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The Impact Of New Jersey's Expanded Prompt Payment Law

Prompt Payment Act Amended

On September 1, 2006, New Jersey amended its Prompt Payment Act. The Act governs private and public construction contracts entered into as of September 1, 2006, and affords certain protections to prime contractors, subcontractors, and second-tier subcontractors and suppliers. Requests for payments are termed a "billing" under the Act and include periodic payments, written approved change orders, final payments and requests for release of held retainage.

Once the prime contractor performs under the contract and the owner-approved payment comes due, the owner must pay the amount due within thirty (30) days of the "billing date" as specified in the contract. Billings are considered approved by the owner 20 days after receipt unless the owner provides the prime contractor with a written statement of the reason(s) for the amount withheld within 20 days of receipt of the billing.

If the owner believes that only a portion of the work is unacceptable, payment may be withheld for the reasonable value of that portion only. With respect to public projects where owners must vote on authorizations to make payments, bid specifications and contract documents may indicate that billings must be voted on at the next scheduled meeting and paid during the subsequent payment cycle.

Prime contractors are required to pay subcontractors, and subcontractors must pay sub-subcontractors, within ten (10) days of receiving payment themselves, unless the parties agreed otherwise in their written contract. The amount paid by the prime contractor or subcontractor must be the full amount it received for the work provided by the respective subcontractor or sub-subcontractor. Unlike owners, prime contractors and subcontractors withholding payments are not under a specific obligation to provide a reason for withholding such payment. However, if they do not provide written justification, the party who is not paid may have the right to suspend work until paid.

Owners, prime contractors or subcontractors who do not making timely payment are liable for interest on the amount due at the prime rate, plus one percentage (1%) point. Interest begins to accrue the day after payment was due. In addition, the party not receiving payment may have a right to suspend work. If that party also did not receive a written statement of the amount withheld and the reason(s) and the payor is not "engaged in a good faith effort to resolve" the dispute, then work may be suspended. A party intending to suspend work must provide seven (7) days written notice of its intent to do so. This can be a "touchy" subject, which requires consultation with an attorney first.

The Act further provides that construction contracts "shall" provide that payment disputes "may" be submitted to "alternate dispute resolution." The unpaid parties have the choice of forum, whether it is Court or a mediation/arbitration. Civil actions to collect payments under the Act must be brought in New Jersey and the prevailing party is entitled to an award of attorneys' fees. Arbitration proceedings need not be brought in New Jersey. However, there may be no right to attorneys' fees unless the contract or arbitration clause specifies.

As of June 2007, there are no reported cases in New Jersey referencing or interpreting the Prompt Payment Act. As such, the Act is open for interpretation above and beyond its clear and stated meaning and is a hot topic in the New Jersey construction industry. Cases interpreting many of the provisions of the Act should be surfacing in the next year, which will shed some light on this newly amended legislation.

For more information regarding the Prompt Payment Act and other construction industry matters, contact Stanley Gentile, Esquire at 856-354-2309, or sgentile@archerlaw.com.

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