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HOUSE BILL 21-1167

BY REPRESENTATIVE(S) Duran and Will, Bird, Herod, Hooton, McCluskie, Michaelson Jenet, Mullica, Valdez A., Woodrow;
also SENATOR(S) Gonzales and Scott, Buckner, Kolker, Moreno, Rodriguez.

CONCERNING RETAINAGE IN CONSTRUCTION CONTRACTS GOVERNING
IMPROVEMENTS TO PRIVATE REAL PROPERTY.

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

SECTION 1. In Colorado Revised Statutes, **add** article 46 to title 38 as follows:

ARTICLE 46

Payment of Construction Contracts in Real Property

38-46-101. Definitions. AS USED IN THIS ARTICLE 46, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "CONTRACT" MEANS A CONTRACT TO CONSTRUCT, ALTER, OR REPAIR A STRUCTURE ON OR IMPROVEMENT ON REAL PROPERTY.

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

(2) "CONTRACTOR" MEANS A PERSON THAT IS A PARTY TO A CONTRACT WITH A PROPERTY OWNER.

(3) "PROPERTY OWNER" MEANS A PRIVATE PERSON WITH AN INTEREST, INCLUDING A LEASEHOLD INTEREST, IN REAL PROPERTY OR IN A REAL PROPERTY FIXTURE THAT HAS ENTERED INTO A CONTRACT WITH A CONTRACTOR.

(4) "RETAINAGE" MEANS A PERCENTAGE OF:

(a) A CONTRACT OR SUBCONTRACT PRICE RETAINED FROM A CONTRACTOR OR SUBCONTRACTOR AS ASSURANCE THAT THE CONTRACT OR SUBCONTRACT WILL BE SATISFACTORILY COMPLETED; OR

(b) A SUPPLY AGREEMENT PRICE AS ASSURANCE THAT THE GOODS, MATERIALS, OR EQUIPMENT MEETS THE SPECIFICATIONS NECESSARY FOR SATISFACTORY PERFORMANCE OF A CONTRACT OR SUBCONTRACT.

(5) (a) "SUBCONTRACT" MEANS AN AGREEMENT:

(I) TO PERFORM A PORTION OF THE WORK REQUIRED BY A CONTRACT;
AND

(II) TO FURNISH OR PERFORM ON-SITE LABOR, WITH OR WITHOUT FURNISHING MATERIALS.

(b) TO BE A SUBCONTRACT, AN AGREEMENT NEED NOT BE MADE DIRECTLY WITH A CONTRACTOR; THE AGREEMENT MAY BE MADE WITH A SUBCONTRACTOR OR A SUBSEQUENT SUBCONTRACTOR.

(6) "SUBCONTRACTOR" MEANS A PERSON THAT ENTERS INTO A SUBCONTRACT WITH A CONTRACTOR, A SUBCONTRACTOR, OR A SUBSEQUENT SUBCONTRACTOR.

(7) "SUBSEQUENT SUBCONTRACTOR" INCLUDES A PERSON WHO HAS SIGNED A SUBCONTRACT WITH A SUB-SUBCONTRACTOR, A SUB-SUB-SUBCONTRACTOR, OR ANY ADDITIONAL LEVEL OF SUBCONTRACTOR.

(8) "SUPPLY AGREEMENT" MEANS AN AGREEMENT TO PROVIDE

MATERIALS, GOODS, OR EQUIPMENT TO A CONTRACTOR OR SUBCONTRACTOR.

38-46-102. Applicability of article. (1) EXCEPT AS PROVIDED IN SUBSECTION (2) OF THIS SECTION, THIS ARTICLE 46 APPLIES TO:

(a) A CONTRACT THAT:

(I) HAS A PRICE OF AT LEAST ONE HUNDRED FIFTY THOUSAND DOLLARS; AND

(II) IS MADE BETWEEN A PROPERTY OWNER AND A CONTRACTOR;

(b) A SUBCONTRACT TO A CONTRACT DESCRIBED IN SUBSECTION (1)(a) OF THIS SECTION, NOTWITHSTANDING THAT THE SUBCONTRACT PRICE IS LESS THAN ONE HUNDRED FIFTY THOUSAND DOLLARS; AND

(c) A SUPPLY AGREEMENT THAT IS MADE TO SUPPLY MATERIALS, GOODS, OR EQUIPMENT USED TO PERFORM A CONTRACT NOTWITHSTANDING THAT THE SUPPLY AGREEMENT PRICE IS LESS THAN ONE HUNDRED FIFTY THOUSAND DOLLARS.

(2) THIS ARTICLE 46 DOES NOT APPLY TO:

(a) A SINGLE CONTRACT THAT GOVERNS THE BUILDING OF EITHER:

(I) ONE SINGLE-FAMILY DWELLING; OR

(II) ONE MULTIFAMILY DWELLING WITH NO MORE THAN FOUR FAMILY DWELLING UNITS; OR

(b) A CONTRACT WITH A PUBLIC ENTITY, AS DEFINED IN SECTION 24-91-102 (3).

38-46-103. Private construction contracts - retainage - conditions precedent. (1) A PROPERTY OWNER, CONTRACTOR, OR SUBCONTRACTOR SHALL NOT WITHHOLD AS RETAINAGE MORE THAN FIVE PERCENT OF THE PRICE OF THE WORK COMPLETED UNDER THE CONTRACT OR SUBCONTRACT. MAKING A PARTIAL PAYMENT UNDER THIS SUBSECTION (1) IS NOT ACCEPTANCE OR APPROVAL OF SOME OF THE WORK OR OF A WAIVER OF DEFECTS IN THE WORK.

(2) THIS ARTICLE 46 ADDRESSES ONLY THE AMOUNT OF RETAINAGE THAT MAY BE WITHHELD BY A PROPERTY OWNER, CONTRACTOR, OR SUBCONTRACTOR AND DOES NOT CHANGE, OVERRIDE, OR INVALIDATE ANY OTHER PROVISION IN A CONTRACT, SUBCONTRACT, OR SUPPLY AGREEMENT. SUCH A PROVISION INCLUDES, BUT IS NOT LIMITED TO:

(a) A PROVISION RELATING TO TIMING OF A PAYMENT, INCLUDING FINAL PAYMENT;

(b) A PROVISION REQUIRING SATISFACTORY PERFORMANCE OF THE WORK OF THE CONTRACT, SUBCONTRACT, OR SUPPLY AGREEMENT BEFORE PAYMENT IS DUE;

(c) A PROVISION ALLOWING A PROPERTY OWNER, CONTRACTOR, OR SUBCONTRACTOR TO WITHHOLD PAYMENT OR DEDUCT FROM ANY PAYMENT OTHERWISE DUE ANY BACKCHARGES OR OTHER AMOUNTS AS AUTHORIZED BY THE CONTRACT, SUBCONTRACT, OR SUPPLY AGREEMENT; OR

(d) A PROVISION RELATING TO A CONDITION PRECEDENT THAT MUST BE SATISFIED BEFORE A PAYMENT IS DUE TO A CONTRACTOR, SUBCONTRACTOR, SUB-SUBCONTRACTOR, OR SUPPLIER. A CONDITION PRECEDENT INCLUDES A REQUIREMENT THAT:

(I) A CONTRACTOR MUST ACTUALLY RECEIVE PAYMENT FROM THE PROPERTY OWNER TO BE OBLIGED TO MAKE PAYMENT TO A SUBCONTRACTOR OR SUPPLIER; OR

(II) A SUBCONTRACTOR MUST ACTUALLY RECEIVE PAYMENT FROM THE CONTRACTOR TO BE OBLIGED TO MAKE PAYMENT TO A SUBSEQUENT SUBCONTRACTOR OR SUPPLIER.

38-46-104. Lien waivers. TO RECEIVE PAYMENT UNDER THIS ARTICLE 46, THE RECIPIENT OF THE PAYMENT MUST PROVIDE AN EXECUTED LIEN WAIVER FOR AMOUNTS ACTUALLY PAID IF REQUIRED BY THE CONTRACT, SUBCONTRACT, OR SUPPLY AGREEMENT.

SECTION 2. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to

section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to contracts made on or after the applicable effective date of this act.

Alec Garnett
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Leroy M. Garcia
PRESIDENT OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED _____
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO