
14 LEAST FOURTEEN-POINT, BOLD-FACED TYPE, ON EACH PAGE OF EACH SET
15 OF PLANS FOR THE CONSTRUCTION PROJECT, INCLUDING, WITHOUT
16 LIMITATION, BID PLANS, CONTRACT PLANS, EACH PAGE OF THE
17 CONSTRUCTION PROJECT'S SPECIFICATIONS, AND ON THE COVER SHEET OF
18 EACH BID PROPOSAL OR REQUEST FOR PROPOSAL:

19 **NOTICE OF EXTENDED PAYMENT PROVISION**

20 **THIS CONTRACT ALLOWS THE PUBLIC ENTITY TO MAKE**
21 **PAYMENT TO THE GENERAL CONTRACTOR WITHIN _____**
22 **DAYS AFTER RECEIPT OF A PROGRESS PAYMENT INVOICE**
23 **FROM THE CONTRACTOR TO THE PUBLIC ENTITY.**

24 (2) IF THE CONTRACT PROVIDES FOR AN EXTENDED PROGRESS
25 PAYMENT UNDER THIS SECTION AND A CONTRACTOR RECEIVES A PROGRESS
26 PAYMENT FROM AN OWNER, THE CONTRACTOR SHALL PAY EACH
27 SUBCONTRACTOR ANY AMOUNTS ACTUALLY RECEIVED FOR THE

1 SUBCONTRACTOR'S WORK THAT WERE INCLUDED IN THE CONTRACTOR'S
2 PROGRESS PAYMENT INVOICE. THE CONTRACTOR SHALL PAY THE
3 SUBCONTRACTORS WITHIN FIVE DAYS AFTER RECEIPT OF THE PROGRESS
4 PAYMENT FROM THE OWNER FOR THE WORK OR WITHIN THE EXTENDED
5 BILLING CYCLE, WHICHEVER OCCURS FIRST.

6 **24-91-113. Change directives.** (1) A CONTRACTOR OR
7 SUBCONTRACTOR DIRECTED TO PERFORM ADDITIONAL WORK SHALL, UNTIL
8 A FORMAL AGREEMENT IS REACHED ON THE COST OF THE ADDITIONAL
9 WORK, BE ENTITLED TO COMPENSATION PAYABLE MONTHLY FROM THE
10 PARTY ISSUING THE CHANGE DIRECTIVE FOR THE ADDITIONAL WORK
11 ACTUALLY PERFORMED AT THE ACTUAL COST LESS RETAINAGE IF:

12 (a) THE ADDITIONAL WORK IS DIRECTED BY A PUBLIC ENTITY OR
13 CONTRACTOR UNDER A CHANGE DIRECTIVE PRIOR TO A CONTRACT AS TO
14 THE COST OF THE ADDITIONAL WORK; AND

15 (b) THE CONTRACTOR OR SUBCONTRACTOR IS, BY THE TERMS OF
16 THE CONTRACT, REQUIRED TO COMMENCE THE ADDITIONAL WORK PRIOR
17 TO AN AGREEMENT AS TO THE COST OF THE ADDITIONAL WORK.

18 (2) (a) SUBJECT TO PARAGRAPHS (b) AND (c) OF THIS SUBSECTION
19 (2), IF THE PARTIES TO THE CHANGE DIRECTIVE HAVE NOT REACHED A
20 MUTUAL AGREEMENT AS TO THE COST OF THE ADDITIONAL WORK WITHIN
21 TWO MONTHS AFTER THE COMMENCEMENT OF THE ADDITIONAL WORK,
22 AND THE PUBLIC ENTITY OR CONTRACTOR DIRECTING THE ADDITIONAL
23 WORK HAS NOT TERMINATED PERFORMANCE OF THE ADDITIONAL WORK,
24 THE PARTY PERFORMING THE ADDITIONAL WORK MAY EITHER:

25 (I) BILL, ON A MONTHLY BASIS, FOR THE COST OF THE ADDITIONAL
26 WORK PREVIOUSLY PERFORMED PLUS OVERHEAD AT TEN PERCENT AND
27 PROFIT AT FIVE PERCENT, AND THE PARTY DIRECTING THE WORK SHALL

1 PAY THE INVOICE; OR

2 (II) AFTER PROVIDING WRITTEN NOTICE TO THE PUBLIC ENTITY OR
3 CONTRACTOR AT LEAST SEVEN DAYS PRIOR TO THE CONTRACTOR'S OR
4 SUBCONTRACTOR'S INTENDED SUSPENSION, CEASE PERFORMING THE
5 ADDITIONAL WORK UNTIL THE AGREEMENT IS REACHED WITHOUT CAUSING
6 A BREACH OF THE CONTRACT.

7 (b) IF THE CONTRACTOR OR SUBCONTRACTOR ELECTS TO BILL FOR
8 PAYMENTS IN ACCORDANCE WITH SUBPARAGRAPH (I) OF PARAGRAPH (a)
9 OF THIS SUBSECTION (2) AND THE PAYMENTS ARE TIMELY MADE,
10 SUSPENSION OF PERFORMANCE SHALL BE A BREACH OF THE AGREEMENT.

11 (c) IF SUSPENSION OF ANY WORK FOR A PUBLIC ENTITY UNDER A
12 CHANGE DIRECTIVE CAN REASONABLY BE EXPECTED TO RESULT IN DANGER
13 TO THE PUBLIC HEALTH OR SAFETY OR RISK OF PERSONAL INJURY, A
14 CONTRACTOR OR SUBCONTRACTOR SHALL NOT SUSPEND WORK PURSUANT
15 TO SUBPARAGRAPH (II) OF PARAGRAPH (a) OF THIS SUBSECTION (2), BUT
16 MAY ELECT TO BILL MONTHLY PURSUANT TO SUBPARAGRAPH (I) OF
17 PARAGRAPH (a) OF THIS SUBSECTION (2).

18 (3) THIS SECTION SHALL NOT BE CONSTRUED TO PROHIBIT THE
19 PUBLIC ENTITY OR CONTRACTOR DIRECTING THE PERFORMANCE OF THE
20 ADDITIONAL WORK UNDER A CHANGE DIRECTIVE FROM ORDERING OR
21 REQUIRING THE CESSATION OF THE ADDITIONAL WORK PRIOR TO REACHING
22 AN AGREEMENT ON THE COST OF THE ADDITIONAL WORK; HOWEVER, THE
23 PUBLIC ENTITY OR CONTRACTOR SHALL BE REQUIRED TO PAY FOR THE
24 ACTUAL COST OF THE COMPLETED WORK PLUS OVERHEAD AT TEN PERCENT
25 AND PROFIT AT FIVE PERCENT.

26 **24-91-114. Suspension of performance.** (1) EXCEPT AS
27 PROVIDED IN THIS ARTICLE, A CONTRACTOR MAY SUSPEND PERFORMANCE

1 UNDER A CONTRACT FOR FAILURE BY THE PUBLIC ENTITY TO MAKE TIMELY
2 PAYMENT OF THE APPROVED PORTION OF ANY PROGRESS PAYMENT
3 INVOICE. A CONTRACTOR SHALL PROVIDE WRITTEN NOTICE TO THE PUBLIC
4 ENTITY AT LEAST FIFTEEN DAYS BEFORE THE CONTRACTOR'S INTENDED
5 SUSPENSION UNLESS A SHORTER NOTICE PERIOD IS PRESCRIBED IN THE
6 CONTRACT BETWEEN THE PUBLIC ENTITY AND THE CONTRACTOR. A
7 CONTRACTOR SHALL NOT BE DEEMED TO BE IN BREACH OF THE CONTRACT
8 FOR SUSPENDING PERFORMANCE PURSUANT TO THIS SUBSECTION (1).

9 (2) (a) A SUBCONTRACTOR MAY SUSPEND PERFORMANCE UNDER
10 A CONTRACT IF THE SUBCONTRACTOR DOES NOT RECEIVE TIMELY
11 PAYMENT OF THE APPROVED PORTION OF A PROGRESS PAYMENT INVOICE.
12 A SUBCONTRACTOR SHALL NOTIFY THE CONTRACTOR IN WRITING AT LEAST
13 FIFTEEN DAYS BEFORE SUSPENSION UNLESS A SHORTER NOTICE PERIOD IS
14 PRESCRIBED IN THE CONTRACT BETWEEN THE CONTRACTOR AND
15 SUBCONTRACTOR; EXCEPT THAT, IF THE CONTRACT PROVIDES FOR
16 PAYMENT BY A PUBLIC ENTITY TO A CONTRACTOR FOR MORE THAN
17 TWENTY-FIVE DAYS, THE NOTICE SHALL BE SENT AT LEAST FIVE BUSINESS
18 DAYS BEFORE SUSPENSION.

19 (b) A SUBCONTRACTOR SHALL NOT BE DEEMED IN BREACH OF A
20 CONTRACT FOR SUSPENDING PERFORMANCE PURSUANT TO THIS
21 SUBSECTION (2).

22 (c) THE CONTRACTOR, WHO HAS RECEIVED PAYMENT FROM THE
23 PUBLIC ENTITY FOR A SUBCONTRACTOR'S WORK, SHALL BE IN BREACH OF
24 THE CONTRACT IF THE CONTRACTOR FAILS TO REMIT THE PAYMENT TO THE
25 SUBCONTRACTOR.

26 (3) UNLESS THE PUBLIC ENTITY DECLARES THE CONTRACTOR TO BE
27 IN BREACH OF THE CONTRACT, THE CONTRACTOR OR SUBCONTRACTOR

1 SHALL RESUME WORK WHEN THE CONTRACTOR OR SUBCONTRACTOR THAT
2 HAS SUSPENDED PERFORMANCE RECEIVES PAYMENT OF THE AMOUNT THAT
3 WAS CERTIFIED AND APPROVED PLUS REASONABLE COSTS OF SHUTDOWN,
4 DEMOBILIZATION, REMOBILIZATION, AND INTEREST ON UNPAID AMOUNTS.

5 (4) A CONTRACTOR OR SUBCONTRACTOR WHO HAS SUSPENDED
6 PERFORMANCE IMPROPERLY SHALL BE LIABLE TO THE PUBLIC ENTITY OR
7 CONTRACTOR FOR ALL DAMAGES RESULTING FROM OR CAUSED BY THE
8 IMPROPER SUSPENSION.

9 (5) SUBJECT TO SUBSECTION (6) OF THIS SECTION, A CONTRACTOR
10 OR SUBCONTRACTOR SHALL NOT SUSPEND PERFORMANCE OF THE WORK
11 UNDER A CONTRACT IF THE FAILURE TO PAY ANY PART OF THE PROGRESS
12 PAYMENT IS DUE TO THE FOLLOWING:

13 (a) UNSATISFACTORY JOB PROGRESS;

14 (b) DEFECTIVE CONSTRUCTION WORK OR MATERIALS NOT
15 REMEDIED;

16 (c) A DISPUTE CONCERNING WORK OR MATERIALS;

17 (d) FAILURE TO COMPLY WITH OTHER MATERIAL PROVISIONS OF
18 THE CONTRACT;

19 (e) THIRD-PARTY CLAIMS FILED OR REASONABLY EXPECTED TO BE
20 FILED;

21 (f) FAILURE TO MAKE TIMELY PAYMENTS FOR LABOR, EQUIPMENT,
22 AND MATERIALS TO THE SUBCONTRACTOR;

23 (g) DAMAGES TO THE PUBLIC ENTITY;

24 (h) INSUFFICIENCY OF THE UNPAID BALANCE UNDER THE
25 CONTRACT TO COMPLETE WORK IF THERE IS REASONABLE EVIDENCE OF
26 SUCH INSUFFICIENCY;

27 (i) A GOOD-FAITH DISPUTE REGARDING WHETHER THE WORK WAS

1 INCLUDED IN THE CONTRACT;

2 (j) THE UNPAID AMOUNT WAS NOT AN APPROVED PORTION OF A
3 PROGRESS PAYMENT INVOICE; OR

4 (k) THE AMOUNT UNPAID WAS AN EXCLUSION, DEDUCTION, OR
5 OFFSET ALLOWED BY THE CONTRACT OR UNDER SECTION 24-91-111 (11).

6 (6) (a) A CONTRACTOR OR SUBCONTRACTOR SHALL NOT SUSPEND
7 PERFORMANCE WITH A PUBLIC ENTITY UNLESS THE CONTRACTOR OR
8 SUBCONTRACTOR HAS FILED A NOTICE OF NONPAYMENT WITH THE PUBLIC
9 ENTITY.

10 (b) IF THE CONTRACTOR OR SUBCONTRACTOR HAS FILED A NOTICE
11 OF NONPAYMENT WITH A PUBLIC ENTITY, THE CONTRACTOR OR
12 SUBCONTRACTOR SHALL NOT SUSPEND PERFORMANCE IF, WITHIN FIFTEEN
13 DAYS AFTER RECEIPT OF THE NOTICE OF NONPAYMENT, THE PUBLIC ENTITY
14 CERTIFIES THAT IT IS WITHHOLDING FUNDS SUFFICIENT TO SATISFY THE
15 AMOUNT OF THE NONPAYMENT.

16 (7) THE RIGHT OF SUSPENSION OF PERFORMANCE SHALL NOT EXIST
17 IN ANY CONTRACT WITH A PUBLIC ENTITY IF SUSPENSION OF PERFORMANCE
18 WOULD RESULT IN DANGER OF PERSONAL INJURY AS A RESULT OF THE
19 SUSPENSION.

20 (8) THE RIGHT OF SUSPENSION OF PERFORMANCE SHALL NOT EXIST
21 IN ANY CONTRACT WITH A PUBLIC ENTITY IF THE RIGHT TO SUSPENSION OF
22 PERFORMANCE MAY RESULT IN THE LOSS OR REFUND OF FEDERAL FUNDS
23 TO THE STATE OR OTHER GOVERNMENTAL ENTITIES FOR CONSTRUCTION,
24 RECONSTRUCTION, REPAIRS, IMPROVEMENTS, PLANNING, SUPERVISION, OR
25 MAINTENANCE OF THE STATE HIGHWAY SYSTEM OR OTHER PUBLIC
26 IMPROVEMENTS.

27 **24-91-115. Prevailing wage ordinances - invoices.** IF A PUBLIC

1 ENTITY HAS ADOPTED A PREVAILING WAGE ORDINANCE OR RESOLUTION,
2 THE CONTRACTOR SHALL, WHEN SUBMITTING A REQUEST FOR A PARTIAL
3 PAYMENT, SUBMIT AN ACCOUNTING OF AMOUNTS PAID TO ANY EMPLOYEE
4 OR SUBCONTRACTOR FOR LABOR COSTS. A SUBCONTRACTOR SHALL
5 SUBMIT WITH THE REQUEST FOR PAYMENT TO THE CONTRACTOR AN
6 ACCOUNTING OF AMOUNTS PAID TO ANY EMPLOYEE OR SUBCONTRACTORS
7 FOR LABOR COSTS.

8 **24-91-116. Written notice.** (1) WRITTEN NOTICE REQUIRED
9 UNDER THIS ARTICLE SHALL BE DEEMED TO HAVE BEEN PROVIDED IF THE
10 WRITTEN NOTICE IS DELIVERED PERSONALLY OR BY ANY RECOGNIZED
11 METHOD OF DELIVERY THAT PROVIDES CONFIRMATION OF THE DELIVERY
12 TO THE FOLLOWING:

- 13 (a) THE INDIVIDUAL RESPONSIBLE TO THE ENTITY FOR THE
14 CONTRACT;
- 15 (b) THE REGISTERED AGENT FOR THE ENTITY; OR
- 16 (c) ANY PERSON DESIGNATED IN THE CONTRACT FOR SUCH
17 PURPOSE.

18 **24-91-117. Public policy.** ANY PROVISION IN A CONTRACT THAT
19 REQUIRES PAYMENT TERMS IN VIOLATION OF THIS ARTICLE SHALL BE
20 UNENFORCEABLE AND VOID AS AGAINST PUBLIC POLICY.

21 **SECTION 5. Act subject to petition - effective date -**
22 **applicability.** (1) This act shall take effect January 1, 2010.

23 (2) However, if a referendum petition is filed against this act or
24 an item, section, or part of this act during the 90-day period after final
25 adjournment of the general assembly that is allowed for submitting a
26 referendum petition pursuant to article V, section 1 (3) of the state
27 constitution, then the act, item, section, or part, shall not take effect unless

1 approved by the people at a biennial regular general election and shall
2 take effect on the date specified in subsection (1) or on the date of the
3 official declaration of the vote thereon by proclamation of the governor,
4 whichever is later.

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