

**First Regular Session  
Seventy-third General Assembly  
STATE OF COLORADO**

**INTRODUCED**

LLS NO. 21-0086.02 Jery Payne x2157

**HOUSE BILL 21-1167**

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**HOUSE SPONSORSHIP**

**Duran and Will,**

**SENATE SPONSORSHIP**

**Gonzales and Scott,**

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**House Committees**  
Business Affairs & Labor

**Senate Committees**

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**A BILL FOR AN ACT**

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

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**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://leg.colorado.gov>.)*

The bill prohibits a property owner from withholding from a contractor more than 5% of the price of completed work to ensure the work is satisfactorily completed. The contractor and subcontractors are also prohibited from withholding more than 5% from subcontractors and suppliers. The bill also clarifies that these prohibitions do not apply to other types of contractual conditions made before payment is due.

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

The contract may require lien waivers to be executed before payment is made.

The bill applies to:

- A contract that has a price of at least \$150,000; and
- A subcontract or supply agreement to such a contract.

The bill does not apply to a single contract that governs:

- The building of:
  - A single-family dwelling;
  - A multifamily dwelling with 4 or fewer family dwelling units; or
- A contract with a public entity.

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

2             **SECTION 1.** In Colorado Revised Statutes, **add** article 46 to title  
3 38 as follows:

4                                     **ARTICLE 46**

5                     **Payment of Construction Contracts in Real Property**

6             **38-46-101. Definitions.** AS USED IN THIS ARTICLE 46, UNLESS THE  
7 CONTEXT OTHERWISE REQUIRES:

- 8             (1) "CONTRACT" MEANS A CONTRACT TO CONSTRUCT, ALTER, OR  
9 REPAIR A STRUCTURE ON OR IMPROVEMENT ON REAL PROPERTY.
- 10            (2) "CONTRACTOR" MEANS A PERSON THAT IS A PARTY TO A  
11 CONTRACT WITH A PROPERTY OWNER.
- 12            (3) "PROPERTY OWNER" MEANS A PRIVATE PERSON WITH AN  
13 INTEREST, INCLUDING A LEASEHOLD INTEREST, IN REAL PROPERTY OR IN A  
14 REAL PROPERTY FIXTURE THAT HAS ENTERED INTO A CONTRACT WITH A  
15 CONTRACTOR.
- 16            (4) "RETAINAGE" MEANS A PERCENTAGE OF:
- 17            (a) A CONTRACT OR SUBCONTRACT PRICE RETAINED FROM A  
18 CONTRACTOR OR SUBCONTRACTOR AS ASSURANCE THAT THE CONTRACT  
19 OR SUBCONTRACT WILL BE SATISFACTORILY COMPLETED; OR

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

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

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

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

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

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

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

19 (8) "SUPPLY AGREEMENT" MEANS AN AGREEMENT TO PROVIDE  
20 MATERIALS, GOODS, OR EQUIPMENT TO A CONTRACTOR OR  
21 SUBCONTRACTOR.

22 **38-46-102. Applicability of article.** (1) EXCEPT AS PROVIDED IN  
23 SUBSECTION (2) OF THIS SECTION, THIS ARTICLE 46 APPLIES TO:

24 (a) A CONTRACT THAT:

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

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

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

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

8 (2) THIS ARTICLE 46 DOES NOT APPLY TO:

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

10 (I) ONE SINGLE-FAMILY DWELLING; OR

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

13 (b) A CONTRACT WITH A PUBLIC ENTITY, AS DEFINED IN SECTION  
14 24-91-102 (3).

15 **38-46-103. Private construction contracts - retainage -**  
16 **conditions precedent.** (1) A PROPERTY OWNER, CONTRACTOR, OR  
17 SUBCONTRACTOR SHALL NOT WITHHOLD AS RETAINAGE MORE THAN FIVE  
18 PERCENT OF THE PRICE OF THE WORK COMPLETED UNDER THE CONTRACT  
19 OR SUBCONTRACT. MAKING A PARTIAL PAYMENT UNDER THIS SUBSECTION  
20 (1) IS NOT ACCEPTANCE OR APPROVAL OF SOME OF THE WORK OR OF A  
21 WAIVER OF DEFECTS IN THE WORK.

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

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

1 FINAL PAYMENT;

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

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

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

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

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

20 **38-46-104. Lien waivers.** TO RECEIVE PAYMENT UNDER THIS  
21 ARTICLE 46, THE RECIPIENT OF THE PAYMENT MUST PROVIDE AN EXECUTED  
22 LIEN WAIVER FOR AMOUNTS ACTUALLY PAID IF REQUIRED BY THE  
23 CONTRACT, SUBCONTRACT, OR SUPPLY AGREEMENT.

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

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

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