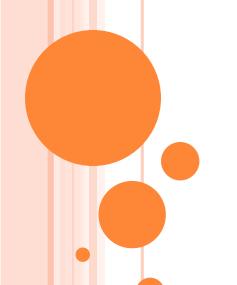


#### 2015 Spring Board Meeting

## PROMPT PAYMENT ACTS: THE U.S. PERSPECTIVE

Christopher A. Wright, Managing Partner, Seattle Office





### **OVERVIEW**

- 1. Background of Prompt Pay in the U.S.
  - Owner to Prime
  - Prime to Subs
  - Adoption by States
- Is there a Loophole? Good Faith Disputes.
- Has PPA Worked? Thoughts and Comments.

# U.S. FEDERAL PROMPT PAYMENT ACT OWNER TO PRIME

- The Prompt Payment Act ("PPA"), was enacted in 1982.
  - Purpose: address issue of late payments on federal projects.
- In 1988, PPA amended to include provisions establishing time periods within which the government/contractor must make payments, as well as provisions relating to subcontractors.
- PPA requires the government to generally make payments within 30 days upon receipt of a contractor's proper invoice.
- Failure to make timely payment, without justification, requires payment of interest and potential statutory penalties.

# U.S. FEDERAL PROMPT PAYMENT ACT PRIME TO SUBCONTRACTORS

- PPA also provides flow-down protection for subcontractors and suppliers at all tiers:
  - Specific payment provisions must be incorporated into all subcontracts;
  - Prime contractors, absent justification, must pay subcontractors within seven (7) days of payment by the government; and
  - Prime contractors must direct subcontractors and suppliers to incorporate similar prompt payment provisions in agreements with lower-tier contractors.

## U.S. STATES ADOPT SIMILAR PROMPT PAYMENT ACTS

- Every state except New Hampshire has some form of prompt payment act governing public projects.
- 34 out of 50 states have prompt payment statutes governing private projects.
- General Requirements of State PPAs:
  - State PPAs establish a specific time period within which payments must be made and impose interest for late payments.
  - Most statutes exempt payment claims where there is a good faith dispute.
  - Most states require general contractors on public projects to promptly pay their subcontractors.
  - Some states specify the timing of payment between general contractor and subcontractor on private projects.

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# WHAT IS GOOD FAITH? DOES THE EXCEPTION SWALLOW THE RULE?

 A good faith or bona fide dispute about whether the work invoiced for was in fact performed or satisfactorily performed may preclude a contractor's claim for prompt payment.

#### • Examples:

- Failure to perform;
- Failure to adhere to terms of contract;
- Untimely completion;
- Filing of third party claims;
- Defective construction; or
- Failure of contractor (or subcontractor) to timely pay lower-tier contractor(s).

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# HAVE PROMPT PAYMENT ACTS WORKED?

- 27 years since PPA was amended to apply to Subcontractors/Suppliers on Federal Construction Projects
- Study by DOT in 2004 showed PPA had reduced Prime Contractor's Profits by 4.35% and increased project costs by 0.14 percent.
  - Study indicated Profits and Costs were being recaptured in future bids.
- Data suggests that PPAs do have an impact.
- PPAs seem to have reduced unjustified nonpayment.
- PPAs provide another collection tool, but:
  - Can be manipulated;
  - Requires litigation to enforce; and
  - General view are not as effective as hoped.
- Use on Private Projects can be more controversial.



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