HOUSE BILL NO. 4837


A bill to promote the prompt payment for labor, materials, and services provided for the improvement of real property in the private contractual construction industry; to provide for certain contract provisions; and to provide for certain remedies and penalties.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act may be cited as the "construction payment act".

Sec. 2. As used in this act:
(a) "Billing period" means the payment cycle agreed to by the parties, or, in the absence of an agreement, the calendar month within which the work is performed.

(b) "Construction project" means any improvement, renovation, addition, or development to real property.

(c) "Contract" means a contract, including any and all additions to, deletions from, and amendments to the contract, of whatever nature, to provide improvements to real property.

(d) "Contractor" includes, but is not limited to, an architect, engineer, general contractor, construction manager, subcontractor, lower-tiered subcontractors, supplier, or other person, who enters into any contract with another person to furnish services, labor, or materials in connection with the erection, construction, completion, alteration, or repair of any building or commercial project that provides an improvement to the real property.

(e) "Court" means the district or circuit court of this state subject to the venue and jurisdictional requirements of each court.

(f) "General contractor" means a contractor who contracts with an owner or lessee to provide, directly or indirectly, through contracts with subcontractors, suppliers, or laborers, the improvements to the real property described in the notice of commencement under section 108 of the constructions lien act, 1980 PA 497, MCL 570.1108.

(g) "Improvement" or "work" means the result of services, labor, or material provided by a contractor, subcontractor, supplier, or laborer, including, but not limited to, surveying, engineering and architectural planning, construction management, clearing, demolishing, excavating, filling, building, erecting,
constructing, altering, repairing, ornamenting, landscaping, paving; leasing equipment, prefabricated materials, or components stored on or off site; or installing or affixing a fixture or material, pursuant to a contract. Improvement does not include stock material stored off site.

(h) "Laborer" means an individual who, pursuant to a contract with a contractor or subcontractor, provides an improvement to real property through the individual's personal labor.

(i) "Money" or "funds" includes, but is not limited to, all money or funds due to a contractor, subcontractor, supplier, or laborer in connection with a contract for the development, erection, construction, completion, alteration, or repair of any building or construction project.

(j) "Owner" means a person, or its agent, that has an interest in the lands or premises upon which a contractor has undertaken to erect, construct, complete, alter, or repair any building or addition to a building, construction project, or development.

(k) "Person" means a corporation, partnership, limited liability company, association, or other legal entity or a natural person.

(l) "Public works contract" means a contract by which a governmental body or public agency obtains any improvement, renovation, or development of, or addition to, real property held or used for a public purpose, including, but not limited to, any of the following:

(i) A public building, including, but not limited to, a municipal building, school, or hospital.

(ii) Transport infrastructure, including, but not limited to, a road, railroad, bridge, public transit, pipeline, canal, port, or
airport.

(iii) A public place, including, but not limited to, a public square, park, or beach.

(iv) Facilities and assets related to a public service, including, but not limited to, water supply and treatment facilities, sewage transport and treatment facilities, communication facilities, electrical grid facilities, utilities, and dams.

(v) Other long-term and public use physical assets and facilities.

(m) "Retainage" means the percentage withheld from a progress payment as described in section 6.

(n) "Subcontractor" means a person that enters into a contract to furnish labor or materials to a contractor.

(o) "Supplier" means a person that enters into a contract with a person to supply materials, rental equipment, prefabricated materials, or components, which by its use or incorporation into the project improve the real property.

Sec. 3. (1) Each construction contract awarded by an owner to a contractor must include all of the following:

(a) A payment clause that obligates the owner to pay the contractor for satisfactory performance under the contract within 30 days after the end of the billing period.

(b) A statement that the owner has sufficient funds or financing in place as of the effective date of the contract to complete the scope of work identified in the contract.

(c) An interest clause that obligates the owner to pay the contractor interest on wrongfully withheld amounts due, equal to 12% per annum, on each payment not made in accordance with the
payment clause included in the contract. The interest applies to
the period beginning on the day after the required date and ending
on the date on which payment of that amount due is made. Any amount
of interest that remains unpaid at the end of any 30-day period
must be added to the principal amount of the debt, and thereafter
interest penalties must accrue on that amount.

(2) A contract provision required by this section must not be
construed to impair the right of the owner to include in its
contract provisions that permit the owner to withhold an amount
from payment, which bears a reasonable relationship to the value of
the dispute or claim, otherwise due to a contractor for
unsatisfactory, incomplete performance or disputed scope of work
under the contract without incurring any obligation to incur
interest. In such a case, the owner shall provide written or
electronic notice to the contractor as to why all or a portion of
the payment is being withheld within 10 days of receipt of the
disputed invoice. If the owner and contractor are unable to come to
an agreement within 30 days after the issuance of the notice to
withhold payment, the owner shall deposit the amount of the
withheld payment into a verifiable and federally insured interest-
bearing bank account or credit union account created for the
subject project. The contractor is entitled to receive verification
of the deposit within 10 days of issuing a written or electronic
notice requesting verification of the deposit to the owner. The
deposited money must remain in that account until the owner and
contractor resolve their dispute or a court or arbitrator orders
how the deposited funds are to be disbursed.

(3) If it is determined by a court of competent jurisdiction
or arbitrator that a payment withheld pursuant to subsection (2)
was not withheld in good faith for reasonable cause, the court or
arbitrator shall award reasonable attorney fees to the prevailing
party. In any civil action or arbitration brought pursuant to this
section, if a court or arbitrator determines after a hearing that
the case was initiated, a defense was asserted, a motion was filed,
or any proceeding in that matter was done frivolously or in bad
faith, the court or arbitrator shall require the party that
initiated the cause, asserted the defense, filed a motion, or
caued a proceeding to be had to pay the other party named in the
action the amount of the costs attributable to those actions and
reasonable expenses incurred by that party, including reasonable
attorney fees.

(4) Once an owner has made payment to the contractor according
to the payment terms of the construction contract or the provisions
of this section, future claims for the withheld payment against the
owner by the contractor are barred.

Sec. 4. (1) Each construction contract awarded by a contractor
to a subcontractor or supplier must include all of the following:

(a) A payment clause that obligates the contractor to pay the
subcontractor and each supplier for satisfactory performance under
the subcontract within 7 calendar days out of the amount paid to
the contractor.

(b) An interest clause that obligates the contractor to pay
the subcontractor or supplier interest on wrongfully withheld
amounts due, equal to 12% per annum, on each payment not made in
accordance with the payment clause included in the contract. The
interest must apply to the period beginning on the day after the
required date and ending on the date on which payment of that
amount due is made. Any amount of interest that remains unpaid at
the end of any 30-day period must be added to the principal amount
of the debt, and thereafter interest penalties must accrue on that
amount.

(2) A contract provision required by this section must not be
construed to impair the right of the contractor to include in its
contract provisions that permit the contractor to withhold an
amount from payment, which bears a reasonable relationship to the
value of the dispute or claim, of each progress payment otherwise
due to a subcontractor or supplier for unsatisfactory performance,
delays, or a dispute regarding the scope of work under the contract
without incurring any obligation to incur interest. In such a case,
the contractor shall provide written or electronic notice to the
subcontractor or supplier as to why all or a portion of the payment
is being withheld within 10 days of receipt of the disputed
invoice. If the contractor, subcontractor, or supplier are unable
to come to an agreement within 30 days after the issuance of the
notice to withhold payment, the contractor shall deposit the amount
of the withheld payment into a verifiable and federally insured
interest-bearing bank account or credit union account created for
the subject project. The subcontractor or supplier is entitled to
receive written or electronic verification of the deposit within 10
days of issuing a written or electronic notice to the contractor
requesting verification of the deposit by the contractor. The
deposited money must remain in that account until the contractor
and subcontractor or supplier resolve their dispute or a court or
arbitrator order how the deposited funds are to be disbursed.

(3) If it is determined by a court of competent jurisdiction
or arbitrator that a payment withheld pursuant to subsection (2)
was not withheld in good faith for reasonable cause, the court or
arbitrator shall award reasonable attorney fees to the prevailing party. In any civil action or arbitration brought pursuant to this section, if a court or arbitrator determines after a hearing for which the cause was initiated, a defense was asserted, a motion was filed, or any proceeding in that matter was done frivolously or in bad faith, the court or arbitrator shall require the party that initiated the cause, asserted the defense, filed the motion, or caused the proceeding to be had to pay the other party named in the action the amount of the costs attributable to those actions and reasonable expenses incurred by the party, including reasonable attorney fees.

(4) Once a contractor has made payment to the subcontractor or supplier according to the payment terms of the construction contract or the provisions of this section, future claims for the withheld payment against the contractor or any surety of the contractor from the subcontractor or supplier on the subject project are barred.

Sec. 5. (1) The owner shall pay the contractor strictly in accordance with the terms of the contract.

(2) If the terms of the contract do not contain a term governing payment, the contractor is entitled to submit an invoice to the owner for payments at the end of the billing period for 1 or more of the following:

(a) Work already commenced but not fully completed if the invoiced work will be completed by the end of the billing period.

(b) Materials already supplied to the project.

(3) If the contract between the owner and a contractor does not contain a provision governing when invoices may be submitted, a contractor is entitled to submit a partial invoice every 30 days
for payment for work performed or a final invoice when the agreed-
upon work is fully completed. The owner shall pay all undisputed
amounts owed to the contractor within 30 days after the end of the
billing period or 30 days after delivery of the invoice by the
contractor, whichever is later. This subsection prohibits an owner
from retaining a specified percentage of each progress payment and
final payment that is due to a contractor, subcontractor, and
supplier to ensure satisfactory performance under the contract.

(4) If payment terms are not specified in the contract between
the general contractor and a subcontractor or supplier, a general
contractor shall pay all undisputed amounts owed to its
subcontractors, suppliers, or materialmen within 7 days after
receipt of payment for the subcontractor's work or supplier's
materials by the general contractor.

(5) If payment terms are not specified in the contract between
the subcontractor and its subcontractors or suppliers, a
subcontractor shall pay all undisputed amounts owed to its
subcontractors, suppliers, or materialmen within 7 days after
receipt of payment for the subcontractors' work or suppliers'
materials by the subcontractor.

Sec. 6. (1) Except as otherwise provided in subsection (2),
retainage by an owner is limited as follows:

(a) Not more that 10% of the total construction contract
amount if less than 50% of the work has been completed.
(b) Zero percent of the total construction contract amount if
50% or more of the work has been completed.

(2) An owner shall release the retainage together with final
payment.

(3) Except as otherwise provided in subsection (4), retainage
by a general contractor, a construction manager, a prime contractor, a supplier, or a subcontractor or their agents, or by a contractor against a lower-tiered contractor, is limited as follows:

(a) Not more than 10% of the total construction contract amount if less than 50% of the work has been completed.

(b) Zero percent of the total construction contract amount if 50% or more of the work has been completed.

(4) Retainage under subsection (3) must be released together with final payment.

Sec. 7. A provision in a contract for a construction project that includes 1 or more of the following is against public policy and is void and unenforceable:

(a) A requirement that a contractor assumes the risk of nonpayment of the owner.

(b) A requirement that a contractor waive any statutory or other right to commence litigation or arbitration until payment is made to the general or prime contractor.

(c) A requirement to make subject to payment by the owner, the obligation of a contractor and its surety under any payment or performance bond, or to make any payment to a claimant under that bond.

(d) A requirement that a subcontractor or a lower-tiered contractor rely on the credit of the owner and not on the credit of the general or prime contractor or of a bonding company.

(e) A requirement that a dispute or claim arising from a construction project located in this state between the contractor, subcontractor, or supplier be governed or subject to the laws of a state other than this state or require litigation, arbitration,
mediation, or other dispute resolution processes to occur in a
state other than this state.

(f) A requirement that a contractor waive any provisions
provided by this act.

Sec. 8. (1) This act does not apply to any of the following:
(a) Public works contracts.
(b) Residential contracts for the erection, alteration, or
repair of any single residential dwelling, attached multiple
residential dwellings less than 7 units, detached condominiums,
site condominiums, or premises used or intended to be used for
residency purposes and related facilities appurtenant to the
premises, used or intended to be used as an adjunct or residential
occupancy.

(2) The burden of proving an exemption from this act is on the
person claiming the exemption.

(3) This act only applies to private commercial construction
projects, including, but not limited to, apartment buildings,
lofts, motels, hotels, office buildings, medical buildings, retail
buildings, industrial buildings, shopping malls, parking
structures, storage buildings, barns, mixed residential and
commercial use buildings, private schools, restaurants, churches,
places of worship, and related facilities, fixtures, and structures
appurtenant to the premises.

Sec. 9. If an owner or contractor disputes any amounts stated
in an invoice for payment, then all of the following apply:
(a) The party disputing the invoice must notify the other
party in writing within 10 days after receipt of the disputed
invoice.
(b) The party disputing the invoice shall, in the written
notice of dispute required under subdivision (a), specifically describe in detail the items within the invoice that are disputed.

(c) If the written notice of dispute is not given within the 10-day period required under subdivision (a), the invoice is considered to be accepted as submitted.

(d) If the written notice of dispute is not given within the 10-day period required under subdivision (a), the lack of notice does not constitute acceptance of the work performed.

Sec. 10. (1) If arbitration or litigation is commenced to recover payment due under section 3, 4, or 5 and it is determined that the owner, contractor, or subcontractor has failed to comply with the payment terms of section 3 or 4, the court or arbitrator shall award damages due equal to the amount that is determined by the court or arbitrator to have been wrongfully withheld. An amount must not be considered to have been wrongfully withheld to the extent that it bears a reasonable relationship to the value of any disputed amount or claim held in good faith by the owner, contractor, or subcontractor against whom the contractor or subcontractor is seeking to recover payment.

(2) Absent any agreement to the contrary between the parties, the court or arbitrator in any arbitration proceeding arising under this act may award to the prevailing party its reasonable attorney fees, arbitration costs, and expenses for expert witnesses.