

## Chapter 23

# COLORADO CONSTRUCTION STATUTES

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### **§ 23.1 • INTRODUCTION AND OVERVIEW**

In this chapter, we have attempted to provide an overview of a number of statutes and ordinances that directly affect construction projects in a handy reference for the construction law practitioner. This chapter is divided into three major sections: Colorado Construction Related Statutes, Home Rule City Ordinances, and Selected Federal Statutes.

The first section presents a summary of Colorado statutes that directly affect construction contracts and projects. This section is intended primarily as a reference source and the reader is directed to the topical chapters for discussion of the subjects covered by the statutes and interpretations of the statutory provisions. The statutory summaries are grouped loosely by common subject matters rather than by numerical order.

The second section addresses issues raised by home rule city ordinances in Colorado. This section also presents summaries of sample home rule city ordinances affecting construction contracts from the municipal codes of the City and County of Denver and the City of Colorado Springs.

The third section presents summaries of selected federal statutes affecting construction. As this book is devoted to Colorado construction law, this section is limited to four federal statutes that are considered among the most prominent federal statutes affecting construction in Colorado.

For amendments to individual statutes, please refer to the current publication of the Colorado Revised Statutes. For supplemental information about statutes applicable to specific issues treated in this book, please refer to the supplements for the appropriate topical chapter. For example, for revisions to the statutes relating to mechanics' liens, please refer to the supplement to Chapter 19.

## § 23.2 • COLORADO CONSTRUCTION STATUTES

The following statutory text is drawn from the 1998 Colorado Revised Statutes printed by Bradford Publishing Co. and cross-checked with *West's Colorado Revised Statutes Annotated* on CD-ROM. For the supplements, we have used Colorado's publication of the Session Laws through the 2007 First Regular Session, 66th General Assembly available at [www.state.co.us](http://www.state.co.us). While every effort has been made to eliminate the inevitable errors that occur when reviewing and summarizing material of this volume, some errors may still exist. The reader is reminded that these materials are assembled as a guide only and the published statutory text should be consulted before reaching a legal conclusion or taking action.

### § 23.2.1—Residential Construction Statutory Requirements

For a discussion of specific legal issues relating to residential construction, see Chapter 14, "Residential Construction."

#### **Residential Soil and Hazard Analysis and Disclosure for New Construction**

Pursuant to C.R.S. § 6-6.5-101, builders and developers of new residential property are required to make disclosures to buyers regarding the building site prior to sale. Fourteen days prior to the sale of a new residential property, the builder or developer must disclose a summary of the soils analysis and site recommendations. If the site is within an area with a recognized sig-

nificant potential for expansive soils, the builder or developer must also provide to the buyer a copy of a publication dealing with expansive soils issues. In addition to any other liability that may exist, the statute makes any builder or developer that fails to comply with the disclosure requirements liable to the purchaser for a \$500 civil penalty. This section does not apply to a builder constructing his or her own residence.

### **Residential Building Energy Conservation Act of 1977**

The Residential Building Energy Conservation Act of 1997, C.R.S. §§ 6-7-101, *et seq.*, was passed during the energy crisis of the late 1970s and relates to insulation and thermal performance requirements for most residential buildings. The Act requires a certain level of insulation efficiency and related inspections/calculations for most residential construction after October 1977.

### **§ 23.2.2—Possible Application Of The Colorado Uniform Commercial Code To Construction Contracts**

A contract for the installation of new carpet, insulation, or shingles in a new house is a construction contract governed by the common law, isn't it? Not necessarily. Practitioners should be aware that the Colorado Uniform Commercial Code (U.C.C.) section on sales, C.R.S. §§ 4-2-101, *et seq.*, with its implied duties and warranties, can be applicable to contracts that might otherwise be considered traditional common law construction contracts. When a construction-related contract's "primary purpose" is the sale of goods (for example, carpet or insulation or a furnace) rather than the provision of services (for example, the framing of a roof), it may be governed by the U.C.C. rather than the common law of contracts.

The seminal case in Colorado is the 1983 case of *Colorado Carpet Installation, Inc. v. Palermo*,<sup>1</sup> issued by the Colorado Supreme Court. In the context of a statute of frauds issue, the *Colorado Carpet* court determined that a contract for the sale and installation of carpet in a home was primarily a contract for the sale of goods and, therefore, governed by the U.C.C.. In reaching its decision, the *Colorado Carpet* court first addressed the scope of the U.C.C.'s application. The court noted that the U.C.C. expressly applies to sales of "goods." The court found that a "good" includes all things that are moveable at the time they are identified in the contract, other than money to be paid.<sup>2</sup> Furthermore, the simple fact that the item at issue (the carpet) might ultimately assume the character of a fixture when installed under the contract does not change its character at the time of contracting.<sup>3</sup> Since the contract at issue was, in part, for the sale of carpet, the court determined that it could, at least in part, fall within the scope of the U.C.C. However, the contract at issue called for both the sale and installation of the carpet, and the court had to determine how to handle such a hybrid contract.

The *Colorado Carpet* court approached the issue by examining whether the U.C.C. would apply where the contract at issue called for both the sale of goods (the carpet) and services (the installation of the carpet). The court called these types of contracts "mixed" contracts, involving the sale of goods normally governed by the U.C.C. as well as the provision of services that would normally be governed by the common law of contracts. The court adopted the "primary purpose" test in determining whether such contracts should be governed by the U.C.C. or the common law of contracts. The court articulated the primary purpose test as follows:

The test for inclusion or exclusion [within the scope of the UCC] is . . . whether [these goods' and services'] predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction for sale, with labor incidentally involved (*e.g.*, installation of water heater in a bathroom).<sup>4</sup>

The court went on to identify four “useful factors to consider in determining whether ‘goods’ or ‘services’ predominates” in a given mixed contract. They are as follows:

- 1) the contractual language used by the parties;
- 2) whether the agreement involves one overall price that includes both goods and labor or, instead, calls for separate and discrete billings for goods versus labor;
- 3) the ratio of the cost of goods to the overall contract price;<sup>5</sup> and
- 4) the nature and reasonableness of the purchaser’s contractual expectations of acquiring a property interest in “goods.”<sup>6</sup>

In Colorado, the U.C.C. has been applied to a contract for the furnishing of materials and labor for the installation of a roof,<sup>7</sup> the sale and installation of a heating system,<sup>8</sup> and the sale and installation of a standby emergency electric power plant.<sup>9</sup> The rules, however, are none too clear. One can envision many lively debates over its application to such classic construction contracts as one for the construction and sale of a house under the right circumstances. Or, how about the various subcontracts involved in building the house? Arguably, the subcontracts for the installation of the roof or furnace are governed by the U.C.C. while the overall general contract is governed by common law.<sup>10</sup>

The potential application of the U.C.C. to contracts traditionally considered to be construction contracts appears most often to raise issues relating to warranties. Unlike the common law of contracts, the U.C.C. imposes implied warranties on most contracts within its scope.<sup>11</sup> In addition to its own implied warranties, the U.C.C. has a well-developed body of law relating to express warranties that may differ from common law authorities at times.<sup>12</sup> The U.C.C. also has express rules regarding exclusion of warranties, contract interpretation, standards for breach, the parties’ options in the event of a breach, and remedies that often differ somewhat from the common law of contracts generally applicable to construction contracts. Consequently, the practitioner must take the standards of the U.C.C. as well as common law standards into consideration when a contract involving the sale of a good is involved. See also Chapter 3, “Private Construction Contracts.”

### **§ 23.2.3—Public Works Construction-Related Statutes**

Chapter 4, “State Construction Projects,” and Chapter 5, “City, County, and Special District Construction Projects,” provide an overview and discussion of the myriad of statutes and issues arising in construction contracts relating to public works or public entities. Generally, the following statutes apply to public construction projects and construction projects involving public entities and municipalities ranging from the state to individual special districts.

**Designation of Supplier on Public Contracts Prohibited**

C.R.S. § 18-8-307 generally prohibits a “public servant”<sup>13</sup> from requiring or directing a bidder on a public project to use a particular person as a supplier of materials or labor. The section imposes criminal liability on violators. There is an affirmative defense, however, if the public servant acts within the scope of his or her authority in rejecting supplies or contracts, for services that do not meet bona fide expectations.

**The Colorado State Buildings Division**

C.R.S. §§ 24-30-1301, *et seq.*, establish various divisions of the Departments of Personnel and Administrative Support for the State of Colorado. C.R.S. §§ 24-30-1301, *et seq.* establishes the State Buildings Division as the entity with overall responsibility for administration and oversight of the state’s inventory of buildings. The Division has general oversight responsibility for all construction of state projects and maintenance on state buildings, except those undertaken by the Department of Transportation. The Division also addresses easements and building codes relating to state buildings.

**Consultants’ Contracts On State Projects**

C.R.S. §§ 24-30-1401, *et seq.*, establish various divisions of the Departments of Personnel and Administrative Support for the State of Colorado. C.R.S. §§ 24-30-1401, *et seq.* establish guidelines for contracting with consultants on state projects. These sections are directed at setting standards for contracting with design professionals, specifically engineers, architects, landscape architects, and land surveyors.

**Construction Contracts with Public Entities**

C.R.S. §§ 24-91-101, *et seq.*, apply broadly to most construction projects let by the state, county, city, home rule city, town, and district governments. For an extensive discussion of the scope of Article 91 and its requirements and applications, see Chapter 4, “State Construction Projects.”

C.R.S. §§ 24-91-101, *et seq.*, generally apply to public construction contracts in excess of \$150,000 and govern payment schedules, payments to subcontractors, retainage, and damages-for-delay provisions in such contracts.

C.R.S. § 24-91-103 provides for the making of partial payments to the contractor during the course of a public works construction project. Subsection (2) requires the contractor to distribute payments that it receives to subcontractors within seven days of receipt.

C.R.S. § 24-91-103.5 invalidates clauses in public works contracts that purport to absolve the contracting public agency from liability to the contractor for damages caused by the contracting agency regarding delay. Predictably, this provision could have particular importance under the right circumstances.

C.R.S. § 24-91-103.6 prohibits a public entity from contracting for construction absent a full and lawful appropriation for the project. This section also requires the contract to note that its

price falls within the appropriation and that the contract prohibits change orders that would increase the contract price above the amount of the appropriation. However, the section expressly permits phased construction over a period of years and bond-financed construction.

C.R.S. § 24-91-104 states the priority for use of retainage in the event a public entity takes over the completion of a construction project.

C.R.S. §§ 24-91-105 through -108 allow the contractor to draw retainage amounts under a contract upon the substitution of appropriate securities.

C.R.S. § 24-91-109 requires a contractor to disburse to subcontractors their respective portions of retainage once the retainage is disbursed to the contractor.

C.R.S. § 24-91-110 excepts from coverage by Article 91 public entity contracts funded from a federal or other source that imposes its own requirements regarding retainage.

### **Construction Bidding for Public Projects**

Article 92 of title 24 governs bidding for construction contracts let by any “Agency of Government”<sup>14</sup> in Colorado; for example, the Division of Parks and Outdoor Recreation.<sup>15</sup>

C.R.S. § 24-92-103 provides that public works contracts should be awarded through competitive sealed bids and outlines the bidding process. C.R.S. § 24-92-104.5 authorizes the Department of Transportation to solicit bids electronically or on the Internet.

C.R.S. § 24-92-104 carves out exceptions to the requirement that contracts be awarded through competitive sealed bids. The exceptions primarily consist of emergency projects, architectural or engineering contracts on projects, and projects for which only one bid is received.

C.R.S. § 24-92-105 allows a governmental agency to cancel an invitation for bids.

C.R.S. § 24-92-106 provides that written determinations of nonresponsibility of a bidder or an offeror shall be made pursuant to rules. Failure to promptly supply information regarding an inquiry concerning responsibility may be sufficient grounds for a determination of nonresponsibility.

C.R.S. § 24-92-107 allows for the prequalification of prospective contractors.

C.R.S. § 24-92-108 generally prohibits the use of “cost plus” contracts on public works.

C.R.S. § 24-92-109 requires a government agency to prepare a cost estimate for a project when the agency proposes to undertake a construction project without a competitive bidding process that is valued at over \$50,000.

C.R.S. § 24-92-110 requires the executive director of the department of personnel to promulgate rules to implement Article 92. However, the executive director of the department of transportation shall promulgate such rules relating to bridge and highway bidding practices.

C.R.S. § 24-92-111 allows the legislative audit committee to determine if any state agency has violated Article 92.

C.R.S. § 24-92-112 provides that the conclusions required under §§ 24-92-103, 24-92-104, 24-92-106, and 24-92-108 are considered conclusive unless clearly erroneous, arbitrary, capricious, or contrary to the law.

C.R.S. § 24-92-113 directs that any suspicion of collusion or anticompetitive practices be reported to the attorney general.

C.R.S. § 24-92-114 prohibits the dividing of public works projects in order to avoid the minimum dollar requirements for application of Article 92.

### **Bid Preferences**

C.R.S. §§ 8-18-101, *et seq.*; §§ 8-19-101, *et seq.*; and §§ 8-19.5-101, *et seq.* provide for certain bid preferences in evaluating bids for public projects let through competitive bidding.

Article 18 and 19 create a form of preference “reciprocity” with other states. The sections give a bidding preference to bidders that are Colorado residents against non-resident bidders on all governmental contracts for supplies, labor, commodities, and public works. The preference applies in two situations. First, if the foreign bidder’s home state grants its residents a preference in public works bidding (say 7 percent), Colorado will grant its residents the same preference when bidding against that foreign company (the same 7 percent), essentially a “tit for tat” approach. Second, regardless of the foreign state’s preferences, if a Colorado resident and a non-resident tie in their bidding, the Colorado resident receives the preference.

Article 19.5 gives a bidding preference on any publicly funded contract to contractors using recycled plastics. The bidding preference is up to 5 percent for finished products using at least 10 percent recycled plastics.

### **Colorado Labor Required on Colorado Public Works**

C.R.S. §§ 8-18-101, *et seq.*, require the use of Colorado labor on any public works project let by the state or any political subdivision of the state. This means that not less than 80 percent of the labor used on the project must be comprised of individuals who reside in Colorado at the time of employment. Any contractor or public office or agent that violates this provision is guilty of a misdemeanor.

### **Minority- and Women-Owned Businesses**

C.R.S. §§ 24-49.5-101, *et seq.*, establishes a framework under which the government can assist minority businesses by providing opportunities for those businesses to participate in

Colorado's economy. Further, Colorado's procurement rules provide for certain advantages to Minority Business Enterprises, as that term is defined in the Code of Colorado Regulations. See 1 C.C.R. 101-9 for specific procurement rules.

#### **Conflicts of Interest in Government Contracts**

C.R.S. §§ 24-18-201, *et seq.*, generally prohibit members of the general assembly, public officers, local government officials, and employees from having an interest in contracts let by the public entity for which they work or that they represent. This general prohibition extends for six months after the end of the public employment. This general prohibition does not apply to contracts issued to the lowest bidders following competitive bidding. Any contract let in violation of these standards is voidable.

#### **Indemnification Provisions and Hold Harmless Provisions Void as to Public Entities**

C.R.S. § 13-50.5-102(8) is part of the Uniform Contribution Among Tortfeasors Act and applies to all public construction-related contracts or agreements for any public entity. It provides that certain contract provisions purporting to indemnify any public entity or hold it harmless against its own negligence are considered void as against public policy.

#### **Procurement-Related Provisions**

Articles 101 through 112 of title 24, C.R.S., establish procurement related standards for state contracts (Procurement Code). Chapter 4, "State Construction Contracts," discusses the various issues relating to state construction contracts and the Colorado Procurement Code, as well as the scope of application of the Colorado Procurement Code. Generally, the Procurement Code states that it applies broadly to all publicly funded contracts entered by all governmental bodies of the executive branch of the State of Colorado, except highway and bridge contracts or public-private initiatives. Specific to the purposes of this Chapter, the Procurement Code applies to traditional construction industry contracts, such as the process of letting construction contracts, the purchasing of equipment, and the renting or leasing of equipment. The Procurement Code applies to contracts for services but expressly excludes from its coverage contracts for the services of professionals such as engineers, architects, landscape architects, and land surveyors.<sup>16</sup>

While not summarized here, the construction professional must also consult the Colorado Code of Regulations, adopted pursuant to the Procurement Code to implement it, at 24 C.C.R. 101-9, *et seq.*

Article 101 states general principles for interpretation and implementation of the Procurement Code and definitions. Article 101 provides that the Procurement Code shall apply to all publicly funded contracts entered by any governmental body of the executive branch of the State of Colorado. However, the Procurement Code does not apply to bridge and highway construction projects, public-private initiatives, or contracts between the state and its political subdivisions or other governments. Other political subdivisions and local public agencies are authorized to make their own decisions on whether to adopt the Procurement Code.

Article 102 establishes the procedures for procurement. It authorizes the executive director of the department of personnel (Executive Director) to promulgate rules to implement the Procurement Code and deals with the divisions of authority for administering procurement activities. Article 102 also directs the Executive Director to create a database of businesses interested in contracting with the state.

Article 103 provides standards for source selection and contract formation, in other words, the bidding process. Article 103 is divided into seven “Parts” consisting of 20 statutory sections.

Part 1 (C.R.S. § 24-103-101) states definitions relating to the bidding process.

Part 2 (C.R.S. §§ 24-103-201 through -208) requires sealed competitive bidding to be used for state contracts and explains exceptions to this requirement. In 2003, the legislature added Section 208 permitting the Executive Director to use alternative methods of procurement in the “best interests of the state.” This is obviously a substantial loophole in the bidding requirement.

Part 3 (C.R.S. § 24-103-301) provides for the cancellation of invitations to bid.

Part 4 (C.R.S. §§ 24-103-401 through -403) contains provisions regarding the qualification and duties of bidders.

Part 5 (C.R.S. §§ 24-103-501 through -503) permits state contracts to be of all types, with the exception of cost-plus contracts, which are prohibited.

Part 6 (C.R.S. § 24-103-601) authorizes the state to audit the records of any party submitting costing or pricing data to the state.

Part 7 (C.R.S. §§ 24-103-701 through -702) provides for the finality of determinations made under Article 103 and the reporting of suspected collusive or anticompetitive practices to the attorney general.

Article 104 directs the Executive Director to establish rules governing the preparation of specifications for supplies, services, and construction for the state.

Article 105 states procurement standards applying specifically to construction contracts. The Executive Director must establish rules for methods of contract management. The Article requires bonds to secure bids and for bids to become irrevocable once opened. The Article also states standards for performance and payment bonds on state construction projects. The Executive Director is also required to establish rules for the inclusion of specific contract clauses in state construction contracts dealing with change orders and any other issues requiring standardized contract clauses.

Article 106 permits the promulgation of rules governing contract clauses dealing with price adjustments, time of performance, and related issues including damages clauses.

Article 107 allows the Executive Director to promulgate rules establishing principles for calculating proper costs for use in contracts that call for the reimbursement of costs.

Article 108 no longer exists.

As summarized below, Article 109 provides for a pre-litigation dispute resolution process and remedies and is divided into the following four “Parts” consisting of 18 statutory sections:

Part 1 (C.R.S. §§ 24-109-101 through -107) governs the pre-litigation resolution of controversies. The head of the purchasing agency is authorized to resolve controversies arising regarding procurement proceedings, debarment, or disputes with contractors. The decisions of agency heads are appealable to the Executive Director or the district court for the City and County of Denver. This Part also provides for protests by bidders to the solicitation and award of a contract as well as debarment proceedings.

Part 2 (C.R.S. §§ 24-109-201 through -206) governs the administrative appeals of decisions of agency heads relating to procurement. If an aggrieved party pursues an administrative appeal, decisions may be appealed for *de novo* review to the Executive Director within 10 working days for solicitation or award protests and within 20 working days for appeals regarding a debarment, suspension, or contract controversy. Aggrieved parties may also pursue an appeal for *de novo* review to the district court.

Part 3 (C.R.S. § 25-109-301) provides for “pre-judgment” interest at the rate of 11 percent.

Part 4 (C.R.S. §§ 24-109-401 through -404) provides for handling of solicitations and awards pursued in violation of law. Solicitations determined to be unlawful prior to a contract award will be cancelled. If the contract has already been awarded at the time of the determination of unlawful solicitation, the contract can be affirmed under certain conditions or declared null and void depending on the best interests of the state and whether the contractor acted in bad faith.

Article 110 deals with intergovernmental relations with respect to procurement. Article 110 permits cooperative procurement among state agencies and addresses the cooperative use of the results of such procurement.

Article 111 addresses the use of preferences in awarding contracts, specifically cross-referencing C.R.S. §§ 17-24-111 (preference for state divisions that provide services), 24-30-1203 (preference for services and products of nonprofit agencies for persons with severe disabilities),

and 26-8.2-103 (preference for the state's Rehabilitation Center for the Visually Impaired), as well as compliance with federal contract award requirements in federally funded projects.

#### **Performance Monitoring**

C.R.S. § 24-103.5-101 establishes procedures for monitoring vendor performance on state contracts and authorizes the state to pursue specified remedies for vendor nonperformance.

#### **Government Competition with Private Enterprise**

C.R.S. §§ 24-113-101, *et seq.* restrict state agency competition with private enterprise in supplying services or products. For example, the department of parks and recreation cannot start selling dimensional lumber to contractors in competition with private lumber yards.

#### **Government Reports of Costs of Construction Done by Government Entities**

The Public Works Fiscal Responsibility Accounting Act of 1981 is contained in C.R.S. §§ 24-16-101, *et seq.* The act applies to public works projects not pursued through a traditional contract with a private contractor. For example, the act applies where a public entity decides to construct a public works project itself, using its own personnel. The act states the accounting, reporting, and audit standards applicable to such projects. Presumably, the reason is to ensure that the public entity accurately reports the cost of the project rather than understate it by failing to account for use of its various resources in the project. The act also permits the comparison of the costs of such projects to the costs if pursued through traditional outside contractors.

#### **Private Enterprise Employee Protection**

C.R.S. §§ 24-114-101, *et seq.*, prohibit private employers on state projects from retaliating against their employees for "whistle blowing."

#### **Contractor Bonds and Liens on Funds Relating to Public Works**

C.R.S. §§ 38-26-101, *et seq.*, deal with bonds and liens for railroad, reservoir, irrigation canal, and public works contracts involving the state or any political subdivision of the state (*e.g.*, departments, divisions, cities, counties, school districts, etc.).<sup>17</sup>

C.R.S. § 38-26-101 broadly defines the term "contractor" to include persons or entities awarded construction contracts for public works.

C.R.S. § 38-26-102 requires that contractors supply bonds on railroad, reservoir, and irrigation construction projects and the section governs actions on such bonds.

C.R.S. §§ 38-26-103 and -104 allow claimants to submit to the contracting party (the equivalent of the owner) verified account claims for unpaid amounts due on railroad, reservoir, or irrigation canal projects. These sections also govern the handling of such verified claims.

C.R.S. § 38-26-105 requires contractors on public works project contracts in excess of \$50,000 to post penal bonds assuring payment and states the general conditions of such bonds.

C.R.S. § 38-26-106 requires contractors on public works project contracts in excess of \$50,000 to post penal bonds assuring payment of subcontractors and materialmen. The section also deprives a contractor of its right to pursue claims if no penal bond has been properly placed.

C.R.S. § 38-26-107 permits an unpaid subcontractor on a public works project to file a claim with the contracting party prior to final settlement. A contracting party receiving such a claim shall withhold the funds claimed from payment to the contractor. The withheld funds will be paid to the contractor after 90 days unless the claimant has filed an action on its claims. The section requires the publication of a notice of the final settlement for work performed under a public works contract that exceeds \$50,000.

#### **§ 23.2.4—Mechanics' Lien Statutes**

Chapter 19, "Mechanics' Liens," provides a guide to the intricate interrelationships of Colorado's mechanic's lien statutes. These statutes provide certain protections to the construction industry in private construction contracts. They do not apply to public works projects undertaken for the State of Colorado or any of its political subdivisions. The following is an overview "key" to the subjects of the individual statutory sections.

C.R.S. § 38-22-101 defines who is entitled to assert a mechanic's lien.

C.R.S. § 38-22-102 addresses the impact of payment and contractual payment provisions on lien rights.

C.R.S. § 38-22-103 governs the scope of property covered by a mechanic's lien.

C.R.S. § 38-22-104 addresses mechanics' liens on mining property.

C.R.S. § 38-22-105 relates to notice of construction on property to those claiming an interest in the property. This section also permits a party claiming an interest in property to give notice that the party's interest in the property shall not be subject to mechanic's lien rights.

C.R.S. § 38-22-105.5 requires that a notice be given to residential property owners of mechanic's lien laws upon issuance of a building permit.

C.R.S. § 38-22-106 establishes the priority of mechanics' liens generally.

C.R.S. § 38-22-107 provides that mechanics' liens attach to water rights and rights-of-way.

C.R.S. § 38-22-108 establishes the ranking or priority among the mechanics' liens on a given property.

C.R.S. § 38-22-109 establishes the requirements for the lien statement, its contents, service, and filing.

C.R.S. § 38-22-110 sets the six-month deadline for filing an action to foreclose mechanics' liens.

C.R.S. § 38-22-111 addresses the consolidation of mechanic's lien foreclosure actions and the joinder of parties in such cases.

C.R.S. § 38-22-112 provides for the allegations needed in a complaint to foreclose a mechanic's lien.

C.R.S. § 38-22-113 addresses the proceedings on a mechanic's lien foreclosure lawsuit.

C.R.S. § 38-22-114 governs the execution on a judgment establishing a mechanic's lien claimant's right of foreclosure and distribution of proceeds.

C.R.S. § 38-22-115 addresses the entities and individuals to be made parties to actions to enforce mechanic's lien rights.

C.R.S. § 38-22-116 directs the court to divide the costs of a case among the parties according to the "justice of the case."

C.R.S. § 38-22-117 allows a lien claimant to assign those lien rights.

C.R.S. § 38-22-118 requires a claimant to release a satisfied mechanic's lien and penalizes the claimant for a failure to release.

C.R.S. § 38-22-119 provides that agreements to waive lien rights are only enforceable against the parties to the agreement.

C.R.S. § 38-22-120 applies the Colorado Rules of Civil Procedure to mechanic's lien foreclosure cases.

C.R.S. § 38-22-121 includes surveyors and engineers within the scope of mechanic's lien claimants.

C.R.S. § 38-22-122 addresses claimants that have provided materials or labor under more than one contract.

C.R.S. § 38-22-123 invalidates payments by owners to contractors to avoid lien claims of subcontractors and invalidates the lien rights of claimants intentionally overstating their lien amounts.

C.R.S. § 38-22-124 clarifies that the mechanic's lien remedies do not prevent a person's exercise of other remedies available to him or her.

C.R.S. § 38-22-125 addresses the enforceability of lien rights against bona fide purchasers.

C.R.S. § 38-22-126 states the obligations of disbursers on construction projects with respect to mechanic's lien claimants.

C.R.S. § 38-22-127 provides that certain payments disbursed to contractors or subcontractors shall be held in trust for the subcontractors, material suppliers, or laborers on the project, and establishes criminal liability for breach of this obligation.

C.R.S. § 38-22-128 penalizes a mechanic's lien claimant for knowingly overstating the amount of his or her lien claim by depriving the claimant of his or her lien rights.

C.R.S. § 38-22-129 permits a principal contractor to avoid lien claims by placement of an appropriate bond prior to the commencement of work on the project.

C.R.S. § 38-22-130 provides an expedited procedure for a surety's payment of claims of less than \$2,000 that are supported by an uncontroverted affidavit.

C.R.S. §§ 38-22-131 through -133 allow the owner to post a bond after the commencement of litigation on mechanic's lien claims to obtain discharge of the lien claims against the property.

### **§ 23.2.5—Statutes Related To Construction Litigation**

#### **Colorado Consumer Protection Act**

Part One of the Colorado Consumer Protection Act (CCPA), at C.R.S. §§ 6-1-101, *et seq.*, prohibits “deceptive trade practices” in the sale of goods, services, and property. Section 105 of the CCPA defines a number of specific “deceptive trade practices” in its approximately 150 paragraphs. A complete recitation of the prohibited practices is beyond the scope of this summary. In general terms, the CCPA categorizes deceptive advertising techniques (such as bait and switch, disparagement, misrepresentations, tie-in sales, deceptive contest, etc.) as prohibited deceptive trade practices. The CCPA permits private civil actions for violations and grants a successful plaintiff treble damages plus attorney fees.

For the plaintiff's bar, asserting a claim for a violation of the CCPA in complaints arising out of residential and other construction disputes has become almost boilerplate. The CCPA specifically states that it applies to sales of goods, services, real property, and manufactured homes. Many argue that this stated scope includes contracts for the construction and sale of homes, commercial buildings, and other construction projects. A provision enacted in 2003, C.R.S. § 13-20-806, indicates the CCPA applies to construction disputes. Subsection (1) of C.R.S. § 13-20-806 states that a construction-defect plaintiff is limited to actual damages.

The true scope of application of the CCPA to construction contracts is yet to be determined. Most of the activity in opposing CCPA claims has been on the issue of the “public impact” requirement for stating a CCPA claim. Most construction cases involve individual contracts and do not satisfy the public impact requirement. The Court of Appeals has been willing to confirm dismissals or summary judgments invalidating CCPA claims in transactions for lack of a public impact. A case of particular interest to the construction practitioner is *Wheeler v. T.L. Roofing, Inc.*,<sup>18</sup> decided in 2003. The court determined that a construction defect dispute involving a single contract did not give rise to a CCPA claim. The opinion goes on to confirm the trial court’s determination that, given the lack of public impact, the CCPA claim was frivolous and groundless entitling the defendant to an award of attorney fees under C.R.S. § 6-1-113(3). The plaintiff practitioner is wise to think carefully about the public impact requirement before adding a CCPA claim as a matter of course. The case can be useful to the defense practitioner in persuading a plaintiff’s counsel to withdraw an injudiciously asserted CCPA claim.

A number of efforts have been made to amend the CCPA as it applies to construction disputes. The reader is strongly encouraged to review the provisions of the CCPA carefully to evaluate its terms for any given time period.

#### **Certificate of Review Required to Sue Professional**

Under C.R.S. §§ 13-20-601, *et seq.*, in civil lawsuits alleging negligence against a professional licensed by the state, the claimant must file a certificate of review.<sup>19</sup> The certificate of review must affirm that the claimant’s counsel has consulted an expert regarding the alleged professional negligence and that the expert has concluded that the claim does not lack substantial justification.

#### **Indemnification Provisions and Hold Harmless Provisions Void as to Private Entities**

C.R.S. § 13-21-111.5’s new subsection (6) applies to nearly every party involved in a construction project and holds each of those parties financially responsible for their own negligence. The subsection makes void and unenforceable any provision in a construction agreement that requires a person to indemnify or insure another person for damage arising out of injury to persons or property caused by the negligence or fault of the indemnitee or any third party under the supervision of the indemnitee. The subsection does not affect provisions that require a person to indemnify and insure another person against liability for damage, including reimbursement of attorney fees, if provided by contract of statute, so long as the amount does not exceed the percentage of fault attributable to the indemnitor. The subsection also does not apply to provisions that require the indemnitor to carry insurance covering the acts of the indemnitor. Any provision in a construction agreement that requires the purchase of additional coverage for damage caused by any acts or omissions not caused by the party providing such additional coverage is void and unenforceable.

This new subsection does not apply to builder’s risk insurance, and the section is not intended to affect the doctrine of *respondeat superior* or vicarious liability. Moreover, the new subsection exempts several public entities from the indemnification restriction, among them railroads, sanitation districts, water districts, combined water and sanitation districts, municipal water enterprises, water conservancy or conservation districts, or metropolitan sewage disposal districts.

**In Actions Against Professionals, a Claimant May Not Recite a Damages Amount in the Ad Damnum Clause/Prayer for Relief**

C.R.S. § 13-21-112 prohibits a claimant in a professional liability action from reciting a damages amount in the *ad damnum* clause of his or her complaint. The statute does not define a “professional liability” action, but it presumably refers, at a minimum, to claims against licensed professionals for violations of the standards of conduct applicable to their profession.

**Architect's Duty to Report Claims Regarding Safety of Building to Professional Board**

C.R.S. § 12-4-117 requires licensed architects to notify their professional board of any “claims regarding the life safety of the occupants of the building” that are made. The section is oddly worded but appears to apply to claims made in formal litigation or arbitration. The architect must report such claims within 90 days of receiving notice of them.

**Engineer's Duty to Report Malpractice Suit to Professional Board**

C.R.S. § 12-25-108(1)(k) imposes a duty on engineers to report to their professional board any claim of malpractice made against them within 60 days of the resolution of the claim. If the engineer fails to comply with this reporting requirement, the engineer's license may be suspended or revoked, or the engineer may be otherwise disciplined.

**General Three-Year Statute of Limitations on Contract Actions**

C.R.S. § 13-80-101(1)(a) establishes the general statute of limitations applicable to contract actions as three years from accrual of the cause of action.

**General Two-Year Statute of Limitations on Claims Against Public Entities**

C.R.S. § 13-80-102(1)(h) establishes the general statute of limitations applicable to actions against public entities, including contract claims, as two years from accrual of the cause of action.

**Limitations of Actions Against Architects, Contractors, Builders, Builder Vendors, Engineers, Inspectors, and Others**

C.R.S. § 13-80-104 defines the statute of limitations applicable to claims against architects, contractors, builders, builder vendors, engineers, and inspectors involved in construction. Such claims must be brought within two years after the cause of action arises but not longer than six years after “substantial completion” of the construction project. The section, however, also provides that causes of action arising within the fifth or sixth year after “substantial completion” may be brought within two years of the date the cause of action arises.<sup>20</sup>

**Limitation of Actions Against Land Surveyors**

C.R.S. § 13-80-105 defines the statute of limitations applicable to claims against land surveyors. Such claims must be brought within three years after they have been or should have been discovered but not later than 10 years after the completion of the survey at issue. This section also requires the survey at issue to contain notice of this limitations period.

**When Causes of Action Accrue**

C.R.S. § 13-80-108 defines when a cause of action “accrues” for statute of limitations purposes.

**Remedies Sections Relating to Public Entities**

C.R.S. §§ 24-109-101, *et seq.* address administrative procedures for dispute resolution other than litigation for contracts let by public entities and are outlined above under § 23.2.3, “Procurement-Related Provisions.”

**Governmental Immunity Act**

The Colorado Governmental Immunity Act is codified at C.R.S. §§ 24-10-101, *et seq.* The Act severely limits the circumstances under which public entities and officials may be sued for torts.

**Colorado Construction Defect Action Reform Act**

In 2001, Colorado enacted the Construction Defect Action Reform Act, codified at C.R.S. §§ 13-20-801, *et seq.*; 13-80-104(1)(b)(II); and 38-33.3-303.5. The Act generally addresses disclosure issues in connection with construction defect litigation.

The bulk of the Act specifically addresses disclosures in construction defect litigation, defined to include arbitration proceedings. The Act alters the traditional rules of “notice pleading” and requires a claimant to file a detailed list of all construction defects being alleged at the outset of the litigation proceeding.<sup>21</sup> This disclosure requirement applies to both residential and commercial construction disputes. This disclosure requirement is intended to accelerate the process by which issues are focused in litigation and allow a contractor to identify other potentially liable parties early in the litigation. The statute creates an entire claim process intended to ensure the parties have attempted to resolve the defects before the case proceeds to litigation.<sup>22</sup>

Next, the Act imposes a restriction on residential construction defect negligence claims.<sup>23</sup> Specifically, the Act states that no negligence claims shall lie in a residential construction dispute for a contractor’s failure to comply with an applicable building code or industry standard unless the claimant also demonstrates actual or probable damage to real property, personal property, a person, or loss of use of property.

The Act also revises an aspect of the statute of limitations. The statute of limitations applicable to construction defect claims previously provided that all actions, including any and all actions in tort, contract, indemnity, or contribution, arise at the same time.<sup>24</sup> As a result, general contractors, when sued by owners for construction defects, had to add any other potentially responsible parties (subcontractors, suppliers, manufacturers, designers, etc.) as parties to the lawsuit, or risk having the statute of limitations for contribution and indemnification claims run out during the course of the lawsuit with the owner.

The general assembly has now provided that any claims for indemnity or contribution arise when the third person’s claim is settled or final judgment is entered. The revised statute also

provides that such claims shall be brought within 90 days after they arise.<sup>25</sup> Thus, in the context of a construction dispute, it will no longer be necessary for general contractors sued for defective construction to immediately bring third-party claims against subcontractors and suppliers. They now have a 90-day window of opportunity after final judgment or settlement of a construction defect claim to seek recovery from subcontractors and suppliers.

A provision enacted in 2003, C.R.S. § 13-20-806, limits a claimant to an award of actual damages unless the claimant proves a Colorado Consumer Protection Act claim. The claimant must also comply with the detailed claim and negotiation procedure set forth in the statute. The section states that any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the Construction Defect Action Reform Act, or provided by the Colorado Consumer Protection Act, or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes, are void as against public policy.

Finally, the Act imposes a disclosure requirement relating to residential construction defect litigation. When a homeowners' association intends to file or files a lawsuit alleging construction defects in five or more units, it must disclose information about its claims to unit owners.<sup>26</sup>

See generally the discussion of the Construction Defect Action Reform Act at Supplement to Chapter 14, § 14.2.2; and Sandgrund, Sullan, and Achenbach, "The Construction Defect Reform Act," 30 *Colo. Law.* 121 (Oct. 2001). The Construction Defects Action Reform Act is also the target of frequent efforts to amend and the reader is encouraged to check the version applicable to the individual case.

### **Limitation of Actions Against Architects, Contractors, Builders, Builder Vendors, Engineers, Inspectors, and Others**

See the discussion of the amendment to C.R.S. § 13-80-104 in the preceding section of this supplement on the Colorado Construction Defect Action Reform Act.

C.R.S. § 13-21-108.3 grants qualified immunity from civil liabilities to licensed architects and engineers that are assisting in an emergency.

### **§ 23.2.6—Miscellaneous Construction-Related Statutes**

#### **Premises Liability Statute Applicable to Contractors**

Colorado's statute defining the tort liability of landowners to persons injured on the property is stated at C.R.S. § 13-21-115. The statute sets the scope of the landowner's liability based on the application of the long-established categories "invitee," "licensee," and "trespasser" to the injured person. Pursuant to subsection 1 of the statute, a construction contractor conducting activities on a given property would be considered a "landowner" under the statute and liable to third parties for damages to the same extent as a landowner.

**Licensing of Construction Professionals**

C.R.S. §§ 12-4-101, *et seq.*, authorize and control the professional licensing of architects.

C.R.S. §§ 12-25-101, *et seq.*, authorize and control the professional licensing of engineers and surveyors.

C.R.S. §§ 12-23-100.2, *et seq.*, authorize and control the professional licensing of electricians and electrical contractors.

C.R.S. §§ 12-45-101, *et seq.*, authorize and control the professional licensing of landscape architects.

C.R.S. §§ 12-58-101, *et seq.*, authorize and control the professional licensing of plumbers and plumbing contractors.

The requirements of these statutory provisions and the general Colorado law addressing the licensing of construction professionals are examined in Chapter 2, “Licensing Requirements for the Parties to the Construction Process.”

**Licensing of Contractors in Unincorporated Areas of Counties**

C.R.S. § 30-11-125 allows any county that has adopted a building code to create a licensing program for building contractors working in the unincorporated areas of the county.

**Unemployment Benefits and the Construction Industry**

C.R.S. § 8-73-108(4)(f)(I) of the Colorado Employment Security Act gives special treatment to the construction industry in the awarding of unemployment benefits. The subsection grants construction workers an award of full unemployment benefits under a series of specific circumstances unique to the construction industry.

**Workers’ Compensation and the Construction Industry**

C.R.S. § 8-41-404 extends workers’ compensation coverage for workers in the construction industry. A site owner, general contractor, or other person who is not a direct party to a contract for construction work will not be held liable solely as a result of the person’s ownership interest or general supervisory role in a construction project.

**Low-Flow Plumbing Fixtures in Residential, Commercial, and Industrial Buildings**

C.R.S. § 9-1.3-102 mandates the use of low-flow plumbing fixtures in residential, commercial, and industrial buildings after January 1, 1990.

**Adoption and Enforcement of Building Energy Codes**

C.R.S. § 30-28-201 requires every board of county commissioners that has a building code to adopt and enforce a building energy code that meets standards expressed in C.R.S. § 30-28-211, which expresses the state’s interest in energy efficiency. Several kinds of buildings are exempt, including historically registered buildings and buildings that do not use electricity or fossil fuels for comfort heating.

**Colorado Excavation Requirements Statute**

The Colorado Excavation Requirements Statute, C.R.S. §§ 9-1.5-101, *et seq.*, establishes requirements for the location and marking of underground utilities prior to excavation. It also imposes on an excavator certain notice requirements prior to excavation.<sup>27</sup>

**Destruction of Survey Monuments**

C.R.S. § 18-4-508 makes the defacing, destroying, or removing of a survey monument or boundary landmark a Class 2 misdemeanor.

**Protection of Building Industry Employees**

C.R.S. §§ 8-14-101, *et seq.*, generally provide some work site safety requirements. The article establishes requirements for the safe use of scaffolding, hoists, ladders, and the like on construction sites. The title requires the building inspector to act immediately on complaints about such contrivances. One violating this title commits a misdemeanor.

**Construction Standards for Buildings to Accommodate Persons with Disabilities**

C.R.S. §§ 9-5-101, *et seq.*, contain an early attempt to address many of the issues now addressed by the Americans With Disabilities Act (ADA). Article 5 generally adopts the American National Standard for Buildings and Facilities Providing Accessibility and Usability for Physically Handicapped People (Accessibility Standards). Article 5 makes the Accessibility Standards applicable to all buildings used by the public, whether built with public or private funds. While the Accessibility Standards do not apply to most privately constructed housing, they do apply to housing projects with eight or more units. A review of the Accessibility Standards or comparison of them to the requirements of the ADA is beyond the scope of this chapter, but one should not assume that compliance with the ADA has eliminated the need of complying with the Accessibility Standards in Colorado.

**Manufactured Homes Industry Regulation**

In 2003, the Colorado legislature enacted C.R.S. §§ 24-32-3301, *et seq.*, which provides for comprehensive regulation of the manufactured housing industry. The act empowers the state housing board to develop regulations for manufacture, sale, and installation of factory-built structures. The act affects residential and non-residential structures. The section applies only to work performed in a factory or completed at a site using components shipped with the factory-built structure as reflected in the approved plans for the factory-built structure.

**Unfair or Discriminatory Housing Practices Against Persons with Disabilities Prohibited**

C.R.S. § 24-34-502.2 prohibits unfair and discriminatory housing practices and defines as “discrimination” a refusal by the owner to permit a disabled renter to make reasonable modifications to the premises occupied by the disabled person or a failure of the owner to make multi-family dwellings accessible to disabled persons.

**Air Quality Control Program**

C.R.S. § 25-7-114.2 requires a construction permit for any construction that will result in a source of air pollution.<sup>28</sup>

**Private Toll Road Construction**

C.R.S. § 7-45-101 specifies requirements that must be met before a company can construct a private toll road or highway.

**Immigration: Employment Eligibility Verification**

C.R.S. § 8-17.5-102 requires employers to confirm the employment eligibility of all employees who are newly hired for employment in the United States. The confirmation would be required to appear in every public contract for services.

**Immigration: Compliance with Federal Law**

C.R.S. § 8-2-122 requires employers to examine the work status and related documents of newly hired employees in compliance with federal law.

**§ 23.3 • HOME RULE CITY ORDINANCES AND CONSTRUCTION****§ 23.3.1—Home Rule Cities In Colorado**

In Colorado, we have a specialized type of municipal entity called a “home rule city.” Municipal home rule powers derive from Article XX of the Colorado Constitution. Colorado adopted municipal home rule powers in 1902 as a constitutional mandate to facilitate the creation of the consolidated City and County of Denver. Colorado granted the new consolidated entity its independence from state legislative control of its internal affairs. Section 6 of Article XX confers these same home rule powers to other cities with over 2,000 inhabitants that elect home rule status.<sup>29</sup> Since the home rule’s inception, the municipal home rule form of government has been adopted by 77 Colorado cities and towns.<sup>30</sup>

Because home rule cities have a degree of “legislative independence,” they may adopt municipal ordinances affecting construction or other issues that supplement or even contradict certain types of statewide statutes identified in the preceding section of this chapter. For this reason, the practitioner examining an issue within one of these home rule cities must identify and consider that city’s ordinances as well as the state statutes that may affect construction issues. Once the practitioner identifies a local ordinance of significance to the issue at hand, the analysis has only begun. The practitioner must next examine the ordinance and determine how it may interact with or supersede related state statutes and whether it is a proper exercise of municipal authority.<sup>31</sup>

In determining the extent of the authority granted to home rule cities, the Colorado courts have recognized three broad categories under which regulatory matters may fall: (1) matters of local and municipal concern, (2) matters of statewide concern, and (3) matters of mixed local and statewide concern. Colorado law has long recognized that in a matter of “purely local and municipal concern,” a home rule city’s ordinance supersedes conflicting state statutes.<sup>32</sup> Conversely, in a matter of “purely statewide concern,” a state statute or regulation supersedes a conflicting ordinance of a home rule city.<sup>33</sup> Of course, if there is a state statute and no competing local regulation,

the state statute governs. In the same manner, where a local regulation stands alone, that local regulation will govern.

Municipal legislation, however, is not always a matter exclusively of either local or statewide concern. Rather, municipal legislation is often a mixed matter of both levels of government concern. In matters of mixed local and statewide concern, a home rule municipal ordinance may co-exist with a state statute only if no conflict exists between the ordinance and the statute.<sup>34</sup> In the event that a conflict exists, the state statute supersedes the conflicting provision of the ordinance.<sup>35</sup> In *Voss v. Lundvall Brothers, Inc.*,<sup>36</sup> the supreme court of Colorado set forth four factors to consider in determining whether a state regulatory scheme preempts a municipal ordinance.<sup>37</sup> Those four factors are:

Whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation.<sup>38</sup>

The *ad hoc* nature of the local versus statewide analysis creates a state of constant evolution. A number of areas, however, are generally categorized as purely local concern. For example, zoning authority within a home rule city's boundaries is considered a matter of local concern.<sup>39</sup> The election and delegated authority of local officials;<sup>40</sup> the construction, financing, and assessment of local capital improvements;<sup>41</sup> and the granting of franchises to use city streets, alleys, and public places<sup>42</sup> are also considered purely local in nature.

In some areas, the state legislature has explicitly granted home rule cities the power to enact legislation. For example, the state of Colorado awards public contracts based on competitive sealed bids under the Construction Bidding for Public Projects Act.<sup>43</sup> The legislature, however, explicitly excluded counties, municipalities, or political subdivisions of the state from the affects of the statute.<sup>44</sup> As a result, a number of home rule cities and towns, including Denver and Colorado Springs, have adopted their own ordinances dealing with the bidding process related to public improvements.<sup>45</sup>

On the other hand, purely statewide matters generally include such matters as unemployment compensation,<sup>46</sup> the operation of telephone facilities by a statewide telephone company,<sup>47</sup> and criminal felony convictions.<sup>48</sup> Matters of conflicting statewide and local concern in the construction arena have been held to include construction and apportionment of the costs of viaducts,<sup>49</sup> construction of advertising billboards along state highways,<sup>50</sup> and land-use regulation involving the development of oil and gas.<sup>51</sup>

Because of a home rule city's ability to enact ordinances that supersede some state statutes, the practitioner must take care to examine ordinances affecting construction issues being considered. This additional power may result in more aggressive local legislation that either supersedes state standards or exceeds the municipality's legislative authority.

**§ 23.3.2—Home Rule City Ordinances Relating To Construction**

In this section, we identify examples of construction-related ordinances passed by the home rule municipalities of Denver and Colorado Springs.

**Ordinances from the Revised Municipal Code (RMC) of the City and County of Denver: Air Pollution Control**

Chapter 4 of the RMC sets forth the provisions for air pollution control in the City and County of Denver. The following sections proscribe rules and regulations governing pollution as it relates to mobile construction equipment and installations in stationary sources. For specific information regarding air pollution control in the context of construction, see the following articles within this chapter:

Article II	Administration, §§ 4-6 through 4-20.
Article III	Stationary Sources, §§ 4-21 through 4-40.
Article IV	Mobile Sources, §§ 4-41 through 4-50.
Article V	Regulation of Products Containing Ozone Depleting Compounds, §§ 4-51 through 4-61.

**Denver RMC §§ 10-1, et seq., Buildings and Building Regulations**

Chapter 10 of the RMC provides those restrictions and prohibitions on structures to be designed, erected, altered, used, or occupied in specific areas of the City and County of Denver. For specific information regarding construction in these locations, see the following articles within this Chapter:

Article IV	Restrictions on Structures Within Areas Necessary to Preserve Mountain Views, §§ 10-56 through 10-80.
Article V	Restrictions on Structures in the Civic Center Area, §§ 10-81 through 10-100.
Article VI	Building and Storage Near Viaducts, Restricted, §§ 10-101 through 10-117.
Article VII	Special Construction Zones, §§ 10-118 through 10-130.
Article VIII	Restriction on Structures Within Areas Necessary to Preserve Central Business District Views, §§ 10-131 through 10-137.
Article IX	Neglected and Derelict Buildings, §§ 10-138 through 10-150.

**Denver RMC §§ 10.5-19 through 10.5-24, Cable and Other Electronic Communication; Construction**

These ordinances set forth the requirements and guidelines for underground and aerial construction of cable and other communication installations in the City and County of Denver.

**Denver RMC § 20, Finance**

This chapter deals with crucial aspects of the contracting, purchasing, and bidding procedure in construction contracts with the City and County of Denver. For more information on specific financial issues associated with construction, see the following articles within this chapter:

- Article IV      Contracts, Purchases, and Conveyances (Includes Bidding and Treatment of Employees Associated with City Contracts), §§ 20-61 through 20-84.
- Article V        Bonds, §§ 20-91 through 20-100.
- Article VII      Prompt Payment to Contractors, Vendors, Suppliers of Goods and Services, §§ 20-107 through 20-115.

**Denver RMC §§ 28.3, Non-Discrimination in City Contracts for Construction, Reconstruction, and Remodeling, and Professional Design and Construction Services**

Based upon a “1990 Disparity Study” conducted by the city of Denver, these provisions were enacted to prohibit race and gender discrimination in city contracts for construction, reconstruction, remodeling, professional design, and construction services.

**Denver RMC § 30-6, Landmark Preservation — Procedure to Authorize Erection, Construction, Reconstruction, Alterations to, or Demolition of Structures Designated for Preservation or Located in Districts Designated for Preservation**

These ordinances proscribe the necessary procedures to perform construction on historical or architectural structures and/or geographical districts that are designated as preserved.

**Denver RMC § 49, Streets, Sidewalks, and Other Public Ways**

This chapter sets forth the various ordinances relating to the construction, reconstruction, repair, and permits associated with streets, sidewalks, and other public ways. The pertinent ordinances associated with construction found in this chapter are as follows:

- Article VI        Sidewalks, Curbs, Gutters, and Driveway (Construction, Reconstruction and Repair; Curb Cuts), §§ 49-111 through 49-144.
- Article VII       Private Designing, Planning, Construction, Reconstruction and Remodeling, §§ 49-161 through 49-190.
- Article VIII      Street Cuts, §§ 49-191 through 49-208.
- Article IX        Encumbrances of the Right-of-Way, §§ 49-246 through 49-251.
- Article X         Protection From Construction Operations, §§ 49-266 through 49-273.
- Article XI        Protection of Irrigation Ditches, §§ 49-291 through 49-304.
- Article XII       Warning Devices and Protective Safeguards, §§ 49-321 through 49-324.
- Article XIII      Permanent Occupancy of Public Right-of-Way, §§ 49-341 through 49-448.
- Article XVII     Contractor Licensing (General, Structural, Sewer, Paving, Special, Sidewalk, and Driveway Contractors), §§ 49-586 through 49-653.

**Denver RMC §§ 56-41 to 56-120, Utilities — Private and Building Sewers**

This section includes ordinances describing the necessary construction materials, permits, fees, bonding, and disposal conditions required in sewage construction and management.

**Denver RMC §§ 56-106, Administrative Review and Court Proceedings**

This section states the administrative procedure for pursuing disputes over amounts owed on contracts. It requires a claimant to pursue its claim through an administrative claim and appeal, rather than through litigation, and subject only to C.R.C.P. 106 review by the courts. While this

section specifically applies to sewer construction projects, most construction contracts entered by the City and County of Denver include a clause incorporating this claims procedure. The Colorado Supreme Court has specifically examined one of these clauses at length and held that a contractual clause requiring pursuit of disputes through an administrative process is akin to an ADR clause and is generally enforceable when the dispute is within the scope of the clause.<sup>52</sup>

### **Denver RMC § 59, Zoning**

### **Ordinances from the Code of the City of Colorado Springs §§ 16-1-101, et seq., Buildings and Building Regulations**

This chapter provides rules and regulations related to local building codes, permits and fees, building inspections, and contractor's licensing and bonding. For specific information regarding building and construction in these areas, see the following sections within this chapter:

- |             |   |
|-------------|---|
| Article II  | Building Codes, §§16-2-101 through 16-2-1106.   |
|             | Part 1 Uniform Building Code, §§ 16-2-101 through 16-2-106.   |
|             | Part 2 Uniform Mechanical Code, §§ 16-2-201 through 16-2-206.   |
|             | Part 3 Uniform Sign Code, §§ 16-2-301 through 16-2-306.   |
|             | Part 4 Uniform Plumbing Code, §§ 16-2-401 through 16-2-406.   |
|             | Part 5 Electrical Code, §§ 16-2-501 through 16-2-506.   |
|             | Part 6 Model Energy Code, §§ 16-2-601 through 16-2-606.   |
|             | Part 7 Mobile Home Code, §§ 16-2-701 through 16-2-710.  |
|             | Part 8 Uniform Code for Solar Energy Installations, §§ 16-2-801 through 16-2-805.   |
|             | Part 9 Application of Regulations, §§ 16-2-901 through 16-2-909.  |
|             | Part 10 Safety for Elevators and Escalators, §§ 16-2-1001 through 16-2-1006.  |
|             | Part 11 Elevator Permits, §§ 16-2-1101 through 16-2-1108.   |
| Article III | Permits and Fees, §§ 16-3-101 through 16-3-213.   |
| Article IV  | Certificates and Inspections, §§ 16-4-101 through 16-4-205.   |
| Article V   | Dangerous Building Code, §§ 16-5-101 through 16-5-409.  |
| Article VI  | Contractors (Building, Concrete, Electrical, Heating, Plumbing, Water Connected Appliance, and Fire Suppression Contractors), §§ 16-6-101 through 16-6-806. |
| Article VII | Swimming Pools, §§ 16-7-101 through 16-7-107.   |

### **Colorado Springs City Code §§ 13-2-301 through 13-2-305, Cable Television Systems: Construction and Installations**

These ordinances set forth the requirements and guidelines for construction and installation of cable lines and other communication systems in the City of Colorado Springs.

**Colorado Springs City Code §§ 6-1-101, et seq., Finance Management**

This chapter deals with crucial aspects of the contracting, purchasing, bidding, and claims management in construction contracts with the City of Colorado Springs. For more information on specific financial issues associated with construction, see the following sections within this chapter:

- Article I Finance Management Procedures, §§ 6-1-101 through 6-1-402.  
Part 3, Purchases (Formal Bidding Procedures), §§ 6-1-301 through 6-1-309.
- Article II Claims, § 6-2-101.
- Article IV Claims Management, §§ 6-4-101 through 6-4-106.

**Colorado Springs City Code §§ 15-3-1501 through 15-3-1529, Grading Plans**

This section provides ordinances that regulate any construction associated with filling, excavation, or grading. Restrictions on grading are defined and the penalties imposed and corresponding procedures for appeal are set forth.

**Colorado Springs City Code §§ 19-1-101, et seq., Public Property and Public Works**

This chapter sets forth the various ordinances relating to the construction, reconstruction, repair, and permits associated with streets, sidewalks, and other public ways. Specific sections also provide the procedure for contract awards for public improvement projects. The pertinent sections associated with these construction matters are as follows:

- Article V Streets and Public Ways, §§ 19-5-101 through 19-5-301
  - Part 1 Construction, Repair and Maintenance, §§ 19-5-101 through 19-5-109.
  - Part 2 Excavations, §§ 19-5-201 through 19-5-219.
  - Part 3 Miscellaneous, § 19-5-301.
- Article VI Sidewalks (Construction and Maintenance), §§ 19-6-101 through 19-6-107.
- Article VII Public Improvements, §§ 19-7-101 through 19-7-803.
  - Part 1 Improvements Needed (Liability During Construction), §§ 19-7-101 through 19-7-114.
  - Part 3 Contracts Awarded, §§ 19-7-301 through 19-7-305.
  - Part 4 Wastewater Sewer and Storm Drainage Improvements, §§ 19-7-401 through 19-7-412.

**Colorado Springs City Code §§ 12-1-101, et seq., Utilities**

This chapter includes all local ordinances regarding utilities. Specific articles within this chapter relate to construction and installation of utility systems (*i.e.*, electric transmission and distribution lines, gas lines, etc.). See the following articles for more information:

Article II	Electric Code, §§ 12-2-101 through 12-2-902. Part 5 Connection and Installation of System, §§ 12-2-501 through 12-2-505. Part 8 Control and Protection of Electrical System, §§ 12-2-801 through 12-2-804.
Article III	Natural Gas Code, §§ 12-3-101 through 12-3-702. Part 5 Connection and Installation of System, §§ 12-3-501 through 12-3-507.
Article IV	Water Code, §§ 12-4-101 through 12-4-1104. Part 5 Connection and Installation of System, §§ 12-4-501 through 12-4-518.
Article V	Wastewater Treatment Code, §§ 12-5-101 through 12-5-1208. Part 5 Connection and Installation of System, §§ 12-5-501 through 12-5-513.

**Zoning — See City of Colorado Springs Zoning Code under the following articles:**

Article I	General
Article III	Land Use Zoning Districts
Article IV	Site Development Standards
Article V	Administration and Procedures

## § 23.4 • SELECTED FEDERAL CONSTRUCTION STATUTES

### § 23.4.1—Contract Dispute Act

Overall, title 41 of the United States Code contains provisions dealing with “public contracts” involving the United States of America. Title 41’s chapters address war contracts, military procurement, procurement procedures, “kickbacks,” etc. Chapter 9, consisting of §§ 601-613, addresses disputes in contracts entered by executive branch agencies and, to a limited extent, contracts entered by the Tennessee Valley Authority (collectively the “Government”).

41 U.S.C. § 604 provides that a contractor that fails to support its claim because the claim is false is liable to the Government for the amount of the claim and all costs incurred by the Government in reviewing the claim.

41 U.S.C. § 605 establishes the administrative procedure for submission of claims by either the contractor or the Government for review and resolution.

41 U.S.C. § 606 grants contractors a right of appeal from a contracting officer’s decision to an agency board of contract appeals.

41 U.S.C. §§ 607 and 610 provide for the establishment and operation of agency boards of contract appeals.

41 U.S.C. § 608 addresses the resolution of small contract claims, claims under \$50,000.

41 U.S.C. § 609 provides for judicial review of board decisions on contract claims.

41 U.S.C. § 611 grants the contractor “post-trial” interest on a claim accruing from the date of the award by the contracting officer.

41 U.S.C. § 612 addresses issues relating to the payment of claims.

### **§ 23.4.2—False Claims Act**

31 U.S.C. § 3729 of title 31 establishes liability for persons who knowingly submit false claims for payment to the Government or otherwise seek to defraud the Government. A person submitting a false claim is liable for a civil fine of between \$5,000 and \$10,000, as well as treble damages. The statute also allows for the reduction of a person’s liability for cooperating with government investigations.

31 U.S.C. § 3730 is the so-called “Lincoln Law” authorizing *qui tam* actions in which a private person can, under certain circumstances, pursue civil actions on behalf of the Government against persons submitting false claims to the Government and, if successful, receive a portion of any damages awarded.

### **§ 23.4.3—Miller Act**

The Miller Act requires government agencies to post payment bonds for the protection of contractors, subcontractors, materialmen, suppliers, and laborers on government construction projects. In essence, the Miller Act provides the payment protection on federal construction projects akin to that provided by state mechanic’s lien laws for most private construction projects.<sup>53</sup>

### **§ 23.4.4—Prompt Payments Act**

The Prompt Payments Act requires governmental agencies to make timely payments to contractors on construction projects. It entitles the contractor to an award of interest compounded monthly for late payments. Colorado has a simplified statutory requirement for prompt payments in C.R.S. § 24-91-103.<sup>54</sup>

## **NOTES**

1. *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384 (Colo. 1983).

2. *Id.* at 1388.

3. *Id.* at 1389.

4. *Id.* at 1388 (*quoting Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

5. This factor could raise an interesting debate in the context of a typical “cost plus” construction contract.

6. *Colorado Carpet Installation, Inc.*, 668 P.2d at 1388-89; *see also Bailey v. Montgomery Ward & Co.*, 690 P.2d 1280, 1282 (Colo. App. 1984) (discussing and applying these four factors in the context of an agreement to purchase and install tires).

7. *Smith v. Union Supply Co.*, 675 P.2d 333 (Colo. App. 1983).
8. *Thomas v. Bove*, 687 P.2d 534 (Colo. App. 1984).
9. *Regents of Univ. of Colo. v. Pacific Pump & Supply, Inc.*, 528 P.2d 941 (Colo. App. 1974).
10. For additional guidance on the application of the UCC to agreements traditionally thought of as construction related, practitioners may look to Robert D. Marshall, *The Applicability of the Uniform Commercial Code to Construction Contracts*, 28 *Emory L.J.* 335, 365-76 (1979), which was favorably cited by the *Colorado Carpet* court. Another source of information is the American Law Reports annotation, Sonja A. Soehnel, *Applicability of U.C.C. Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R. 4th 501 (1981).
11. See C.R.S. § 4-2-312 (warranty of title), § 4-2-314 (merchantability), § 4-2-315 (fitness for a particular purpose), and § 4-2-318 (third-party beneficiaries and implied warranties).
12. See, e.g., C.R.S. § 4-2-313 (governing express warranties), § 4-2-317 (cumulation and conflict of warranties), and § 4-2-318 (third-party beneficiaries and express/implied warranties).
13. A “public servant” is statutorily defined as any officer, employee or consultant of the state or any county, municipality or other political unit as well as any board, department, agency, or subdivision of the foregoing and any corporation or other entity established by law to carry out any governmental function. C.R.S. § 18-1-901(3).
14. Agency of Government means, “any agency, department, division, board, bureau, commission, institution, or section of this state that is a budgetary unit exercising construction contracting authority or discretion.” C.R.S. § 24-92-102(1).
15. See Chapters 4 and 5 for a discussion of governmental contracts.
16. C.R.S. § 24-101-105(1).
17. For a discussion of general public works issues, see Chapter 4, “State Construction Projects” and Chapter 5, “City, County, and Special District Construction Projects.” For a discussion of bond and surety related issues, see Chapter 12, “Construction Sureties.”
18. *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499 (Colo. App. 2003).
19. The licensing of construction professionals is discussed in Chapter 2, “Licensing Requirements for the Parties to the Construction Process.”
20. For a good discussion of the meaning of “substantial completion” in the context of this provision, see R. Christopher Rhodes, “Defining ‘Substantial Completion’ in Construction Defect Actions,” 27 *Colo. Law.* 73 (Oct. 1998); see also Jon F. Sands, “The Two Year Construction Statute of Limitations,” 15 *Colo. Law.* 402 (Mar. 1986).
21. See C.R.S. §§ 13-20-803 and -803.5.
22. C.R.S. § 13-20-803.5.
23. See C.R.S. § 13-20-804.
24. See *Nelson, Haley, et al. v. Garney Companies*, 781 P.2d 153, 155 (Colo. App. 1989).
25. C.R.S. § 13-80-104(1)(b)(II).
26. C.R.S. § 38-33.3-303.5.
27. For a discussion of the requirements of the Colorado Excavation Requirements Statute, see Thomas R. Quinn and Barry A. Hudson, “The Current Law of Underground Utility Location in Colorado,” 23 *Colo. Law.* 2545 (Nov. 1994).
28. See also Chapter 13, “Environmental Liabilities in the Construction Industry.”
29. Colo. Const. art. XX, § 6.
30. There are 271 incorporated municipalities in Colorado including 86 home rule municipalities, 15 statutory cities, one territorial charter city, and 169 statutory towns. The 86 home rule municipalities include:  
Alamosa, Arvada, Aspen, Aurora, Avon, Black Hawk, Boulder, Breckenridge, Brighton, Broomfield, Burlington, Canon City, Carbondale, Castle Rock, Central City, Cherry Hills Village, Colorado Springs, Commerce City, Cortez, Craig, Crested Butte, Dacono, Delta, Denver, Dillon, Durango, Edgewater, Englewood, Evans, Fort Collins, Fort Morgan, Fountain, Frisco, Fruita, Glendale, Glenwood Springs, Golden, Grand Junction, Greeley, Greenwood Village, Gunnison, Gypsum, Holyoke, La Junta, Lafayette, Lakewood, Lamar, Larkspur, Littleton, Lone Tree,

Longmont, Louisville, Loveland, Manitou Springs, Minturn, Monte Vista, Montrose, Morrison, Mountain View, Mountain Village, Mt. Crested Butte, New Castle, Northglenn, Ophir, Pagosa Springs, Parker, Pueblo, Rico, Ridgway, Rifle, Silverthorne, Snowmass Village, Steamboat Springs, Sterling, Telluride, Thornton, Trinidad, Vail, Ward, Watkins, Westminster, Wheat Ridge, Winter Park, Woodland Park, Wray, and Yuma.

From the Colorado Department of Local Affairs, [www.dola.state.co.us/LGS/localgovtinfo/municipalities.htm](http://www.dola.state.co.us/LGS/localgovtinfo/municipalities.htm).

31. See also Chapter 5, "City, County, and Special District Construction Projects."
32. See, e.g., *City of Colorado Springs v. Smartt*, 620 P.2d 1060 (Colo. 1980); *People ex rel. People of Thornton v. Horan*, 556 P.2d 1217 (Colo. 1976); *Dominguez v. City & County of Denver*, 363 P.2d 661 (Colo. 1961) *overruled in part*, 464 P.2d 515; *Lehman v. City & County of Denver*, 355 P.2d 309 (Colo. 1960); *Wiggins v. McAuliffe*, 356 P.2d 487 (Colo. 1960); *Retallack v. Police Court*, 351 P.2d 884 (Colo. 1960); *Thiele v. City & County of Denver*, 312 P.2d 786 (Colo. 1957).
33. See, e.g., *City of Colo. Springs v. Industrial Comm.*, 749 P.2d 412, 416 (Colo. 1988); *City of Aurora v. Martin*, 507 P.2d 868 (Colo. 1973); *Gazotti v. City & County of Denver*, 352 P.2d 963 (Colo. 1960); *Davis v. City & County of Denver*, 342 P.2d 674, 676 (Colo. 1959); *City of Canyon City v. Merris*, 323 P.2d 614 (Colo. 1958); *City & County of Denver v. Bridwell*, 224 P.2d 217 (Colo. 1950); *People v. Graham*, 110 P.2d 256 (Colo. 1941).
34. *U.S. West Comm., Inc. v. City of Longmont*, 948 P.2d 509, 515 (Colo. 1997) ("[I]n matters of local concern, both home rule cities and the state may legislate, but when a home rule ordinance or charter provision and a state statute conflict, the home rule provisions supersedes [*sic*] conflicting state provision."); *Vela v. People*, 484 P.2d 1204, 1205-26 (Colo. 1971) ("For a state statute to be superseded by ordinance of home rule city, statute and ordinance must be in conflict and ordinance must pertain to purely local matter, and where both of such conditions exist, state statute is without effect within jurisdiction of the home rule city.").
35. See, e.g., *U.S. West Comm., Inc.*, 948 P.2d at 515; *R.E.N. v. City of Colo. Springs*, 823 P.2d 1359 (Colo. 1992); *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1066 (Colo. 1992); *City & County of Denver v. State of Colo.*, 788 P.2d 764 (Colo. 1990); *National Adv. Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988); *City of Colorado Springs v. State*, 626 P.2d 1122 (Colo. 1980); *Delong v. City & County of Denver*, 576 P.2d 537, 540 (Colo. 1978); *Woolverton v. City & County of Denver*, 361 P.2d 982, 984 (Colo. 1961).
36. *Voss*, 830 P.2d at 1061.
37. *Voss*, 830 P.2d at 1067 (citing *City & County of Denver v. State*, 788 P.2d at 768. Cf. *R.E.N.*, 823 P.2d at 1362 (explaining that the test for whether an ordinance conflicts with a state statute is whether the ordinance authorizes what the statute forbids, or the ordinance forbids what the statute authorizes).
38. *Voss*, 830 P.2d at 1067.
39. *Smartt*, 620 P.2d 1060 (Colo. 1980); see also *Moore v. City of Boulder*, 484 P.2d 134, 136 (Colo. App. 1971) (holding that a home rule city ordinance rezoning a tract for the purpose of establishing low-cost housing is a matter of purely local concern).
40. See *Fraternal Order of Police v. City & County of Denver*, 926 P.2d 582, 587 (Colo. 1996); *International Bhd. of Police Officers Local 127 v. City & County of Denver*, 521 P.2d 916 (Colo. 1974).
41. See *Davis v. City of Pueblo*, 406 P.2d 671 (Colo. 1965); *Berman v. City & County of Denver*, 400 P.2d 434 (Colo. 1965); see also *Gidley v. City of Colo. Springs*, 418 P.2d 291 (Colo. 1966).
42. See *City of Greeley v. Poudre Valley Rural Elec.*, 744 P.2d 739 (Colo. 1987).
43. C.R.S. §§ 24-92-101, *et seq.* (1997).
44. *Id.* at § 24-92-104(3).
45. See Colo. Rev. Municipal Code of the City and County of Denver, § A2.3-1(1); Colo. Code of the City of Colo. Springs §§ 6-1-301, *et seq.*, 19-7-301, *et seq.*
46. See *City of Colo. Springs v. Industrial Comm'n of Colo.*, 749 P.2d 412, 416 (Colo. 1988).
47. See *City of Englewood v. Mountain States Tel. & Tel. Co.*, 431 P.2d 40, 43 (Colo. 1967).
48. See *Martin*, 507 P.2d at 868.

49. *Denver & Rio Grande W. R.R. Co., v. City & County of Denver*, 673 P.2d 354 (Colo. 1983) (holding that the construction and apportionment of costs for a viaduct was mixed matter of state and local concern, and since there was a conflict between the city charter provision and the state statute, the state statute superseded the city charter provision).

50. *National Adv. Co. v. Dept. of Highways*, 751 P.2d 632 (Colo. 1988) (explaining that construction of advertising billboards along state highways in home rule municipalities was “at least” a matter of mixed local and statewide concern).

51. *Voss*, 830 P.2d at 1061 (holding that the state’s interest in efficient development and production of oil and gas preempts a home-rule city from totally excluding all drilling operations within city limits).

52. *City And County Of Denver v. District Court*, 939 P.2d 1353 (Colo. 1997).

53. See Chapter 19 for an overview of the Miller Act.

54. For an overview of the various prompt payment acts in the United States, see Allen Holt Gwyn, “Contractor/Subcontractor Prompt Pay Acts—Public And Private Projects,” 16 *Constr. Law*. 61 (1996).

