

1 HOUSE BILL NO. 448

2 INTRODUCED BY G. FORRESTER, GLASER

3

4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A CONTRACTOR'S REQUEST FOR
5 PAYMENT IS CONSIDERED APPROVED BY THE OWNER UNLESS THE OWNER WITHIN ~~30~~ 21 DAYS OF
6 THE REQUEST, ON CERTAIN GROUNDS, DECLINES TO PAY; ~~ESTABLISHING CONDITIONS AND~~
7 ~~REQUIREMENTS UNDER WHICH A CONTRACTOR OR SUBCONTRACTOR MAY SUSPEND OR TERMINATE~~
8 ~~A CONSTRUCTION CONTRACT~~; PROVIDING THAT CERTAIN PROVISIONS IN CONSTRUCTION
9 CONTRACTS ARE VOID AS AGAINST PUBLIC POLICY; AMENDING SECTION 28-2-2103, MCA;
10 ~~REPEALING SECTION 28-2-2107, MCA~~; AND PROVIDING AN APPLICABILITY DATE."

11

12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13

14 **Section 1.** Section 28-2-2103, MCA, is amended to read:

15 **"28-2-2103. Payment to contractor and subcontractor.** (1) ~~(a) If a contractor performs a~~
16 ~~construction contract according to the terms of the contract and requests, either directly to the owner or~~
17 ~~to the owner's representative, payment for performance of the contract, the owner shall pay the~~
18 ~~contractor, within 30 days after receipt by the owner or the owner's representative of the request for~~
19 ~~payment, for work performed or materials provided in accordance with the contract~~ BY MUTUAL AGREEMENT
20 WITH A CONTRACTOR, AN OWNER MAY MAKE PROGRESS PAYMENTS ON CONSTRUCTION CONTRACTS OF LESS THAN 60
21 DAYS. AN OWNER SHALL MAKE PROGRESS PAYMENTS TO A CONTRACTOR ON ALL OTHER CONSTRUCTION CONTRACTS.
22 PROGRESS PAYMENTS MUST BE MADE ON THE BASIS OF A DULY CERTIFIED AND APPROVED BILLING OR ESTIMATE OF THE
23 WORK PERFORMED AND THE MATERIALS SUPPLIED DURING THE PRECEDING MONTHLY BILLING CYCLE.

24 (b) A contractor's request for payment must be considered approved by the owner ~~30~~ 21 days
25 after receipt of the request by the owner or the owner's representative unless prior to that time, the owner
26 or the owner's representative provides the contractor with a written statement containing the specific
27 items in the request for payment that are being disapproved by the owner or the owner's representative.

28 (c) The owner or the owner's representative may disapprove the request for payment or a portion
29 of the request based upon a claim of:

30 (i) unsatisfactory job progress;

1 (ii) failure to remedy defective construction work or materials;
 2 (iii) disputed work or materials;
 3 (iv) failure to comply with material provisions of the construction contract;
 4 (v) failure of a contractor or subcontractor to make timely payment for labor, equipment, or
 5 materials;

6 (vi) damage to the owner; or
 7 (vii) the existence of reasonable evidence that the construction contract cannot be completed for
 8 the unpaid balance of the contract sum.

9 (D) THE OWNER OR THE OWNER'S REPRESENTATIVE IS CONSIDERED TO HAVE RECEIVED THE REQUEST FOR
 10 PAYMENT WHEN THE REQUEST FOR PAYMENT IS SUBMITTED TO ANY PERSON DESIGNATED BY THE OWNER OR THE OWNER'S
 11 REPRESENTATIVE FOR THE RECEIPT OF THE REQUEST FOR PAYMENT.

12 ~~(d)~~(E) An owner or owner's representative may only withhold an amount from a payment that is
 13 sufficient to pay the direct expenses that the owner reasonably expects to incur to correct any of the
 14 items set out in subsection (1)(c).

15 ~~(e)~~(F) A written statement by an owner or owner's representative must contain a detailed account
 16 of all alleged problems for which the payment or a portion of the payment is being withheld BE FURNISHED
 17 TO THE CONTRACTOR SPECIFYING THE CONDITIONS PURSUANT TO SUBSECTION (1)(C) FOR WITHHOLDING APPROVAL OF
 18 THE REQUEST FOR PAYMENT OR A PORTION OF THE REQUEST FOR PAYMENT AND IDENTIFYING THE AMOUNT TO BE WITHHELD
 19 FOR EACH CONDITION. If an owner or owner's representative disapproves only a portion of a request for
 20 payment, the remainder of the request for payment must be considered approved.

21 (G) IF AN OWNER APPROVES ALL OR A PORTION OF A CONTRACTOR'S REQUEST FOR PAYMENT AS PROVIDED FOR
 22 IN SUBSECTION (1)(B), THE OWNER SHALL PAY THE CONTRACTOR THE APPROVED AMOUNT WITHIN 3 WORKING DAYS AFTER
 23 THE CONTRACTOR'S REQUEST FOR PAYMENT IS CONSIDERED APPROVED.

24 ~~(f)~~(H) Upon written request of a subcontractor, an owner or owner's representative shall notify
 25 the subcontractor of any progress payment or final payment made to the contractor within 5 days of
 26 issuing the payment. THE SUBCONTRACTOR'S REQUEST MUST REMAIN IN EFFECT FOR THE DURATION OF THE
 27 SUBCONTRACTOR'S WORK ON THE PROJECT OR UNTIL THE SUBCONTRACTOR HAS BEEN FULLY PAID.

28 (I) PAYMENT IS NOT REQUIRED UNDER THIS SECTION UNLESS THE CONTRACTOR PROVIDES THE OWNER OR THE
 29 OWNER'S REPRESENTATIVE WITH A BILLING OR ESTIMATE FOR THE WORK PERFORMED OR THE MATERIAL SUPPLIED IN
 30 ACCORDANCE WITH THE TERMS OF THE CONSTRUCTION CONTRACT.

1 (2) Within 3 working days after a contractor receives a periodic or final payment from an owner
 2 or a state agency, the contractor shall pay the subcontractor, if any, the full amount due the subcontractor
 3 in accordance with the subcontract for work performed or materials provided in accordance with that
 4 subcontract. PAYMENT IS NOT REQUIRED UNDER THIS SECTION UNLESS THE SUBCONTRACTOR OR MATERIAL SUPPLIER
 5 PROVIDES TO THE CONTRACTOR OR THE SUBCONTRACTOR A BILLING OR INVOICE FOR THE WORK PERFORMED OR THE
 6 MATERIAL SUPPLIED IN COMPLIANCE WITH THE TERMS OF THE CONTRACT BETWEEN THE PARTIES.

7 (3) Within 3 working days after a subcontractor receives a periodic or final payment from a
 8 contractor, the subcontractor shall pay another subcontractor, if any, the full amount due the
 9 subcontractor under the subcontract for work performed or materials provided in accordance with that
 10 subcontract. PAYMENT IS NOT REQUIRED UNDER THIS SECTION UNLESS THE SUBCONTRACTOR OR MATERIAL SUPPLIER
 11 PROVIDES TO THE CONTRACTOR OR THE SUBCONTRACTOR A BILLING OR INVOICE FOR THE WORK PERFORMED OR MATERIAL
 12 SUPPLIED IN COMPLIANCE WITH THE TERMS OF THE CONTRACT BETWEEN THE PARTIES.

13 (4) NOTHING IN THIS SECTION PREVENTS A CONTRACTOR OR SUBCONTRACTOR FROM DISAPPROVING A
 14 SUBCONTRACTOR'S REQUEST FOR PAYMENT OR A PORTION OF THE REQUEST FOR PAYMENT BASED UPON THE CLAIM OF:

15 (A) UNSATISFACTORY JOB PROGRESS;

16 (B) FAILURE TO REMEDY DEFECTIVE CONSTRUCTION WORK OR MATERIALS;

17 (C) DISPUTED WORK OR MATERIALS;

18 (D) FAILURE TO COMPLY WITH MATERIAL PROVISIONS OF THE CONSTRUCTION CONTRACT;

19 (E) FAILURE OF A CONTRACTOR OR SUBCONTRACTOR TO MAKE TIMELY PAYMENT FOR LABOR, EQUIPMENT, OR
 20 MATERIALS;

21 (F) DAMAGE TO THE CONTRACTOR OR OTHER SUBCONTRACTORS; OR

22 (G) THE EXISTENCE OF REASONABLE EVIDENCE THAT THE CONSTRUCTION CONTRACT CANNOT BE COMPLETED FOR
 23 THE UNPAID BALANCE OF THE CONTRACT SUM.

24 (5) IF A CONTRACTOR OR SUBCONTRACTOR DISAPPROVES OF ALL OR A PORTION OF A SUBCONTRACTOR'S OR
 25 MATERIAL SUPPLIER'S PAYMENT REQUEST, THE CONTRACTOR OR SUBCONTRACTOR SHALL NOTIFY THE SUBCONTRACTOR
 26 OR MATERIAL SUPPLIER IN WRITING AT THE TIME THE CONTRACTOR'S OR SUBCONTRACTOR'S PAYMENT REQUEST IS MADE
 27 TO THE OWNER, THE OWNER'S REPRESENTATIVE, THE CONTRACTOR, OR THE SUBCONTRACTOR."

28

29 ~~NEW SECTION. Section 2. Suspension of performance -- termination. (1) (a) A contractor may~~
 30 ~~suspend performance under a construction contract or terminate a construction contract for failure by the~~

1 owner to make timely payment of the amount certified and approved pursuant to 28-2-2103.

2 ~~—— (b) A contractor shall provide written notice to the owner at least 7 calendar days before the~~
3 ~~contractor's intended suspension or termination unless a shorter notice period is prescribed in the~~
4 ~~construction contract between the owner and contractor.~~

5 ~~—— (c) A contractor may not be considered in breach of the construction contract for suspending~~
6 ~~performance or terminating a construction contract pursuant to this subsection (1).~~

7 ~~—— (d) A construction contract may not extend the time period for a contractor to suspend~~
8 ~~performance or terminate a construction contract under this subsection (1).~~

9 ~~—— (2) (a) A subcontractor may suspend performance under a construction contract or terminate a~~
10 ~~construction contract if the owner fails to make timely payment of amounts certified and approved~~
11 ~~pursuant to 28-2-2103 for the subcontractor's work and if the contractor fails to pay the subcontractor~~
12 ~~for the certified and approved work.~~

13 ~~—— (b) A subcontractor shall provide written notice to the contractor and owner at least 3 calendar~~
14 ~~days before the subcontractor's intended suspension or termination unless a shorter notice period is~~
15 ~~prescribed in the construction contract between the contractor and subcontractor.~~

16 ~~—— (c) A subcontractor may not be considered in breach of a construction contract for suspending~~
17 ~~performance or terminating a construction contract pursuant to this subsection (2).~~

18 ~~—— (d) A construction contract may not extend the time period for a subcontractor to suspend~~
19 ~~performance or terminate a construction contract under this subsection (2).~~

20 ~~—— (3) (a) A subcontractor may suspend performance under a construction contract or terminate a~~
21 ~~construction contract if the owner makes timely payment of amounts certified and approved pursuant to~~
22 ~~28-2-2103 for the subcontractor's work but the contractor fails to pay the subcontractor for the certified~~
23 ~~and approved work.~~

24 ~~—— (b) A subcontractor, suspending or terminating work under this subsection (3), shall provide~~
25 ~~written notice to the contractor and owner at least 7 calendar days before the subcontractor's intended~~
26 ~~suspension or termination unless a shorter notice period is prescribed in the construction contract between~~
27 ~~the contractor and subcontractor.~~

28 ~~—— (c) A subcontractor may not be considered in breach of a construction contract for suspending~~
29 ~~performance or terminating a construction contract pursuant to this subsection (3).~~

30 ~~—— (d) A construction contract may not extend the time period for a subcontractor to suspend~~

1 ~~performance or terminate a construction contract under this subsection (3).~~

2 ~~———(4) (a) A subcontractor may suspend performance under a construction contract or terminate a~~
 3 ~~construction contract if the owner declines to approve and certify portions of the contractor's billing or~~
 4 ~~estimate pursuant to 28-2-2103 for that subcontractor's work if the reasons for that failure by the owner~~
 5 ~~to approve and certify are not the fault of or directly related to the subcontractor's work.~~

6 ~~———(b) A subcontractor shall provide written notice to the contractor and the owner at least 7 calendar~~
 7 ~~days before the subcontractor's intended suspension or termination unless a shorter notice period is~~
 8 ~~prescribed in the construction contract between the contractor and subcontractor.~~

9 ~~———(c) A subcontractor may not be considered in breach of a construction contract for suspending~~
 10 ~~performance or terminating a construction contract pursuant to this subsection (4).~~

11 ~~———(d) A construction contract may not extend the time period for a subcontractor to suspend~~
 12 ~~performance or terminate a construction contract under this subsection (4).~~

13 ~~———(5) A contractor or subcontractor that suspends performance, as provided in this section, is not~~
 14 ~~required to furnish further labor, materials, or services until the contractor or subcontractor is paid the~~
 15 ~~amount that was certified and approved, together with any costs incurred for mobilization and project~~
 16 ~~rescheduling resulting from the shutdown or restarting of a project.~~

17 ~~———(6) Written notice required under this section must be considered to have been provided if either~~
 18 ~~of the following occurs:~~

19 ~~———(a) the written notice is delivered in person to the individual or a member of the entity or to an~~
 20 ~~officer of the corporation for which it was intended; or~~

21 ~~———(b) the written notice is delivered to or sent by any means that provides written, third-party~~
 22 ~~verification of delivery to the last business address known to the party giving notice.~~

23

24 ~~NEW SECTION. Section 2. Construction contracts -- void provisions. The following provisions are~~
 25 ~~against this state's public policy and are void and unenforceable:~~

26 ~~———(1) a A provision, covenant, clause, or understanding in, collateral to, or affecting a construction~~
 27 ~~contract that makes the contract subject to the laws of another state or that requires any litigation,~~
 28 ~~arbitration, or other dispute resolution proceeding arising from the contract to be conducted in another~~
 29 ~~state; and~~

30 ~~———(2) a provision, covenant, clause, or understanding in, collateral to, or affecting a construction~~

1 contract stating that a party to the contract cannot suspend performance under the contract or terminate
 2 the contract if another party to the contract fails to make prompt payments under the contract pursuant
 3 to ~~28-2-2103~~ IS AGAINST THIS STATE'S PUBLIC POLICY AND IS VOID AND UNENFORCEABLE.

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5 NEW SECTION. Section 3. Codification instruction. ~~{Sections 2 and 3}~~ are [SECTION 2] IS intended
 6 to be codified as an integral part of Title 28, chapter 2, part 21, and the provisions of Title 28, chapter
 7 2, part 21, apply to ~~{sections 2 and 3}~~ [SECTION 2].

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9 ~~NEW SECTION. Section 5. Repealer. Section 28-2-2107, MCA, is repealed.~~

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11 NEW SECTION. Section 4. Applicability. [This act] applies to contracts entered into after October
 12 1, 2001.

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