



Ten Things Out-of-State Contractors Need to Know About Working in North Dakota

North Dakota may not have many trees, but it has economic power. Besides its obvious agricultural industries, it has coal, oil, gas, and wind. In this era of reshoring industry, development of those energy resources is likely to attract new business to the state. But working in North Dakota means more than just driving across the Red River. It also means that out-of-state contractors are venturing into a new jurisdiction whose laws and rules are often quite different from those they are familiar with. This article discusses some of the important nuances of North Dakota law affecting contractors. This article is not exhaustive, so contractors doing business in North Dakota should seek legal counsel about their forms, contracts, and practices to ensure compliance with North Dakota law.

1. Mechanic's Liens

It is a fact of life that contractors, subcontractors, and suppliers sometimes do not get paid. That is why most states, including North Dakota, have laws giving contractors, subcontractors, and suppliers the right to file and, if necessary, to foreclose mechanic's liens.¹ Mechanic's liens are created by law, so they are subject to the particular requirements imposed by each state's legislature. North Dakota's construction lien statute has a few quirks that contractors must be knowledgeable about to protect their ability to get paid for their work.

North Dakota has several layers of deadlines for preserving construction lien rights. For example, contractors must provide the owner written notice by certified mail of a potential lien claim at least 10 days before recording a construction lien statement with the county recorder.² The owner can demand an itemized and verified account of all claims within 15 days of the completion of a project, and the contractor seeking

a lien cannot take any action to enforce the lien until 10 days after that account is furnished to the owner.³ Unlike, for example, Minnesota, which allows 120 days to record a lien statement, in North Dakota, lien statements must be recorded within 90 days of the contractor's last contribution to the project for the contractor to retain all rights.⁴ After those 90 days, and until the lien statement is recorded, the contractor still has lien rights against the owner of the land during the project, but the lien will be ineffective against anyone who purchases or records an interest against the land, such as a mortgage.⁵

All of a contractor's lien rights terminate if a lien statement is not recorded within three years of the first item of material being furnished to the project.⁶ The recorded lien statement must include, (1) a description of the property; (2) the amount due; (3) the dates of the first and last contributions to the project by the lien claimant; and (4) with whom the lien claimant contracted.⁷ In contrast to Minnesota, where a contractor must file a lawsuit to foreclose a lien within one year of the last day of work⁸, in North Dakota, the contractor has three years after recording the lien statement to commence suit to foreclose the lien.⁹ Before commencing the lawsuit, however, the contractor must provide the owner with a written notice of intent to commence a lawsuit. That notice must be provided at least 10 days before commencing the lawsuit if served by personal service, or 20 days in advance if served by registered mail.¹⁰

North Dakota has an unusual statute regarding attorneys' fees in construction lien lawsuits. Because liens are intended to protect contractors, many states allow contractors to recover their attorneys' fees if they win a construction lien action. North Dakota, however, does not. Instead, the North Dakota mechanic's lien statute says, "Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorney's fees incurred by the owner."¹¹ There is a case in North Dakota where a contractor successfully foreclosed its lien and the jury awarded the contractor almost all of the money it claimed on its lien statement, but the court still awarded the owner its attorneys' fees. Contractors should be very cautious, therefore, that they only file accurate and valid construction lien claims to avoid liability for the owner's attorney's fees.¹²

2. Registration

All foreign corporations, that is those that were not incorporated in North Dakota, must obtain a certificate of authority from the North Dakota Secretary of State's Office before conducting business in North Dakota.¹³ The application for the certificate demands certain basic information about the corporation, such as its name, state of incorporation, date of incorporation, period of duration, purpose of the corporation, the address of its principal executive office, and the names and addresses of the corporation's officers and directors.¹⁴ A certificate of good standing from the state in which the corporation was incorporated must also be submitted with the application.¹⁵ The fee for the certificate of authority is \$145.¹⁶

After a foreign corporation obtains its certificate of authority, it must keep current information on file with the Secretary of State. The Secretary of State must be informed of changes in the foreign corporation's name, purpose, or entity type.¹⁷ The fees for filing amendments are nominal and are controlled by law.¹⁸

There are serious consequences for failure to obtain a certificate of authority. Foreign corporations cannot obtain licenses or permits without a certificate.¹⁹ They also cannot make any claims or file any lawsuits in North Dakota courts.²⁰ If a court determines that a foreign corporation has conducted business in North Dakota without a certificate of authority, the court is required to issue an order preventing that foreign corporation from transacting any further business until it obtains a certificate.²¹ Moreover, the North Dakota Attorney General can seek civil penalties of up to \$5,000 against the foreign corporation for conducting business without a certificate.²² And the Attorney General can seek civil penalties of up to \$1,000 against each director, officer, or agent of the foreign corporation who authorizes, directs, or participates in the transaction of business without a certificate of authority.²³

3. Registered Agent

In addition to a certificate of authority, foreign corporations must appoint and maintain a registered agent within the state.²⁴ The purpose of a registered agent is to accept service of legal notices and papers for the foreign corporation.²⁵ The registered agent forwards the legal papers to the foreign corporation for action.²⁶ If

a foreign corporation does not wish to maintain an office in North Dakota and appoint one of its own employees as its registered agent, it can hire another person or firm to be its registered agent. The North Dakota Secretary of State maintains a list of professional registered agents on its [website](#).

4. Licensing

Contractors must be licensed in North Dakota before performing any projects with a “cost, value, or price” that exceeds four thousand dollars.²⁷ North Dakota defines the term “contractor” very broadly. It means:

any person engaged in the business of construction, repair, alteration, dismantling, or demolition of bridges, highways, roads, streets, buildings, airports, dams, drainage or irrigation ditches, sewers, water or gas mains, water filters, tanks, towers, oil, gas, or water pipelines, and every other type of structure, project, development, or improvement coming within the definition of real or personal property, including the construction, alteration, or repair of property to be held either for sale or rental, and shall include subcontractor, public contractor, and nonresident contractor.²⁸

Contractors obtain their licenses by submitting an application to the North Dakota Secretary of State’s Office. The application must be accompanied by proof of liability insurance and a statement of compliance from North Dakota Workforce Safety & Insurance (worker’s compensation insurance).²⁹ There are four classes of contractor licenses ranging from a Class D license, which is limited to projects of less than \$100,000, to a Class A license, which is unlimited.³⁰ The fees for the different classes of licenses vary from \$100 for a Class D license to \$450 for a Class A license.³¹ Additionally, contractors may have to obtain trade specific licenses. Obvious examples are plumbers³² and electricians.³³ Working as a contractor without the appropriate license is a Class A misdemeanor, and it can lead to liability for civil penalties.³⁴

License status is important on public projects. With few exceptions, contractors cannot bid on public projects unless they have held a license for at least 10 days before the bid date.³⁵ Contractors should also keep their income, sales, and use tax payments current, because otherwise, they are prohibited by law from entering

contracts with public entities.³⁶

Design-build projects present licensing issues that go beyond the scope of this article. Contractors should seek legal counsel about whether they can enter into a design-build contract without violating North Dakota's architectural and engineering licensing laws, whether they can obtain an architecture or engineering license, and whether they can subcontract the design portion of the project to another firm.

5. Retention

North Dakota is fairly contractor friendly regarding retention. For contracts "entered between persons for the performance of work to be done by a contractor," 10% retention is allowed until the project is 50% complete, and no retention is permitted on the second half of the project.³⁷ If retained funds are invested by the owner, all interest that accrues must be paid to the contractor with the project's final payment.³⁸ Naturally, on federally funded contracts, federal rules and regulations supersede the state's retention rules.³⁹ The North Dakota Department of Transportation (NDDOT) is permitted to retain no more than 10%, but it can do so throughout the project.⁴⁰ Interestingly, NDDOT is required to retain at least 1% on all progressive payments.⁴¹ On other types of public projects, the public body can retain 10% until the project is 50% complete, but it is authorized to pay up to 95% of the retained funds when the project is 95% complete.⁴²

6. Dispute Resolution on NDDOT Contracts

North Dakota makes arbitration, instead of litigation in court, mandatory on all disputes "arising out of a contract for the construction or repair of a highway entered by the director [of NDDOT]."⁴³ By law, disputes must be arbitrated by a panel of three arbitrators when the claim is for one hundred thousand dollars or more.⁴⁴ This law is particularly hard on smaller contractors and subcontractors whose claims are likely to be closer to one hundred thousand dollars than one million dollars. Even though arbitration costs are split between the claimant and the NDDOT, paying for three arbitrators can get expensive in a hurry.

Note that this dispute resolution statute only applies to NDDOT contracts. Contractors should pay close attention to municipal and county road projects, which often incorporate the NDDOT Standard Specifications by reference. Sometimes those owners will incorporate the statutory arbitration provision; sometimes they do not.

7. Competitive Bidding on Public Projects

In addition to all the usual issues that arise in bidding on public projects, North Dakota's public bidding law has an unusual twist. It requires separate bids for the general, electrical, and mechanical portions of the project when any of those scopes of work, or any combination of them, exceed \$200,000.⁴⁵ If one of the general, electrical, or mechanical portions is estimated to be less than \$50,000, however, that scope can be included in one of the other prime contracts.⁴⁶ Public owners have the right, but not the obligation, to accept bids from a single contractor for the complete project, but they cannot accept such a bid unless it is lower than the combined total of the lowest responsible component bids for the project.⁴⁷ The public owner can also request separate bids for specialized portions of the contract.⁴⁸

This type of contracting is intended to increase competition, but it can have other effects that impact contractors. For example, having multiple prime contracts on a project increases the administrative cost for the public owner.⁴⁹ Instead of working with a single general contractor, the owner may be working with three different prime contractors. Contractors need to be vigilant to make sure that the public owner is not getting overwhelmed and is responding to the prime contractors in a timely fashion. Having multiple prime contractors on a project also increases the potential for coordination problems. As always, communication is key, but if that does not work, keeping detailed records is the best way to prevail if a dispute arises.

8. Prompt Pay Requirements on Public Projects

North Dakota has a prompt pay statute covering contracts with every "state agency, political subdivision, or school district."⁵⁰ That statute requires public entities to pay contractors within 45 days after receipt of an invoice, unless a different period is specified in the contract.⁵¹ If the public entity does not make timely payment on

undisputed amounts, interest accrues at 1.75% per month, and the interest is compounded every 45 days.⁵² Disputing a charge is not a bullet-proof defense to liability for interest. If the public entity does not make payment because it is disputing a charge, but the contractor ultimately prevails, the interest accrues and must be paid.⁵³

Prompt payment requirements on public contracts do not just apply to owners; they flow down to contractors as well. Contractors on public projects are required to pay their subcontractors and suppliers within 45 days after payment from the public owner.⁵⁴ Failure to pay results in the same interest charges of 1.75% per month, compounded every 45 days that public owners face.⁵⁵ Like the public owner, if the contractor does not pay its subcontractor or supplier because of a dispute, and the contractor loses, interest will accrue and must be paid.⁵⁶

Interestingly, the statute allows public entities, contractors, subcontractors, and suppliers to vary the prompt pay requirements in their contracts. Parties can change the payment period and the rate at which interest accrues in their contracts.⁵⁷ Contractors and suppliers planning to perform public projects in North Dakota should look at their contracts carefully to gauge their exposure to prompt payment risk.

9. Payment Bonds

Subcontractors and suppliers are protected from non-payment on public projects by North Dakota's payment bond statute. Except on NDDOT contracts, which have their own rules discussed below, anyone that supplies labor or material for a public improvement may sue on the contractor's payment bond if they have not been paid in full within 90 days after the completion of their contribution to the project.⁵⁸ Parties that contribute to the public improvement, but do not have a direct contractual relationship with the contractor, such as a sub-subcontractor or a subcontractor's supplier, must send the contractor furnishing the bond a written notice of their claim by registered mail within 90 days of the completion of their contribution before they can file suit.⁵⁹ Bond claims cannot be brought against a contractor or the contractor's surety later than one year after completion and acceptance of the project.⁶⁰

Slightly different rules apply on NDDOT projects. On NDDOT projects, anyone who provides labor or materials may file a claim on the contractor's bond if they have not been paid in full at the time of final acceptance of the project.⁶¹ Note that contractors may have to partially finance the project as a result. To avoid bond claims, the contractor must pay its sub-contractors and suppliers in full, even though NDDOT may still be holding retainage. Notice of a bond claim must be sent by certified mail to the contractor or the surety within 180 days of the completion of that claimant's contribution to the project.⁶² The lawsuit to enforce the bond claim must be commenced within one year of final acceptance of the project.⁶³

10. Pay-if-Paid and Pay-when-Paid Clauses

Payment timing and risk are always issues between contractors and subcontractors. There are two subtly different, but distinct, types of contract clauses that address those issues. A "Pay-if-Paid" clause says that the contractor will pay the subcontractor if the owner pays the contractor. This type of clause is a risk transfer mechanism that shifts the risk of owner default from the contractor to the subcontractor. A "Pay-when-Paid" clause, on the other hand, says that the contractor will pay the subcontractor when the owner pays the contractor. This type of clause appears to transfer risk of owner default, but most courts that have addressed the issue have ruled that payment risk transfers must be explicit. Courts typically treat "Pay-when-Paid" clauses as a requirement for the contractor to pay the subcontractor within a reasonable time, even if the owner does not pay the contractor.⁶⁴

North Dakota's courts have not issued any reported opinions directly stating their position on the enforceability of "Pay-if-Paid" or "Pay-when-Paid" clauses.⁶⁵ That lack of established law increases the risk of litigation in the event of a payment dispute between a contractor and a subcontractor because there is room to ethically argue both sides of that issue. Contractors and subcontractors performing work in North Dakota should have an attorney review their contracts' payment provisions to minimize that risk.

Conclusion

North Dakota is the land of opportunity. But the inevitable companion of opportunity is risk. Contractors can mitigate some of the risk of operating in an unfamiliar jurisdiction by seeking legal counsel to review their forms, contracts, and practices to avoid traps for the unwary.

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In North Dakota, this remedy is called a “construction lien,” rather than the more commonly used “mechanic’s lien.”

²See N.D.C.C. § 35-27-02(4). “N.D.C.C.” is the abbreviation for the North Dakota Century Code, the state’s collection of statutes. Those laws are available at <http://www.legis.nd.gov/general-information/north-dakota-century-code>.

³See N.D.C.C. § 35-27-09.

⁴See N.D.C.C. § 35-27-13.

⁵See N.D.C.C. § 35-27-14.

⁶See *id.*

⁷See N.D.C.C. § 35-27-13.

⁸See Minn. Stat. § 514.12 subd. 3.

⁹See N.D.C.C. § 35-27-25.

¹⁰See N.D.C.C. § 35-27-24.

¹¹ N.D.C.C. § 35-27-24.1 (emphasis added).

¹²See *Northern Excavating Co., Inc. v. Sisters of Mary of the Presentation Long Term Care*, 815

N.W.2d 280 (N.D. 2012).

¹³See N.D.C.C. § 10-19.1-134. This discussion focuses on corporations, but there are similar, though not necessarily identical, statutes for other business forms, such as limited partnerships (^{see} N.D.C.C. § 45-10.2-78), limited liability partnerships (^{see} N.D.C.C. § 45-22-03), and limited liability companies (^{see} N.D.C.C. § 10-32.1-74). Your attorney can advise you on the rules that pertain to your firm’s particular entity type.

¹⁴See N.D.C.C. § 10-19.1-135(1).

¹⁵See N.D.C.C. § 10-19.1-135(2).

¹⁶See N.D.C.C. § 10-19.1-147(20).

¹⁷See N.D.C.C. §§ 10-19.1-137 and -139.

¹⁸See N.D.C.C. § 10-19.1-147.

¹⁹See N.D.C.C. § 10-19.1-134(1).

²⁰See N.D.C.C. § 10-19.1-142(1). They can, however, defend themselves against any claims or lawsuits brought against them in North Dakota. See N.D.C.C. § 10-19.1-142(2).

²¹See N.D.C.C. § 10-19.1-142(6).

²²See N.D.C.C. § 10-19.1-142(5).

²³See *id*

²⁴See N.D.C.C. § 10-19.1-138. Again, this is also true for other business forms, such as partnerships and LLC's.

²⁵See N.D.C.C. §§ 10-01.1-02(2) and (19).

²⁶See N.D.C.C. § 10-01.1-14.

²⁷See N.D.C.C. § 43-07-02.

²⁸N.D.C.C. § 43-07-01(1).

²⁹See N.D.C.C. § 43-07-04.

³⁰See N.D.C.C. § 43-07-07.

³¹*id*

³²See .

³³See N.D.C.C. § 43-18-11.

³⁴See N.D.C.C. § 43-09-09.

³⁵See N.D.C.C. § 43-07-02(2).

³⁶See N.D.C.C. § 43-07-12.

³⁷See N.D.C.C. § 43-07-11.1.

³⁸See *id*.

³⁹See *id*.

⁴⁰See *id*.

⁴¹See N.D.C.C. § 24-02-25.

⁴²See *id*

⁴³See N.D.C.C. § 48-01.2-13 (applying to public improvements); N.D.C.C. § 40-22-37 (applying to municipal contracts); and N.D.C.C. § 61-35-103 (applying to water districts).

⁴⁴See N.D.C.C. § 24-02-26.

⁴⁵See *id*

⁴⁶See N.D.C.C. § 48-01.2-06.

⁴⁶See *id.*

⁴⁷See *id.*

⁴⁸See *id.*

⁴⁹See 1997 N.D. Op. Atty. Gen. L-84.

⁵⁰See N.D.C.C. § 13-01.1-01.

⁵¹See *id.*

⁵²See N.D.C.C. §§ 13-01.1-02, -03, and -05.

⁵³See N.D.C.C. § 13-01.1-05.

⁵⁴See N.D.C.C. § 13-01.1-06.

⁵⁵See *id.*

⁵⁶See N.D.C.C. § 13-01.1-05.

⁵⁷See N.D.C.C. §§ 13-01.1-01, -02, and -06.

⁵⁸See N.D.C.C. § 48-01.2-11.

⁵⁹See *id.*

⁶⁰See N.D.C.C. § 48-01.2-12.

⁶¹See N.D.C.C. § 24-02-25.1.

⁶²See *id.*

⁶³See N.D.C.C. § 24-02-25.2

⁶⁴See, e.g., *Mrozik Constr., Inc. v. Lovering Assoc., Inc.*, 461 N.W.2d 49, 51-52 (Minn. Ct. App. 1990).

⁶⁵But see *Gift v. Ehrichs*, 284 N.W.2d 435, 440 (N.D. 1979) (discussing effect of failure of a condition precedent to payment on a debt).

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