

REFERENCE TITLE: contractor retention

State of Arizona
House of Representatives
Forty-ninth Legislature
Second Regular Session
2010

HB 2680

Introduced by
Representative Schapira

AN ACT

AMENDING SECTIONS 32-1129, 32-1129.01, 32-1129.02 AND 32-1129.05, ARIZONA REVISED STATUTES; AMENDING TITLE 32, CHAPTER 10, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 32-1129.07; RELATING TO CONTRACTORS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 32-1129, Arizona Revised Statutes, is amended to
3 read:

4 32-1129. Definitions

5 In sections 32-1129.01, 32-1129.02, 32-1129.03, 32-1129.04, ~~and~~
6 32-1129.05 ~~AND~~ 32-1129.07, unless the context otherwise requires:

7 1. "Construction contract" means a written or oral agreement relating
8 to the construction, alteration, repair, maintenance, moving or demolition of
9 any building, structure or improvement or relating to the excavation of or
10 other development or improvement to land.

11 2. "Contractor" means any person, firm, partnership, corporation,
12 association or other organization, or a combination of any of them, that has
13 a direct contract with an owner to perform work under a construction
14 contract.

15 3. "FINAL COMPLETION" MEANS THE EARLIEST OF THE FOLLOWING:

16 (a) WHEN THE WORK, OR THE WORK UNDER A PORTION OF A CONSTRUCTION
17 CONTRACT FOR WHICH THE CONTRACT STATES A SEPARATE PRICE, HAS BEEN COMPLETED
18 IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE CONSTRUCTION CONTRACT.

19 (b) THE DATE OF FINAL INSPECTION AND FINAL WRITTEN ACCEPTANCE BY THE
20 GOVERNMENTAL BODY THAT ISSUES THE BUILDING PERMIT FOR THE BUILDING, STRUCTURE
21 OR IMPROVEMENT OR PORTION OF THE BUILDING, STRUCTURE OR IMPROVEMENT.

22 ~~3-~~ 4. "Owner" means any person, firm, partnership, corporation,
23 association or other organization, or a combination of any of them, that
24 causes a building, structure or improvement to be constructed, altered,
25 repaired, maintained, moved or demolished or that causes land to be excavated
26 or otherwise developed or improved, whether the interest or estate of the
27 person is in fee, as vendee under a contract to purchase, as lessee or
28 another interest or estate less than fee.

29 5. "RETENTION" MEANS A PORTION OF A PROGRESS PAYMENT OTHERWISE DUE
30 FROM THE OWNER TO THE CONTRACTOR THAT IS BOTH OF THE FOLLOWING:

31 (a) WITHHELD PURSUANT TO THE TERMS AND CONDITIONS OF A CONSTRUCTION
32 CONTRACT TO ENSURE PROPER PERFORMANCE OF THE CONSTRUCTION CONTRACT.

33 (b) HELD BY THE OWNER IN TRUST FOR THE BENEFIT OF THE CONTRACTOR AND
34 THE CONTRACTOR'S SUBCONTRACTORS WHO ARE WORKING TOWARD COMPLETION OF THE
35 CONSTRUCTION CONTRACT AND IN PROPORTION TO THEIR RESPECTIVE INTERESTS.

36 ~~4-~~ 6. "Subcontractor" means any person, firm, partnership,
37 corporation, association or other organization, or a combination of any of
38 them, that has a direct contract with a contractor or another subcontractor
39 to perform a portion of the work under a construction contract.

40 7. "SUBSTANTIAL COMPLETION" OR "SUBSTANTIALLY COMPLETE" MEANS THE
41 EARLIEST OF THE FOLLOWING EVENTS:

42 (a) THE STAGE IN THE PROGRESS OF THE WORK ON A CONSTRUCTION CONTRACT
43 WHEN THE WORK, OR THE WORK UNDER A PORTION OF A CONSTRUCTION CONTRACT FOR
44 WHICH THE CONTRACT STATES A SEPARATE PRICE, IS SUFFICIENTLY COMPLETE IN
45 ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE CONSTRUCTION CONTRACT SO THAT

1 THE OWNER CAN OCCUPY OR USE THE WORK OR SUCH PORTION OF THE WORK FOR ITS
2 INTENDED PURPOSE. WHEN SUBSTANTIAL COMPLETION OCCURS FOR A PORTION OF A
3 CONSTRUCTION CONTRACT FOR WHICH THE CONTRACT STATES A SEPARATE PRICE,
4 SUBSTANTIAL COMPLETION OCCURS ONLY TO THE WORK UNDER THAT PORTION OF THE
5 CONTRACT.

6 (b) THE DATE ON WHICH THE GOVERNMENTAL BODY THAT ISSUES THE BUILDING
7 PERMIT, IF ANY, FOR A BUILDING, STRUCTURE OR IMPROVEMENT ISSUES THE WRITTEN
8 ACCEPTANCE ALLOWING THE OWNER TO OCCUPY OR USE THE WORK UNDER A CONSTRUCTION
9 CONTRACT OR PORTION OF A CONSTRUCTION CONTRACT.

10 8. "WORK" MEANS THE LABOR, MATERIALS, EQUIPMENT AND SERVICES TO BE
11 PROVIDED BY A CONTRACTOR OR SUBCONTRACTOR UNDER A CONSTRUCTION CONTRACT.

12 Sec. 2. Section 32-1129.01, Arizona Revised Statutes, is amended to
13 read:

14 32-1129.01. Progress payments by owner; conditions; interest

15 A. By mutual agreement with a contractor, an owner may make progress
16 payments on construction contracts of less than sixty days. An owner shall
17 make progress payments to a contractor on all other construction contracts.
18 Progress payments shall be made on the basis of a duly certified and approved
19 billing or estimate of the work performed and the materials supplied during
20 the preceding thirty day billing cycle, or such other billing cycle as stated
21 in the construction contract. IF ANY WORK IS PERFORMED DURING THE PRECEDING
22 BILLING CYCLE, A CONTRACTOR SHALL SUBMIT TIMELY A BILLING OR ESTIMATE TO THE
23 OWNER COVERING THE WORK PERFORMED DURING THAT BILLING CYCLE. If billings or
24 estimates are to be submitted in other than thirty day billing cycles, the
25 construction contract and each page of the plans, including bid plans and
26 construction plans, shall specifically identify such other billing cycle in a
27 clear and conspicuous manner as prescribed in subsection B OF THIS SECTION.
28 Except as provided in subsection C OF THIS SECTION, the owner shall make
29 progress payments to the contractor within seven days after the date the
30 billing or estimate is certified and approved pursuant to subsection D OF
31 THIS SECTION. EXCEPT AS PROVIDED IN SUBSECTION C OF THIS SECTION, AN OWNER
32 SHALL RELEASE RETENTION TO THE CONTRACTOR WITHIN SEVEN DAYS AFTER THE DATE
33 THE BILLING OR ESTIMATE FOR RELEASE OF RETENTION IS CERTIFIED AND APPROVED
34 PURSUANT TO SUBSECTION I OF THIS SECTION. EXCEPT AS PROVIDED IN SUBSECTION C
35 OF THIS SECTION, AN OWNER SHALL MAKE FINAL PAYMENT TO THE CONTRACTOR WITHIN
36 SEVEN DAYS AFTER THE BILLING OR ESTIMATE FOR FINAL PAYMENT IS CERTIFIED AND
37 APPROVED PURSUANT TO SUBSECTION L OF THIS SECTION.

38 B. A construction contract may provide for a billing cycle other than
39 a thirty day billing cycle if the construction contract specifically sets
40 forth such other billing cycle and either of the following applies:

41 1. The following legend or substantially similar language setting
42 forth the other billing cycle appears in clear and conspicuous type on each
43 page of the plans, including bid plans and construction plans:

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Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. Billings or estimates for this contract shall be submitted as follows:

2. The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. A written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request.

C. An owner may make progress payments, **RELEASE OF RETENTION AND FINAL PAYMENT** later than seven days after the date the billing or estimate is certified and approved if both:

1. The construction contract in a clear and conspicuous manner specifically provides for a later payment defined by a specified number of days after certification and approval.

2. The following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

Notice of Extended Payment Provision

This contract allows the owner to make payment within ___ days after certification and approval of billings and estimates **FOR PROGRESS PAYMENTS, RELEASE OF RETENTION AND FINAL PAYMENT.**

D. **EXCEPT AS PROVIDED IN SUBSECTION G OF THIS SECTION,** a billing or estimate **FOR A PROGRESS PAYMENT** shall be deemed ~~approved~~ **CERTIFIED** and ~~certified~~ **APPROVED** fourteen days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement ~~detailing those items in~~ **STATING IN REASONABLE DETAIL THE OWNER'S REASONS FOR NOT CERTIFYING OR APPROVING ALL OR A PORTION OF** the billing or estimate ~~that are not approved and certified.~~ **THE OWNER IS DEEMED TO HAVE RECEIVED THE BILLING OR ESTIMATE WHEN THE BILLING OR ESTIMATE IS SUBMITTED TO ANY PERSON DESIGNATED BY THE OWNER FOR THE RECEIPT, CERTIFICATION AND APPROVAL OF THE BILLING OR ESTIMATE. THE OWNER MAY WITHHOLD FROM A PROGRESS PAYMENT A REASONABLE AMOUNT FOR RETENTION.** An owner may decline to ~~approve~~ **CERTIFY** and ~~certify~~ **APPROVE** a billing or estimate or portion of a billing or estimate for **ANY OF THE FOLLOWING REASONS:**

- 1 1. Unsatisfactory job progress. ~~,-~~
- 2 2. Defective construction work or materials not remedied. ~~,-~~
- 3 3. Disputed work or materials. ~~,-~~
- 4 4. Failure to comply with other material provisions of the
- 5 construction contract. ~~,-~~
- 6 5. Third party claims filed or reasonable evidence that a claim will
- 7 be filed. ~~,-~~
- 8 6. Failure of the contractor or a subcontractor to make timely
- 9 payments for labor, equipment and materials. ~~,-~~
- 10 7. Damage to the owner. ~~,-~~
- 11 8. Reasonable evidence that the construction contract cannot be
- 12 completed for the unpaid balance of the construction contract sum. ~~or a~~
- 13 ~~reasonable amount for retention. The owner is deemed to have received the~~
- 14 ~~billing or estimate when the billing or estimate is submitted to any person~~
- 15 ~~designated by the owner for the receipt of these submissions or for review or~~
- 16 ~~approval of the billing or estimate.~~
- 17 E. AN OWNER MAY DECLINE TO CERTIFY AND APPROVE A BILLING OR ESTIMATE
- 18 OR A PORTION OF A BILLING OR ESTIMATE UNDER SUBSECTION D OF THIS SECTION
- 19 WHETHER OR NOT THE REASON TO DECLINE ARISES FROM WORK OR MATERIALS APPEARING
- 20 ON A PRIOR BILLING OR ESTIMATE AND WHETHER OR NOT THE OWNER HAS PREVIOUSLY
- 21 CERTIFIED, APPROVED OR PAID OR CERTIFIED, APPROVED AND PAID THE PRIOR BILLING
- 22 OR ESTIMATE, OR BOTH.
- 23 ~~E.~~ F. An owner may withhold from a progress payment only an amount
- 24 that is sufficient to pay the direct COSTS AND expenses the owner reasonably
- 25 expects to incur to ~~correct any items~~ PROTECT THE OWNER FROM LOSS FOR WHICH
- 26 THE CONTRACTOR IS RESPONSIBLE AND THAT RESULTS FROM ANY REASONS set forth in
- 27 writing pursuant to subsection D OF THIS SECTION.
- 28 ~~F.~~ G. An owner may extend the period within which the billing or
- 29 estimate FOR PROGRESS PAYMENTS, RELEASE OF RETENTION AND FINAL PAYMENT is
- 30 certified and approved if both:
- 31 1. The construction contract in a clear and conspicuous manner
- 32 specifically provides for an extended time period within which a billing or
- 33 estimate shall be certified and approved defined by a specified number of
- 34 days after the owner has received the billing or estimate.
- 35 2. The following legend or substantially similar language, setting
- 36 forth the specified number of days, appears in clear and conspicuous type on
- 37 each page of the plans, including bid plans and construction plans:
- 38 Notice of Extended Certification and
- 39 Approval Period Provision
- 40 This contract allows the owner to certify and approve
- 41 billings and estimates FOR PROGRESS PAYMENTS, RELEASE OF
- 42 RETENTION AND FINAL PAYMENT within ____ days after the billings
- 43 and estimates are received from the contractor.

1 ~~G.~~ H. After the effective date of a construction contract, an owner
2 and contractor may change the number of specified days after certification
3 and approval for the owner to make payment to the contractor or within which
4 a billing or estimate must be certified and approved. Any contractor or
5 subcontractor that does not provide written consent to the change will
6 continue to be paid as previously agreed.

7 I. ON SUBSTANTIAL COMPLETION OF THE WORK, A CONTRACTOR MAY SUBMIT A
8 BILLING OR ESTIMATE FOR RELEASE OF RETENTION. EXCEPT AS PROVIDED IN
9 SUBSECTION G OF THIS SECTION, THE BILLING OR ESTIMATE FOR RELEASE OF
10 RETENTION SHALL BE DEEMED CERTIFIED AND APPROVED WITHIN FOURTEEN DAYS AFTER
11 THE OWNER RECEIVES THE BILLING OR ESTIMATE, UNLESS BEFORE THAT TIME THE OWNER
12 OR THE OWNER'S AGENT ISSUES A WRITTEN STATEMENT STATING IN SUBSTANTIAL DETAIL
13 THE OWNER'S REASONS FOR NOT CERTIFYING OR APPROVING ALL OR A PORTION OF THE
14 BILLING OR ESTIMATE. THE OWNER IS DEEMED TO HAVE RECEIVED THE BILLING OR
15 ESTIMATE WHEN THE BILLING OR ESTIMATE IS SUBMITTED TO ANY PERSON DESIGNATED
16 BY THE OWNER FOR THE RECEIPT, CERTIFICATION AND APPROVAL OF THE BILLING OR
17 ESTIMATE. THE OWNER MAY:

18 1. DECLINE TO CERTIFY AND APPROVE A BILLING OR ESTIMATE FOR RELEASE OF
19 RETENTION OR A PORTION OF A BILLING OR ESTIMATE FOR RELEASE OF RETENTION FOR
20 FAILURE OF THE CONTRACTOR TO COMPLETE A MATERIAL REQUIREMENT OF THE
21 CONSTRUCTION CONTRACT OR FOR ANY REASON PERMITTED UNDER SUBSECTION D OF THIS
22 SECTION.

23 2. WITHHOLD FROM RETENTION TO BE RELEASED ONLY AN AMOUNT NOT TO EXCEED
24 ONE HUNDRED FIFTY PER CENT OF THE DIRECT COSTS AND EXPENSES THE OWNER
25 REASONABLY EXPECTS TO INCUR TO PROTECT THE OWNER FROM LOSS FOR WHICH THE
26 CONTRACTOR IS RESPONSIBLE AND THAT RESULTS FROM ANY REASONS SET FORTH IN
27 WRITING PURSUANT TO THIS SUBSECTION.

28 J. EXCEPT AS PROVIDED IN SUBSECTIONS C AND I OF THIS SECTION, THE
29 OWNER SHALL PAY THE RETENTION TO THE CONTRACTOR WITHIN SEVEN DAYS AFTER THE
30 DATE THE BILLING OR ESTIMATE FOR RELEASE OF RETENTION IS CERTIFIED AND
31 APPROVED. IF THE OWNER HAS DECLINED TO CERTIFY OR APPROVE A BILLING OR
32 ESTIMATE FOR RELEASE OF RETENTION OR A PORTION OF A BILLING OR ESTIMATE FOR
33 RELEASE OF RETENTION PURSUANT TO SUBSECTION I OF THIS SECTION, WHEN ANY
34 REASON OR THE REASONS AS STATED IN THE OWNER'S WRITTEN STATEMENT HAVE BEEN
35 REMOVED, THE CONTRACTOR MAY SUBMIT A SUPPLEMENTAL BILLING OR ESTIMATE FOR ALL
36 OR A PORTION OF THE WITHHELD AMOUNTS OF RETENTION PURSUANT TO SUBSECTION I OF
37 THIS SECTION.

38 K. WHEN A CONTRACTOR SUBSTANTIALLY COMPLETES ALL WORK UNDER A PORTION
39 OF A CONSTRUCTION CONTRACT FOR WHICH THE CONTRACT STATES A SEPARATE PRICE,
40 THE CONTRACTOR MAY SUBMIT A BILLING OR ESTIMATE FOR RELEASE OF RETENTION ON
41 THAT PORTION OF THE CONSTRUCTION CONTRACT PURSUANT TO SUBSECTION I OF THIS
42 SECTION.

43 L. ON FINAL COMPLETION OF THE WORK, A CONTRACTOR MAY SUBMIT A BILLING
44 OR ESTIMATE FOR FINAL PAYMENT. EXCEPT AS PROVIDED IN SUBSECTION G OF THIS
45 SECTION, A BILLING OR ESTIMATE FOR FINAL PAYMENT SHALL BE DEEMED CERTIFIED

1 AND APPROVED FOURTEEN DAYS AFTER THE OWNER RECEIVES THE BILLING OR ESTIMATE,
2 UNLESS BEFORE THAT TIME THE OWNER OR OWNER'S AGENT PREPARES AND ISSUES A
3 WRITTEN STATEMENT STATING IN SUBSTANTIAL DETAIL THE REASONS THE BILLING OR
4 ESTIMATE HAS NOT BEEN CERTIFIED OR APPROVED. THE OWNER IS DEEMED TO HAVE
5 RECEIVED THE BILLING OR ESTIMATE FOR FINAL PAYMENT WHEN THE BILLING OR
6 ESTIMATE IS SUBMITTED TO ANY PERSON DESIGNATED BY THE OWNER FOR THE RECEIPT,
7 CERTIFICATION AND APPROVAL OF THE BILLING OR ESTIMATE. THE OWNER MAY:

8 1. DECLINE TO CERTIFY AND APPROVE A BILLING OR ESTIMATE FOR FINAL
9 PAYMENT OR A PORTION OF A BILLING OR ESTIMATE FOR FINAL PAYMENT FOR FAILURE
10 OF THE CONTRACTOR TO COMPLETE A REQUIREMENT OF THE CONSTRUCTION CONTRACT OR
11 FOR ANY REASON PERMITTED UNDER SUBSECTION D OF THIS SECTION.

12 2. WITHHOLD FROM FINAL PAYMENT ONLY AN AMOUNT NOT TO EXCEED ONE
13 HUNDRED FIFTY PER CENT OF THE DIRECT COSTS AND EXPENSES THE OWNER REASONABLY
14 EXPECTS TO INCUR TO PROTECT THE OWNER FROM LOSS FOR WHICH THE CONTRACTOR IS
15 RESPONSIBLE AND THAT RESULTS FROM ANY REASONS SET FORTH IN WRITING PURSUANT
16 TO THIS SUBSECTION.

17 M. EXCEPT AS PROVIDED IN SUBSECTION C OF THIS SECTION, THE OWNER SHALL
18 MAKE FINAL PAYMENT TO THE CONTRACTOR WITHIN SEVEN DAYS AFTER THE DATE THE
19 BILLING OR ESTIMATE FOR FINAL PAYMENT IS CERTIFIED AND APPROVED. IF THE
20 OWNER HAS DECLINED TO CERTIFY OR APPROVE A BILLING OR ESTIMATE FOR FINAL
21 PAYMENT OR A PORTION OF A BILLING OR ESTIMATE FOR FINAL PAYMENT PURSUANT TO
22 SUBSECTION L OF THIS SECTION, WHEN ANY REASON OR REASONS AS STATED IN THE
23 OWNER'S WRITTEN STATEMENT HAVE BEEN REMOVED, THE CONTRACTOR MAY SUBMIT A
24 SUPPLEMENTAL BILLING OR ESTIMATE FOR ALL OR A PORTION OF THE WITHHELD AMOUNTS
25 OF FINAL PAYMENT PURSUANT TO SUBSECTION L OF THIS SECTION.

26 N. EXCEPT AS PROVIDED IN SUBSECTION C OF THIS SECTION, ON PROJECTS
27 THAT REQUIRE A FEDERAL AGENCY'S FINAL CERTIFICATION OR APPROVAL, THE OWNER
28 SHALL MAKE PAYMENT IN FULL ON THE CONSTRUCTION CONTRACT WITHIN SEVEN DAYS
29 AFTER THE FEDERAL AGENCY'S FINAL CERTIFICATION OR APPROVAL.

30 ~~H. O. When a contractor completes and an owner approves and certifies~~
31 ~~all work under a construction contract, the owner shall make payment in full~~
32 ~~on the construction contract within seven days. When a contractor completes~~
33 ~~and an owner approves and certifies~~ all work under a portion of a
34 construction contract for which the contract states a separate price, the
35 ~~owner shall make payment in full~~ CONTRACTOR MAY SUBMIT A BILLING OR ESTIMATE
36 FOR FINAL PAYMENT on that portion of the construction contract ~~within seven~~
37 ~~days. On projects that require a federal agency's final approval or~~
38 ~~certification, the owner shall make payment in full on the construction~~
39 ~~contract within seven days of the federal agency's final approval or~~
40 ~~certification~~ PURSUANT TO SUBSECTION L OF THIS SECTION.

41 ~~I. P.~~ Payment shall not be required pursuant to this section unless
42 the contractor provides the owner with a billing or estimate ~~for the work~~
43 ~~performed or the material supplied~~ SUBSTANTIALLY in accordance with the terms
44 of the construction contract between the parties.

1 ~~J.~~ Q. A construction contract shall not alter the rights of any
2 contractor, subcontractor or material supplier to receive prompt and timely
3 ~~progress~~ payments as provided under this article.

4 ~~K.~~ R. If an owner or a third party designated by an owner as the
5 person responsible for making progress payments, **RELEASING RETENTION OR**
6 **MAKING FINAL PAYMENT** on a construction contract does not make a timely
7 payment pursuant to this section, **EXCEPT FOR PERIODS OF TIME WHEN PAYMENT IS**
8 **PROPERLY WITHHELD PURSUANT TO SUBSECTION D, I OR L OF THIS SECTION**, the owner
9 shall pay the contractor interest at the rate of one and one-half per cent a
10 month or fraction of a month on the unpaid balance, or at a higher rate as
11 the parties to the construction contract agree.

12 ~~L.~~ S. On the written request of a subcontractor, the owner shall
13 notify the subcontractor within five days after the issuance of a progress
14 payment to the contractor. On the written request of a subcontractor, the
15 owner shall notify the subcontractor within five days after the owner
16 **RELEASES RETENTION OR** makes the final payment to the contractor on the
17 construction contract. **A SUBCONTRACTOR'S REQUEST PURSUANT TO THIS SUBSECTION**
18 **SHALL REMAIN IN EFFECT FOR THE DURATION OF THE SUBCONTRACTOR'S WORK ON THE**
19 **PROJECT.**

20 ~~M.~~ T. In any action or arbitration brought to collect payments or
21 interest pursuant to this section, the successful party shall be awarded
22 costs and attorney fees in a reasonable amount.

23 ~~N.~~ U. If the owner and contractor are a single entity, that entity
24 shall pay its subcontractors or material suppliers within fourteen days after
25 the billing or estimate is certified and approved unless the deadlines for
26 approval and certification or for payment have been modified pursuant to
27 subsection C or ~~F.~~ **G OF THIS SECTION.**

28 **V. IF THE OWNER REQUIRES AND THE CONTRACTOR PROVIDES PAYMENT AND**
29 **PERFORMANCE BONDS THAT COVER THE CONTRACTOR'S PERFORMANCE OF A CONSTRUCTION**
30 **CONTRACT AND THAT ARE EXECUTED BY ONE OR MORE SURETY COMPANIES HOLDING A**
31 **CERTIFICATE OF AUTHORITY TO TRANSACT SURETY BUSINESS IN THIS STATE ISSUED BY**
32 **THE DIRECTOR OF THE DEPARTMENT OF INSURANCE PURSUANT TO TITLE 20, CHAPTER 2,**
33 **ARTICLE 1, THE OWNER SHALL NOT WITHHOLD RETENTION ON THAT CONSTRUCTION**
34 **CONTRACT IN AN AMOUNT IN EXCESS OF TWO AND ONE-HALF PER CENT OF THE CONTRACT**
35 **VALUE.**

36 Sec. 3. Section 32-1129.02, Arizona Revised Statutes, is amended to
37 read:

38 32-1129.02. Performance and payment by contractor,
39 subcontractor or material supplier; conditions;
40 interest

41 A. Notwithstanding the other provisions of this ~~section~~ **ARTICLE**,
42 performance by a contractor, subcontractor or material supplier in accordance
43 with the provisions of a construction contract entitles the contractor,
44 subcontractor or material supplier to payment from the party with whom the
45 contractor, subcontractor or material supplier contracts.

1 B. If a subcontractor or material supplier has performed in accordance
2 with the provisions of a construction contract, the contractor shall pay to
3 its subcontractors or material suppliers and each subcontractor shall pay to
4 its subcontractors or material suppliers, within seven days of receipt by the
5 contractor or subcontractor of each progress payment, RETENTION RELEASE or
6 final payment, the full amount received for such subcontractor's work and
7 materials supplied based on work completed or materials supplied under the
8 subcontract. Payment shall not be required pursuant to this subsection
9 unless the subcontractor or material supplier provides to the contractor or
10 subcontractor a billing or ~~invoice for the work performed or material~~
11 ~~supplied~~ ESTIMATE SUBSTANTIALY in ~~compliance~~ ACCORDANCE with the terms of
12 the CONSTRUCTION contract between the parties. Each subcontractor or
13 material supplier shall provide a waiver of any mechanic's or materialman's
14 lien conditioned ~~upon~~ ON payment for the work completed or material supplied.
15 The contractor or subcontractor may require that such conditional waivers of
16 lien be notarized. Any diversion by the contractor or subcontractor of
17 payments received for work performed pursuant to a contract, or failure to
18 reasonably account for the application or use of such payments, constitutes
19 grounds for disciplinary action by the registrar of contractors. Violations
20 of this section shall be grounds for suspension or revocation of a license or
21 other disciplinary action by the registrar pursuant to section 32-1154,
22 subsections B, C and D. The subcontractor or material supplier may notify
23 the registrar of contractors and the owner in writing of any payment less
24 than the amount or percentage approved for the class or item of work as set
25 forth in this section.

26 C. Nothing in this section prevents the contractor or subcontractor,
27 at the time of application or certification to the owner or contractor, from
28 withholding such application or certification to the owner or contractor for
29 payment to the subcontractor or material supplier for ANY OF THE FOLLOWING
30 REASONS:

- 31 1. Unsatisfactory job progress. ~~,-~~
- 32 2. Defective construction work or ~~material~~ MATERIALS not remedied. ~~,-~~
- 33 3. Disputed work OR MATERIALS. ~~,-~~
- 34 4. Failure to comply with other material provisions of the
35 construction contract. ~~,-~~
- 36 5. Third party claims filed or reasonable evidence that a claim will
37 be filed. ~~,-~~
- 38 6. Failure of the subcontractor to make timely payments for labor,
39 equipment and materials. ~~,-~~
- 40 7. Damage to a contractor or another subcontractor or material
41 supplier. ~~,-~~
- 42 8. Reasonable evidence that the subcontract cannot be completed for
43 the unpaid balance of the subcontract sum ~~or a reasonable amount for~~
44 ~~retention that does not exceed the actual percentage retained by the owner.~~

1 9. THE OWNER HAS WITHHELD RETENTION FROM THE CONTRACTOR, IN WHICH CASE
2 THE AMOUNT OF THE WITHHOLDING BY THE CONTRACTOR SHALL NOT EXCEED THE ACTUAL
3 AMOUNT OF THE RETENTION RETAINED BY THE OWNER PERTAINING TO THE
4 SUBCONTRACTOR'S WORK.

5 D. A CONTRACTOR OR SUBCONTRACTOR SHALL NOT WITHHOLD RETENTION FROM A
6 SUBCONTRACTOR IN AN AMOUNT GREATER THAN THE ACTUAL AMOUNT OF THE RETENTION
7 RETAINED BY THE OWNER SPECIFICALLY PERTAINING TO THE WORK OF THE
8 SUBCONTRACTOR.

9 E. WITHIN SEVEN DAYS AFTER RECEIVING AN OWNER'S WRITTEN STATEMENT
10 PURSUANT TO SECTION 32-1129.01, SUBSECTION D, THE CONTRACTOR SHALL PREPARE
11 AND ISSUE A WRITTEN STATEMENT TO THE APPLICABLE SUBCONTRACTORS STATING IN
12 DETAIL THE AMOUNTS BEING WITHHELD BY THE OWNER THAT ARE ATTRIBUTABLE TO THOSE
13 SUBCONTRACTORS. WITHIN SEVEN DAYS AFTER RECEIVING A CONTRACTOR'S WRITTEN
14 STATEMENT, THE SUBCONTRACTOR SHALL PREPARE AND ISSUE A WRITTEN STATEMENT TO
15 THE APPLICABLE SUBCONTRACTORS AND MATERIAL SUPPLIERS STATING IN DETAIL THE
16 AMOUNTS BEING WITHHELD BY THE CONTRACTOR THAT ARE ATTRIBUTABLE TO THOSE
17 SUBCONTRACTORS OR MATERIAL SUPPLIERS.

18 F. IF AMOUNTS ARE WITHHELD BY AN OWNER PURSUANT TO SECTION 32-1129.01,
19 SUBSECTION D, I OR L AND THE AMOUNT RECEIVED BY THE CONTRACTOR FROM THE OWNER
20 FOR THE PROGRESS PAYMENT, RELEASE OF RETENTION OR FINAL PAYMENT IS
21 INSUFFICIENT TO PAY FOR ALL WORK SATISFACTORILY PERFORMED BY SUBCONTRACTORS
22 WHOSE WORK IS NOT THE SUBJECT OF THE OWNER'S WRITTEN STATEMENT ISSUED
23 PURSUANT TO SECTION 32-1129.01, SUBSECTION D, I OR L, THE CONTRACTOR SHALL
24 MAKE PROGRESS PAYMENT, RELEASE OF RETENTION AND FINAL PAYMENT TO THOSE
25 SATISFACTORILY PERFORMING SUBCONTRACTORS WITHIN SEVEN DAYS AFTER PAYMENT
26 WOULD HAVE OTHERWISE BEEN MADE BY THE OWNER PURSUANT TO SECTION 32-1129.01,
27 SUBSECTION A.

28 G. IF AMOUNTS ARE WITHHELD BY A CONTRACTOR OR SUBCONTRACTOR PURSUANT
29 TO SUBSECTION C OF THIS SECTION AND THE AMOUNT RECEIVED BY THE SUBCONTRACTOR
30 FROM THE CONTRACTOR IS INSUFFICIENT TO PAY FOR ALL WORK SATISFACTORILY
31 PERFORMED BY SUBCONTRACTORS WHOSE WORK IS NOT THE SUBJECT OF THE AMOUNTS
32 WITHHELD, OR MATERIALS SATISFACTORILY PROVIDED BY MATERIAL SUPPLIERS WHOSE
33 MATERIALS ARE NOT THE SUBJECT OF THE AMOUNTS WITHHELD, THE SUBCONTRACTOR
34 SHALL MAKE PAYMENT TO THOSE SATISFACTORILY PERFORMING SUBCONTRACTORS AND
35 MATERIAL SUPPLIERS WITHIN SEVEN DAYS AFTER PAYMENT WOULD HAVE OTHERWISE BEEN
36 MADE BY THE CONTRACTOR OR SUBCONTRACTOR PURSUANT TO SUBSECTION B OF THIS
37 SECTION.

38 ~~D.~~ H. If a ~~periodic~~ PROGRESS or final payment OR RELEASE OF RETENTION
39 to a subcontractor or material supplier is delayed by more than seven days
40 after receipt of ~~periodic~~ PROGRESS or final payment OR RELEASE OF RETENTION
41 by the contractor or subcontractor IS DUE AND THE DELAY IS NOT THE FAULT OF
42 THE SUBCONTRACTOR OR MATERIAL SUPPLIER, the contractor or subcontractor shall
43 pay its subcontractor or material supplier interest, except for periods of
44 time during which payment is PROPERLY withheld pursuant to subsection C of
45 this section, beginning on the eighth day, at the rate of one and one-half

1 per cent per month or a fraction of a month on the unpaid balance or at such
2 higher rate as the parties agree.

3 ~~E.~~ I. Any licensed contractor, licensed subcontractor or material
4 supplier who files a complaint with the registrar of contractors under this
5 section shall be required to post a surety bond or cash deposit of five
6 hundred dollars or one-half of the amount due, whichever is less, with the
7 registrar to secure the payment of claims under this section. If the
8 complaint is determined by the registrar to be without merit and frivolous,
9 the registrar shall order the person who filed the complaint to pay one-half
10 of the amount of the required surety bond or cash deposit to the respondent
11 and one-half to the registrar for deposit into the state general fund. If no
12 claim may be made under this section against the surety bond or cash deposit,
13 the surety bond or cash deposit shall be returned to the complainant. The
14 surety bond or cash deposit shall be in the name of the licensee or material
15 supplier who files the complaint and shall be subject to claims by the
16 registrar of contractors and the respondent licensee as provided in this
17 section. The surety bond or cash deposit shall be conditioned ~~upon~~ ON and
18 provide for payment ~~upon~~ ON the presentation of a certified copy of the order
19 of the registrar and a certification by the complainant of nonpayment within
20 thirty days after the order becomes final. The surety bond shall be executed
21 by the complainant as principal with a corporation duly authorized to
22 transact surety business in this state. Evidence of the surety bond shall be
23 submitted to the registrar in a form acceptable to the registrar. The cash
24 deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the
25 registrar in the contractors prompt pay complaint fund and shall be held for
26 the payment of claims.

27 ~~F.~~ J. In any action or arbitration brought to collect payments or
28 interest pursuant to this section, the successful party shall be awarded
29 costs and attorney fees in a reasonable amount.

30 K. IF THE CONTRACTOR REQUIRES AND A SUBCONTRACTOR PROVIDES PAYMENT AND
31 PERFORMANCE BONDS THAT COVER THE SUBCONTRACTOR'S PERFORMANCE OF A
32 CONSTRUCTION SUBCONTRACT AND THAT ARE EXECUTED BY ONE OR MORE SURETY
33 COMPANIES HOLDING A CERTIFICATE OF AUTHORITY TO TRANSACT SURETY BUSINESS IN
34 THIS STATE ISSUED BY THE DIRECTOR OF THE DEPARTMENT OF INSURANCE PURSUANT TO
35 TITLE 20, CHAPTER 2, ARTICLE 1, THE CONTRACTOR SHALL PAY TO THE SUBCONTRACTOR
36 ANY AMOUNT OF RETENTION RETAINED BY THE OWNER PERTAINING TO THE
37 SUBCONTRACTOR'S WORK.

38 Sec. 4. Section 32-1129.05, Arizona Revised Statutes, is amended to
39 read:

40 32-1129.05. Construction contracts; void provisions

41 A. The following are against this state's public policy and are void
42 and unenforceable:

43 1. A provision, covenant, clause or understanding in, collateral to or
44 affecting a construction contract that makes the contract subject to the laws
45 of another state or that requires any litigation, ~~arbitration or other~~

1 ~~dispute resolution proceeding~~ arising from the contract to be conducted in
2 another state.

3 2. A provision, covenant, clause or understanding in, collateral to or
4 affecting a construction contract stating that a party to the contract cannot
5 suspend performance under the contract or terminate the contract if another
6 party to the contract fails to make prompt payments under the contract
7 pursuant to section 32-1129, 32-1129.01 or 32-1129.02.

8 B. ANY MEDIATION, ARBITRATION OR OTHER DISPUTE RESOLUTION PROCEEDING
9 ARISING FROM A CONSTRUCTION CONTRACT FOR WORK PERFORMED IN THIS STATE SHALL
10 BE CONDUCTED IN THIS STATE.

11 Sec. 5. Title 32, chapter 10, article 2, Arizona Revised Statutes, is
12 amended by adding section 32-1129.07, to read:

13 32-1129.07. Applicability to construction of a dwelling for an
14 owner-occupant; definitions

15 A. THE REQUIREMENTS IN SECTION 32-1129.01 DO NOT APPLY TO CONSTRUCTION
16 CONTRACTS FOR THE CONSTRUCTION OF A DWELLING FOR AN OWNER-OCCUPANT UNLESS THE
17 FOLLOWING LEGEND OR SUBSTANTIALLY SIMILAR LANGUAGE APPEARS IN CLEAR AND
18 CONSPICUOUS TYPE ON THE FRONT PAGE OF EACH BILLING OR ESTIMATE FROM THE
19 CONTRACTOR TO THE OWNER-OCCUPANT:

20 NOTICE TO OWNER OF APPLICABILITY OF ARIZONA PROMPT PAY ACT
21 (NOTICE REQUIRED BY ARIZONA REVISED STATUTES
22 SECTION 32-1129.07)

23 ATTENTION: YOUR OBLIGATIONS TO PAY YOUR CONTRACTOR ARE SUBJECT
24 TO THE ARIZONA PROMPT PAY ACT. THAT ACT IS SET FORTH IN SECTION
25 32-1129, ARIZONA REVISED STATUTES, AND SECTIONS 32-1129.01
26 THROUGH 32-1129.07, ARIZONA REVISED STATUTES. THE FULL TEXT OF
27 THE STATUTES ARE AVAILABLE AT YOUR LOCAL PUBLIC LAW LIBRARY OR
28 THE INTERNET. UNDER THAT ACT, YOU HAVE THE RIGHT TO WITHHOLD
29 ALL OR A PORTION OF A PAYMENT TO A CONTRACTOR FOR A VARIETY OF
30 REASONS, INCLUDING DEFECTIVE CONSTRUCTION WORK THAT HAS NOT BEEN
31 CORRECTED. HOWEVER, IN ORDER TO DO SO, YOU MUST ISSUE A WRITTEN
32 STATEMENT SETTING FORTH IN SUBSTANTIAL DETAIL YOUR REASONS FOR
33 WITHHOLDING PAYMENTS WITHIN FOURTEEN (14) DAYS AFTER THE DATE
34 YOU RECEIVE A BILLING OR ESTIMATE. IF YOU FAIL TO ISSUE THE
35 WRITTEN STATEMENT WITHIN THAT PERIOD, THE BILLING OR ESTIMATE
36 WILL BE DEEMED APPROVED. ONCE THE BILLING OR ESTIMATE IS DEEMED
37 APPROVED, YOU MUST PAY THE BILLING OR ESTIMATE WITHIN SEVEN (7)
38 DAYS. GENERALLY, YOU ARE LIMITED BY THE ACT TO WITHHOLDING ONLY
39 AN AMOUNT THAT IS SUFFICIENT TO PAY THE DIRECT COSTS AND
40 EXPENSES YOU REASONABLY EXPECT TO INCUR TO PROTECT YOU FROM LOSS
41 FOR WHICH THE CONTRACTOR IS RESPONSIBLE. YOU ARE ENCOURAGED TO
42 READ THE ACT IN FULL TO KNOW YOUR OBLIGATIONS AND RIGHTS.

43 B. FOR THE PURPOSES OF THIS SECTION, "DWELLING" AND "OWNER-OCCUPANT"
44 HAVE THE SAME MEANINGS PRESCRIBED IN SECTION 33-1002.

1 Sec. 6. Applicability

2 Sections 32-1129, 32-1129.01, 32-1129.02 and 32-1129.05, Arizona
3 Revised Statutes, as amended by this act, and section 32-1129.07, Arizona
4 Revised Statutes, as added by this act, apply to all construction contracts
5 if either of the following has occurred:

6 1. The initial distribution or dissemination of any plans, including
7 bid plans and construction plans, specifications or contract documents by an
8 owner to a contractor or subcontractor occurred after the effective date of
9 this act.

10 2. The construction contract between the owner and contractor is
11 entered into on or after January 1, 2011.