

SENATE BILL No. 1121

September 26, 2018, Introduced by Senators JONES and HERTEL and referred to the Committee on Commerce.

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:

1 Sec. 1. This act shall be known and may be cited as the
2 "construction payment act".

3 Sec. 2. As used in this act:

4 (a) "Billing period" means the payment cycle agreed to by the
5 parties, or, in the absence of an agreement, the calendar month
6 within which the work is performed.

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

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

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

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

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

22 (g) "Improvement" means the result of services, labor, or
23 material provided by a contractor, subcontractor, supplier, or
24 laborer, including, but not limited to, surveying, engineering and
25 architectural planning, construction management, clearing,
26 demolishing, excavating, filling, building, erecting, constructing,
27 altering, repairing, ornamenting, landscaping, paving; leasing

1 equipment, prefabricated materials, or components stored on or off
2 site; or installing or affixing a fixture or material, pursuant to
3 a contract. Improvement does not include stock material stored off
4 site.

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

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

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

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

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

22 (m) "Supplier" means a person that enters into a contract with
23 a person to supply materials, rental equipment, prefabricated
24 materials, or components, which by its use or incorporation into
25 the project improve the real estate.

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

1 (a) A payment clause that obligates the owner to pay the
2 contractor for satisfactory performance under the contract within
3 30 days from the end of the billing period.

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

7 (c) An interest clause that obligates the owner to pay the
8 contractor interest on wrongfully withheld amounts due, equal to
9 12% per annum, on each payment not made in accordance with the
10 contracts payment clause included in the contract. The interest
11 shall apply to the period beginning on the day after the required
12 date and ending on the date on which payment of that amount due is
13 made. Any amount of an interest which remains unpaid at the end of
14 any 30-day period shall be added to the principal amount of the
15 debt, and thereafter interest penalties shall accrue on that
16 amount.

17 (2) A contract provision required by this section shall not be
18 construed to impair the right of the owner to include in its
19 contracts provisions that permit the owner to retain a specified
20 percentage, which bears a reasonable relationship to the value of
21 the dispute or claim, of each progress payment otherwise due to a
22 contractor for unsatisfactory, incomplete performance or disputed
23 scope of work under the contract without incurring any obligation
24 to incur interest. In such a case, the owner must provide written
25 or electronic notice to the contractor as to why all or a portion
26 of the payment is being withheld within 10 days of receipt of the
27 disputed invoice. In the event the owner and contractor are unable

1 to come to an agreement within 30 days after the issuance of the
2 notice to withhold payment, the owner shall deposit the amount of
3 the withheld payment into a verifiable and federally insured
4 interest-bearing bank account or credit union account created for
5 the subject project. The contractor shall be entitled to receive
6 verification of the deposit within 10 days of issuing a written or
7 electronic notice requesting verification of the deposit to the
8 owner. The deposited money shall remain in that account until the
9 owner and contractor resolve their dispute or a court or arbitrator
10 order how the deposited funds are to be disbursed.

11 (3) If it is determined by a court of competent jurisdiction
12 or arbitrator that a payment withheld pursuant to subsection (2)
13 was not withheld in good faith for reasonable cause, the court or
14 arbitrator may award reasonable attorney fees to the prevailing
15 party. In any civil action or arbitration brought pursuant to this
16 section, if a court or arbitrator determines after a hearing for
17 such purpose that the cause was initiated, or a defense was
18 asserted, or a motion was filed or any proceeding therein was done
19 frivolously or in bad faith, the court or arbitrator shall require
20 the party that initiated the cause, asserted the defense, filed a
21 motion, or caused a proceeding to be had to pay the other party
22 named in the action the amount of the costs attributable to those
23 actions and reasonable expenses incurred by that party, including
24 reasonable attorney fees.

25 (4) Once an owner has made payment to the contractor according
26 to the payment terms of the construction contract or the provisions
27 of this section, future claims for the withheld payment against the

1 owner by the contractor shall be barred.

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

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

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

18 (2) A contract provision required by this section shall not be
19 construed to impair the right of the contractor to include in its
20 contracts provisions that permit the contractor to retain a
21 specified percentage, which bears a reasonable relationship to the
22 value of the dispute or claim, of each progress payment otherwise
23 due to a subcontractor or supplier for unsatisfactory performance,
24 delays, or a dispute regarding the scope of work under the contract
25 without incurring any obligation to incur interest. In such a case,
26 the contractor must provide written or electronic notice to the
27 subcontractor or supplier as to why all or a portion of the payment

1 is being withheld within 10 days of receipt of the disputed
2 invoice. In the event the contractor, subcontractor, or supplier
3 are unable to come to an agreement within 30 days after the
4 issuance of the notice to withhold payment, the contractor shall
5 deposit the amount of the withheld payment into a verifiable and
6 federally insured interest-bearing bank account or credit union
7 account created for the subject project. The subcontractor or
8 supplier shall be entitled to receive written or electronic
9 verification of the deposit within 10 days of issuing a written or
10 electronic notice to the contractor requesting verification of the
11 deposit by the contractor. The deposited money shall remain in that
12 account until the contractor and subcontractor or supplier resolve
13 their dispute or a court or arbitrator order how the deposited
14 funds are to be disbursed.

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

1 reasonable attorney fees.

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

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

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

- 14 (a) Work already commenced but not fully completed if the
15 invoiced work will be completed by the end of the billing period.
16 (b) Materials already supplied to the project.

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

1 under the contract.

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

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

14 Sec. 6. (1) An owner shall not retain a specified percentage
15 of each progress payment or final payment otherwise due to a
16 contractor, subcontractor, or supplier for satisfactory performance
17 under the contract.

18 (2) A general contractor, a construction manager, a prime
19 contractor, or a subcontractor or their agents shall not retain a
20 specified percentage of each progress payment or final payment
21 otherwise due to a subcontractor, supplier, lower-tiered
22 subcontractor, or lower-tiered supplier for satisfactory
23 performance under the contract.

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

27 (a) A requirement that a contractor assumes the risk of

1 nonpayment of the owner.

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

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

9 (d) A requirement that a contractor rely on the credit of the
10 owner and not on the credit of the general or prime contractor or
11 of a bonding company.

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

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

20 Sec. 8. (1) This act shall not apply to any of the following:

21 (a) Public works contracts.

22 (b) Residential contracts for the erection, alteration, or
23 repair of any single residential dwelling, attached multiple
24 residential dwellings less than 7 units, detached condominiums,
25 site condominiums, or premises used or intended to be used for
26 residency purposes and related facilities appurtenant to the
27 premises, used or intended to be used as an adjunct or residential

1 occupancy.

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

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

12 Sec. 9. If an owner or contractor disputes any amounts stated
13 in an invoice for payment, then all of the following apply:

14 (a) The party disputing the invoice must notify the other
15 party in writing within 10 days of the receipt of the disputed
16 invoice.

17 (b) The party disputing the invoice must in the notice
18 specifically describe in detail as to those items within the
19 invoice that are disputed.

20 (c) If notice of dispute is not given within the time required
21 by this section, then the invoice is considered to be accepted as
22 submitted.

23 (d) If notice of dispute is not given within the time required
24 by this section, the lack of notice does not constitute acceptance
25 of the work performed.

26 Sec. 10. (1) If arbitration or litigation is commenced to
27 recover payment due under sections 3, 4, or 5 and it is determined

1 that the owner, contractor, or subcontractor has failed to comply
2 with the payment terms of section 3 or 4, the court or arbitrator
3 shall award damages due equal to the amount that is determined by
4 the court or arbitrator to have been wrongfully withheld. An amount
5 shall not be considered to have been wrongfully withheld to the
6 extent that it bears a reasonable relationship to the value of any
7 disputed amount or claim held in good faith by the owner,
8 contractor, or subcontractor against whom the contractor or
9 subcontractor is seeking to recover payment.

10 (2) Absent any agreements to the contrary between the parties,
11 the court or arbitrator in any arbitration proceeding arising under
12 this act shall award to the substantially prevailing party its
13 reasonable attorney fees, arbitration costs, and expenses for
14 expert witnesses.