

APPENDIX F

Retainage

- Retainage Statute
CRS 24-91-101 through 110
- Escrow Contract for Retainage

Retainage Statutes

24-91-101. Legislative declaration. (1) The general assembly hereby declares that retentions in and delays in the completion of construction contracts with public entities are a matter of statewide concern and are affected with the public interest and that the provisions of this article are enacted in the exercise of the police power of this state for the purpose of protecting the health, peace, safety, and welfare of the people of this state.

(2) The general assembly hereby further finds and declares that the construction industry is a significant component of the state's economy; that there is a substantial statewide interest in fostering the growth and stability of the construction industry and ensuring that it remains economically viable; that the ability of construction and design enterprises to obtain and satisfactorily perform projects at all levels of government affects the construction industry as a whole; that clauses in public construction contracts which provide that public entities shall not be required to compensate contractors for delays in the completion of the work caused by the public entity are adhesive in nature and, if enforced, can have ruinous financial consequences on affected contractors due to risks over which the contractor may have no control; that public construction projects are subject to public appropriation laws which may be in direct conflict with commonly used construction contract clauses such as clauses which authorize additional payment to the contractor based on changed conditions; and that there is a substantial statewide interest in ensuring that the policy underlying the efficient expenditure of public moneys is balanced with the policy of fostering a healthy and viable construction industry.

Source: L. 79: Entire article added, p. 995, § 1, effective July 1. L. 89: Entire section amended, p. 1142, § 1, effective April 10. L. 92: Entire section amended, p. 1086, § 1, effective July 1.

24-91-102. Definitions. As used in this article, unless the context otherwise requires:

(1) "Acceptable securities" means:

- (a) United States bonds, United States treasury notes, or United States treasury bills;
- (b) General obligation or revenue bonds of this state;
- (c) General obligation or revenue bonds of any political subdivision of this state;
- (d) Certificates of deposit from a state or national bank or a savings and loan association insured by the federal deposit insurance corporation or the federal savings and loan insurance corporation and having its principal office in this state.

(2) "Contractor" means any person, company, firm, or corporation which is a party to a contract with a public entity to construct, erect, alter, install, or repair any highway, public building, public work, or public improvement, structure, or system.

(3) "Public entity" means this state or a county, city, city and county, town, or district, including any political subdivision thereof.

(4) "Subcontractor" means and includes any person, company, firm, or corporation which is a party to a contract with a contractor to construct, erect, alter, install, or repair any highway, public building, public work, or public improvement, structure, or system and which, in connection therewith, furnishes and performs on-site labor with or without furnishing materials.

(5) "Substantial completion" means the date when the construction is sufficiently complete, in accordance with the contract documents, as modified by any change orders agreed to by the parties, so that the work or designated portion thereof is available for use by the owner.

Source: L. 79: Entire article added, p. 995, § 1, effective July 1. L. 84: (1)(d) amended, p. 741, § 1, effective February 23. L. 86: (1)(d) amended, p. 971, § 1, effective July 1.

24-91-103. Public entity - contracts - partial payments. (1) A public entity awarding a contract exceeding eighty thousand dollars for the construction, alteration, or repair of any highway, public building, public work, or public improvement, structure, or system shall authorize partial payments of the amount due under such contract at the end of each calendar month, or as soon thereafter as practicable, to the contractor, if the contractor is satisfactorily performing the contract. At least ninety percent of the calculated value of any work completed shall be paid until fifty percent of the work required by the contract has been performed. Thereafter, the public entity shall pay any of the remaining installments without retaining additional funds if, in the opinion of the public entity, satisfactory progress is being made in the work. The withheld percentage of the contract price of any such work, improvement, or construction shall be retained until the contract is completed satisfactorily and finally accepted by the public entity. If the public entity finds that satisfactory progress is being made in all phases of the contract, it may, upon written request by the contractor, authorize final payment from the withheld percentage to the contractor or subcontractors who have completed their work in a manner finally acceptable to the public entity. Before such payment is made, the public entity shall determine that satisfactory and substantial reasons exist for the payment and shall require written approval from any surety furnishing bonds for the contract work.

(2) Whenever a contractor receives payment pursuant to this section, the contractor shall make payments to each of his subcontractors of any amounts actually received which were included in the contractor's request for payment to the public entity for such subcontracts. The contractor shall make such payments within seven calendar days of receipt of payment from the public entity in the same manner as the public entity is required to pay the contractor under this section if the subcontractor is satisfactorily performing under his contract with the contractor. The subcontractor shall pay all suppliers, sub-subcontractors, laborers, and any other persons who provide goods, materials, labor, or equipment to the subcontractor any amounts actually received which were included in the subcontractor's request for payment to the contractor for such persons, in the same manner set forth in this subsection (2) regarding payments by the contractor to the subcontractor. If the subcontractor fails to make such payments in the required manner, the subcontractor shall pay said suppliers, sub-subcontractors, and laborers interest in the same manner set forth in this subsection (2) regarding payments by the contractor to the subcontractor. At the time the subcontractor submits a request for payment to the contractor, the subcontractor shall also submit to the contractor a list of the subcontractor's suppliers, sub-subcontractors, and laborers. The contractor shall be relieved of the requirements of this subsection (2) regarding payment in seven days and interest payment until the subcontractor submits such list. If the contractor fails to make timely payments to the subcontractor as required by this section, the contractor shall pay the subcontractor interest as specified by contract or at the rate of fifteen percent per annum whichever is higher, on the amount of the payment which was not made in a timely manner. The interest shall accrue for the period from the required payment date to the date on which payment is made. Nothing in this subsection (2) shall be construed to affect the retention provisions of any contract.

(3) The provisions of this section shall apply to contracts between contractors and subcontractors entered into on or after July 1, 1991.

Source: L. 79: Entire article added, p. 996, § 1, effective July 1. L. 91: Entire section amended, p. 904, § 1, effective July 1.

24-91-103.5. Public entity - contracts - delay clauses. (1) (a) Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

(b) As used in this subsection (1), public works contract means a contract of the state, county, city and county, city, town, school district, special district, or any other political subdivision of the state for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other work dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.

(2) Subsection (1) of this section is not intended to render void any contract provision of a public works contract that:

(a) Precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;

(b) Requires notice of any delay by the party responsible for such delay;

(c) Provides for reasonable liquidated damages;

(d) Provides for arbitration or any other procedure designed to settle contract disputes.

Source: L. 89: Entire section added, p. 1142, § 2, effective April 10.

24-91-103.6. Public entity - contracts - appropriations - change orders - severability. (1) No public entity shall contract with a designer, a contractor, or a designer and contractor for the construction, the design, or both the construction and design of a public works project unless a full and lawful appropriation when required by statute, charter, ordinance, resolution, or rule or regulation has been made for such project.

(2) Every public works contract, as defined in section 24-91-103.5 (1) (b), shall contain the following:

(a) A statement that the amount of money appropriated is equal to or in excess of the contract amount; and

(b) A clause which prohibits the issuance of any change order or other form of order or directive by the public entity requiring additional compensable work to be performed, which work causes the aggregate amount payable under the contract to exceed the amount appropriated for the original contract, unless the contractor is given written assurance by the public entity that lawful appropriations to cover the costs of the additional work have been made or unless such work is covered under a remedy-granting provision in the contract.

(3) If the requirements of subsection (1) or (2) of this section are not met, a civil action may be maintained against the public entity which has contracted for the public works project to recover sums due under the contract notwithstanding any appropriation statute, ordinance, resolution, or law to the contrary.

(4) In the event that a good faith dispute arises between a public entity and a contractor concerning the contractor's right to receive additional compensation under a remedy-granting provision of the public works contract, it shall not be a defense to a civil action for payment for such claim that no moneys have been appropriated for such claimed amounts, so long as the contractor has complied with all provisions of the contract applicable to the dispute, including but not limited to change order and additional work clauses, and has submitted to the public entity a statement sworn to under penalty of perjury which sets forth: The amount of additional compensation to which the contractor contends that it is entitled; that claim-supporting data which is accurate and complete to the best of the contractor's knowledge and belief have been submitted; and that the amount requested accurately reflects what is owed by the public entity.

As used in this subsection (4), "remedy-granting provision" means any contract clause which permits additional compensation in the event that a specific contingency or event occurs. Such term shall include, but shall not be limited to, change clauses, differing site conditions clauses, variation in quantities clauses, and termination for convenience clauses.

(5) If a final judgment is entered pursuant to a civil action brought by a contractor for which adequate appropriations have not been made, the judgment debtor public entity shall promptly make payment pursuant to section 13-60-101, 24-10-113, 24-10-113.5, or 30-25-104, C.R.S., and any other statutory requirement on payment of judgments.

(6) Any provision of this section which is in conflict with the terms of any federal grant shall be inapplicable to a contract between a contractor and a public entity which is funded in whole or in part by that grant.

(7) Nothing in this section shall prohibit:

(a) The use of phased construction over a period of years where, if applicable, the public entity has informed the contractor of initial annual appropriations at the time the contract is signed, and subsequent annual appropriations as they occur, in statements issued pursuant to subsection (2) of this section; or

(b) The use of bond-financed construction where appropriations to service bond debt may occur subsequent to the commencement of construction, where this fact is clearly stated in disclosure statements made pursuant to subsection (2) of this section.

(8) The provisions of this section shall apply to any contract executed on or after July 1, 1992.

(9) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

Source: L. 92: Entire section added, p. 1087, § 2, effective July 1.

24-91-104. Contract - completion by public entity - partial payments. If it becomes necessary for a public entity to take over the completion of any contract, all of the amounts owing the contractor, including the withheld percentage, shall be applied: First, toward the cost of completion of the contract; second, toward performance of the public entity's withholding requirement set forth in section 38-26-107, C.R.S.; third, to the surety furnishing bonds for the contract work, to the extent such surety has incurred liability or expense in completing the contract work or made payments pursuant to section 38-26-106, C.R.S.; then, to the contractor. Such retained percentage as may be due any contractor shall be due and payable at the expiration of thirty days from the date of final acceptance by the public entity of the contract work.

Source: L. 79: Entire article added, p. 996, § 1, effective July 1. L. 86: Entire section amended, p. 971, § 2, effective July 1.

24-91-105. Withdrawal by contractor of sums withheld - security deposit required. The contractor under any contract exceeding eighty thousand dollars made or awarded by any public entity, pursuant to which sums are withheld to assure satisfactory performance of the contract, may withdraw the whole or any portion of the said sums withheld if the contractor deposits acceptable securities with the public entity. The contractor shall take such actions as the public entity may require to transfer the securities or a limited interest in the securities, including a security interest, and to authorize the public entity to negotiate the acceptable securities and to receive the payments due the public entity pursuant to law or the terms of the contract, and, to the extent there are excess funds resulting from said negotiation, the balance shall be returned to the contractor. Such acceptable securities so deposited at all times shall have a market value at

least equal in value to the amount so withdrawn. If at any time a public entity determines that the market value of the acceptable securities theretofore deposited has fallen below the amount so withdrawn, the public entity shall give notice thereof to the contractor, who forthwith shall deposit additional acceptable securities in an amount sufficient to reestablish a total deposit of securities equal in value to the amount so withdrawn.

Source: L. 79: Entire article added, p. 996, § 1, effective July 1. L. 86: Entire section amended, p. 972, § 3, effective July 1.

24-91-106. Escrow agreement - authority to enter into - effect on acceptable securities. (1) A public entity and the contractor may enter into an escrow contract or escrow contract and security agreement with any national bank, state bank, trust company, or savings and loan association located in this state and designated by mutual agreement of the public entity and the contractor, after notice to the surety, to provide as escrow agent for the custodial care and servicing of any acceptable securities deposited with him pursuant to this section. Such services shall include the safekeeping of the acceptable securities and the rendering of all services required to effectuate the purposes of this section and section 38-26-107, C.R.S.

(2) Any acceptable securities deposited with an escrow agent pursuant to this section shall be deemed to be in the possession of the public entity, and the public entity shall be deemed to have a perfected security interest in the acceptable securities for purposes of article 8 or 9 of title 4, C.R.S.

(3) The deposit of acceptable securities with a state or national bank, or a state or federal savings and loan association, shall not be deemed a holding of public deposits for purposes of article 10.5 or 47 of title 11, C.R.S.

Source: L. 79: Entire article added, p. 997, § 1, effective July 1. L. 86: Entire section amended, p. 972, § 4, effective July 1. L. 96: (2) amended, p. 246, § 24, effective July 1.

24-91-107. Custodian for acceptable securities - collection of interest income - payable to contractor. The public entity or any national bank, state bank, trust company, or savings and loan association located in this state and designated by mutual agreement of the public entity and the contractor to serve as custodian for the acceptable securities pursuant to section 24-91-106 shall collect all interest and income when due on the acceptable securities so deposited and shall pay them, when and as collected, to the contractor who deposited the acceptable securities. If the deposit is in the form of coupon bonds, the escrow agent shall deliver each coupon, as it matures, to the contractor. Any expense incurred for this service shall not be charged to the public entity.

Source: L. 79: Entire article added, p. 997, § 1, effective July 1. L. 86: Entire section amended, p. 972, § 5, effective July 1.

24-91-108. Retained payments - amount deducted by a public entity. Any amount deducted by a public entity, pursuant to law or the terms of a contract, from the retained payments otherwise due to the contractor thereunder shall be deducted first from that portion of the retained payments for which no acceptable securities have been substituted and then from the proceeds of any deposited acceptable securities, in which case, the contractor shall be entitled to receive the interest, coupons, or income only from those acceptable securities which remain on deposit after such amount has been deducted.

Source: L. 79: Entire article added, p. 997, § 1, effective July 1. L. 86: Entire section amended, p. 973, § 6, effective July 1.

24-91-109. Retained payments - disbursement. All retained payments and interest thereon disbursed to any contractor under any contract with a public entity covered under this article

shall be disbursed to each subcontractor by the contractor. The disbursement of such retained payments and interest shall be in proportion to the respective amounts of retained payments, if any, which the contractor theretofore has withheld from his subcontractors if the subcontractor has performed under his contract with the contractor.

Source: L. 79: Entire article added, p. 997, § 1, effective July 1.

24-91-110. Contracts excepted from article. The provisions of this article shall not apply in the case of a contract made or awarded by any public entity if a part of the contract price is to be paid with funds from the federal government or from some other source and if the federal government or such other source has requirements concerning retention or payment of funds which are applicable to the contract and which are inconsistent with this article.

Source: L. 79: Entire article added, p. 998, § 1, effective July 1.

Project No. _____

ESCROW CONTRACT

THIS ESCROW CONTRACT, made this _____ day of _____, 19_____, by and between the State of Colorado, acting by and through the Department of _____ for the use and benefit of the Division of _____, hereinafter referred to as the State, and _____ (a national bank, state bank, trust company, or savings and loan association) located in Colorado, hereinafter referred to as the Escrow Agent.

WHEREAS, required approval clearance and coordination has been accomplished from and with appropriate agencies; and

WHEREAS, the State and _____, a _____, doing business by virtue of the laws of the State of Colorado, hereafter referred to as the "Contractor" have heretofore entered into a contract, dated _____, 19_____, exceeding the amount of \$80,000, for the construction, alteration, or repair of a public building, work improvement, structure or system, identified as _____; and

WHEREAS, pursuant to Article 91 of Title 24, C.R.S. 1973, as amended, hereinafter referred to as the Statute, the State has already retained or shall retain payments otherwise due to the said Contractor in accordance with the terms and conditions of the aforesaid construction contract; and

WHEREAS, pursuant to the above cited statute the State may enter into an escrow contract with an Escrow Agency designated by the Contractor, after notice to the Surety, to provide for the custodial care, safekeeping and servicing of acceptable securities, as defined in said statute, deposited by the Contractor in substitution for the retained payments; and

WHEREAS, the Escrow Agent and the Contractor have agreed to the designation of the Escrow Agent and, further, as prescribed by the statute, the Escrow Agent and Contractor have agreed that any expenses incurred for the services of the Escrow Agent shall be charged to the State.

NOW, THEREFORE, it is hereby agreed that:

1. The Escrow Agent shall from time to time receive from the Contractor and deposit acceptable securities which shall consist of United States bonds, United States treasury notes, United States treasury bills, general obligation or revenue bonds of the State of Colorado, general obligation or revenue bonds of, or of any political subdivision of, the State of Colorado; and/or certificates of deposit from a state or national bank or a savings

and loan association insured by the federal deposit insurance corporation or the federal savings and loan insurance corporation and having its principal office in the State of Colorado. The Contractor shall execute the attach to each acceptable security an assignment in the form approved by the State (Attachment 1), but such executed assignment form may be separately transmitted when a safekeeping receipt or other valid item is substituted for the actual security document. The assignment shall authorize the State to negotiate the security and receive any payments due the State pursuant to law or the terms of the contract.

2. At the time of receipt of the acceptable securities of whatsoever nature herein described with executed form of assignment (Attachment 1) attached thereto (or separately transmitted); or at any time thereafter when other acceptable securities with executed form of assignment attached thereof (or separately transmitted); are substituted therefore, the Escrow Agent promptly shall notify the State in writing specifically identifying the kind, character and class of such security.
3. The Escrow Agent shall retain the acceptable securities together with executed assignments until such time as the State, by its designated representative, shall instruct the Escrow Agent as to the disposition of such acceptable securities.
4. The Escrow Agent shall collect all interest and income when due on the acceptable securities so deposited and shall pay such interest and income when and as collected, to the Contractor. If the deposit is in the form of coupon bonds, the Escrow Agent shall deliver each coupon, as it matures, to the Contractor.
5. The Escrow Agent shall maintain the acceptable securities and assignments so deposited in a separate custody account under this contract, and shall not less than once each month determine the market value of such securities, and report such value to the designated representative of the State, and to the Contractor.
6. Once each quarter the Escrow Agent shall furnish the State a statement showing the transactions for the preceding quarter and identify acceptable securities being held by the Escrow Agent as of the last day of the previous quarter. From time to time at the request of the State, the Escrow Agent will furnish to the State and to the Contractor an interim statement showing the acceptable securities currently being held as of the 25th day of each month or if the 25th day is a non-business day, then the following business day.
7. Any expense incurred by the Escrow Agent in connection with the holding in escrow of the acceptable securities pursuant to the provisions of this contract shall not be charged to the State. The acceptable securities shall be free of any claim or charge for such expense.
8. It is clearly understood that the Escrow Agent shall not be deemed liable nor responsible for the collectibility of any acceptable securities held in escrow pursuant to the terms and

conditions of this contract. The State shall have the right to have its designated representative inspect the acceptable securities from time to time to determine their authenticity. If such inspection shall determine that any of the securities are not authentic or collectible, the State shall have the obligation to forthwith require the Contractor to correct such deficiency.

9. Notwithstanding anything to the contrary herein appearing, the State shall have no duty to know or determine the performance or non-performance of any term or condition of any contract or agreement between the Escrow Agent and the Contractor, and the Escrow Agent shall have no duty to know or determine the performance or non-performance of any contract or agreement between the State and the Contractor, and the duties and responsibilities of the parties hereto are limited to those specifically stated herein.
10. The Escrow Agent shall waive and hereby does waive, any right or power of set-off against either the State or the Contractor in relation to the acceptable securities assigned.

IN WITNESS WHEREOF, the parties hereto have executed this Escrow Contract on the day first above written.

STATE OF COLORADO
ROY ROMER, GOVERNOR

ESCROW AGENT

By _____
Title _____

By _____

APPROVALS
State Controller

Attorney General
By _____

Assignment of Acceptable Security

The undersigned Contractor represents that he (it) is the owner of the acceptable security identified as follows:

Contractor hereby sells, assigns and transfers unto _____
(Beneficiary - Public Entity) all of his (its) right, title and interest in and to said security and does hereby
irrevocable constitute and appoint _____
(Beneficiary - Public Entity) attorney to transfer said security at any time unto _____
_____ (Beneficiary - Public Entity).

Dated at _____, Colorado this _____ day of _____, 19 _____.

Contractor-Owner

By _____
Title

NOTE: A separate form of this assignment should be executed and attached to each separate security.