

REFERENCE TITLE: **contractors; payment**

State of Arizona
House of Representatives
Forty-ninth Legislature
First Regular Session
2009

HB 2080

Introduced by
Representatives Reagan, Schapira: Campbell CL, Chabin, Crandall

AN ACT

**AMENDING SECTIONS 32-1129, 32-1129.01, 32-1129.02 AND 32-1129.05, ARIZONA
REVISED STATUTES; 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, 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 A DESIGNATED PORTION OF THE WORK HAS BEEN
17 COMPLETED IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE CONSTRUCTION
18 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.

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 ~~4-~~ 5. "Subcontractor" means any person, firm, partnership,
30 corporation, association or other organization, or a combination of any of
31 them, that has a direct contract with a contractor or another subcontractor
32 to perform a portion of the work under a construction contract.

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

35 32-1129.01. Progress payments by owner; conditions; interest

36 A. By mutual agreement with a contractor, an owner may make progress
37 payments on construction contracts of less than sixty days. An owner shall
38 make progress payments to a contractor on all other construction contracts.
39 Progress payments shall be made on the basis of a duly certified and approved
40 billing or estimate of the work performed and the materials supplied during
41 the preceding thirty day billing cycle, or such other billing cycle as stated
42 in the construction contract. If billings or estimates are to be submitted
43 in other than thirty day billing cycles, the construction contract and each
44 page of the plans, including bid plans and construction plans, shall
45 specifically identify such other billing cycle in a clear and conspicuous

1 manner as prescribed in subsection B. Except as provided in subsection C,
2 the owner shall make progress payments to the contractor within seven days
3 after the date the billing or estimate is certified and approved pursuant to
4 subsection D.

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

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

11 Notice of Alternate Billing Cycle

12 This contract allows the owner to require the submission
13 of billings or estimates in billing cycles other than thirty
14 days. Billings or estimates for this contract shall be
15 submitted as follows:
16 _____
17 _____
18 _____

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

22 Notice of Alternate Billing Cycle

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

30 C. An owner may make progress payments later than seven days after the
31 date the billing or estimate is certified and approved if both:

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

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 Payment Provision

39 This contract allows the owner to make payment within ____
40 days after certification and approval of billings and estimates.

41 D. A billing or estimate **FOR A PROGRESS PAYMENT** shall be deemed
42 approved and certified fourteen days after the owner receives the billing or
43 estimate, unless before that time the owner or the owner's agent prepares and
44 issues a written statement detailing ~~those items in~~ **THE OWNER'S REASONS FOR**
45 **NOT APPROVING OR CERTIFYING ALL OR A PORTION OF** the billing or estimate ~~that~~

1 ~~are not approved and certified.~~ THE OWNER IS DEEMED TO HAVE RECEIVED THE
2 BILLING OR ESTIMATE WHEN THE BILLING OR ESTIMATE IS SUBMITTED TO ANY PERSON
3 DESIGNATED BY THE OWNER FOR THE RECEIPT OF THESE SUBMISSIONS OR FOR REVIEW OR
4 APPROVAL OF THE BILLING OR ESTIMATE. An owner may decline to approve and
5 certify a billing or estimate or portion of a billing or estimate for ANY OF
6 THE FOLLOWING REASONS:

- 7 1. Unsatisfactory job progress. ~~,-~~
- 8 2. Defective construction work or materials not remedied. ~~,-~~
- 9 3. Disputed work or materials. ~~,-~~
- 10 4. Failure to comply with other material provisions of the
11 construction contract. ~~,-~~
- 12 5. Third party claims filed or reasonable evidence that a claim will
13 be filed. ~~,-~~
- 14 6. Failure of the contractor or a subcontractor to make timely
15 payments for labor, equipment and materials. ~~,-~~
- 16 7. Damage to the owner. ~~,-~~
- 17 8. Reasonable evidence that the construction contract cannot be
18 completed for the unpaid balance of the construction contract sum. ~~or a~~
19 ~~reasonable amount for retention. The owner is deemed to have received the~~
20 ~~billing or estimate when the billing or estimate is submitted to any person~~
21 ~~designated by the owner for the receipt of these submissions or for review or~~
22 ~~approval of the billing or estimate.~~

23 E. An owner may withhold from a progress payment only an amount that
24 is sufficient to pay the direct expenses the owner reasonably expects to
25 incur to ~~correct any items~~ 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 subsection D.

28 F. An owner may extend the period within which the billing or estimate
29 is certified and approved if both:

30 1. The construction contract in a clear and conspicuous manner
31 specifically provides for an extended time period within which a billing or
32 estimate shall be certified and approved defined by a specified number of
33 days after the owner has received the billing or estimate.

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

37 Notice of Extended Certification and
38 Approval Period Provision

39 This contract allows the owner to certify and approve
40 billings and estimates within ____ days after the billings and
41 estimates are received from the contractor.

42 G. After the effective date of a construction contract, an owner and
43 contractor may change the number of specified days after certification and
44 approval for the owner to make payment to the contractor or within which a
45 billing or estimate must be certified and approved. Any contractor or

1 subcontractor that does not provide written consent to the change will
2 continue to be paid as previously agreed.

3 H. A CONTRACTOR MAY SUBMIT A BILLING OR ESTIMATE FOR FINAL PAYMENT ON
4 FINAL COMPLETION. A BILLING OR ESTIMATE FOR FINAL PAYMENT SHALL BE DEEMED
5 APPROVED AND CERTIFIED FOURTEEN DAYS AFTER THE OWNER RECEIVES THE BILLING OR
6 ESTIMATE, UNLESS BEFORE THAT TIME THE OWNER OR OWNER'S AGENT PREPARES AND
7 ISSUES A WRITTEN STATEMENT DETAILING THE SPECIFIC WORK OR OTHER REQUIREMENTS
8 IN THE CONSTRUCTION CONTRACT YET TO BE COMPLETED. THE OWNER IS DEEMED TO
9 HAVE RECEIVED THE BILLING OR ESTIMATE FOR FINAL PAYMENT WHEN THE BILLING OR
10 ESTIMATE IS SUBMITTED TO ANY PERSON DESIGNATED BY THE OWNER FOR THE RECEIPT
11 OF THESE SUBMISSIONS OR FOR REVIEW OR APPROVAL OF THE BILLING OR ESTIMATE.

12 I. THE OWNER SHALL MAKE FINAL PAYMENT TO THE CONTRACTOR WITHIN SEVEN
13 DAYS AFTER THE DATE THE BILLING OR ESTIMATE FOR FINAL PAYMENT IS APPROVED AND
14 CERTIFIED PURSUANT TO SUBSECTION H. IF THE OWNER ISSUES A WRITTEN STATEMENT
15 PURSUANT TO SUBSECTION H, THE OWNER MAY WITHHOLD FROM FINAL PAYMENT AN AMOUNT
16 NOT TO EXCEED ONE HUNDRED FIFTY PER CENT OF THE DIRECT EXPENSES THE OWNER
17 REASONABLY EXPECTS TO INCUR TO COMPLETE THE SPECIFIC WORK OR TO PROTECT THE
18 OWNER FROM LOSS FOR WHICH THE CONTRACTOR IS RESPONSIBLE AND THAT RESULTS FROM
19 THE OTHER UNCOMPLETED REQUIREMENTS SET FORTH IN THE WRITTEN STATEMENT. IF A
20 REASON FOR WITHHOLDING FINAL PAYMENT IS REMOVED, THE OWNER WITHIN SEVEN DAYS
21 SHALL MAKE PAYMENT TO THE CONTRACTOR OF THE AMOUNT WITHHELD FOR THAT SPECIFIC
22 REASON.

23 ~~H. J. When a contractor completes and an owner approves and certifies~~
24 ~~all work under a construction contract, the owner shall make payment in full~~
25 ~~on the construction contract within seven days.~~ When a contractor completes
26 ~~and an owner approves and certifies~~ all work under a portion of a
27 construction contract for which the contract states a separate price, the
28 ~~owner shall make payment in full~~ CONTRACTOR MAY SUBMIT A BILLING OR ESTIMATE
29 FOR FINAL PAYMENT on that portion of the construction contract ~~within seven~~
30 ~~days~~ PURSUANT TO SUBSECTION H. On projects that require a federal agency's
31 final approval or certification, the owner shall make payment in full on the
32 construction contract within seven days of the federal agency's final
33 approval or certification.

34 ~~I.~~ K. Payment shall not be required pursuant to this section unless
35 the contractor provides the owner with a billing or estimate for the work
36 performed or the material supplied in accordance with the terms of the
37 construction contract between the parties.

38 ~~J.~~ L. A construction contract shall not alter the rights of any
39 contractor, subcontractor or material supplier to receive prompt and timely
40 ~~progress~~ payments OR ANY OF THE OTHER PROTECTIONS OR REMEDIES as provided
41 under this article. IT IS AGAINST PUBLIC POLICY FOR ANY PARTY TO REQUIRE ANY
42 OTHER PARTY TO WAIVE ANY PROVISION OF THIS ARTICLE.

43 ~~K.~~ M. If an owner or a third party designated by an owner as the
44 person responsible for making progress payments on a construction contract
45 does not make a timely payment pursuant to this section, the owner shall pay

1 the contractor interest at the rate of one and one-half per cent a month or
2 fraction of a month on the unpaid balance, or at a higher rate as the parties
3 to the construction contract agree.

4 ~~L.~~ N. On the written request of a subcontractor, the owner shall
5 notify the subcontractor within five days after the issuance of a progress
6 payment to the contractor. On the written request of a subcontractor, the
7 owner shall notify the subcontractor within five days after the owner makes
8 the final payment to the contractor on the construction contract.

9 ~~M.~~ O. In any action or arbitration brought to collect payments or
10 interest pursuant to this section, the successful party shall be awarded
11 costs and attorney fees in a reasonable amount.

12 ~~N.~~ P. If the owner and contractor are a single entity, that entity
13 shall pay its subcontractors or material suppliers within fourteen days after
14 the billing or estimate is certified and approved unless the deadlines for
15 approval and certification or for payment have been modified pursuant to
16 subsection C or F.

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

19 32-1129.02. Performance and payment by contractor,
20 subcontractor or material supplier; conditions;
21 interest

22 A. Notwithstanding the other provisions of this section, performance
23 by a contractor, subcontractor or material supplier in accordance with the
24 provisions of a construction contract entitles the contractor, subcontractor
25 or material supplier to payment from the party with whom the contractor,
26 subcontractor or material supplier contracts.

27 B. If a subcontractor or material supplier has performed in accordance
28 with the provisions of a construction contract, the contractor shall pay to
29 its subcontractors or material suppliers and each subcontractor shall pay to
30 its subcontractors or material suppliers, within seven days of receipt by the
31 contractor or subcontractor of each progress payment or final payment, the
32 full amount received for such subcontractor's work and materials supplied
33 based on work completed or materials supplied under the subcontract. Payment
34 shall not be required pursuant to this subsection unless the subcontractor or
35 material supplier provides to the contractor or subcontractor a billing or
36 invoice for the work performed or material supplied in compliance with the
37 terms of the contract between the parties. Each subcontractor or material
38 supplier shall provide a waiver of any mechanic's or materialman's lien
39 conditioned upon payment for the work completed or material supplied. The
40 contractor or subcontractor may require that such conditional waivers of lien
41 be notarized. Any diversion by the contractor or subcontractor of payments
42 received for work performed pursuant to a contract, or failure to reasonably
43 account for the application or use of such payments, constitutes grounds for
44 disciplinary action by the registrar of contractors. Violations of this
45 section shall be grounds for suspension or revocation of a license or other

1 disciplinary action by the registrar pursuant to section 32-1154, subsections
2 B, C and D. The subcontractor or material supplier may notify the registrar
3 of contractors and the owner in writing of any payment less than the amount
4 or percentage approved for the class or item of work as set forth in this
5 section.

6 C. Nothing in this section prevents the contractor or subcontractor,
7 at the time of application or certification to the owner or contractor, from
8 withholding such application or certification to the owner or contractor for
9 payment to the subcontractor or material supplier for **ANY OF THE FOLLOWING**
10 **REASONS:**

- 11 1. Unsatisfactory job progress. ~~,-~~
- 12 2. Defective construction work or ~~material~~ **MATERIALS** not remedied. ~~,-~~
- 13 3. Disputed work. ~~,-~~
- 14 4. Failure to comply with other material provisions of the
15 construction contract. ~~,-~~
- 16 5. Third party claims filed or reasonable evidence that a claim will
17 be filed. ~~,-~~
- 18 6. Failure of the subcontractor to make timely payments for labor,
19 equipment and materials. ~~,-~~
- 20 7. Damage to a contractor or another subcontractor or material
21 supplier. ~~,-~~
- 22 8. Reasonable evidence that the subcontract cannot be completed for
23 the unpaid balance of the subcontract sum. ~~or a reasonable amount for~~
24 ~~retention that does not exceed the actual percentage retained by the owner.~~

25 D. If a ~~periodic~~ **PROGRESS** or final payment to a subcontractor or
26 material supplier is delayed by more than seven days after receipt of
27 ~~periodic~~ **PROGRESS** or final payment by the contractor or subcontractor, the
28 contractor or subcontractor shall pay its subcontractor or material supplier
29 interest, except for periods of time during which payment is withheld
30 pursuant to subsection C of this section, beginning on the eighth day, at the
31 rate of one and one-half per cent per month or a fraction of a month on the
32 unpaid balance or at such higher rate as the parties agree.

33 E. Any licensed contractor, licensed subcontractor or material
34 supplier who files a complaint with the registrar of contractors under this
35 section shall be required to post a surety bond or cash deposit of five
36 hundred dollars or one-half of the amount due, whichever is less, with the
37 registrar to secure the payment of claims under this section. If the
38 complaint is determined by the registrar to be without merit and frivolous,
39 the registrar shall order the person who filed the complaint to pay one-half
40 of the amount of the required surety bond or cash deposit to the respondent
41 and one-half to the registrar for deposit into the state general fund. If no
42 claim may be made under this section against the surety bond or cash deposit,
43 the surety bond or cash deposit shall be returned to the complainant. The
44 surety bond or cash deposit shall be in the name of the licensee or material
45 supplier who files the complaint and shall be subject to claims by the

1 registrar of contractors and the respondent licensee as provided in this
2 section. The surety bond or cash deposit shall be conditioned upon and
3 provide for payment upon the presentation of a certified copy of the order of
4 the registrar and a certification by the complainant of nonpayment within
5 thirty days after the order becomes final. The surety bond shall be executed
6 by the complainant as principal with a corporation duly authorized to
7 transact surety business in this state. Evidence of the surety bond shall be
8 submitted to the registrar in a form acceptable to the registrar. The cash
9 deposit shall be deposited, pursuant to sections 35-146 and 35-147, by the
10 registrar in the contractors prompt pay complaint fund and shall be held for
11 the payment of claims.

12 F. In any action or arbitration brought to collect payments or
13 interest pursuant to this section, the successful party shall be awarded
14 costs and attorney fees in a reasonable amount.

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

17 32-1129.05. Construction contracts; void provisions; dispute
18 resolution

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

21 1. A provision, covenant, clause or understanding in, collateral to or
22 affecting a construction contract that makes the contract subject to the laws
23 of another state or that requires any litigation, ~~arbitration or other~~
24 ~~dispute resolution proceeding~~ arising from the contract to be conducted in
25 another state.

26 2. A provision, covenant, clause or understanding in, collateral to or
27 affecting a construction contract stating that a party to the contract cannot
28 suspend performance under the contract or terminate the contract if another
29 party to the contract fails to make prompt payments under the contract
30 pursuant to section 32-1129, 32-1129.01 or 32-1129.02.

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