

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 552

Introduced by White, 8.

Read first time January 21, 2009

Committee: Business and Labor

A BILL

1 FOR AN ACT relating to construction; to amend section 81-2407,
2 Reissue Revised Statutes of Nebraska; to adopt the
3 Nebraska Construction Prompt Pay Act; to harmonize
4 provisions; to provide an operative date; and to repeal
5 the original section.
6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 10 of this act shall be known
2 and may be cited as the Nebraska Construction Prompt Pay Act.

3 Sec. 2. For purposes of the Nebraska Construction Prompt
4 Pay Act:

5 (1) Contractor includes individuals, firms, partnerships,
6 limited liability companies, corporations, or other associations of
7 persons engaged in the business of the construction, alteration,
8 repairing, dismantling, or demolition of buildings, roads, bridges,
9 viaducts, sewers, water and gas mains, streets, disposal plants,
10 water filters, tanks and towers, airports, dams, levees and canals,
11 water wells, pipelines, transmission and power lines, and every
12 other type of structure, project, development, or improvement
13 coming within the definition of real property and personal
14 property, including such construction, repairing, or alteration
15 of such property to be held either for sale or rental. Contractor
16 also includes any subcontractor engaged in the business of such
17 activities and any person who is providing or arranging for labor
18 for such activities, either as an employee or as an independent
19 contractor, for any contractor or person;

20 (2) Owner means a person (a) who has an interest in any
21 real property improved, (b) for whom an improvement is made, or
22 (c) who contracted for an improvement to be made. Owner includes a
23 person, entity, the state, or any political subdivision;

24 (3) Owner's representative means an architect, engineer,
25 or construction manager in charge of a project for the owner or

1 such other contract representative or officer as designated in the
2 contract document as the party representing the owner's interest
3 regarding administration and oversight of the project;

4 (4) Real property means real estate that is improved,
5 including private and public land, and leaseholds, tenements, and
6 improvements placed on the real property;

7 (5) Receipt means actual receipt of cash or funds by the
8 contractor or subcontractor; and

9 (6) Subcontractor means a person or entity that has
10 contracted to furnish labor or materials to, or performed labor or
11 supplied materials for, a contractor or another subcontractor in
12 connection with a contract to improve real property. Subcontractor
13 includes materialmen and suppliers.

14 Sec. 3. (1) When a contractor has performed work in
15 accordance with the provisions of a contract with an owner, the
16 owner shall pay the contractor within thirty days after receipt by
17 the owner or the owner's representative of a payment request made
18 pursuant to the contract.

19 (2) When a subcontractor has performed work in accordance
20 with the provisions of a subcontract and all conditions precedent
21 to payment contained in the subcontract have been satisfied, the
22 contractor shall pay the subcontractor and the subcontractor shall
23 pay his, her, or its subcontractor, within ten days after receipt
24 by the contractor or subcontractor of each periodic or final
25 payment, the full amount received for the subcontractor's work

1 and materials based on work completed or service provided under
2 the subcontract for which the subcontractor has properly requested
3 payment, if the subcontractor provides or has provided satisfactory
4 and reasonable assurances of continued performance and financial
5 responsibility to complete the work.

6 Sec. 4. When work has been performed pursuant to a
7 contract, a party may only withhold payment:

8 (1) For retainage, in an amount not to exceed the
9 amount specified in the contract, if applicable, until the work is
10 substantially complete;

11 (2) Of a reasonable amount, to the extent that such
12 withholding is allowed in the contract, for any of the following
13 reasons:

14 (a) Reasonable evidence showing that the contractual
15 completion date will not be met due to unsatisfactory job progress;

16 (b) Third-party claims filed or reasonable evidence that
17 such a claim will be filed with respect to work under the contract;
18 or

19 (c) Failure of the contractor to make timely payments for
20 labor, equipment, subcontractors, or materials; or

21 (3) After substantial completion, in an amount not to
22 exceed one hundred twenty-five percent of the estimated cost to
23 complete the work remaining on the contract.

24 Sec. 5. Except as provided in section 4 of this section,
25 if a periodic or final payment to (1) a contractor is delayed

1 by more than thirty days after receipt of a properly submitted
2 periodic or final payment request by the owner or owner's
3 representative or (2) a subcontractor is delayed by more than
4 ten days after receipt of a periodic or final payment by the
5 contractor or subcontractor, then the remitting party shall pay the
6 contractor or subcontractor interest due until such amount is paid,
7 beginning on the day following the payment due date at the rate of
8 one percent per month or a pro rata fraction thereof on the unpaid
9 balance. Interest is due under this section only after the person
10 charged the interest has been notified of the provisions of this
11 section by the contractor or subcontractor. Acceptance of progress
12 payments or a final payment shall release all claims for interest
13 on such payments.

14 Sec. 6. The Nebraska Construction Prompt Pay Act shall
15 not modify the remedies available to any person under the terms of
16 a contract in existence prior to the operative date of this act or
17 by any other statute.

18 Sec. 7. The Nebraska Construction Prompt Pay Act does not
19 apply to improvements to real property intended for residential
20 purposes when the residence consists of no more than four
21 residential units.

22 Sec. 8. The Nebraska Construction Prompt Pay Act applies
23 to contracts or subcontracts entered into on or after October 1,
24 2009.

25 Sec. 9. The following provisions in any contract or

1 subcontract for construction work performed within the State of
2 Nebraska shall be against public policy and shall be void and
3 unenforceable:

4 (1) A provision that purports to waive, release, or
5 extinguish rights to file a claim against a payment or performance
6 bond, except that a contract or subcontract may require a
7 contractor or subcontractor to provide a waiver or release of
8 such rights as a condition for payment, but only to the extent of
9 the amount of the payment received;

10 (2) A provision that purports to make any state law other
11 than that of Nebraska applicable to or governing any contract for
12 construction within the state; or

13 (3) A provision that purports to require that the venue
14 for a court or arbitration hearing be held at any location outside
15 of the state.

16 Sec. 10. (1) Any liquidated or unliquidated claim against
17 the state or any political subdivision of the state arising from
18 construction performed for the state or such political subdivision
19 shall: (a) Be presented in writing to the individual or officer as
20 set forth in subsection (2) of this section; (b) state the name of
21 the claimant and the amount of the claim; and (c) identify the item
22 or service for which payment is claimed or the time, place, nature,
23 and circumstance giving rise to the claim. All claims shall be
24 filed within one hundred eighty days after the date of substantial
25 completion of the construction project.

1 (2) A construction contract entered into by the state or
2 any political subdivision of the state may provide the name and
3 location of the office in which a claim under this section may be
4 filed. In the absence of such provision, a written claim shall be
5 filed as follows:

6 (a) Claims against the state shall be filed with the Risk
7 Manager;

8 (b) Claims against a city of the metropolitan, primary,
9 first, or second class shall be filed with the appropriate city
10 clerk;

11 (c) Claims against a village shall be filed with the
12 village clerk;

13 (d) Claims against a county shall be filed with the
14 county clerk; and

15 (e) Claims against any other political subdivision shall
16 be filed with the person who executed the contract on behalf of the
17 political subdivision or that person's successor in office.

18 (3) The state or applicable political subdivision shall
19 issue a decision on the claim within ninety days after receipt
20 thereof by the state or political subdivision. If no decision
21 has been issued after such period, the claim shall be deemed to
22 be denied in whole and the claimant may commence an action in
23 accordance with subsection (4) of this section.

24 (4) If a claim is denied in whole or in part by the state
25 or a political subdivision, a claimant may bring a civil action

1 on the claim. An action under this subsection may only be brought
2 within two years after the denial of the claim or the date upon
3 which the claim is deemed to be denied. Any such action shall be
4 in the nature of an original action and not an appeal and shall
5 be commenced in the district court of the county in which the
6 construction project at issue was located. Either party may appeal
7 from the decision of the district court.

8 (5) Notwithstanding any other provision of law in
9 Chapters 13, 14, 15, 16, 17, 23, and 81, claims against the state
10 or a political subdivision of the state arising from construction
11 performed for the state or such political subdivision shall be
12 governed by this section.

13 Sec. 11. Section 81-2407, Reissue Revised Statutes of
14 Nebraska, is amended to read:

15 81-2407 The Prompt Payment Act shall not apply to the
16 following:

17 (1) Claims subject to a good faith dispute if notice of
18 the dispute is conveyed to the creditor in writing before the time
19 required for payment, except that the Prompt Payment Act shall take
20 effect on the date that the dispute is resolved;

21 (2) Contracts related to ~~highway or road~~ construction,
22 reconstruction, or maintenance, including that of a highway or
23 road; and

24 (3) Claims, contracts, or projects which are to be paid
25 for exclusively with federal funds.

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1 Sec. 12. This act becomes operative on October 1, 2009.

2 Sec. 13. Original section 81-2407, Reissue Revised

3 Statutes of Nebraska, is repealed.