
CONSTRUCTION LAW NEWS

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DIGEST OF PROMPT PAYMENT LAWS - NEW JERSEY

In September 2006, New Jersey adopted revisions to the Prompt Payment Act. These amendments were meant to give the statute some "teeth" so that unpaid contractors would have some additional weapons to use in confronting owners or higher tiers who were wrongfully withholding earned contract funds. The new law has created some controversy, in that some contractors who have studied it say they are not sure it will really work for them. Some of the new provisions look like they were adopted as compromises and accordingly are somewhat vague - particularly the provisions calling for alternate dispute resolution (ADR). Here is a survey of the amended law. In our next newsletter we will provide a digest of the Pennsylvania version of the Prompt Payment law, for the benefit of those parties doing public contract work in the Commonwealth.

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, N.J.S.A. 2A:30A-1 et. seq., 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 thirty days and no proper withholding is done, you are entitled to an award of pre-judgment 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 a 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 pre-judgment 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 remedies 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.

Appendix - 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.

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Do you have a general question about construction law or legal procedures that you have encountered in your business? Would the answer be useful or interesting for our other readers? Please send your questions to us, and we will try to answer them in a future letter. Direct your questions to:

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