

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:

- (1) road, highway, bridge, parking area or
related project;
- (2) building, stadium or other structure;
- (3) airport, subway or similar facility;
- (4) park, trail, athletic field, golf course
or similar facility;
- (5) dam, reservoir, canal, ditch or similar
facility;
- (6) sewage or water treatment facility,

power generating plant, pump station, natural gas compression station or similar facility;

(7) sewage, water, gas or other pipeline;

(8) transmission line;

(9) radio, television or other tower;

(10) water, oil or other storage tank;

(11) shaft, tunnel or other mining

appurtenance;

(12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditions;

(13) air conditioning conduit, heating or other similar mechanical work;

(14) leveling or clearing land;

(15) excavating earth;

(16) drilling wells of any type, including seismographic shot holes or core drilling; and

(17) similar work, structures or installations;

B. "contractor" means a person performing construction through a contract with an owner;

C. "owner" means a person, local public body or state agency other than the state highway and transportation department;

D. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability

company, association, joint venture or similar legal entity;

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

F. "subcontractor" means a person performing construction for the owner not through a contract with the owner.

Section 3. APPLICABILITY OF ACT. --The provisions of the Retainage Act do not apply to construction contracts for residential property containing four or fewer dwelling units.

Section 4. RETAINAGE IN ABSENCE OF ESCROW AGREEMENT. --

A. Except as otherwise provided in this section, retainage shall not be withheld on any construction contract within New Mexico unless an escrow arrangement is used. Securities may be offered by a contractor or subcontractor in lieu of retention.

B. A local public body may provide in its bidding documents the manner in which retainage is to be held. Retainage by a local public body shall be in an interest-bearing account. A local public body may combine retainage from more than one project into a single account, and the interest shall be allocated to the contractors and subcontractors pro rata to each project's retainage.

C. A manufacturing plant engaged in at least ten

construction projects at the same time may serve as its own escrow agent; provided that all other conditions pertaining to escrow accounts shall apply.

Section 5. PAYMENTS--PROMPT PAY REQUIRED--RETAINAGE.--

A. Except as provided in Subsection B of this section, all construction contracts shall provide that payment for amounts due, except for retainage, shall be paid within twenty-one days after the owner receives an undisputed request for payment. Payment by the owner to the contractor may be made by first-class mailing, electronic funds transfer or by hand delivery of the undisputed amount of a pay request based on work completed or service provided under the contract. If the owner fails to pay the contractor within twenty-one days after receipt of an undisputed request for payment, the owner shall pay interest to the contractor beginning on the twenty-second day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month until the payment is issued. If an owner receives an improperly completed invoice, he shall notify the sender of the invoice within seven days of receipt in what way the invoice is improperly completed, and he has no further duty to pay on the improperly completed invoice until it is resubmitted as complete.

B. A local public body may make payment within forty-five days after submission of an undisputed request for

payment when grant money is a source of funding, if:

(1) the construction contract specifically provides in a clear and conspicuous manner for a payment later than twenty-one days after submission of an undisputed request for payment; and

(2) the following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

"Notice of Extended Payment Provision

This contract allows the owner to make payment within _____ days after submission of an undisputed request for payment. "

C. All construction contracts shall provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed on the construction project within seven days after receipt of payment from the owner, contractor or subcontractor. If the contractor or subcontractor fails to pay his subcontractor and suppliers by first-class mail or hand delivery within seven days of receipt of payment, the contractor or subcontractor shall pay interest to his subcontractors and suppliers beginning on the eighth day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month

until payment is issued. These payment provisions apply to all tiers of contractors, subcontractors and suppliers.

D. A creditor shall not collect, enforce a security interest against, garnish or levy execution on those retainage, progress payments or other payments that are owed by an owner, contractor or subcontractor to a person, or his surety, who has furnished labor or material pursuant to a construction contract.

E. When making payments, the owner shall retain no more than five percent of the cost of estimated work done and the value of materials stored on the site or suitably stored and insured off-site. When the project is substantially complete, no further retainage shall be withheld. A contractor shall retain no more than five percent retainage, regardless of whether retainage is withheld by the owner.

F. The retainage may be held until substantial completion of each separate building, public work or other division of the contract on which a price is stated separately in the contract or that can be separately ascertained from the contractor's schedule of values if the escrow arrangement described in Section 6 of the Retainage Act is used.

Section 6. ESCROW ACCOUNTS. --An escrow account, established pursuant to an escrow agreement, shall be entered

into only on the following conditions:

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

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

C. as interest on all investments held in escrow becomes due, it shall be collected by the escrow agent and paid to the contractor. The contractor and his subcontractors shall pay interest as it is received pro rata to their subcontractors;

D. the escrow agent shall provide monthly reports to the owner, the contractor and the subcontractor as to the amount and value of the escrow account held by the escrow agent and any additions to the escrow account. Withdrawals from the escrow account shall be made only subject to

approval of the owner;

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

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

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

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

I. the escrow account constitutes a specific pledge to the owner, and the contractor or subcontractor shall not, except to its surety, otherwise assign, pledge, discount, sell or transfer his interest in the escrow account, and money in the escrow account is not subject to levy, garnishment, attachment or other process;

J. the form and provisions of the escrow

agreement shall be included in all solicitations for construction services and shall be given to the contractor and subcontractors prior to entering into a contract;

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

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

Section 7. CARE AND PROTECTION OF WORK.--All material and work covered by partial payments become the property of the owner, but the contractor and subcontractor are not relieved from the sole responsibility for the care and protection of materials and work for which payments have been made; provided, however, the contractor and subcontractor have no duty for the care and protection of materials and work after the owner has assumed occupancy or use of the work.

Section 8. FINAL PAYMENT.--Ten days after certification of completion, any amounts remaining due the contractor or subcontractor under the terms of the contract shall be paid upon the presentation of the following:

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

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

C. proof of completion.

Section 9. DISPUTES--EFFECT ON RETAINAGE. --If a dispute arises between the owner and the contractor or subcontractor as to work performed or materials supplied, the owner is only entitled to retain the amount that is reasonably calculated to cover the cost to correct a deficiency in the work or materials supplied. All other money due to the contractor or subcontractor pursuant to the Retainage Act shall be paid as provided in that act. The money retained by the owner as provided in this section shall be deposited in the escrow account for the benefit of the contractor or subcontractor, but shall not be paid to the contractor or subcontractor until the dispute has been resolved.

Section 10. FAILURE TO DEPOSIT OR RELEASE RETAINAGE. -- If an owner fails to deposit retainage that is withheld or to release retainage as required by the Retainage Act, the owner

