

## DIGEST OF PROMPT PAYMENT LAWS - NEW JERSEY AND PENNSYLVANIA

Prepared for Masonry Contractors of New Jersey by:  
Timothy J. Korzun, Esq., Sheak & Korzun, P.C.  
1 Washington Crossing Road, Pennington, New Jersey 08534  
609-737-6885; Fax: 609-737-6808; E-mail: [sheakkorzun@comcast.net](mailto:sheakkorzun@comcast.net)

### New Jersey Prompt Payment Act - amended to be effective 9/1/2006 What You Get As A Claimant

1. The amended Prompt Payment Act statute applies to all construction contracts for improvements to real property. "Owners" includes public/governmental entities and agencies. It took effect September 1, 2006. The new version only affects contracts made after September 1, 2006.
2. Within 30 days after you submit a requisition for payment, you are to be paid in full. If your contract provides for a different time frame between requisition and payment, the contract will govern.
3. Your billing is deemed to be approved and certified by law 20 days after the owner receives it...
4. ... Unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment.
5. In the case of a public entity that requires a vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and paid during the entity's subsequent payment cycle. In order for this exception to apply it has to be stated in the bid specifications and contract documents.
6. If timely payment is not made within the thirty days and no proper withholding is done, you are entitled to an award of prejudgment interest at the prime rate plus 1% from the date a delinquent payment is due until judgment is entered.
7. A new change is that counsel fees and costs also can be awarded when judgment is entered on a collection action.
8. A claimant who is a general contractor or subcontractor has the option to suspend work after 7 day written notice if there is no response from the higher tier/owner. The stop work option is not available, however, if the project is a federally funded transportation project - then a work suspension is not permitted if the effect of the claimant's work suspension will jeopardize federal funding per 49 C.F.R. 18.20.
9. The new law says that the remedies in the Prompt Payment Act are meant to be cumulative. In that case it may be possible to seek additional claims for interest under the New Jersey court rule permitting prejudgment interest on certain contract claims. *See*, New Jersey Court Rule R. 4:42-11 (prejudgment interest on contract claims for liquidated amounts are allowed

upon entry of judgment in the discretion of the court - calculated at prime plus 2%). So far there is no reported case saying this remedy now also available in addition to Prompt Payment Act interest.

10. The new law contains a jurisdictional clause requiring court cases and ADR proceedings to be conducted in New Jersey on New Jersey-based construction.

#### **What owners and contractors paying money to lower tiers must do**

1. If you have good cause to dispute a portion of a contractor's or subcontractor's bill, be sure to give the itemization required within 20 days of your receipt of the invoice, stating the reasons for withholding. The more specific you can be, the better.
2. If your contract contains a different time frame for paying requisitions, be sure it is spelled out clearly. If it is hidden or looks like a provision that was "forced" on the lower tier a judge may not enforce it. If you can show a good business reason for the changed deadline, however, it should be enforceable.
3. Alternative dispute resolution (ADR) such as mediation or arbitration is specifically to be listed in all contracts after September 1, 2006 as an option (though not a mandatory one) for adjusting/asserting claims under an existing contract/subcontract. The statute only says the contract should provide for it. Since you have to provide for it, it stands to reason you can choose what it should be. You could make it a settlement meeting or some form of mediation. If you say nothing in the contract about optional ADR, the court will probably force you and your opponent to attend a court-ordered mediation effort before you can get a court trial.
4. ADR is not required, however, for bid solicitation contests or award disputes and, interestingly, is not required when the dispute is over whether a contract or subcontract has been formed or not.
5. While the amended act takes effect immediately, it does not apply to contracts for the improvement of structures entered into before the effective date of September 1, 2006. Those are governed by the old law, which will not include the mandatory ADR and does not provide for an automatic counsel fee.

The text of the new amendments follows at the end of this paper.

#### **Pennsylvania Prompt Pay Act 62 Pa. C.S.A. § 3931 through § 3939**

#### **What You Get As A Claimant**

The Pennsylvania statute applies to public works contracts only. By contrast, the New Jersey law, as amended, applies to both public and private contracts for construction/real estate improvements.

The basic provisions of the law have been recently summarized thusly:

1. A subcontractor's performance that complies with the subcontract entitles the subcontractor to payment from its contractor. *See* 62 Pa.C.S.A. §§ 3931(b) and 3933(a).
2. When a subcontractor has performed under its agreement, "the contractor shall pay to the subcontractor ... the full or proportional amount received for each such subcontractor's work and material, based on work completed or services provided under the subcontract, 14 days after the receipt of a progress payment." *Id.* at § 3933(c).
3. The contractor does not have to comply with section 3933(c) and may withhold payment for a "deficiency item" if the governmental agency does so, *id.* at § 3934(a) and (b), but must give the subcontractor its reasons for doing so "within 15 calendar days of the date after the receipt of the notice of the deficiency item from the government agency." *Id.* at § 3934(b).
4. Within twenty days of a contractor's receipt of payment, the contractor must also pay its subcontractors "their earned share of the payment." *Id.* at § 3922.
5. If a progress payment is not made to a subcontractor either by the contractual deadline or the statutory fourteen-day deadline in section 3933(c), the contractor is liable for interest as well as the amount due. *Id.* at § 3933(d).
6. If a payment is withheld in "bad faith" (for an "arbitrary or vexatious" reason), a penalty of one percent per month on the amount withheld may be imposed. *Id.* at § 3935(a).
7. A party prevailing on any claim under the act is entitled to attorney's fees incurred in pursuing the claim. *Id.* at § 3935(b).

#### **What owners and contractors paying money to lower tiers must do**

1. As noted above, the contractor may withhold payment for a "deficiency item" if the governmental agency does so, *id.* at § 3934(a) and (b). To do this, you must give the subcontractor its reasons for doing so "within 15 calendar days of the date after the receipt of the notice of the deficiency item from the government agency." *Id.* at § 3934(b). Honor this time deadline scrupulously.
2. Even if payment is late under the original forty-five day period in the statute (or within the term the contract provides), there is still a fifteen-day grace period in which the interest charge can be avoided if payment is made on or before the 15th calendar day after the payment date required under this sub-chapter.

*See discussion in G.R. Sponaugle & Sons, Inc. v. Hunt Construction Group, Inc.*, 366 F. Supp.2d 236, 245-46 (M.D. Pa. 2004)

**Here is a brief digest of the Pennsylvania law, section by section:**

**Sec. 3931** This section recites the overall policy that a government agency shall pay its contractor promptly upon the funds being earned, and that a contractor shall pay its subcontractors promptly as well.

While the statute language as written does not limit its scope to public works only, the statute is enacted as part of the Pennsylvania General Procurement Code under the sub-heading Contracts for Public Works, and the owners are defined as government agencies.

**Sec. 3932** Defines the interest due and payable for improperly withheld funds. If payment is not timely made within forty-five calendar days of the requisition being received, the government agency or contractor must pay the aggrieved contractor, subcontractor or vendor interest.

Even if payment is late under the original forty-five day period in the statute (or as the contract provides), there is still a fifteen-day grace period in which the interest charge can be avoided if payment is made on or before the 15th calendar day after the payment date required under this sub-chapter.

The interest shall be computed at the rate determined by the Secretary of Revenue for interest payments on overdue taxes or the refund of taxes as provided in 72 Pa. C.S.A. sections 806 and 806.1. If the contract provides a different time limit for payment to issue, that time limit will apply. These tax refund interest laws provide that the annual rate of interest shall be the interest rate established by the Secretary of the Treasury of the United States under the provisions of the Internal Revenue Code effective January 1 of such calendar year without regard to any change or changes in that Federal interest rate during the calendar year. *See* cites at end.

Otherwise, under Pennsylvania law, when interest is to be compounded and no other formula is specified, the statutory interest rate is fixed at six percent simple interest. 41 Pa. C.S.A. Sec. 202.

**Sec. 3933** Defines the procedure for prompt payment by a contractor upon its payment by the owner. It states that interest will be due under 3932(c) if payment is not timely made unless the payment is legally withheld or there is a change in circumstances beyond the contractor's control.

**Sec. 3934** Provides the vehicle whereby a public owner or general contractor can lawfully withhold payment for what is called a "deficiency item". The law requires, however, that the owner/contractor must pay the claimant the rest of any contract payment which is due and owing. In order to obtain the protection of this safe haven, the owner/contractor must give notice within 15 days of withholding of payment and identify the deficiency item (in short, give a reason for the withholding).

**Sec. 3935** Is known as the “bad faith” section, meaning the payment is deemed to be withheld in bad faith if no valid reason for withholding is given. The “bad faith” allegation is now a common pleading in collection cases. If found to exist the court imposes a 1% penalty for the defendant’s “bad faith” in improperly withholding overdue payment plus the claimant can request a counsel fee award.

**Sec. 3936** Is a catch-all provision to avoid any possible claim of federal pre-emption: If a federal law arguably governs, the state statute defers to federal law so there is no conflict with federal statutes or regulations.

**Sec. 3937** Outlaws one-sided forum selection clauses (clauses requiring that any case must be tried or ADR held in another state). Such clauses are prohibited if venue/choice of law is to be set in another jurisdiction.

**Sec. 3938** Is an exception to the interest provision as applied to a public entity. It states no interest chargeable against government when legislature or municipality does not allocate funds legislatively for contract work in question. No cases have arisen under this section.

**Other Pa. cases interpreting statute:**

As the statute itself provides a private contract payment deadline provision, if more generous, will supersede the one in the statute. If the private contract clause calls for payment regardless of when payment is made by the owner, the subcontractor is entitled to enforce it.  
*American Rock Mechanics, Inc. v. N. Abbonizio Contractors, Inc.* 887 A.2d 322 (Pa. Super. 2005)

The provisions of Pennsylvania’s Contractor and Subcontractor Payment Act permitting a subcontractor to seek penalty payments and attorney fees against a contractor according to the provisions of their subcontract did not provide for the recovery of such damages against a contractor’s payment bond surety unless the bond explicitly covers such claims.  
*R.W. Sidley, Inc. v. U.S. Fidelity & Guar. Co.*, 319 F.Supp.2d 554 (W.D.Pa. 2004).

Under the new Pa. Prompt Payment Procurement Code, so long as the general contractor has paid its subcontractor in full for the work of sub-subcontractors, neither the general contractor nor its surety have any legal duty to pay twice to satisfy a sub-subcontractor’s claim which the subcontractor has not paid. There are two separate cites for two opinions in the case.  
*Trumble Corp. v. Boss Corp. and A&L Construction*, 2002 WL 1425294 (Pa. Cmwlth Ct. 2002)  
AND: 768 A.2d 368 (Pa. Cmwlth Ct. 2001).

## Appendix 1 - Text of Amended New Jersey Prompt Payment Act

### N.J.S.A. 2A:30A-1 - Definitions.

As used in this act:

“**Billing**” means, in accordance with the terms and definitions of the applicable contract, any periodic payment, final payment, written approved change order or request for release of retainage.

“**Prime contractor**” means a person who contracts with an owner to improve real property.

“**Improve**” means to build, alter, repair or demolish any structure upon, connected with, on or beneath the surface of any real property; to excavate, clear, grade, fill or landscape any real property; to construct driveways and private roadways on real property; to furnish construction related materials, including trees and shrubbery, for any of the above purposes; or to perform any labor upon a structure, including any design, professional or skilled services furnished by an architect, engineer, land surveyor or landscape architect licensed or registered pursuant to the laws of this State.

“**Structure**” means all or any part of a building and other improvements to real property.

“**Owner**” means any person, including any public or governmental entity, who has an interest in the real property to be improved and who has contracted with a prime contractor for such improvement to be made. “Owner” shall be deemed to include any successor in interest or agent acting on behalf of an owner.

“**Prime rate**” means the base rate on corporate loans at large United States money center commercial banks.

“**Real property**” means the real estate that is improved upon or to be improved upon.

“**Subcontractor**” means any person who has contracted to furnish labor, materials or other services to a prime contractor in connection with a contract to improve real property.

“**Sub-subcontractor**” means any person who has contracted to furnish labor, materials or other services to a subcontractor in connection with a contract to improve real property.

### **2A:30A-2. Payments on contracts approved and certified by owner; time for payments to contractors, subcontractors, and sub-subcontractors; alternative dispute resolution**

A. If a prime contractor has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved and certified by the owner or the owner's authorized approving agent, the owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing

date, which for a periodic billing, shall be the periodic billing date specified in the contract. The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment, except that in the case of a public or governmental entity that requires the entity's governing body to vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and paid during the entity's subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents.

B. If a subcontractor or sub-subcontractor has performed in accordance with the provisions of his contract with the general contractor or subcontractor and the work has been accepted by the owner or general contractor, as applicable, and the parties have not otherwise agreed in writing, the contractor shall pay to his subcontractor and the subcontractor shall pay to his sub-subcontractor within 10 calendar days of the receipt of each periodic payment, final payment or receipt of retainage monies, the full amount received for the work of the subcontractor or sub-subcontractor based on the work completed or the services rendered under the applicable contract. In the case of ongoing work on the same project for which partial payments are made, the amount of money owed for work already completed shall only be payable if the subcontractor or sub-subcontractor is performing to the satisfaction of the contractor or subcontractor, as applicable.

C. If a payment due pursuant to the provisions of this section is not made in a timely manner, the delinquent party shall be liable for the amount of money owed under the contract, plus interest at a rate equal to the prime rate plus 1%. Interest on amounts due pursuant to this section shall be paid to the subcontractor or sub-subcontractor for the period beginning on the day after the required payment date and ending on the day on which the check for payment has been drawn. The provisions of this subsection c. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c. 73 (C.27:1B-3), if that project receives federal funding and the awarding agency has been notified by the federal government that it will be classified as a high risk grantee pursuant to 49 C.F.R. 18.12.

D. A prime contractor, subcontractor or sub-subcontractor may, after providing seven calendar days' written notice to the party failing to make the required payments, suspend performance of a construction contract, without penalty for breach of contract, until the payment

required pursuant to this section is made, if the contractor, subcontractor or sub-subcontractor: is not paid as required by this section; is not provided a written statement of the amount withheld and the reason for the withholding; and the payor is not engaged in a good faith effort to resolve the reason for the withholding. The provisions of this subsection d. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c. 73 (C.27:1B-3), if that project receives federal funding and the application of this provision would jeopardize the funding because the owner could not meet the federal standards for financial management systems as outlined in 49 C.F.R. 18.20.

E. (1) The rights, remedies or protections provided by this section for prime contractors, subcontractors and sub-subcontractors shall be in addition to other remedies provided pursuant to any other provision of State law. To the extent that the provisions of this section provide greater rights, remedies or protections for prime contractors, subcontractors and sub-subcontractors than other provisions of State law, the provisions of this section shall supersede those other provisions.

(2) No provision of this section shall be construed as restricting in any way the rights or remedies provided by any other applicable State or federal law to an owner who is a resident homeowner or purchaser with respect to the real property being improved.

F. All contracts for the improvement of structures entered into after the effective date of P.L.2006, c. 96 between owners, prime contractors, subcontractors or sub-subcontractors shall provide that disputes regarding whether a party has failed to make payments required pursuant to this section may be submitted to a process of alternative dispute resolution. Alternative dispute resolution permitted by this section shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts. In any civil action brought to collect payments pursuant to this section, the action shall be conducted inside of this State and the prevailing party shall be awarded reasonable costs and attorney fees.



**Appendix 2: Pa. interest provisions cited in 62 Pa. C.S.A. sec. 3932(c):**

**72 Pa. C.S.A. 806: Interest on taxes and bonus due the Commonwealth**

All taxes due the Commonwealth shall bear simple interest from the date they become due and payable until paid. The interest rate per annum during each calendar year shall be the interest rate established by the Secretary of the Treasury of the United States under the provisions of the Internal Revenue Code [FN1] of 1954, effective January 1 of such calendar year without regard to any change or changes in said Federal interest rate during such calendar year. No penalties shall bear any interest whatsoever. The payment of interest, as aforesaid, shall not relieve any person from any of the penalties, commissions or additional tax prescribed by law for neglect or refusal to furnish timely returns or reports to the Department of Revenue, or to pay any claim due to the Commonwealth from such person. The Secretary of Revenue shall publish the rate of interest for each calendar year in the Pennsylvania Bulletin. In the case of any tentative tax, estimated tax or installment payment, interest shall run on any unpaid amount from the last day the payment is due to the date paid. In the case of tax which is resettled as a result of a final change or correction of taxable income by the Commissioner of Internal Revenue or any other agency or court of the United States, interest shall be computed on any additional tax due from thirty (30) days after the corporation receives notice of such final change or correction until paid.

Whenever the tax liability of a person is so affected by any payment or credit, settlement or resettlement, assessment or reassessment or determination or redetermination as to change the interest liability of such person, such interest liability shall be recomputed and adjusted by the Department of Revenue and approved by the Department of the Auditor General in cases in which said latter department is required to approve settlements and resettlements, so as to correspond to the tax liability as changed, without the necessity for the filing of any petition or request by such person or by said departments.

[FN1] 26 U.S.C.A. § 6621 *et seq.*

**72 Pa. C.S.A. 806.1 Interest on overpayments**

- (a) "Overpayment" shall mean any payment of tax which is determined in the manner provided by law not to be legally due. Simple interest shall be allowed and paid by the Commonwealth upon any overpayment to the Commonwealth of any tax. The interest shall be allowed and paid for the period during which the Commonwealth retained the overpayment, beginning with the date of the overpayment, except that:
- (1) Any tax actually deducted and withheld at the source shall be deemed to have been overpaid on the last day prescribed for filing the return or report for the taxable year (determined without regard to any extension of time for filing).
  - (2) Any amount overpaid as estimated tax, tentative tax or installment payment for a taxable year shall be deemed to have been overpaid on the last day prescribed for

filing the final return or report for the taxable year (determined without regard to any extension of time for filing).

- (3) Any overpayment made before the last day prescribed for payment shall be considered made on the last day.
  - (4) Any amount claimed to be overpaid with respect to which an administrative review or appellate procedure is initiated in the manner provided by law by the taxpayer shall be deemed to have been overpaid sixty (60) days following the date of initiation of said review or procedure.
  - (5) If any overpayment of tax is refunded or credited within seventy-five (75) days after the last date prescribed for filing the final return or report of the tax (determined without regard to any extension of time for filing) or, in case the final return or report is filed after the last day, and is refunded or credited within seventy-five (75) days after the date the final return or report is filed, no interest shall be allowed on the overpayment. For the purpose of this clause, a final return or report shall be deemed to have been filed only if, when it is received by the Department of Revenue, it has been submitted on a permitted form containing (i) the taxpayer's name, address and identifying number and the required signature; and (ii) sufficient required information, either on the permitted form or attachments thereto, to permit the verification of tax liability shown on the return.
  - (6) Any tax paid to an officer, licensee or collector shall be deemed to have been overpaid no earlier than the first date that the tax is required by law to be reported and transmitted to the department by the officer, licensee or collector.
  - (7) No overpayment of interest or penalty shall bear any interest whatsoever.
- (b) Interest on overpayments shall be allowed and paid at the rate as is prescribed for underpayments under section 806 less two per centum.
- (b.1) Interest on overpayments of the tax imposed under Article III of the act of March 4, 1971 (P.L. 6, No. 2), known as the "Tax Reform Code of 1971," shall be allowed and paid at the same rate as is prescribed for underpayments under section 806.
- (c) Interest on overpayments shall be allowed and paid as follows:
- (1) In the case of a cash refund, from the date of the overpayment to a date preceding the date of the Commonwealth's refund check by not more than thirty (30) days.
  - (2) In the case of a credit for an overpayment, from the date of the overpayment to:
    - (i) The date of the Commonwealth's notice to the taxpayer of the final determination of the credit; or

- (ii) The date as of which the credit is applied, whichever first occurs: Provided, however, That in the case of a cash refund of a previously determined credit, interest shall be allowed and paid on the amount of the credit from a date ninety (90) days after the filing of a petition for a cash refund to a date preceding the date of the refund check by not more than thirty (30) days whether or not the refund check is accepted by the taxpayer after tender to the taxpayer.
- (3) The taxpayer's acceptance of the Commonwealth's check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon. Tender of a refund check shall be deemed acceptance thereof for the purposes of this section.