

SENATE BILL 1375: UPDATES TO THE ARIZONA PROMPT PAY ACT

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Recently, the Arizona Legislature approved multiple changes to the Arizona Prompt Pay Act (A.R.S. § 32-1129.01 et seq.). These changes will take full effect on January 1, 2011. The following is a summary of the changes enacted and how they will affect Subcontractors and Suppliers. Please note that the Prompt Pay Act (including all the changes described below) applies only to private construction projects located within the state of Arizona. The Act is not applicable to local, state or federal public work. Despite this limitation the Act still provides several tools that Subcontractors and Suppliers can use to make sure they are paid in a timely manner.

Retention is Now a Part of Prompt Pay Act

Before the recent changes the Arizona Prompt Pay Act did not adequately address retention and final payment. Perhaps the most important addition to the Act, from a Subcontractor's perspective, is the inclusion of retention in the prompt pay scheme. In accordance with the new changes, retention is to be released from the Owner upon "substantial completion." "Substantial Completion" is defined in A.R.S. § 32-1129.01, and the definition is beneficial to Subcontractors. Essentially, "substantial completion" is defined as the date when the Owner can occupy or use the structure.

Subcontractors should educate their General Contractors about these changes, and request retention when a project is substantially complete. If a General Contractor does not timely pay retention the Subcontractor is entitled to interest of 1.5% per month and attorney fees incurred collecting the unpaid sums. We often hear from clients that have been waiting for retention payments for months. These provisions can help to fix that problem.

General Contractors are Required by Law to Submit Timely Applications for Payment

Recently we have noticed that some General Contractors are "engineering" their billing by failing to submit charges for all work performed. The changes to the Prompt Pay Act prohibit this practice. General Contractors must include charges for all work performed in the prior month. It is a good practice to request a copy of all invoices and payment applications submitted by the General Contractor. If the General Contractor is unwilling to provide copies of these documents you should be suspicious. You have a right to know if your charges are being included, as required by statute.

Subcontractors Have A Right to Know When Owner Makes Payment to General Contractor

Pursuant to A.R.S. § 32-1129.01®): "On the written request of a Subcontractor, the Owner shall notify the subcontractor within five days" after the owner issues a progress payment, retention payment or final payment to the General Contractor. This is an important tool that every subcontractor should use to track payments from the Owner to the General Contractor. Further, you only need to make one written request at the start of the job and the Owner is required to provide updates when each payment is made. A good practice would be to

prepare a form letter requesting updates on all payments, in accordance with subsection (e), and submit the letter to the Owner at the start of every project. You should not accept any subcontracts that include pay-when-paid clauses, but it is still useful to know if the general contractor has been paid.

A General Contractor Must Timely Disclose Any Reason Owner Provides to Support Withholding Payment

Under the Act an Owner is entitled to withhold payment from the General Contractor only if the Owner provides a written statement identifying the specific reasons for declining payment. § 32-1129.02(f) requires that the General Contractor provide a copy of this written statement to all affected Subcontractors within seven days of receipt. If a General Contractor claims the Owner has not paid, you should immediately request a copy of the written statement. If no written statement is provided by the Owner then the billing is approved and payment is due.

A New Limitation on Pay-if-Paid Clauses

SB 1375 may not kill pay-if-paid clauses, but the new A.R.S. § 32-1129.02(g) does provide an important limitation on pay-if-paid clauses. Subsection (g) states that even if an Owner declines to pay the Contractor because of alleged defective work or materials: “The Contractor shall nevertheless pay any Subcontractor or Material Supplier whose work was not the basis of the Owner’s withholding for defective construction work or materials not remedied within twenty-one days after payment would otherwise have been made by the Owner under section 32-1129.01.” This means that pay-if-paid is unenforceable if the sole reason the Owner is withholding payment from the general contractor is defective work or materials. This is a major change since this is the most common reason cited by Owners for withholding payment.

Special Language Required on Invoices for Owner-Occupied Dwellings

Any Subcontractors or Suppliers that perform residential work should be aware of the new A.R.S. § 32-1129.07. The legislature specifically excluded work performed directly for the owner of an owner-occupied dwelling from the provisions of the Prompt Pay Act. If you are a Subcontractor/Supplier that performs work directly for an owner/occupant of a residence, and you want the Act to apply, you must include specific language on all your invoices. The language required is available on-line, or you can contact ACT.

Every Arizona subcontractor and supplier should be familiar with the updates to the Arizona Prompt Pay Act. Often, simply quoting the Act is enough to encourage General Contractors and owners to make timely payments. The tools provided by the updated Prompt Pay Statutes only work if Subcontractors know how to use them.