

NEW JERSEY LAWYER

The pro's and cons of Prompt Payment Act

The Prompt Payment Act (N.J.S.A. 2A:30A-1, *et. seq.*) governs virtually all public and private construction contracts entered in New Jersey after last Sept. 1. Philosophically, the legislative attempt to enact a uniform payment statute that eliminates many financial inequities within the construction industry should be applauded. However, the statute lends itself to inequitable judicial interpretations,

A positive provision of the law is that a bill is deemed approved 20 days after the owner receives it, "unless the owner provides, before the 20 days expires, a written statement of the amount withheld and the reason for non-payment." While this leaves the door open for non-payment, it mandates the prime contractor be furnished the reason for lack of payment. The statute recognizes

that where the owner is a public entity, an approval meeting may have to occur prior to payment; but the law then states "provided this exception has been defined in the bid specifications and contract documents." This places a burden on the owner to set forth the reasons for non-payment and sets a time frame in which to act. By the very fact the bases for nonpayment are being put on the table, it is hoped payment issues will be discussed and resolved prior to commencing



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especially to subcontracting entities. This skepticism isn't intended to detract from the law, but the construction community and their counsel must recognize the perils.

The statute includes all construction contracts from demolition to erection, from laborers to design professionals. By definition, the law is applicable to owners, prime contractors, subcontractors and sub-subcontractors, but apparently does not apply to lower-tiered sub-subcontractors.

Prime contractor and owner: The statute places on the owner the statutory obligation to pay the amount due the prime contractor, whether a progress payment, final payment or retainage, within 30 calendar days after the billing date. The billing date for payments should be established in the contract. However, to be entitled to payment, the prime contractor must have performed "in accordance with the provisions of a contract with the owner." This opens the door for an owner to state the work has not been performed properly. Further, the billing must have been approved and certified by the owner or its authorized agent such as the design professional, construction manager and even a financial institution.

an adversarial proceeding.

Subcontractor and sub-subcontractor: This provision is similar to the one that applies to prime contractors and owners. If the subcontractor or sub-subcontractor "has performed in accordance with the provisions of its contract ... and the work has been accepted" by the applicable party, the prime contractor will pay the subcontractor, and the subcontractor will pay the sub-subcontractor the full amount received "within 10 calendar days of the receipt of each" payment. While there is no provision entitling the prime contractor to withhold further retainage, the statute essentially puts a condition on the payment obligations with the words "and the parties have not otherwise agreed in writing." The importance of the contract provisions has been heightened.

Arguably, this law legislatively inserts a "pay if paid" or a "pay when paid" condition into the prime contractor's payment obligations to the subcontractor, and the subcontractor to its sub-subcontractors. This concept is supported by the provision requiring payment "within 10 calendar days of the receipt." This statute undermines the reasoning of

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New York courts that have held a “pay when/if paid” provision is against public policy, since it would negate rights under New York’s lien law. Is the New Jersey legislature saying that rights under statutory bonds do not come into existence, as no monies may be due the subcontractor or sub-subcontractor until after the prime contractor’s receipt of funds from the owner?

Further confusion exists in the law’s following provision: “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 prime contractor or subcontractor, as applicable.”

If payment is not made, the violator will pay interest at prime plus 1 percent. If a “civil action” is required to collect payments, “the prevailing party shall be awarded reasonable costs and attorney fees.”

This leads to a question: Does the reference to civil action mean fees cannot be awarded in an alternative dispute resolution procedure?

Remedy: If a party has not received payment as required, then after providing seven days’ written notice to the violator, it has the

right to suspend performance, without penalty for breach, until payment is made. However, the law adds two further conditions to the lack of payment. One, the violator has “not provided a written statement of the amount withheld and the reason,” and two, if the violator “is not engaged in a good-faith effort to resolve the reason for the withholding.” This might alter case law that upheld the right to stop work for nonpayment alone. I raise this question despite the law’s provision stating, “The rights, remedies or protections provided by this section ... shall be in addition to other remedies provided pursuant to any other provision of state law.” There is no definition of what “state law” means.

The statute also provides that contracts subject to it shall provide that payment disputes “may be submitted to a process of alternative dispute resolution.” This appears to provide for a mandatory unilateral right. However, will this create multiple dispute resolution procedures? Further, is or must the alternative dispute resolution be binding?

While the law creates new equitable rights and obligations, the wording also supports potential negative judicial interpretations. Counsel must review their clients’ prime and subcontracts to determine how they integrate with this statute.