



**Canadian
Construction
Association**

2015 SPRING BOARD MEETING

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

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OVERVIEW

1. Background of Prompt Pay in the U.S.
 - Owner to Prime
 - Prime to Subs
 - Adoption by States
2. Is there a Loophole? Good Faith Disputes.
3. 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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