

Robert C. Kozak, Esq.
3619 Crossings Drive, Suite B
Prescott, AZ 86305

928-445-7140
bkozak@qwestoffice.net

ARIZONA'S PROMPT PAY ACT

(Private Sector Projects)

OVERVIEW

Prompt Payment Act Applies To Owners, Generals, and Subs:

- subcontractors must timely submit payment applications to generals
- general contractors must timely submit payment applications to owners
- EVERYONE must carefully scrutinize payment applications and invoices
- owners must promptly pay general contractors
- general contractors must promptly pay subcontractors
- generals and subs must promptly pay suppliers

Contractor's Obligations:

- strict deadlines must be met
- for submission: payment applications must be thoroughly itemized
- before payment: payment applications must be thoroughly scrutinized
- requires internal calendaring methods
- requires maintenance of and adherence to disciplined cash flow controls (billings can no longer be submitted "when money is needed")

THE ACT

Billing Cycle:

- construction contracts lasting over 60 days have a 30-day billing cycle. ARS §§32-1129.01(A) and 32-1129.02(A)
- only one billing or estimate may be submitted during each 30 day billing cycle (unless otherwise agreed to in writing). ARS §32-1129.01(I)

Owner-Occupied Dwellings:

Pursuant to ARS §32-1129.07(B) the Act does not apply to owner-occupied dwellings *unless*:

- a statement summarizing the Act appears "in a clear and conspicuous manner" on each and every page of the bid plans and on construction plans
- and the statement must be the approved statutory language appearing in ARS §32-1129.07(A)
- NOTE: contracts between the general and subcontractors, and a contractor and supplier are not subject to this limitation.

Changing the Terms of the Act:

- the billing cycle, time of payment, certificate of approval, definitions, retention and final payment terms can only be changed if the change is made in strict compliance with ARS §§32-1129.01(A),(B),(C),(F),(G),(V) and (W)
- a change of a specific term requires the use of specific language within the contract and on the plans

Payment Application:

- NO APPLICATION, NO PAYMENT: the owner is only required to pay when the contractor submits a written payment application in compliance with the contract and the Act. ARS §32-1129.01
- every payment application must contain a detailed itemization of the work performed and supplies provided within the prior 30 days. ARS §32-1129.01(A)
- payment applications (including payments for estimated work and materials) must be made "in accordance with the terms of the contract between the parties." ARS §32-1129.01(O)

Applications Must Be Challenged within 14 Days:

- owner and general contractor are required to review/scrutinize and challenge any applications for payment within 14 days after submission. ARS §§32-1129.01(D) and 32-1129.02(E)
- if a challenge is not made in writing and delivered within 14 days to the general/sub submitting the bill, the billing application is considered to have been approved. ARS §32-1129.01(A)
- challenges must be in writing. ARS §§32-1129.01(D) and 32-1129.02(E)
- the challenge must state in reasonable detail the reason for not approving all or a portion of the payment application. ARS §§32-1129.01(D) and 32-1129.02(E)
- if no written challenge has been submitted in 14 days, the payment application is deemed to be approved. ARS §§32-1129.01(D) and 32-1129.02(E)
- NOTE: payment of a bill does not prevent a later challenge to the quality of the workmanship or to compliance with the contract. ARS §32-1129.01(D) and (K)

- if requested by the subcontractor, the general contractor must notify the subcontractor where the owner challenges that subcontractor's application. ARS §32-1129.02(G) and (F)

Payment May Be Withheld:

- *only if* the challenge is properly made. ARS §§32-1129.01(D) and 32-1129.02(E)
- payment may be withheld for a variety of reasons: unsatisfactory job progress, uncorrected work or materials, disputed work or materials, failure to comply with the contract, failure to pay (for labor, equipment, subs or suppliers, third-party claims), damage to the owner, reasonable evidence that the contract cannot be completed for the contracted amount, and failure to comply with a material provision of the contract. ARS §§32-1129.01(D) and 32-1129.02(C)
- NOTE: Payment does not prove the work was properly performed if the workmanship is later challenged
- payment **MUST** be made for the undisputed amount of the payment application. ARS §§32-1129.01(E) and 32-1129.02(C)

Payment Within 7 Days After Approval:

- owners must pay contractors within 7 days after approval of the application for payment. ARS §32-1129.01(A)
- generals must pay subcontractors within 7 days after approval of the application for payment. ARS §32-1129.02(B) *provided the owner has paid the general*
- subs must pay suppliers within 7 days after receipt of funds. ARS §32-129.02(B)
- upon written request of a subcontractor, the *owner* must notify that sub within five days after issuing a payment to the general contractor. ARS §32-1129.01(R)

Subs Get Paid Only When General Gets Paid:

- general contractor is only obligated to pay his subs after payment by the owner. ARS §32-1129.02(B)

Suspension of Work:

- work may be suspended if payment is not made in accordance with the Act. ARS §1129.04

Slow Payors Pay 1.5% Monthly Interest:

- unless the contract states otherwise, slow payors - owners, generals or subs - pay 18% annual interest rate (1.5% per month) on properly submitted, but unpaid invoicing. ARS §§32-1129.01(Q) and 32-1129.02(H)

Lien Waivers:

- subs and suppliers must provide a waiver of any materialmen's liens (conditioned on payment for the work completed or material supplied). ARS §32-1129.02(B)

Final Payment / Release of Retention:

- contractor must submit a payment application for final payment/release of retention "on substantial completion of the work." ARS §§32-1129.01(H) and (K), and 32-1129.029(H). "Substantial completion" can be defined by the contract [ARS §32-1129.01(U)] or in the absence of a contractual definition, it is defined under ARS §32-1129(A)(7)
- a retention payment application is deemed certified 14 days after the owner receives the billing or challenges in writing with reasonable detail the reason for not approving the retention. ARS §§32-1129.01(H) and (K), and 32-1129.02(H)
- a retention must be in a "reasonable amount" (150% of the labor and materials) which is anticipated to be needed to complete the contract. ARS §§32-1129.01(H) and 32-1129.02(E) and (D)
- retention must be released within 7 days after approval of the payment application. ARS §32-1129.01(I)

ROC Revocation or Suspension:

- any diversion of money received for work performed, or any failure to account for such payments, constitutes grounds for disciplinary action by the Registrar. ARS §32-1129.02(B)
- violations by contractors or subs to promptly pay may result in license suspension or revocation. ARS §§32-1129.02(B) and 32-1154(A)(11)

Attorneys Fees May Be Awarded:

- attorney's fees can be awarded to the successful party in a lawsuit or arbitration for claims under the Act. ARS §§32-1129.01(S) and 32-1129.02(J)

Minimize Exposure/Maximize Recovery:

- consult an attorney for all questions relating to the Prompt Payment Act before, rather than after, proceeding
- include in every construction contract a provision which requires that mediation and arbitration be used to resolve any dispute between the parties

Other Remedies are Available:

- other methods are available to collect on unpaid construction bills, such as a lawsuit for breach of contract or unjust enrichment, mechanic's lien foreclosure, performance or payment bond claim, mediation, arbitration, etc.

Public Sector Prompt Payment Laws:

Prompt payment laws exist relating to public sector construction projects. However, public sector projects are governed by many additional and different statutes, rules and regulations. Prompt payment laws for public-sector projects are not within the scope of these seminar materials: CONTACT AN ATTORNEY for matters involving public sector payment laws.

Caveat: This material has been prepared to assist the user in better understanding these topics of Arizona construction law. This material is not an exhaustive analysis of a very complex and complicated area of the law. This material does not take the place of legal or other professional advice. Frequently, subtle, minor or even unknown factors can significantly alter the opinion, procedure, or predicted outcome of a legal issue in this area of the law. Consult with an attorney about your questions *prior to* that issue becoming a larger, more complicated and more costly problem.