

The Contractor Prompt Payment Act and How It Can Affect Your Construction Project

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One of the most common disputes on a private construction project arises when the owner withholds payment from the contractor. While the decision to withhold payment may, in some instances, be legitimate (e.g., defects in the work), it is often motivated by less-than-noble intentions (e.g., forcing the contractor to accept a lesser amount than he is otherwise entitled to receive). Although contractors on public projects have long had non-payment protection under state and local prompt payment acts, contractors working in the private sector were left with only one possible remedy: a breach of contract claim.

In order to address this perceived inequity, Illinois Governor Rod Blagojevich recently signed into law the Contractor Prompt Payment Act, which provides contractors on private construction projects with a statutory means of obtaining payment similar to that found in the public sector. The act applies to any construction contract entered into after August 31, 2007.

Implications to Your Construction Project

As a matter of public policy, the Contractor Prompt Payment Act is deemed to be a part of every construction contract. There are two critical features to the act that significantly affect the owner/contractor relationship. First, an owner is required to pay the amount the contractor requests no more than 15 calendar days after approval of the contractor's payment application. Thus, the standard 30- or 60-day time period for payment is no longer allowed. The second feature affecting the owner/contractor relationship is the express statement that if the owner does not approve the payment application within 25 days after receipt and does not provide the contractor with written notice of the reason, the payment application is deemed approved. In other words, the owner loses any defense to non-payment.

A further feature of the act is the provision allowing the unpaid contractor to suspend performance in the event of non-payment. While this right of suspension exists in most standard form construction agreements, this part of the act will most likely affect owner-drafted agreements that typically do not afford the contractor this right. It must be noted, however, that under the common law, non-payment is generally considered a material breach of contract entitling the contractor to terminate. Thus, while this provision is useful, it is not as big a sword as it might appear to be.

Also significant is the apparent reach of the Contractor Prompt Payment Act. Although the use of common industry terms such as "contractor" and "payment application" would appear to limit the application, the definition of those terms within the act itself demonstrates that its reach is sweeping. For example, the term "contractor" is defined as anyone who, under a contract with the owner, improves the owner's property. This means that architects, engineers, surveyors and property managers, as well as anyone who furnishes labor, materials, fixtures, apparatuses, machinery, forms or form work for concrete, is protected by the act. The term "payment application" is also broadly defined to include not only the standard payment application that owners are accustomed to receiving from contractors but also invoices, bills and any other requests for periodic payment.

The only limitation on the reach of the act is found in the definition of "construction contract." According to the act, the term does not apply to the design, construction, alteration, improvement or repair of single-family residences or multiple-family residences with 12 or fewer units in a single building.

Unlike prior drafts of the Contractor Prompt Payment Act, the final version does not allow a contractor who successfully brought a lawsuit to enforce the act to recover fees and expenses. Further, even though the act provides for interest at a rate of 10% per annum, it also mandates that the interest imposed shall not be duplicative of the interest allowed under the Illinois Mechanics Lien Act. As a result, there is little, if any, additional protection for a contractor who properly perfects a mechanics lien.

It is also worth noting that the initial drafts of the act contained language allowing the parties, by contract, to waive their rights to the protections provided under the act. Although this language is not included in the version the Governor signed, an argument can be made that existing state law allows the parties a similar waiver. Under Illinois law, individuals generally may waive substantive rules of law, statutory rights and even constitutional rights enacted for their benefit, so long as the waiver is knowing, voluntary and intentional. Thus, including a conspicuous contractual provision expressly stating that the parties waive the protection of the Contractor Prompt Payment Act may allow an owner to avoid the application of the act. Of course, it remains to be seen whether a court will enforce such a contractual waiver.

While the act provides contractors with an additional avenue for obtaining payment from a recalcitrant owner, it clearly lacks the "teeth" necessary to make it an effective collection tool. Further, it is likely that in the event of nonpayment, the contractor will seek protection under the Mechanics Lien Act. However, careful owners will tailor their payment procedures to meet the requirements of the act in order to avoid a claim by a contractor for violation of the Contractor Prompt Payment Act.

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