

LEGISLATIVE BILL 552

Approved by the Governor February 11, 2010

Introduced by White, 8; Mello, 5.

FOR AN ACT relating to construction; to amend section 81-2402, Reissue Revised Statutes of Nebraska; to adopt the Nebraska Construction Prompt Pay Act; to harmonize provisions; to provide an operative date; and to repeal the original section.

Be it enacted by the people of the State of Nebraska,

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

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

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

(2) Owner means a person (a) who has an interest in any real property improved, (b) for whom an improvement is made, or (c) who contracted for an improvement to be made. Owner includes a person, an entity, or any political subdivision of this state. Owner does not include the State of Nebraska;

(3) Owner's representative means an architect, an engineer, or a construction manager in charge of a project for the owner or such other contract representative or officer as designated in the contract document as the party representing the owner's interest regarding administration and oversight of the project;

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

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

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

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

(2) When a subcontractor has performed work in accordance with the provisions of a subcontract and all conditions precedent to payment contained in the subcontract have been satisfied, the contractor shall pay the subcontractor and the subcontractor shall pay his, her, or its subcontractor, within ten days after receipt by the contractor or subcontractor of each periodic or final payment, the full amount received for the subcontractor's work and materials based on work completed or service provided under the subcontract for which the subcontractor has properly requested payment, if the subcontractor provides or has provided satisfactory and reasonable assurances of continued performance and financial responsibility to complete the work.

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

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

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

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

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

(c) Failure of the contractor to make timely payments for labor,

equipment, subcontractors, or materials; or

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

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

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

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

Sec. 8. The Nebraska Construction Prompt Pay Act applies to contracts or subcontracts entered into on or after October 1, 2010.

Sec. 9. The following provisions in any contract or subcontract for construction work performed within the State of Nebraska shall be against public policy and shall be void and unenforceable:

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

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

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

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

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

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

(b) Claims against a village shall be filed with the village clerk;

(c) Claims against a county shall be filed with the county clerk;

and

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

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

(4) If a claim is denied in whole or in part, a claimant may bring a civil action on the claim. An action under this subsection may only be brought within two years after the denial of the claim or the date upon which the claim is deemed to be denied. Any such action shall be in the nature of an original action and not an appeal and shall be commenced in the district court of the county in which the construction project at issue was located. Either party may appeal from the decision of the district court.

(5) Notwithstanding any other provision of law in Chapters 13, 14,

15, 16, 17, and 23, claims against a political subdivision of this state arising from construction performed for such political subdivision shall be governed by this section.

Sec. 11. Section 81-2402, Reissue Revised Statutes of Nebraska, is amended to read:

81-2402 As used in the Prompt Payment Act, unless the context otherwise requires:

(1) Agency shall mean the state and any agency, department, office, commission, board, panel, or division of the state. Agency shall include the University of Nebraska and the Nebraska state colleges;

(2) Bill shall mean a proper billing or invoice which requests a payment and which is supplemented by all necessary verification and forms required by agency rules and regulations to process payments;

(3) Creditor shall mean any person, corporation, association, or other business concern engaged in a trade or business, either on a for-profit or not-for-profit basis, and providing any goods or services to an agency;

(4) Good faith dispute shall mean:

(a) A contention by the agency that goods delivered or services rendered were of less quantity or quality than ordered or specified by contract, faulty, or installed improperly; or

(b) Any other reason giving cause for the withholding of payment by the agency until the dispute is settled, except that failure to give notice as prescribed in section 81-2405 shall preclude an agency from claiming a good faith dispute in the case of a defective or improper billing;

(5) Goods shall mean any goods, supplies, materials, equipment, or other personal property but shall not mean any real property; and

(6) Services shall mean any contractual services, including, but not limited to, architectural, engineering, medical, financial consulting, or other professional services, any construction services, and any other personal services but shall not mean any services performed as an officer or employee of any agency.

Sec. 12. This act becomes operative on October 1, 2010.

Sec. 13. Original section 81-2402, Reissue Revised Statutes of Nebraska, is repealed.