

CHAPTER 136

(HB 490)

AN ACT relating to the construction industry.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 6 of this Act:

- (1) *"Construction" means the process of building, altering, repairing, improving, or demolishing any structures or buildings, or other improvements of any kind to any real property, but does not include processing equipment used for the process of manufacturing or the routine maintenance of existing structures, buildings, or real property;*
- (2) *"Contract" means a contract or agreement concerning construction made and entered into by and between a contracting entity and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor;*
- (3) *"Contracting entity" means an owner of real property; a trustee or agent of an owner of real property; or a public official, public authority, or other public entity authorized to contract under the Kentucky Revised Statutes;*
- (4) *"Contractor" means a person performing construction and having a contract with a contracting entity;*
- (5) *"Disputed amount" means to question in good faith the validity, either in whole or part, of a request for payment asserted by any party;*
- (6) *"Owner" means a person who holds an ownership interest in real property;*
- (7) *"Person" means an individual, corporation, estate, trust, partnership, limited liability company, association, joint venture, or any other legal entity;*
- (8) *"Processing equipment" means equipment which uses physical or chemical methods to increase the value of a raw material or product and is installed by the person contractually responsible to the contracting entity for the design, purchase, installation, and performance of that equipment;*
- (9) *"Retainage" means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor and that shall be paid upon completion of contractual obligations;*
- (10) *"Subcontractor" means any person performing construction covered by a contract between a contracting entity and a contractor who does not have a contract with the contracting entity; and*
- (11) *"Undisputed amount" means a good faith, valid, accurate, timely request for payment which has been submitted to any entity owing money, that the recipient of the request for payment has reviewed and agrees that the money is due and owing.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

- (1) *All payments on construction contracts entered into after the effective date of Sections 1 to 6 of this Act shall be made pursuant to the terms of the contract and as required in this section and Section 3 of this Act.*
- (2) *The following provisions in a contract for construction shall be against the public policy of this Commonwealth and shall be void and unenforceable:*
 - (a) *A provision that purports to waive, release, or extinguish the right to resolve disputes through litigation, in court or substantive or procedural rights in connection with such litigation, except that a contract may require binding arbitration as a substitute for litigation or require nonbinding alternative dispute resolution as a prerequisite to litigation;*
 - (b) *A provision that purports to waive, release, or extinguish rights provided by KRS Chapter 376 with the exception of partial waivers of lien rights provided by the contractor or subcontractor for progress payments; or*
 - (c) *A provision that purports to waive, release, or extinguish the right of a contractor or subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for*

delays in performing the contract that are, in whole or part, within the control of the contracting entity. Unusually bad weather that cannot be reasonably anticipated, fire, or other act of God shall not automatically entitle the contractor to additional compensation under this paragraph.

- (3) *Paragraph (c) of subsection (2) of this section shall not render null, void, and unenforceable a contract provision that:*
- (a) *Permits a contractor or subcontractor to recover that portion of delay costs caused by acts or omissions of the contracting entity;*
 - (b) *Requires notice of any delay by the party affected by the delay;*
 - (c) *Provides for reasonable liquidated damages;*
 - (d) *Provides for arbitration or any other procedure designed to resolve contract disputes; or*
 - (e) *Specifies which costs are recoverable by a contractor or subcontractor for delay.*
- (4) *If a provision of a construction contract is found to be null and unenforceable, that provision shall not affect other provisions of the contract that are in compliance with this section and, to this end, the provisions of the contract are severable.*
- (5) *Except as provided in subsection (7) of this section, all contracts for construction shall provide that payment of amounts due a contractor from a contracting entity, except retainage, shall be made within thirty (30) business days after the contracting entity receives a timely, properly completed, undisputed request for payment.*
- (6) *Except as provided in subsection (7) of this section, if the contracting entity fails to pay a contractor within thirty (30) business days following receipt of a timely, properly completed, undisputed request for payment, the contracting entity shall pay interest to the contractor beginning on the thirty-first business day after receipt of the request for payment, computed at the rate of twelve percent (12%) per annum on the unpaid amount. Twenty-five (25) business days following the submission of a timely, properly completed, undisputed request for payment, the contractor shall notify the contracting entity by certified mail if payment has not been received. The notice shall also include the date on which interest shall begin to accrue.*
- (7) *For purposes of subsections (5) and (6) of this section, a postsecondary institution and a board of education shall have forty-five (45) business days to make the payment required by those subsections. For purposes of payments by a board of education, the Department of Education shall have ten (10) business days, including the day the undisputed request for payment is received, to complete the final approval and application for payment and return it to the board of education. The ten (10) business days shall be included in the forty-five (45) business days. If the contracting entity fails to pay a contractor within forty-five (45) business days after receipt of the timely, properly completed, undisputed request for payment, the contracting entity shall, beginning on the forty-sixth day after receipt of the request, pay interest to the contractor computed at the rate of twelve percent (12%) per annum on the unpaid amount.*
- (8) *A contractor shall pay its subcontractors any undisputed amounts due within fifteen (15) business days of receipt of payment from the contracting entity, including payment of retainage if retainage is released by the contracting entity, if the subcontractor has provided a timely, properly completed, and undisputed request for payment to the contractor.*
- (9) *If a contractor fails to pay a subcontractor any undisputed amounts due within fifteen (15) business days of receipt of payment from the contracting entity, the contractor shall pay interest to the subcontractor beginning on the sixteenth business day after receipt of payment by the contractor, computed at the rate of twelve percent (12%) per annum on the unpaid amount.*
- (10) *Subsections (8) and (9) of this section shall apply to all payments from subcontractors to their subcontractors.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

- (1) *Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, until fifty percent (50%) of the construction project has been completed in accordance with the contract, a contracting entity, contractor, or subcontractor may withhold no more than ten percent (10%) retainage from the amount of any undisputed payment due, and retainage held after fifty-one percent (51%) of the construction project has been completed shall not be more than five percent (5%) of the total contract amount.*

- (2) *Within thirty (30) days after substantial completion of a construction project, the contracting entity or contractor shall release the retainage less an amount equal to two hundred percent (200%) of the contracting entity's reasonably estimated cost of the balance of any contractor's or subcontractor's contractually obligated, yet uncompleted, work remaining. The contracting entity's agent shall determine the reasonably estimated cost due under this subsection. The contracting entity, contractor, and any subcontractor with work yet to be completed shall mutually agree with the schedule for completion of the work necessary for release of final payment. Within fifteen (15) business days after the retainage has been released by the contracting entity to the contractor, the contractor shall release to the subcontractors their proportional shares of the retainage. For purposes of this subsection, "substantial completion" is the point at which, as certified in writing by the contracting entity, a project is at the level of completion, in strict compliance with the contract, where:*
- (a) *Necessary approval by public regulatory authorities has been given;*
 - (b) *The owner has received all required warranties and documentation, and*
 - (c) *The owner may enjoy beneficial use or occupancy and may use, operate, and maintain the project in all respects, for its intended purpose.*

Partial use or occupancy shall not necessarily result in the project being deemed substantially complete and shall not be evidence of substantial completion.

- (3) *If a contracting entity, contractor, or subcontractor fails to pay retainage, if any, pursuant to the terms of a contract or as required in this section, the contracting entity, contractor, or subcontractor shall pay interest to the contractor or subcontractor to whom payment was due, beginning on the first business day after the payment was due, at the rate of twelve percent (12%) per annum.*

SECTION 4. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

In any action to enforce Sections 1 to 6 of this Act, including arbitration, the court or arbitrator shall award costs and reasonable attorney fees to the prevailing party if the losing party is deemed to have acted in bad faith. For public construction contracts, recovery of attorney fees under this section shall be limited to the public contract rate for attorney's fees. Venue of such an action shall be within the Commonwealth of Kentucky.

SECTION 5. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

- (1) *Sections 1 to 6 of this Act shall be known and may be cited as the Kentucky Fairness in Construction Act.*
- (2) *Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, after a judgment for the contractor against a contracting entity is entered by a court of competent jurisdiction, a contractor has sixty (60) days to file a mechanic's lien as provided in KRS Chapter 376. The filing of this lien shall not preclude the contractor from seeking additional relief. This subsection shall not apply to public construction contracts with lien rights governed under KRS 376.250.*

SECTION 6. A NEW SECTION OF KRS CHAPTER 371 IS CREATED TO READ AS FOLLOWS:

- (1) *Except as provided in subsections (3) and (4) of this section, Sections 1 to 6 of this Act shall apply to public construction and public works projects, and to private construction, excluding residential construction.*
- (2) *Sections 1 to 6 of this Act shall apply to construction contracts entered into after the effective date of Sections 1 to 6 of this Act.*
- (3) *Sections 1 to 6 of this Act shall not apply to contracts entered into by a borrower of funds that are provided, insured, or guaranteed by the United States Department of Agriculture's Rural Utilities Service, or financed under a lien accommodation by the Rural Utilities Service.*
- (4) *Sections 1 to 6 of this Act shall not apply to any contract for construction of or relating to any facility as defined in KRS Chapter 278.*

Section 7. KRS 376.230 is amended to read as follows:

- (1) The lien provided for in KRS 376.210 shall be dissolved unless the person who furnishes the labor, materials, or supplies shall, *whichever is later*, within sixty (60) days after the last day of the month in which any labor, materials, or supplies were furnished, *or by the date of substantial completion*, file in the county clerk's office of each county in which labor, materials, or supplies were furnished, except as hereinafter provided, a statement in writing verified by affidavit of the claimant or his or her authorized agent or attorney, setting forth the amount due for which the lien is claimed, the date on which labor, materials, or supplies were last furnished

and the name of the canal, railroad, bridge, public highway, or other public improvement upon which it is claimed.

- (2) In all cases where a lien is claimed for labor, materials, or supplies furnished for the improvement of any bridge, public highway, or other public property owned by the state or by any county, charter county, urban-county, consolidated local government, or city, the statement of lien shall be filed only in the county clerk's office of the county in which the seat of government of the owner of the property is located.
- (3) The county clerk, upon the filing of the statement, shall make an abstract and entry thereof as now provided by law in case of mechanics' liens in the same book used for that purpose, and shall make proper index thereof. The clerk shall be paid by the party filing the claim, and for attesting any copy of the lien statement. If he or she is required to make the copy, he or she may make an additional charge as provided by law. The clerk's fees shall be determined pursuant to KRS 64.012. All of these charges may be recovered by the lien claimant as costs from the party and out of the fund against which the claim is filed.

Approved April 5, 2007.