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HOUSE BILL 320

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

INTRODUCED BY

Ray Ruiz

AN ACT

**RELATING TO CONSTRUCTION; ENACTING THE RETAINAGE ACT; APPLYING
RETAINAGE PROVISIONS TO PUBLIC AND PRIVATE OWNERS; REQUIRING
SPECIFIC PAYMENT SCHEDULES IN ALL CONSTRUCTION CONTRACTS;
REQUIRING INTEREST ON LATE PAYMENTS; ESTABLISHING TRUST
RELATIONSHIPS; REQUIRING ESCROW ACCOUNTS IF PARTIAL PAYMENTS
ARE RETAINED; REPEALING SECTIONS OF THE NMSA 1978 PERTAINING
TO GOVERNMENT RETAINAGE.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. SHORT TITLE. --This act may be cited as the
"Retainage Act".**

Section 2. DEFINITIONS. --As used in the Retainage Act:

**A. "construction" means building, altering,
repairing, installing or demolishing in the ordinary course of
business any:**

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- 1 (1) road, highway, bridge, parking area or
2 related project;
- 3 (2) building, stadium or other structure;
- 4 (3) airport, subway or similar facility;
- 5 (4) park, trail, athletic field, golf course
6 or similar facility;
- 7 (5) dam, reservoir, canal, ditch or similar
8 facility;
- 9 (6) sewage or water treatment facility, power
10 generating plant, pump station, natural gas compression
11 station or similar facility;
- 12 (7) sewage, water, gas or other pipeline;
- 13 (8) transmission line;
- 14 (9) radio, television or other tower;
- 15 (10) water, oil or other storage tank;
- 16 (11) shaft, tunnel or other mining
17 appurtenance;
- 18 (12) electrical wiring, plumbing or plumbing
19 fixture, gas piping, gas appliances or water conditions;
- 20 (13) air conditioning conduit, heating or
21 other similar mechanical work;
- 22 (14) leveling or clearing land;
- 23 (15) excavating earth;
- 24 (16) drilling wells of any type, including
25 seismographic shot holes or core drilling; and

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1 (17) similar work, structures or
2 installations;

3 B. "contractor" means a person performing
4 construction for an owner;

5 C. "owner" means a state agency, local public body
6 or private person;

7 D. "retainage" means money payable to the
8 contractor or subcontractor that has been withheld by the
9 owner conditioned on substantial completion of all work in
10 connection with a construction contract;

11 E. "subcontractor" means a person performing
12 construction for the owner not through a contract with the
13 owner; and

14 F. "substantial completion" means the occurrence
15 of any of the following conditions:

16 (1) occupancy or use of the project by the
17 owner;

18 (2) issuance by a duly authorized agency of a
19 certificate of occupancy or temporary certificate of
20 occupancy; or

21 (3) issuance of a certificate of substantial
22 completion by an agent of the owner, including the architect,
23 project manager or construction manager.

24 Section 3. RETAINAGE IN ABSENCE OF ESCROW AGREEMENT. --
25 Retainage shall not be withheld on any construction contract

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1 within New Mexico unless an escrow arrangement is used.

2 Section 4. PAYMENTS--PROMPT PAY REQUIRED--RETAINAGE.--

3 A. All construction contracts shall provide that
4 payment for amounts due, except for retainage, shall be paid
5 within twenty-one days after the owner receives an undisputed
6 request for payment. Payment by the owner to the contractor
7 may be made by first-class mailing or by hand delivery of the
8 undisputed amount of a pay request based on work completed or
9 service provided under the contact. If the owner fails to pay
10 the contractor within twenty-one days after receipt of an
11 undisputed request for payment, the owner shall pay interest
12 to the contractor beginning on the twenty-second day after
13 payment was due, computed at one and one-half percent of the
14 undisputed amount per month or fraction of a month until the
15 payment is issued. If an owner receives an improperly
16 completed invoice, he shall notify the sender of the invoice
17 within seven days of receipt in what way the invoice is
18 improperly completed, and he has no further duty to pay on the
19 improperly completed invoice until it is resubmitted as
20 complete.

21 B. All construction contracts shall provide that
22 contractors and subcontractors make prompt payment to their
23 subcontractors and suppliers for amounts owed for work
24 performed on the construction project within seven days after
25 receipt of payment from the owner, contractor or

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1 subcontractor. If the contractor or subcontractor fails to
2 pay his subcontractor and suppliers by first-class mail or
3 hand delivery within seven days of receipt of payment, the
4 contractor or subcontractor shall pay interest to his
5 subcontractors and suppliers beginning on the eighth day after
6 payment was due, computed at one and one-half percent of the
7 undisputed amount per month or fraction of a month until
8 payment is issued. These payment provisions apply to all
9 tiers of contractors, subcontractors and suppliers.

10 C. Payments made pursuant to this section on a
11 construction contract to a contractor or subcontractor or
12 money held by the owner on an undisputed invoice are trust
13 funds. A person who has control or direction of the trust
14 funds is a trustee, and an artisan, laborer, mechanic,
15 supplier or other contractor or subcontractor who labors or
16 who furnishes labor or materials pursuant to the construction
17 contract is a beneficiary of the trust funds. This subsection
18 applies to all tiers of contractors, subcontractors and
19 suppliers.

20 D. When making payments, the owner shall retain no
21 more than five percent of the cost of estimated work done and
22 the value of materials stored on the site or suitably stored
23 and insured off-site. When the project is fifty percent
24 complete, no further retainage shall be withheld.

25 E. The retainage may be held until substantial

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1 completion of each separate building, public work or other
2 division of the contract on which a price is stated separately
3 in the contract or that can be separately ascertained from the
4 contractor's schedule of values if the escrow arrangement
5 described in Section 5 of the Retainage Act is used.

6 Section 5. ESCROW ACCOUNTS. --An escrow account,
7 established pursuant to an escrow agreement, shall be entered
8 into only on the following conditions:

9 A. only state or national banks chartered with the
10 state or savings and loan associations domiciled in the state
11 may serve as escrow agent;

12 B. the escrow agent shall limit the investment of
13 funds held in escrow as retainage to certificates of deposit
14 or similar time deposit investments, which may, at the
15 election of the owner, be in excess of the maximum dollar
16 amount of coverage by the federal deposit insurance
17 corporation, the federal savings and loan insurance
18 corporation or other similar agency; United States treasury
19 bonds, United States treasurer notes, United States treasurer
20 certificates of indebtedness and United States treasury bills;
21 or bonds or notes of the state or political subdivision of the
22 state;

23 C. as interest on all investments held in escrow
24 becomes due, it shall be collected by the escrow agent and
25 paid to the contractor and subcontractor pro rata to the

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1 retainage withheld;

2 D. the escrow agent shall provide monthly reports
3 to the owner, the contractor and the subcontractor as to the
4 amount and value of the escrow account held by the escrow
5 agent and any additions to the escrow account. Withdrawals
6 from the escrow account shall be made only subject to approval
7 of the owner;

8 E. if the owner has entered into more than one
9 construction contract allowing for the maintenance of escrow
10 accounts, the owner may elect to combine the amounts held as
11 retainage under each contract into one or more escrow accounts
12 or may establish a separate escrow account for each contract;

13 F. upon default or overpayment, as determined by a
14 court of competent jurisdiction, the escrow agent shall
15 deliver a cashier's check within ten days to the owner in the
16 amount of the default or overpayment; provided, however, the
17 amount is subject to the redemption value of the investments
18 at the time of disbursement;

19 G. the escrow account may be terminated upon
20 completion and acceptance of the contract as provided in the
21 Retainage Act;

22 H. all fees and expenses of the escrow agent shall
23 be paid by the owner;

24 I. the escrow account constitutes a specific
25 pledge to the owner, and the contractor or subcontractor shall

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1 not, except to its surety, otherwise assign, pledge, discount,
2 sell or transfer his interest in the escrow account, and money
3 in the escrow account is not subject to levy, garnishment,
4 attachment or other process;

5 J. the form and provisions of the escrow agreement
6 shall be included in all solicitations for construction
7 services and shall be given to the contractor and
8 subcontractors prior to entering into a contract;

9 K. the owner is not liable to the contractor,
10 subcontractor or their sureties for the failure of the escrow
11 agent to perform under the escrow agreement, or for the
12 failure of a financial institution to honor investments issued
13 by it that are held in the escrow account; and

14 L. an escrow agent is not liable to a party to the
15 escrow agreement unless the escrow agent is found by a court
16 of competent jurisdiction to have breached his fiduciary duty
17 to a beneficiary of the escrow agreement.

18 Section 6. CARE AND PROTECTION OF WORK. --All material
19 and work covered by partial payments become the property of
20 the owner, but the contractor and subcontractor are not
21 relieved from the sole responsibility for the care and
22 protection of materials and work for which payments have been
23 made; provided, however, the contractor and subcontractor have
24 no duty for the care and protection of materials and work
25 after the owner has assumed occupancy or use of the work.

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1 Section 7. FINAL PAYMENT.--Ten days after certification
2 of substantial completion, any amounts remaining due the
3 contractor or subcontractor under the terms of the contract
4 shall be paid upon the presentation of the following:

5 A. a properly executed release and duly certified
6 voucher for payment;

7 B. a release, if required, of all claims and
8 claims of lien against the owner arising under and by virtue
9 of the contract other than such claims of the contractor, if
10 any, as may be specifically excepted by the contractor or
11 subcontractor from the operation of the release in stated
12 amounts to be set forth in the release; and

13 C. proof of substantial completion.

14 Section 8. DISPUTES--EFFECT ON RETAINAGE.--If a dispute
15 arises between the owner and the contractor or subcontractor
16 as to work performed or materials supplied, the owner is only
17 entitled to retain the amount that is reasonably calculated to
18 cover the cost to correct a deficiency in the work or
19 materials supplied. All other money due to the contractor or
20 subcontractor pursuant to the Retainage Act shall be paid as
21 provided in that act. The money retained by the owner as
22 provided in this section shall be deposited in the escrow
23 account for the benefit of the contractor or subcontractor,
24 but shall not be paid to the contractor or subcontractor until
25 the dispute has been resolved.

