

HOUSE BILL NO. 5375

January 22, 2020, Introduced by Reps. Elder, Sneller, Stone, Sowerby, Haadsma, Kuppa, Marino, Brenda Carter, Garza, Liberati, Hood, Hammoud, Tate, Kennedy, Cambensy, Bellino, Manoogian, Sabo, Peterson and Love and referred to the Committee on Commerce and Tourism.

A bill to promote prompt payment for labor, materials, and services provided for 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



1 parties, or, absent an agreement, the calendar month within which
2 the work is performed.

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

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

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

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

17 (f) "General contractor" means a contractor who contracts with
18 an owner or lessee to provide, directly or indirectly, through
19 contracts with subcontractors, suppliers, or laborers, improvements
20 to real property described in a notice of commencement recorded
21 under section 108 of the constructions lien act, 1980 PA 497, MCL
22 570.1108.

23 (g) "Improvement" means the result of services, labor, or a
24 use of material or equipment provided under a contract by a
25 contractor, subcontractor, supplier, or laborer. Services, labor,
26 and material or equipment include, but are not limited to,
27 surveying, engineering and architectural planning, construction
28 management, clearing, demolishing, excavating, filling, building,
29 erecting, constructing, altering, repairing, ornamenting,



1 landscaping, and paving; rental equipment, prefabricated materials,
2 or components stored on or off site; or installing or affixing a
3 fixture or material. Material does not include stock material
4 stored off site.

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

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

13 (j) "Owner" means a person, or a person's agent, that has an
14 interest in the land or premises upon which a contractor has
15 undertaken to erect, construct, complete, alter, or repair a
16 building or an addition to a building, or, as applicable, other
17 construction project or development.

18 (k) "Person" means an individual or a corporation,
19 partnership, limited liability company, association, or other legal
20 entity.

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

23 (m) "Supplier" means a person that enters into a contract to
24 supply materials, rental equipment, prefabricated materials, or
25 components, which by their use or incorporation into a project
26 improves real property.

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

29 (a) A payment clause that obligates the owner to pay the



1 contractor for satisfactory performance under the contract within
2 30 days from the end of the billing period.

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

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

15 (2) The requirement under subsection (1) to include a contract
16 provision as described in that subsection does not impair the right
17 of an owner to include in the contract a provision that permits the
18 owner to withhold, as a result of unsatisfactory or incomplete
19 performance by the contractor, or in relation to a dispute
20 regarding the scope of the contracted work, a specified percentage
21 of a progress payment, or the entire payment, that is otherwise due
22 without incurring an obligation to pay interest on the amount
23 withheld if the amount withheld bears a reasonable relationship to
24 the value of the claim or dispute.

25 (3) If an owner withholds a specified percentage of a progress
26 payment, or the entire payment, under a contract provision
27 described in subsection (2), the owner shall provide to the
28 contractor within 10 days of receiving the invoice disputed by the
29 owner a written or electronic notice stating the reasons for

1 withholding the specified percentage or entire payment.

2 (4) If after 30 days following the issuance of the notice
3 described in subsection (3) the owner and contractor are unable to
4 come to an agreement regarding the disputed payment, the owner
5 shall deposit the specified percentage of the payment withheld, or
6 the entire payment, into a verifiable and federally insured
7 interest-bearing bank account or credit union account created for
8 the subject project. The owner shall provide verification of the
9 deposit to the contractor within 10 days of receiving from the
10 contractor a written or electronic notice requesting verification.
11 The deposited money must remain in the account until the owner and
12 contractor resolve their dispute or a court of competent
13 jurisdiction or arbitrator orders the deposited funds to be
14 disbursed, including the manner of that disbursement.

15 (5) If a court of competent jurisdiction or arbitrator
16 determines that a payment withheld under a contract provision
17 described in subsection (2) was not withheld in good faith for
18 reasonable cause, the court or arbitrator may award reasonable
19 attorney fees to the prevailing party.

20 (6) In a civil action or arbitration brought under this
21 section, if the court or arbitrator determines after a hearing that
22 the cause was initiated, a defense was asserted, a motion was
23 filed, or any other proceeding related to the civil action or
24 arbitration was done frivolously or in bad faith, the court or
25 arbitrator shall order the party that initiated the cause, asserted
26 the defense, filed the motion, or caused the proceeding to be held,
27 to pay the other party named in the action the costs attributable
28 to those actions and the reasonable expenses incurred by that
29 party, including reasonable attorney fees.



1 (7) If an owner has made payment of an amount withheld under
2 this section to the contractor according to the payment terms of
3 the construction contract, or the provisions of this section,
4 future claims for the withheld amount against the owner by the
5 contractor are barred.

6 Sec. 4. (1) A construction contract awarded by a contractor to
7 a subcontractor or supplier shall include all of the following:

8 (a) A payment clause that obligates the contractor to pay the
9 subcontractor and each supplier for satisfactory performance under
10 the contract within 7 calendar days of the contract's completion
11 and that the payment must be made from the amount paid to the
12 contractor.

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

22 (2) The requirement under subsection (1) to include a contract
23 provision as described in that subsection does not impair the right
24 of a contractor to include in the contract a provision that permits
25 the contractor to withhold, as a result of unsatisfactory
26 performance or delays by the subcontractor or supplier, or in
27 relation to a dispute regarding the scope of the contracted work, a
28 specified percentage of a progress payment, or the entire payment,
29 that is otherwise due without incurring an obligation to pay



1 interest on the amount withheld if the amount withheld bears a
2 reasonable relationship to the value of the claim or dispute.

3 (3) If a contractor withholds a specified percentage of a
4 progress payment, or the entire payment, under a contract provision
5 described in subsection (2), the owner must provide to the
6 contractor within 10 days of receiving the invoice disputed by the
7 contractor a written or electronic notice stating the reasons for
8 withholding the specified percentage or entire payment.

9 (4) If after 30 days following the issuance of the notice
10 described in subsection (3) the contractor and subcontractor or
11 supplier are unable to come to an agreement regarding the disputed
12 payment, the contractor shall deposit the specified percentage of
13 the payment withheld, or the entire payment, into a verifiable and
14 federally insured interest-bearing bank account or credit union
15 account created for the subject project. The contractor shall
16 provide verification of the deposit to the subcontractor or
17 supplier within 10 days of receiving from the subcontractor or
18 supplier a written or electronic notice requesting verification.
19 The deposited money must remain in the account until the contractor
20 and subcontractor or supplier resolve their dispute or a court of
21 competent jurisdiction or arbitrator orders the deposited funds to
22 be disbursed, including the manner of that disbursement.

23 (5) If a court of competent jurisdiction or arbitrator
24 determines that a payment withheld under a contract provision
25 described in subsection (2) was not withheld in good faith for
26 reasonable cause, the court or arbitrator may award reasonable
27 attorney fees to the prevailing party.

28 (6) In a civil action or arbitration brought under this
29 section, if the court or arbitrator determines after a hearing that



1 the cause was initiated, a defense was asserted, a motion was
2 filed, or any other proceeding related to the civil action or
3 arbitration was done frivolously or in bad faith, the court or
4 arbitrator shall order the party that initiated the cause, asserted
5 the defense, filed the motion, or caused the proceeding to be held,
6 to pay the other party named in the action the costs attributable
7 to those actions and the reasonable expenses incurred by the party,
8 including reasonable attorney fees.

9 (7) If a contractor has made payment of an amount withheld
10 under this section to the subcontractor or supplier according to
11 the payment terms of the construction contract or the provisions of
12 this section, future claims for the withheld amount against the
13 contractor or any surety of the contractor from the subcontractor
14 or supplier on the subject project are barred.

15 Sec. 5. (1) An owner shall pay a contractor strictly in
16 accordance with the terms of their contract.

17 (2) If the terms of a contract between an owner and a
18 contractor do not contain a term governing payment, the contractor
19 may submit to the owner, for payment at the end of the billing
20 period, an invoice for 1 or more of the following:

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

23 (b) Materials already supplied to the project.

24 (3) If a contract between an owner and a contractor does not
25 contain a provision governing when an invoice may be submitted, a
26 contractor may submit either a partial invoice every 30 days for
27 payment for work performed or a final invoice when the agreed-upon
28 work is fully completed. The owner shall pay all undisputed amounts
29 owed to the contractor within 30 days after the end of the billing



1 period or 30 days after delivery of the invoice by the contractor,
2 whichever is later. An owner shall not retain under this subsection
3 a specified percentage of a progress payment or final payment
4 otherwise due a contractor, subcontractor, or supplier for the
5 purpose of ensuring satisfactory performance under the contract.

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

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

18 Sec. 6. (1) An owner shall not withhold a specified percentage
19 of a progress payment or final payment otherwise due a contractor,
20 subcontractor, or supplier upon satisfactory performance under the
21 contract.

22 (2) A general contractor or a subcontractor, or their agents,
23 shall not withhold a specified percentage of a progress payment or
24 final payment otherwise due to a subcontractor, supplier, lower-
25 tiered subcontractor, or lower-tiered supplier upon satisfactory
26 performance under the contract.

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



1 (a) A requirement that a contractor assume the risk of
2 nonpayment of the owner.

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

6 (c) A requirement that makes the obligation of a contractor
7 and its surety to provide a payment to a claimant, under a payment
8 or performance bond, subject to payment by the contractee.

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

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

18 (f) A requirement that a contractor waive a provision of this
19 act.

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

21 (a) Public works contracts.

22 (b) Residential contracts for the erection, alteration, or
23 repair of a 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 residential purposes and related facilities appurtenant to the
27 premises that are used or intended to be used as an adjunct or
28 residential occupancy.

29 (2) The burden of proving an exemption from this act is upon



1 the person claiming the exemption.

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

10 Sec. 9. If an owner or contractor disputes an amount stated in
11 an invoice for payment, all of the following apply:

12 (a) The party disputing the invoice shall notify the other
13 party in writing within 10 days of the receipt of the invoice.

14 (b) The party disputing the invoice shall in the notice
15 specifically describe in detail those items in the invoice that are
16 disputed.

17 (c) If a notice of dispute is not given within the time
18 required by this section, the invoice is considered accepted as
19 submitted.

20 (d) If a notice of dispute is not given within the time
21 required by this section, the lack of notice does not constitute
22 acceptance of the work performed.

23 Sec. 10. (1) If arbitration or litigation is commenced to
24 recover payment due under sections 3, 4, or 5 and it is determined
25 that the owner, contractor, or subcontractor has failed to comply
26 with the payment terms required under section 3 or 4, the court or
27 arbitrator shall award damages equal to the amount determined by
28 the court or arbitrator to have been wrongfully withheld. An amount
29 is not wrongfully withheld if it bears a reasonable relationship to



1 the value of a disputed amount or claim held in good faith by the
2 owner, contractor, or subcontractor against whom the contractor or
3 subcontractor is seeking to recover payment.

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

