

# **Survey of Prompt Pay Statutes†**

**By: Edward H. Tricker, Kory D. George, and Erin L. (Gerdes) Ebeler**

†The original edition of this article was printed in the *Journal of the American College of Construction Lawyers*, Volume 3, Number 1, Winter 2009, © 2009 Thompson/West.

This article was updated in April 2010 . © 2010, Woods & Aitken LLP. All Rights Reserved.

## **Disclaimer**

Woods & Aitken LLP is a limited liability partnership engaged in the practice of law. This publication is not intended as, and does not constitute, either legal advice or a solicitation of any particular prospective client. An attorney/client relationship with Woods & Aitken LLP cannot be formed by reading or responding to this publication, as such a relationship may be formed only by specific and explicit agreement with an individual attorney of Woods & Aitken LLP.

The content of this publication was written or collected by Woods & Aitken LLP for informational purposes only and is intended only to illustrate the variations in the treatment of issues among different jurisdictions. The firm does not intend to practice law in any jurisdiction in which its attorneys are not licensed. The information contained in this publication does not constitute a legal opinion and is not to be relied upon by anyone for any purpose.

## **Thank You**

Thanks are extended to all who contributed to gathering, collating, and writing the content of this document. Members of the American College of Construction Lawyers ([www.accl.org](http://www.accl.org)) were especially instrumental in this endeavor. A special thanks to Jill Fiddler, Sara Gude, Brian Koerwitz, Kimberly Olivera, and Christopher Kortum for their work in making this a complete survey of all 50 states.

## Introduction

Labeled as “one of the most important issues for construction specialty trade contractors and suppliers” by the American Subcontractors Association, Inc. (“ASA”),<sup>1</sup> the issue of prompt payment has garnered the attention of lobbyists and legislatures throughout the United States. As a result, many jurisdictions have passed “prompt pay acts” (“PPAs”), requiring payment be made on construction contracts within specified periods of time by owners and / or contractors. Typically, these laws are geared toward the protection of subcontractors, and, indeed, the ASA has claimed credit for passage of PPAs in Kansas,<sup>2</sup> Arizona,<sup>3</sup> South Carolina,<sup>4</sup> Wisconsin,<sup>5</sup> and likely other states as well.

Of the states that have purpose statements drafted into their statutes, stated reasons for the importance of a prompt pay statute include (1) that the construction industry is a significant portion of the state economy, so it is important to ensure that the players within

---

<sup>1</sup> American Subcontractors Association, Inc., *The ASA Report: The Policy Environment in the States* 14 (2007), available at <http://www.asaonline.com/pdfs/The%20ASA%20Report%202007%20Media%20Kit.pdf>.

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *New Arizona Law Brings Sweeping Changes*, BUSINESS CREDIT, Sept. 2000, at 69; see also Sharon B. Shively, Arizona Owners Are Subject to Prompt Pay Requirements, REEVES JOURNAL: PLUMBING, HEATING, COOLING, Aug. 2000, at 10 (detailing “years of lobbying” prior to the Arizona PPA’s passage).

<sup>4</sup> American Subcontractors Association of the Carolinas, *Specialty Trade Associations Council*, <http://www.asacarolinas.com/General/STAC.htm> (last visited September 8, 2008) (contrasting ASA’s five year fight with the American General Contractors’ Association over prompt pay in North Carolina with the joint efforts of the ASA and AGC in South Carolina to pass a prompt pay act).

<sup>5</sup> American Subcontractors Association of Wisconsin, *History*, <http://www.asa-wi.org/about/history.htm> (last visited September 8, 2008) (claiming credit for expanding Wisconsin’s PPA as well as passage of The Subcontractors’ Rights Act (1991 Wisconsin Act 200), “which voids certain construction contract provisions, including “pay-if-paid” clauses”).

that industry remain “economically viable;”<sup>6</sup> (2) that no-damage-for-delay clauses “are adhesive in nature and . . . can have ruinous financial consequences on affected contractors due to risks over which the contractor may have no control;”<sup>7</sup> (3) that firms who do business with a state “expect and deserve to be paid in a timely manner;”<sup>8</sup> and (4) that a state’s failure to promptly pay its contractors may discourage people from doing business with the state, thereby increasing state construction costs.<sup>9</sup>

However, while the purpose of these statutes may have a common theme, this fact does not imply that these laws are consistent with one another from state-to-state or even within one state. To be clear, many of the laws discussed throughout this Survey are scattered throughout the various statutory compilations of the states. Similarly, some of these PPAs or prompt pay statutes apply only to public contracts, certain types of public or private contracts, or both private and public construction contracts of all types. Many PPAs will have different provisions and requirements based upon whether the contract at issue is public or private. Oftentimes, contracts relating to residential housing and/or a state department of transportation are excluded. In short, these laws can safely be described as “all over the place” both in terms of statutory location and scope of protection. Thus, while the authors have tried diligently to identify the prompt pay statutes applicable to construction contracts, it is not only possible, but also likely that a state has an issue specific prompt pay act or statute that is not mentioned in this Survey.

---

<sup>6</sup> COLO. REV. STAT. ANN. § 24-91-101(2).

<sup>7</sup> *Id.*

<sup>8</sup> R.I. GEN. LAWS § 42-11.1-1.

<sup>9</sup> *Id.*

Generally speaking, few would dispute the idea that a contractor or subcontractor should be paid promptly for work properly completed. Obviously, various reasons exist for non-payment by a prime to a sub or for non-payment by an owner to a prime, including, among others, that (1) a prime contractor has not received payment from the owner for the work completed by a subcontractor, (2) the prime contractor perceives deficiencies in the subcontractor's work for which he anticipates a future claim from the owner, (3) the owner disputes that certain work has been completed or that the work meets contract specifications; or (4) the prime contractor (or the owner) is a "bad actor" who knows that he ought to pay, but refuses. Many PPAs recognize that, oftentimes, if a subcontractor (or contractor) is not being paid, then the prime contractor (or owner) may have a valid reason for withholding payment.<sup>10</sup> However, the legislative histories to these statutes also indicate a feeling that prime contractors hold a better position either to bear the loss or to evaluate the owner's ability / willingness to pay the contractor for work on the project.<sup>11</sup>

It should also be noted that PPAs may have consequences beyond ensuring prompt payment for work. For instance, in a study of prompt pay provisions promulgated by the United States Department of Transportation, research has shown that the provisions reduced a contractor's profits by 4.35 percent and increased project costs by 0.14 percent.<sup>12</sup>

---

<sup>10</sup> See, e.g., *Masingale Elec.-Mechanical, Inc. v. Constr. One, Inc.*, 102 Ohio St.3d 1, 2004-Ohio-1748 at ¶ 30 (Lundberg Stratton, J., dissenting) (arguing that the dual purposes of Ohio's PPA were to (1) ensure subcontractors and materialmen were paid promptly by contractors and (2) allow contractors to withhold payments from subcontractors and materialmen when valid disputes arose).

<sup>11</sup> See, e.g., NEV. REV. STAT. § 624.626(1)(b) (allowing a lower-tiered subcontractor to stop work if not paid within a specified period of time after a request for payment even if the higher-tiered contractor has not been paid and the subcontract agreement contains either a "pay-if-paid" or "pay-when-paid" clause).

<sup>12</sup> Ali Touran, Metin Atgun, and Ittiphol Bhurisith, *Analysis of the United States Department of Transportation Prompt Pay Provisions*, J. OF CONSTRUCTION ENGINEERING AND MGMT 719, 719 and

As indicated by the fact that the primary proponent of PPAs are subcontractors and trade groups such as the ASA, when these laws are passed the focus is often on the perceived unfairness imposed on subcontractors who are not paid—for whatever reason—by a prime contractor.<sup>13</sup> The Nevada PPA provides a strong example of this. For instance, the Nevada PPA was said to have been passed in 2007 due to problems arising with the construction of the Venetian Resort-Hotel-Casino, a “case wherein \$300 million of liens were filed, the owner filed a counterclaim for \$200 million, and numerous subcontractors filed for bankruptcy.”<sup>14</sup>

The Committee Hearings on the Nevada PPA illustrate common concerns that are discussed when a PPA is on the legislative table. The dependency of subcontractors on prime contractors for payment seems to be a concern, and numerous sub-issues stem from that overarching topic. For instance, during a committee hearing, a representative from the Mason Contractors Association of Southern Nevada was asked whether prime contractors or owners were the primary “culprit” for non-payment issues, and the representative testified that the “chief culprit” was unknown because subcontractors were often locked out of negotiations

---

724 (Oct. 2004) (also noting that this loss of profits will likely be incorporated in future bids on projects).

<sup>13</sup> See, e.g., Bill Andrews and Eric M. Cohen, *Recent Changes in Texas Affecting Construction Credit Professionals*, BUSINESS CREDIT, Oct. 1999, at 54 (detailing changes made to the Texas PPA that were made to allow a subcontractor to suspend work when not paid by a contractor who also has not been paid by the owner); Scott Marshutz, *The Check's in the Mail*, REEVES JOURNAL: PLUMBING, HEATING, COOLING, Feb. 1999, at 6 (arguing that without PPAs general contractors act like “brokers [who] . . . shield[] themselves if the project owner skips town, goes belly up or refuses to pay,” so the generals have little to lose if the owner fails to make payments since subcontractors perform the work on projects)

<sup>14</sup> John E. Sebastian, *Legislative Update: Nevada's Subcontractors Dealt Winning Hand*, 27 CONSTRUCTION LAWYER 38, 38 (Spring 2007); see also Hearing on S.B. 274 before the Nevada Senate Comm. on Commerce and Labor, 71st Session (March 15, 2001) (statement of Steve G. Holloway, Lobbyist, Associated General Contractors-Las Vegas regarding the vast amounts of litigation stemming from the building of the Venetian Resort-Hotel-Casino).

between contractors and owners, and prime contractors failed to warn subcontractors that they were at risk for not being paid.<sup>15</sup> Additionally, the use of pay-if-paid and pay-when-paid clauses to shift the risk of non-payment by the owner or higher-tiered contractor to a lower-tiered subcontractor was also a topic of conversation.<sup>16</sup> Others testified that “neither the general contractor nor the owners . . . cared if the trade contractors were paid for their labor.”<sup>17</sup> Additionally, one concern seems to be the length of time contractors or subcontractors must continue to perform without receiving payment before they are allowed to stop work on a project.<sup>18</sup> Thus, many prompt pay statutes have included provisions that allow contractors and/or subcontractors to suspend performance or terminate the applicable contract or subcontract.

In short, as shown in the summary of PPAs to follow, while the overarching purpose of these PPAs appears to be ensuring that payment is not withheld from those entitled to it, the

---

<sup>15</sup> Hearing on S.B. 274 before the Nevada Senate Comm. on Commerce and Labor, 71st Session (March 15, 2001) (statement of Ronald Allyn, Owner, Mason Contractors Association of Southern Nevada); *but see* Press Release, Governor Corzine Signs Prompt Construction Payment Legislation (Sept. 1, 2006) (Describing amendments to New Jersey’s PPA that make owners subject to the payment obligations previously imposed only on prime contractors, Governor Jon Corzine stated, “This legislation will level the playing field and hold project owners to the same responsibilities and penalties that we require of contractors and subcontractors.”)

<sup>16</sup> *Id.* (statement of Richard L. Peel, Attorney, Construction Industry Coalition).

<sup>17</sup> *Id.* (statement of Dennis R. Haney, Attorney (Mr. Haney was an attorney working on claims related to the Venetian Resort-Hotel-Casino)).

<sup>18</sup> *Id.* (statement of Steve G. Holloway, Lobbyist, Associated General Contractors-Las Vegas); Andrews and Cohen, *supra* note 7, at 54-55 (detailing amendments to the Texas PPA that allow subcontractors and contractors to stop work if payment is not received within the statutory guidelines, even if there is a “pay-if-paid” or “pay-when paid” provision in the contract); S. 1726, 212th Leg., at 5 (NJ 2006) (bill as introduced; statement of Senators Stephen M. Sweeney and Fred H. Madden, Jr. that one effect of proposed PPA for private contractors would be to allow contractors, subcontractors, and subsubcontractors to suspend work if not paid).

strength of a PPA and the parties to whom a PPA applies will vary from jurisdiction to jurisdiction as well as within each jurisdiction. Therefore, parties must carefully determine whether they are a protected and / or an obligated party under an applicable PPA when evaluating potential payment disputes that may arise under a contract.

As detailed above, PPAs may affect not only the profit to be earned on a project by a contractor, but also the costs of completing the overall project. Therefore, the estimators involved in bidding a project should not overlook the potential impact of a recently adopted PPA that applies to his project. From the standpoint of a subcontractor, inherent project risks will likely be reduced by an applicable PPA given that many such laws now make it easier for subcontractors to stop work if not paid (without being found in breach of contract)—regardless of whether the contract contains a pay-if-paid or a pay-when-paid provision. From the standpoint of either an owner or a contractor, these laws make it more important to carefully track (1) when requests for payment are received, (2) when payment is issued, and (3) when any applicable notice is due given the potential penalties involved with making a late payment. Therefore, while the purpose behind the laws may be (somewhat) clear, the impact of these laws will likely reach into many different facets of a construction project.

## **About the Survey**

As mentioned above, while this Survey is intended to be as complete as possible, these statutes are many and have recently begun to spring up in vast numbers. Thus, readers should be aware of what was *not* done:

1. *Case law research was not undertaken.* As a general rule, very few cases are cited within this survey. If the authors were aware of a relevant case, such case may be referenced. However, that is the exception rather than the rule. The approach for

this Survey was to look purely at the statutory text, and where possible, some of the legislative history behind these statutes.

2. *Research regarding statutes other than the prompt pay and retainage statutes was not undertaken.* This statement has particular importance with regard to the provision for attorney's fees. Once again, if the authors were aware of an attorney's fee provision outside of the prompt pay statutes that may have relevance, that statute was mentioned. However, independent research into each state's statutory compilation with regard to an allowance for attorney's fees was not undertaken.
3. *Research regarding city ordinances was not undertaken.* This Survey is focused only on prompt pay statutes within a state's statutory compilation. If a state statute addressed prompt payment under a contract with a city, the authors have tried to include it in this Survey at least by mention. However, the authors have not researched individual city codes.

With regard to the structure of the Survey, the general format was to break down each state into four divisions: (1) Owner to Prime - Public, (2) Prime to Sub - Public, (3) Owner to Prime - Private, and (4) Prime to Sub - Private. Under each subdivision, \*\*\* questions were addressed:

1. *Who is Covered?* In this section, a general overview of the parties protected by the prompt payment statutes or act is provided. Additionally, relevant definitions under the statutes were identified.
2. *Who is Entitled to Payment?* In this section, the question was whether a statute identified when it was appropriate for a contractor, subcontractor, or materialman to request payment or to be paid.

3. *What is the Payment Period?* Here, multiple issues were addressed, including how often does the statute provide for payment, can the parties contract around that payment period, and how quickly is a contractor, subcontractor, or supplier to be paid?
4. *What are the Grounds to Withhold Payment?* In this section, the question is whether the statutes or act provided specific grounds upon which payment may rightfully be withheld?
5. *What is the Interest Penalty?* If a progress, final, or retainage payment is late, what interest will be charged on that late payment?
6. *What are the Retainage Provisions?* What is the maximum rate of retainage that may be withheld and when may/must retainage be paid? Occasionally, penalties associated with wrongfully withheld retainage are discussed in this section, if appropriate.
7. *Are Attorney's Fees Recoverable?* If an action must be brought to recover payment of principle or interest, are a prevailing party's reasonable attorney's fees recoverable?
8. *What Else is Noteworthy?* This section is for those statutory provisions that a person ought to know about, but that did not fit well into the above seven categories.

# Survey of Prompt Pay Statutes

## Contents

Disclaimer.....	1
Thank You.....	1
Introduction.....	2
About the Survey.....	7
Contents.....	10
<b>Alabama.....</b>	<b>15</b>
OWNER TO PRIME – PUBLIC.....	15
PRIME TO SUB – PUBLIC.....	16
OWNER TO PRIME – PRIVATE.....	16
PRIME TO SUB – PRIVATE.....	18
<b>Alaska.....</b>	<b>20</b>
OWNER TO PRIME – PUBLIC.....	20
PRIME TO SUB – PUBLIC.....	21
OWNER TO PRIME – PRIVATE.....	23
PRIME TO SUB – PRIVATE.....	23
<b>Arizona.....</b>	<b>24</b>
OWNER TO PRIME – PUBLIC.....	24
PRIME TO SUB – PUBLIC.....	25
OWNER TO PRIME – PRIVATE.....	26
PRIME TO SUB – PRIVATE.....	28
<b>Arkansas.....</b>	<b>30</b>
OWNER TO PRIME – PUBLIC.....	30
PRIME TO SUB – PUBLIC.....	31
OWNER TO PRIME – PRIVATE.....	31
PRIME TO SUB – PRIVATE.....	31
<b>California.....</b>	<b>32</b>
OWNER TO PRIME – PUBLIC.....	32
PRIME TO SUB – PUBLIC.....	33
OWNER TO PRIME – PRIVATE.....	34
PRIME TO SUB – PRIVATE.....	36
<b>Colorado.....</b>	<b>37</b>
OWNER TO PRIME – PUBLIC.....	37
PRIME TO SUB – PUBLIC.....	38
OWNER TO PRIME – PRIVATE.....	39
PRIME TO SUB – PRIVATE.....	39
<b>Connecticut.....</b>	<b>40</b>
OWNER TO PRIME – PUBLIC.....	40
PRIME TO SUB – PUBLIC.....	41
OWNER TO PRIME – PRIVATE.....	42
PRIME TO SUB – PRIVATE.....	45
<b>Delaware.....</b>	<b>46</b>
OWNER TO PRIME – PUBLIC.....	46
PRIME TO SUB – PUBLIC.....	47
OWNER TO PRIME – PRIVATE.....	48
PRIME TO SUB – PRIVATE.....	49
<b>Florida.....</b>	<b>51</b>
OWNER TO PRIME – PUBLIC.....	51
PRIME TO SUB – PUBLIC.....	54

OWNER TO PRIME – PRIVATE .....	56
PRIME TO SUB – PRIVATE .....	57
<b>Georgia</b> .....	59
OWNER TO PRIME – PUBLIC .....	59
PRIME TO SUB – PUBLIC .....	60
OWNER TO PRIME – PRIVATE .....	61
PRIME TO SUB – PRIVATE .....	62
<b>Hawaii</b> .....	63
OWNER TO PRIME – PUBLIC .....	63
PRIME TO SUB – PUBLIC .....	64
OWNER TO PRIME – PRIVATE .....	65
PRIME TO SUB – PRIVATE .....	65
<b>Idaho</b> .....	67
OWNER TO PRIME – PUBLIC .....	67
PRIME TO SUB – PUBLIC .....	68
OWNER TO PRIME – PRIVATE .....	68
PRIME TO SUB – PRIVATE .....	69
<b>Illinois</b> .....	70
OWNER TO PRIME – PUBLIC .....	70
PRIME TO SUB – PUBLIC .....	71
OWNER TO PRIME – PRIVATE .....	72
PRIME TO SUB – PRIVATE .....	74
<b>Indiana</b> .....	75
OWNER TO PRIME – PUBLIC .....	75
PRIME TO SUB – PUBLIC .....	77
OWNER TO PRIME – PRIVATE .....	78
PRIME TO SUB – PRIVATE .....	78
<b>Iowa</b> .....	79
OWNER TO PRIME – PUBLIC .....	79
PRIME TO SUB – PUBLIC .....	80
OWNER TO PRIME – PRIVATE .....	81
PRIME TO SUB – PRIVATE .....	81
<b>Kansas</b> .....	82
OWNER TO PRIME – PUBLIC .....	82
PRIME TO SUB – PUBLIC .....	86
OWNER TO PRIME – PRIVATE .....	86
PRIME TO SUB – PRIVATE .....	89
<b>Kentucky</b> .....	91
OWNER TO PRIME – PUBLIC .....	91
PRIME TO SUB – PUBLIC .....	94
OWNER TO PRIME – PRIVATE .....	95
PRIME TO SUB – PRIVATE .....	95
<b>Louisiana</b> .....	97
OWNER TO PRIME – PUBLIC .....	97
PRIME TO SUB – PUBLIC .....	98
OWNER TO PRIME – PRIVATE .....	99
PRIME TO SUB – PRIVATE .....	99
<b>Maine</b> .....	100
OWNER TO PRIME – PUBLIC .....	100
PRIME TO SUB – PUBLIC .....	102
OWNER TO PRIME – PRIVATE .....	103
PRIME TO SUB – PRIVATE .....	103
<b>Maryland</b> .....	105
OWNER TO PRIME – PUBLIC .....	105

PRIME TO SUB – PUBLIC .....	106
OWNER TO PRIME – PRIVATE .....	108
PRIME TO SUB – PRIVATE .....	109
<b>Massachusetts</b> .....	<b>110</b>
OWNER TO PRIME – PUBLIC .....	110
PRIME TO SUB – PUBLIC .....	113
OWNER TO PRIME – PRIVATE .....	114
PRIME TO SUB – PRIVATE .....	115
<b>Michigan</b> .....	<b>117</b>
OWNER TO PRIME – PUBLIC .....	117
PRIME TO SUB – PUBLIC .....	118
OWNER TO PRIME – PRIVATE .....	119
PRIME TO SUB – PRIVATE .....	119
<b>Minnesota</b> .....	<b>120</b>
OWNER TO PRIME – PUBLIC .....	120
PRIME TO SUB – PUBLIC .....	123
OWNER TO PRIME – PRIVATE .....	124
PRIME TO SUB – PRIVATE .....	125
<b>Mississippi</b> .....	<b>127</b>
OWNER TO PRIME – PUBLIC .....	127
PRIME TO SUB – PUBLIC .....	129
OWNER TO PRIME – PRIVATE .....	130
PRIME TO SUB – PRIVATE .....	131
<b>Missouri</b> .....	<b>133</b>
OWNER TO PRIME – PUBLIC .....	133
PRIME TO SUB – PUBLIC .....	135
OWNER TO PRIME – PRIVATE .....	136
PRIME TO SUB – PRIVATE .....	138
<b>Montana</b> .....	<b>139</b>
OWNER TO PRIME – PUBLIC .....	139
PRIME TO SUB – PUBLIC .....	141
OWNER TO PRIME – PRIVATE .....	142
PRIME TO SUB – PRIVATE .....	143
<b>Nebraska</b> .....	<b>144</b>
OWNER TO PRIME – PUBLIC .....	144
PRIME TO SUB – PUBLIC .....	147
OWNER TO PRIME – PRIVATE .....	148
PRIME TO SUB – PRIVATE .....	148
<b>Nevada</b> .....	<b>149</b>
OWNER TO PRIME – PUBLIC .....	149
PRIME TO SUB – PUBLIC .....	152
OWNER TO PRIME – PRIVATE .....	154
PRIME TO SUB – PRIVATE .....	156
<b>New Hampshire</b> .....	<b>158</b>
OWNER TO PRIME – PUBLIC .....	158
PRIME TO SUB – PUBLIC .....	158
OWNER TO PRIME – PRIVATE .....	158
PRIME TO SUB – PRIVATE .....	158
<b>New Jersey</b> .....	<b>159</b>
OWNER TO PRIME – PUBLIC .....	159
PRIME TO SUB – PUBLIC .....	160
OWNER TO PRIME – PRIVATE .....	161
PRIME TO SUB – PRIVATE .....	161
<b>New Mexico</b> .....	<b>163</b>

OWNER TO PRIME – PUBLIC .....	163
PRIME TO SUB – PUBLIC .....	164
OWNER TO PRIME – PRIVATE .....	165
PRIME TO SUB – PRIVATE .....	166
<b>New York</b> .....	<b>167</b>
OWNER TO PRIME – PUBLIC .....	167
PRIME TO SUB – PUBLIC .....	172
OWNER TO PRIME – PRIVATE .....	175
PRIME TO SUB – PRIVATE .....	177
<b>North Carolina</b> .....	<b>179</b>
OWNER TO PRIME – PUBLIC .....	179
PRIME TO SUB – PUBLIC .....	180
OWNER TO PRIME – PRIVATE .....	181
PRIME TO SUB – PRIVATE .....	182
<b>North Dakota</b> .....	<b>184</b>
OWNER TO PRIME – PUBLIC .....	184
PRIME TO SUB – PUBLIC .....	186
OWNER TO PRIME – PRIVATE .....	186
PRIME TO SUB – PRIVATE .....	187
<b>Ohio</b> .....	<b>188</b>
OWNER TO PRIME – PUBLIC .....	188
PRIME TO SUB – PUBLIC .....	189
OWNER TO PRIME – PRIVATE .....	191
PRIME TO SUB – PRIVATE .....	191
<b>Oklahoma</b> .....	<b>192</b>
OWNER TO PRIME – PUBLIC .....	192
PRIME TO SUB – PUBLIC .....	194
OWNER TO PRIME – PRIVATE .....	195
PRIME TO SUB – PRIVATE .....	196
<b>Oregon</b> .....	<b>198</b>
OWNER TO PRIME – PUBLIC .....	198
PRIME TO SUB – PUBLIC .....	200
OWNER TO PRIME – PRIVATE .....	201
PRIME TO SUB – PRIVATE .....	204
<b>Pennsylvania</b> .....	<b>206</b>
OWNER TO PRIME – PUBLIC .....	206
PRIME TO SUB – PUBLIC .....	208
OWNER TO PRIME – PRIVATE .....	209
PRIME TO SUB – PRIVATE .....	212
<b>Rhode Island</b> .....	<b>213</b>
OWNER TO PRIME – PUBLIC .....	213
PRIME TO SUB – PUBLIC .....	215
<i>GROUNDS TO WITHHOLD PAYMENTS</i> .....	216
OWNER TO PRIME – PRIVATE .....	216
PRIME TO SUB – PRIVATE .....	216
<b>South Carolina</b> .....	<b>217</b>
OWNER TO PRIME – PUBLIC .....	217
PRIME TO SUB – PUBLIC .....	219
OWNER TO PRIME – PRIVATE .....	220
PRIME TO SUB – PRIVATE .....	220
<b>South Dakota</b> .....	<b>222</b>
OWNER TO PRIME – PUBLIC .....	222
PRIME TO SUB – PUBLIC .....	223
OWNER TO PRIME – PRIVATE .....	224

PRIME TO SUB – PRIVATE .....	224
<b>Tennessee</b> .....	<b>225</b>
OWNER TO PRIME – PUBLIC .....	225
PRIME TO SUB – PUBLIC .....	226
OWNER TO PRIME – PRIVATE .....	227
PRIME TO SUB – PRIVATE .....	228
<b>Texas</b> .....	<b>230</b>
OWNER TO PRIME – PUBLIC .....	230
PRIME TO SUB – PUBLIC .....	232
OWNER TO PRIME – PRIVATE .....	232
PRIME TO SUB – PRIVATE .....	234
<b>Utah</b> .....	<b>236</b>
OWNER TO PRIME – PUBLIC .....	236
PRIME TO SUB – PUBLIC .....	238
OWNER TO PRIME – PRIVATE .....	239
PRIME TO SUB – PRIVATE .....	239
<b>Vermont</b> .....	<b>241</b>
OWNER TO PRIME – PUBLIC .....	241
PRIME TO SUB – PUBLIC .....	243
OWNER TO PRIME – PRIVATE .....	243
PRIME TO SUB – PRIVATE .....	244
<b>Virginia</b> .....	<b>245</b>
OWNER TO PRIME – PUBLIC .....	245
PRIME TO SUB – PUBLIC .....	246
OWNER TO PRIME – PRIVATE .....	247
PRIME TO SUB – PRIVATE .....	247
<b>Washington</b> .....	<b>248</b>
OWNER TO PRIME – PUBLIC .....	248
PRIME TO SUB – PUBLIC .....	249
OWNER TO PRIME – PRIVATE .....	250
PRIME TO SUB – PRIVATE .....	250
<b>West Virginia</b> .....	<b>251</b>
OWNER TO PRIME – PUBLIC .....	251
PRIME TO SUB – PUBLIC .....	252
OWNER TO PRIME – PRIVATE .....	252
PRIME TO SUB – PRIVATE .....	252
<b>Wisconsin</b> .....	<b>253</b>
OWNER TO PRIME – PUBLIC .....	253
PRIME TO SUB – PUBLIC .....	254
OWNER TO PRIME – PRIVATE .....	255
PRIME TO SUB – PRIVATE .....	255
<b>Wyoming</b> .....	<b>256</b>
OWNER TO PRIME – PUBLIC .....	256
PRIME TO SUB – PUBLIC .....	257
OWNER TO PRIME – PRIVATE .....	257
PRIME TO SUB – PRIVATE .....	257

# Alabama

## Owner to Prime – Public

### *Who's Covered*

The Alabama prompt payment act provides protection for prime contractors and a prime's subcontractors and sub-subcontractors. *Ala. Code* § 41-16-3(a).

### *Entitlement to Payment*

A party is entitled to payment upon “full[] execution” of its responsibilities under the public contract. *Ala. Code*. § 41-16-3(a).

### *Payment Period*

If the amount due by the state is not in dispute, payment shall be made to the prime contractor within 30 days after the other party has completed his or her portion of the contract and presented a proper invoice. *Ala. Code* § 41-16-3(a). An owner is required to notify a contractor in writing within 15 days of receipt of any disputed request for payment. *Id.* § 41-16-3(c).

### *Grounds to Withhold Payments*

Payments may be withheld if there is a bona fide dispute over one or more of the following: (1) unsatisfactory job progress, (2) defective construction not remedied, (3) disputed work, (4) third party claims filed or reasonable evidence that a claim will be filed, (5) failure of the contractor, subcontractor, or sub-subcontractor to make timely payments for labor, equipment and materials, (6) property damage to owner, contractor, or subcontractor, (7) reasonable evidence that the contract, subcontract, or sub-subcontract cannot be completed for the unpaid balance of the contract or contract sum. *Ala. Code* § 41-16-3(a). In the event that there is a bona fide dispute over all or any portion of the amount due on a progress payment from the owner, contractor, or subcontractor, then the owner, contractor, or subcontractor may withhold payment in an amount not to exceed two times the disputed amount. *Ala. Code* § 41-16-3(b).

### *Interest*

Late payments are subject to interest at the rate equal to the legal amount currently charged by the state. *Ala. Code* § 41-16-3(a).

### *Retainage*

In the event that there is a bona fide dispute over all or any portion of the amount due on a progress payment from the owner, contractor, or subcontractor, then the owner, contractor, or subcontractor may withhold payment in an amount not to exceed two times the disputed amount. *Ala. Code* § 41-16-3(b). The amount of retainage withheld by the contractor to the subcontractor or the subcontractor to the sub-subcontractor shall not exceed the retainage withheld by the state unless interest is applied to the withheld amount. *Ala. Code* § 41-16-3(d).

### *Attorney's Fees*

There does not appear to be a provision under Alabama's prompt payment for the payment of attorney's fees incurred in collecting a payment

## *Noteworthy*

### **Prime to Sub – Public**

#### *Who's Covered*

See Alabama Owner to Prime - Public.

#### *Entitlement to Payment*

See Alabama Owner to Prime - Public.

#### *Payment Period*

Upon receiving a payment from the state in connection with a contract, a party shall pay each of its subcontractors or sub-subcontractors the portion representing their interest in the state's payment in accordance with the payment terms agreed to. *Ala. Code*. § 41-16-3(a). If payment terms are not agreed to, payment shall be made within seven days after receipt of payment from the state. *Id.* A contractor, subcontractor, or sub-subcontractor is required to provide written notification within five days of disputed request for payment or notice of disputed request for payment. *Ala. Code* § 41-16-3(c).

#### *Grounds to Withhold Payments*

See Alabama Owner to Prime - Public.

#### *Interest*

See Alabama Owner to Prime - Public.

#### *Retainage*

See Alabama Owner to Prime - Public.

#### *Attorney's Fees*

See Alabama Owner to Prime - Public.

## *Noteworthy*

### **Owner to Prime – Private**

#### *Who's Covered*

As *Ala. Code* § 8-29-2 states: "Performance by a contractor, subcontractor, or [first tier] sub-subcontractor in accordance with the provisions of his or her contract entitles them to payment from the party with whom they contract."

Under the statutes, the following relevant terms are defined:

"Contractor" includes any person, individual, firm, corporation, partnership, or other legal entity that contracts with an owner to improve real property or perform construction services for an owner. *Ala. Code* § 8-29-1(1).

“Improve“ means to build, effect, alter, repair, or demolish any improvements upon, connected with, or on, or beneath the surface of any real property; to excavate, clear, grade, fill, landscape any real property; to construct driveways and roadways; to furnish materials, including trees and shrubbery, for any of these purposes; or to perform any labor upon these improvements. *Id.* § 8-29-1(2). Similarly, the term “improvement“ means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and roadways on real property. *Id.* § 8-29-1(3).

“Owner“ means any person, individual, firm, corporation, partnership, or other legal entity who has contracted to furnish labor or materials to, or has performed labor or supplied materials for a subcontractor in connection with a contract to improve real property. *Id.* § 8-29-1(4).

“Subcontractor” is defined as any person, individual, firm, corporation, partnership, or other legal entity who has contracted to furnish labor or materials to, or has performed labor or supplied materials for a contractor in connection with a contract to improve real property. *Id.* § 8-29-1(6)

“Sub-subcontractor“ means any person, individual, firm, corporation, partnership, or other legal entity who has contracted to furnish labor or materials to, or has performed labor or supplied materials for a subcontractor in connection with a contract to improve real property. *Id.* § 8-29-1(7).

### ***Entitlement to Payment***

Performance in accordance with the provisions of the contract entitles the contractor, subcontractor, or sub-subcontractor to payment from the party with whom they contract. All contracts between parties require a date of payment. *Ala. Code* § 8-29-2.

### ***Payment Period***

When a contractor has performed pursuant to his or her contract and submits a request for payment or an invoice, the owner shall timely pay the contractor by mailing via first class mail or delivering the amount in accordance with the payment terms agreed to by the owner and the contractor. If payment terms are not agreed to in the contract, payment must be made within 30 days after receipt of the pay request or invoice. *Ala. Code* § 8-29-3(a).

### ***Grounds to Withhold Payments***

An owner, contractor, or subcontractor may withhold application and certification for payment if there is a bona fide dispute over one or more of the following: (1) unsatisfactory job progress, (2) defective construction not remedied, (3) disputed work, (4) third party claims filed or reasonable evidence that a claim will be filed, (5) failure of the contractor, subcontractor, or sub-subcontractor to make timely payments for labor, equipment and materials, (6) property damage to owner, contractor, or subcontractor, (7) reasonable evidence that the contract, subcontract, or sub-subcontract cannot be completed for the unpaid balance of the contract or contract sum. In the event that there is a bona fide dispute over all or any portion of the amount due on a progress payment from the owner, contractor, or subcontractor, then the owner, contractor or subcontractor may withhold payment in an amount not to exceed two times the disputed amount. *Ala. Code* § 8-29-4.

### ***Interest***

Late payments are subject to interest at the rate of 1% per month (12% per annum) on the unpaid balance due. *Ala. Code* § 8-29-3(d).

### ***Retainage***

The percentage of retainage on payments by the contractor to the subcontractor shall not exceed the percentage of retainage on payments made by the owner to the contractor. Retainage in excess of these amounts shall be subject to interest at the rate of 1% per month (12% per annum). *Ala. Code* § 8-29-3(f).

### ***Attorney's Fees***

If a civil action is filed to recover the amount due, and the court finds that the owner, contractor, or subcontractor has not made payment as required, then the court shall award the interest specified in addition to the amount due. The party in whose favor a judgment is rendered shall be entitled to recover payment of reasonable attorney's fees, court costs, and reasonable expenses from the other party. *Ala. Code* § 8-29-6.

### ***Noteworthy***

A party may not waive the right to receive interest before a payment is due under a contract. A party may waive the interest due on any late payment on or after the date the payment is due. *Ala. Code* § 8-29-5. The Act does not apply to residential homebuilders; improvements to real property intended for residential purposes which consist of 16 or fewer residential units; contracts, subcontracts, or sub-subcontracts in the amount of \$10,000 or less; or contracts with the state or local governments of the state of Alabama. *Id.* § 8-29-7.

## **Prime to Sub – Private**

### ***Who's Covered***

See Alabama Owner to Prime - Private.

### ***Entitlement to Payment***

See Alabama Owner to Prime - Private.

### ***Payment Period***

When a subcontractor or sub-subcontractor has performed pursuant to the contract and submits a payment request in sufficient time to allow the subcontractor or contractor to include the request in his or her own payment request, the contractor or subcontractor shall timely pay to the subcontractor or sub-subcontractor in accordance with the payment terms. If payment terms are not agreed to in the contract, payment must be made within 7 days of receipt of payment from the owner or contractor respectively by delivering via first class mail or delivering the amount received based on the subcontractor's or sub-subcontractor's work and materials based on work completed or service provided under the contract. *Ala. Code* § 8-29-3(b).

### ***Grounds to Withhold Payments***

See Alabama Owner to Prime - Private.

### ***Interest***

See Alabama Owner to Prime - Private.

***Retainage***

The percentage of retainage on payments by the subcontractor to the sub-subcontractor shall not exceed the percentage of retainage on payments made by the contractor to the subcontractor. Retainage in excess of these amounts shall be subject to interest at the rate of 1% per month (12% per annum). *Ala. Code § 8-29-3(g)*.

***Attorney's Fees***

*See Alabama Owner to Prime - Private.*

***Noteworthy***

*See Alabama Owner to Prime - Private.*

# Alaska

## Owner to Prime – Public

### *Who's Covered*

The Alaska public construction payment laws provide protection for both prime contractors and subcontractors at any level on a public project. Under the statutes, the following terms are defined:

“Prime contractor“ is defined as a person required to be registered as a contractor who has a contract with the state or a political subdivision of the state to provide materials or services, other than as an employee, for a public construction or public works project. *Alaska Stat.* § 36.90.290(1).

“Subcontractor“ includes a person at any level, other than prime contractor, who provides materials or services, other than as an employee, to be used in a public construction or public works project. *Id.* § 36.90.290(2). “

### *Entitlement to Payment*

Upon satisfactory performance on the prime contract, the prime contractor is entitled to request payment from the state or political subdivision. *Alaska Stat.* § 36.90.200.

### *Payment Period*

The state or a political subdivision of the state shall pay the prime contractor within 30 calendar days of the date of receipt of a payment request that complies with the contract. If a political subdivision is using grant money for the contract, payment shall be made within 21 calendar days of the date of request for payment that complies with the contract or the date the subdivision actually receives the grant money, whichever is later. If the state is using federal money for the contract, payment shall be made within 21 calendar days of the date of request for payment that complies with the contract or the date the state actually receives the federal money, whichever is later. *Alaska Stat.* § 36.90.200.

### *Grounds to Withhold Payments*

If a state or political subdivision withholds all or part of a payment for unsatisfactory performance or for payment requests not in compliance with the requirements of the contract, the state or political subdivision shall, within eight working days, notify the prime contractor in writing stating specifically why payment is being withheld and what remedial actions may be taken to receive full payment. *Alaska Stat.* § 36.90.200(c). The notice must be in writing and must state the amount being withheld, specifically why part or all of the payment is being withheld and what remedial actions may be taken by the price contractor to receive the full payment. *Id.* If the notification by the state or political subdivision does not comply with the requirements of the Act, the state or political subdivision shall pay interest on the withheld amount from the eighth working day after receipt of the initial payment request until it provides notice that does comply. *Id.* § 36.90.200(d).

A state or political subdivision shall pay the withheld amount within 21 calendar days after the prime contractor satisfactorily completes the remedial actions identified in the notice. If a political subdivision is using grant money for the contract, the subdivision shall pay the prime contractor

within 21 calendar days after the prime contractor satisfactorily completes the remedial actions or within 21 calendar days after the political subdivision actually receives the grant money, whichever is later. If the state is using federal money for the contract, the state shall pay the prime contractor within 21 calendar days after the prime contractor satisfactorily completes the remedial actions or within 21 calendar days after the subdivision actually receives the money, whichever is later. *Id.* § 36.90.200(e).

If the withheld amount is not paid within 21 calendar days, the state or political subdivision shall pay interest on the amount withheld from the 21st calendar day at an interest rate equal to that set out in *Alaska Stat.* § 45.45.010(a). *Id.* The obligations to pay interest, however, do not apply to retainage. *Id.* § 36.90.200(f). This section does not apply to public construction or public works contracts made by a political subdivision that has a population under 800. *Id.* § 36.90.200(g).

### **Interest**

If the prime contractor is not paid as required, the state or political subdivision shall pay interest on the unpaid amount of the required payment from the 21st calendar day after the date required for payment at an interest rate equal to that set out in *Alaska Stat.* § 45.45.010(a). *Id.* § 36.90.200(e).

### **Retainage**

The state or a political subdivision of the state shall pay to the prime contractor interest on retainage, including warranty retainage, on a contract for public construction or public works at an interest rate that is equal to the amount set out in *Alaska Stat.* § 45.45.010(a). *Alaska Stat.* § 36.90.250(a). Interest on retainage accrues from the date of approval of a pay request until the date of payment to the contractor. *Id.* However, political subdivisions with a population of 500 or less are exempt from the payment of interest. *Id.* § 36.90.250(b).

### **Attorney's Fees**

The Alaska prompt pay statutes do not appear to include a provision for an attorney's fees.

### **Noteworthy**

*Alaska Stat.* § 36.90.210 sets out terms required in contracts between prime contractors and subcontractors as well as between subcontractors and their subcontractors. Section 36.90.260 defines miscellaneous provisions relating to when a payment is considered to be made and received and when an invoice is considered to be received. The Act applies to public construction or public works contracts of political subdivisions if the political subdivision has entered into a written contract with the state for the state to provide funds for the public construction or public work. *Alaska Stat.* § 36.90.265. Contract provisions that waive provisions required by §§ 36.90.200 through 36.90.290 are void. *Id.* § 36.90.270.

## **Prime to Sub – Public**

### **Who's Covered**

See Alaska Owner to Prime - Public.

### **Entitlement to Payment**

Upon satisfactory performance on the prime contract, the prime contractor is entitled to request payment from the state or political subdivision. *Alaska Stat.* § 36.90.200. The prime contractor and

a subcontractor on a public construction or public works contract shall include in a subcontract between the prime contractor and subcontractor for the public construction or public works a clause that requires the prime contractor to pay the subcontractor for satisfactory performance under the subcontract. *Id.* § 36.90.210.

### **Payment Period**

Prime contractors are required to pay the subcontractor for satisfactory performance under the subcontract within eight working days after receiving payment from which the subcontractor is to be paid, and all retainage due under the subcontract within eight working days after final payment is received from the state or political subdivision or after the notice period under § 36.25.020 expires, whichever is later. *Alaska Stat.* § 36.90.210(a). Subcontractors are required to pay a person providing services, other than an employee, for satisfactory performance under the subcontract within eight working days after receiving payment from which the person is to be paid, and all retainage due under the subcontract with the person within eight working days after the subcontractor receives its share of the state-held retainage from the prime contractor or another subcontractor. *Id.* § 36.90.210(b).

### **Grounds to Withhold Payments**

If the prime contractor on a public construction or public works contract, after making a request for payment to the state or political subdivision but before paying a subcontractor the amount covered by the request, discovers that part or all of the payment otherwise due is subject to withholding for unsatisfactory performance, the prime contractor may withhold the amount as allowed under the subcontract. *Alaska Stat.* § 36.90.230(a).

If the prime contractor withholds an amount under this subsection, the prime contractor shall: (1) give the subcontractor notice complying with *Alaska Stat.* § 36.90.240 as soon as practicable after determining the cause for withholding but before the due date for the payment; (2) give the contracting officer of the state or political subdivision a copy of the notice furnished to the subcontractor; (3) pay the subcontractor within eight working days after correction of the identified subcontractor performance deficiency. *Id.* If the prime contractor does not comply with the notice and payment requirements the contractor shall pay the subcontractor interest on the withheld amount from the eighth working day at an interest rate equal to the amount set out in *Alaska Stat.* § 45.45.010(a). *Id.* § 36.90.230(b).

### **Interest**

Prime contractors and subcontractors are required to pay interest at a rate equal to that set out in §45.45.010(a) on amounts not timely paid. *Alaska Stat.* § 36.90.210. Interest will begin to accrue on the day after the required payment date. *Id.*

### **Retainage**

*See* Alaska Owner to Prime - Public.

### **Attorney's Fees**

*See* Alaska Owner to Prime - Public.

### **Noteworthy**

*See* Alaska Owner to Prime - Public.

### **Owner to Prime – Private**

Alaska does not appear to have a prompt payment act applicable to private construction contracts.

### **Prime to Sub – Private**

Alaska does not appear to have a prompt payment act applicable to private construction contracts.

# Arizona

## Owner to Prime – Public

### *Who's Covered*

Arizona's public prompt pay act applies to protect contractors, a contractor's subcontractors or material suppliers, and subcontractors' subcontractors or material suppliers. *Ariz. Rev. Stat.* § 34-221(C), (D), (F) - (K).

### *Entitlement to Payment*

Progress payments to the prime contractor are to be made upon a duly certified and approved estimate of the work performed on projects exceeding 90 days. *Ariz. Rev. Stat.* § 34-221(C)(2).

### *Payment Period*

Estimates of work submitted shall be deemed approved and certified for payment after seven days from the date of submission. Progress payments shall be paid on or before 14 days after the estimate is certified and approved. *Ariz. Rev. Stat.* § 34-221(C)(2). Any retention shall be paid to the contractor within 60 days after completion or filing notice of completion of the contract. *Id.* § 34-221(C)(5). Retention for longer than 60 days after final completion and acceptance of the work requires a specific written finding of the reasons justifying the delay. *Id.* For Highway Construction Projects, progress payments shall be paid on or before 14 days after the estimate of the work is certified and approved. *Id.* § 28-6924(1). Estimates are deemed approved and certified seven days after the date of submission unless the department provides specific written finding detailing those items that are not approved before that time. *Id.* § 34-221(C)(2).

### *Grounds to Withhold Payments*

The owner may withhold amounts from progress payments sufficient to pay the expenses the owner reasonably expects to incur in correcting the deficiency set forth in the written finding. *Ariz. Rev. Stat.* § 34-221(C)(2). Additionally, if the project is more than 50% complete, the owner may reinstate a 10% retainage amount, as opposed to a 5% retainage, if the contractor is not making satisfactory progress. *Ariz. Rev. Stat.* § 34-221(C)(3).

### *Interest*

Late payments are subject to interest at the rate of 1% per month or fraction of a month. *Ariz. Rev. Stat.* § 34-221(J) & (K).

### *Retainage*

Construction contract payments shall be retained at a rate of 10% to ensure complete performance under the contract. *Ariz. Rev. Stat.* § 34-221(C)(5). Once the project is 50% completed, however, one-half of the amount retained shall, upon request, be paid to the contractor. *Id.* § 34-221(C)(3). Additionally, after the project is 50% completed, no more than 5% of the amount of any progress payments may be retained providing the contractor is making satisfactory progress. *Id.* If satisfactory progress is not being made, 10% retention shall be reinstated for all subsequent payments. *Id.*

### ***Attorney's Fees***

Under *Ariz. Rev. Stat.* § 12-341.01(C), in any contested action arising out of an express or implied contract, a court shall award a successful party reasonable attorney fees upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless, and is not made in good faith.

### ***Noteworthy***

See also *Ariz. Rev. Stat.* §§ 15-213, 28-6924, 41-2576, 41-2577, 41-2578, & 41-2580.

## **Prime to Sub – Public**

### ***Who's Covered***

Under *Ariz. Rev. Stat.* § 34-101(26), the term “subcontractor” is defined to mean a person who contracts to perform work or render service to a contractor or to another subcontractor as a part of a contract with an agent (defined under *Id.* § 34-101(1) to include any county, city or town, or officer, board or commission thereof, and irrigation, power, electrical, drainage and flood control districts, tax levying public improvement districts, county or city improvement districts, and any representative of the foregoing entities).

### ***Entitlement to Payment***

Progress payments are to be made upon a duly certified and approved estimate of the work performed on projects exceeding 90 days. *Ariz. Rev. Stat.* § 34-221(C)(2) & (D).

### ***Payment Period***

Contractors shall pay subcontractors or material suppliers, and subcontractors shall pay their subcontractors or material suppliers, within seven days of receipt of each progress payment. *Ariz. Rev. Stat.* § 34-221(G). Such payments are based on payments received. For Highway Construction Projects: the contractor shall pay its subcontractors or material suppliers, and subcontractors shall pay their subcontractors or material suppliers, within seven days of receipt of each progress payment, unless otherwise agreed in writing by the parties. *Id.* § 28-6924(A)(2). Such payments shall be based on payments received. *Id.* §§ 28-6924 & 34-221.

### ***Grounds to Withhold Payments***

Grounds to withhold payments include the following: unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, third party claims filed or reasonable evidence that a claim will be filed, failure of a subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention that does not exceed the actual percentage retained by the owner. *Ariz. Rev. Stat.* §§ 28-6924(C) & 34-221(I).

### ***Interest***

Payments delayed by more than seven days after receipt of the periodic or final payment by the contractor or subcontractor are subject to interest beginning on the eighth day at the rate of 1% per month or fraction of a month. *Ariz. Rev. Stat.* §§ 28-6924(A)(4)–(5) & 34-221(J)–(K).

### ***Retainage***

See Arizona Owner to Prime - Public.

### ***Attorney's Fees***

See Arizona Owner to Prime - Public.

### ***Noteworthy***

A subcontractor or material supplier shall notify the registrar of contractors and the purchasing agency in writing of any payment less than the amount or percentage approved. *Ariz. Rev. Stat.* §§ 28-6924(A)(2) & 34-221(G).

## **Owner to Prime – Private**

### ***Who's Covered***

The Arizona prompt pay act for private construction contracts protects contractors, subcontractors, and material suppliers. *Ariz. Rev. Stat.* §§ 32-1129.01–.02. The following relevant terms are defined, among others:

“Construction Contract“ means a written or oral agreement relating to the construction, alteration, repair, maintenance, moving or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land. *Id.* § 32-1129(A)(1).

“Contractor“ means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that has a direct contract with an owner to perform work under a construction contract. *Id.* § 32-1129(A)(2).

“Owner“ is defined by the statutes to mean any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that causes a building, structure or improvement to be constructed, altered, repaired, maintained, moved or demolished or that causes land to be excavated or otherwise developed or improved. *Id.* § 32-1129(A)(4).

“Subcontractor“ means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that has a direct contract with a contractor or another subcontractor to perform a portion of the work under a construction contract. *Id.* § 32-1129(6).

### ***Entitlement to Payment***

Performance in accordance with the provisions of the contract entitles the contractor, subcontractor, or material supplier to payment. *Ariz. Rev. Stat.* § 32-1129.01.

### ***Payment Period***

An owner shall make progress payments to the contractor within seven days after the date the estimate is certified and approved. An estimate is deemed approved and certified 14 days after the owner receives the estimate, unless before that time the owner issues a written statement stating in reasonable detail the owner's reasons for not certifying or approving all or a portion of the billing or estimate. When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full within seven days. *Ariz. Rev. Stat.* § 32-1129.01.

However, an owner may make progress payments later than seven days after the date the billing or estimate is certified and approved if (1) the construction contract clearly and conspicuously specifically provides for a later payment defined by a specified number of days after certification and approval, (2) the following statutory notice (or substantially similar language) appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

**Notice of Extended Payment Provision**

**This contract allows the owner to make payment within \_\_\_ days after certification and approval of billings and estimates for progress payments, within \_\_\_ days after certification and approval of billings and estimates for release of retention and within \_\_\_ days after certification and approval of billings and estimates for final payment.**

***Grounds to Withhold Payments***

Unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed or reasonable evidence that a claim will be filed, failure of a contractor or a subcontractor to make timely payments for labor, equipment and materials, damage to the owner, reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum. *Ariz. Rev. Stat. § 32-1129.01(D)*.

***Interest***

Late payments are subject to interest at the rate of 1.5% per month or fraction of a month or at a higher rate if agreed to in the contract. *Ariz. Rev. Stat. § 32-1129.01(Q)*.

***Retainage***

An owner may withhold from a progress payment only an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to protect the owner from loss for which the contractor is responsible and that results from any reason for which the owner is entitled to withhold payment.. *Ariz. Rev. Stat. § 32-1129.01(E)*.

***Attorney's Fees***

In any action or arbitration brought to collect payments or interest, the successful party shall be awarded costs and attorney fees in a reasonable amount. *Ariz. Rev. Stat. § 32-1129.01(S)*; *see also Id. § 12-341.01(C)* (allowing a “successful party” attorney’s fees in a contract case upon a showing of clear and convincing evidence that the claim or defense constitutes harassment, is groundless, and is not made in good faith).

***Noteworthy***

Under *Ariz. Rev. Stat. §32.1129.01*, for a construction contract to provide for a billing period other than a 30 day cycle, the contract must include one of the two following statutory notices in “clear and conspicuous type on each page of the plans, including bid plans and construction plans:”

**Notice of Alternate Billing Cycle**

**This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. Billings or estimates for this contract shall be submitted as follows:**

---

---

---

Or,

**Notice of Alternate Billing Cycle**

**This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. A written description of such other billing cycle applicable to the project is available from the owner or the owner’s designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request.**

**Prime to Sub – Private**

*Who’s Covered*

See Arizona Owner to Prime - Private.

*Entitlement to Payment*

See Arizona Owner to Prime - Private. Generally speaking, *Ariz. Rev. Stat.* § 32-1129.02 is similar to § 32-1129.01; however, only the prime contract is allowed to “contract out” of the requirement that payments be made within seven days after the date on which the billing or estimate is certified and approved.

*Payment Period*

A contractor shall pay its subcontractors or material suppliers and each subcontractor shall pay its subcontractors or material suppliers within seven days of receipt by the contractor or subcontractor of each progress payment or final payment. *Ariz. Rev. Stat.* § 32-1129.02.

*Grounds to Withhold Payments*

Grounds to withhold payment include unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed or reasonable evidence that a claim will be filed, failure of the subcontractor to make timely payments for labor, equipment and materials, damage to a contractor or another subcontractor or material supplier, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum, or the owner has withheld retention from a contractor, in which case the amount of retention withholding by the contractor shall not exceed the actual amount of the retention retained by the owner pertaining to the subcontractor’s work.. *Ariz. Rev. Stat.* § 32-1129.02(C).

### ***Interest***

See Arizona Owner to Prime - Private; *Ariz. Rev. Stat.* § 32-1129.02(H).

### ***Retainage***

A contractor or subcontractor may withhold a reasonable amount for retention that does not exceed the actual percentage retained by the owner. *Ariz. Rev. Stat.* § 32-1129.02(C).

### ***Attorney's Fees***

In any action or arbitration brought to collect payments or interest, the successful party shall be awarded costs and attorney fees in a reasonable amount. *Ariz. Rev. Stat.* § 32-1129.02(J).

### ***Noteworthy***

Any licensed contractor, licensed subcontractor or material supplier who files a complaint with the registrar of contractors under *Ariz. Rev. Stat.* § 32-1129.02 will be required to post a surety bond or cash deposit in the lesser of five hundred dollars or one-half of the amount due with the registrar. If the complaint is deemed to be meritless and frivolous by the registrar, then the complainant will be ordered to pay one-half the bond amount or cash deposit to the respondent and one-half to the registrar for deposit into the state general fund. *Ariz. Rev. Stat.* § 32-1129.02(I).

# Arkansas

## Owner to Prime – Public

### *Who's Covered*

The Arkansas prompt pay statutes apply to ensure public agencies promptly pay prime contractors on a construction contracts other than those in connection with the construction or maintenance of public highways, roads, or streets. *Ark. Code Ann.* §§ 22-9-601 & 22-9-602.

Under the statutes, the following terms are defined:

“Construction Contract“ means a contract between a public agency and a prime contractor which obligates the prime contractor to construct, repair, replace, or maintain improvements for the public agency;

“Prime Contractor“ means the party which establishes a direct contractual relationship with the public agency obligating the prime contractor to construct improvements for the public agency; and

“Public Agency“ means the State of Arkansas or any of its agencies, departments, or institutions or any political subdivision of the state, or taxing unit, and includes any nonprofit corporation or association receiving public funds in whatever form, including grants, loans, and subsidies.

*Id.* § 22-9-601.

### *Entitlement to Payment*

The Arkansas statutes do not appear to identify additional criteria beyond what exists in the parties' contracts or common law for determining when payment is due.

### *Payment Period*

Under *Ark. Code Ann.* § 19-4-1411, a contractor's properly prepared request for payment of completed work must be processed within a set period of time, excluding time required for transmittal from one (1) party to another. Generally, claims submitted to a design professional, institutions of higher education exempt from review and approval by the AR Building Authority, or the Department of Finance and Administration must be processed within five working days. If a claim is not processed within that time period, the contractor may be entitled to an additional payment. *Ark. Code Ann.* § 19-4-1411. If a claim is contested, the entity to whom the payment request was submitted must notify the contractor within that five day period that the payment is contested and the reasons therefore. *Id.* Once again, however, claims made to the State Highway Commission and Arkansas State Highway and Transportation Department are exempted from this maximum processing time period. *Id.* § 19-4-1403.

Notably, if a contract provides that payment on a project is not to be made until completion and approval of the project—including projects involving construction and improvements to highways,

roads, and streets—then, payment must be made within 90 days of the presentation of the claim. *Id.* § 22-9-205.

### **Grounds to Withhold Payments**

Neither Ark. Code Ann. §§ 22-9-604 or 19-4-1411 identifies grounds upon which payment may be withheld. Presumably, individual contracts and Arkansas common law will determine when payments may be withheld.

### **Interest**

Failure to process uncontested requests for payment within the time limits following date of receipt results in a penalty of 8% per annum. When the contract provides for payment upon completion and submitted claims are not paid within 90 days, they are thereafter subject to interest at the rate of 10% per annum. *Ark. Code Ann.* §§ 19-4-1411 & 22-9-205.

### **Retainage**

For contracts between a public agency (other than the State Highway Commission for the construction or maintenance of public highways, roads, or streets) and a contractor who is required to furnish a performance bond, the contractor shall be entitled to payment of 95% of the earned progress payments when due, with the public agency retaining 5% to assure faithful performance of the contract. *Ark. Code Ann.* §§ 22-9-602 & 22-9-604.

If the contract allows phased work in which completion may occur on a partial occupancy, retention proceeds withheld shall be partially released within 30 days in proportion to the value of the part completed. *Id.* Additionally, all sums withheld by the public agency must be paid to the contractor within 30 days after the construction contract has been completed. *Id.*

### **Attorney's Fees**

The Arkansas prompt pay act does not appear to provide for the payment of an attorney's fees.

### **Noteworthy**

The parties covered by the statutes in title 22, chapter 9, subchapter 6 have no authority to vary or waive those provisions by agreement of the parties. *Ark. Code Ann* § 22-9-603.

### **Prime to Sub – Public**

The Arkansas public prompt payment act does not appear to impose requirements on prime contractors with regard to their subcontractors.

### **Owner to Prime – Private**

Arkansas does not appear to have a prompt payment act applicable to private construction contracts.

### **Prime to Sub – Private**

Arkansas does not appear to have a prompt payment act applicable to private construction contracts.

# California

## Owner to Prime – Public

### *Who's Covered*

Prime contractors and public entities that contract for public works of improvement. *Cal. Pub. Cont. Code* § 10261.5.

### *Entitlement to Payment*

A contractor's entitlement to payment will arise in accordance with the terms of the applicable contract and the applicable provisions of various codes described in this section.

### *Payment Period*

A state agency must make a progress payment within 30 days of receiving a properly submitted, undisputed payment request. *Cal. Pub. Cont. Code* § 10261.5.

### *Grounds to Withhold Payments*

The California statutes do not appear to define specific grounds upon which monies may be withheld from a prime contractor beyond discussions of retainage. *See* Owner to Prime - Public (Retainage), *infra*. Presumably, the parties' contract and California common law would govern when payments may properly be withheld.

### *Interest*

If a retention payment is not made when required, then the public entity (or original contractor) wrongfully withholding a certain amount will be charged 2% per month on that amount, in lieu of any interest otherwise due. *Cal. Pub. Cont. Code* § 7107(f).

If a progress payment is not made within the time period required, then interest may be collected as provided in *Cal. Pub. Cont. Code* § 10261.5 at the rate established in *Cal. Civ. Proc. Code* § 685.010. *Cal. Pub. Cont. Code* § 10261.5(a). At the time of this writing, the current interest rate under that section was 10% per annum on the principle amount that is unpaid. *Cal. Civ. Proc. Code* § 685.010(a). Depending on the reason for the delay, either the state agency or the State Controller will be responsible for paying that interest. *Cal. Pub. Cont. Code* § 10261.5(a).

### *Retainage*

A public owner must release withheld retention to a prime contractor within 60 days after the date of completing the work of improvement. Completion is defined as any of the following: (1) the occupation, beneficial use, and employment of work of improvement, excluding any operation only for testing, startup, or commissioning, accompanied by cessation of labor on the work of improvement; (2) the acceptance by the public owner, or its agent; (3) cessation of labor on the work of improvement for a continuous period of 100 days or more, due to factors beyond the control of the contractor; or (4) cessation of labor on the work of improvement for a continuous period of 30 days or more, if the public owner files notice of cessation or a notice of completion. *Cal. Pub. Cont. Code* § 7107(c).

In the event of a dispute over amount due, public owner may withhold an amount not to exceed 150% of the disputed amount. *Id.* If a state agency retains an amount greater than 125% of the estimated value of the work yet to be completed, the state agency shall distribute undisputed retention proceeds within 60 days after the date of completion of the work of improvement. However, if a state agency retains an amount equal to or less than 125% of the estimated value of the work yet to be completed, the state agency shall have 90 days in which to release undisputed retention. *Cal. Pub. Cont. Code § 7107(g).*

### ***Attorney's Fees***

Section 7107(f) of the California Code of Public Contracts provides that “in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney’s fees and costs.”

### ***Noteworthy***

It is against public policy to require waiver of any of the provisions dealing with release of retention, and any such waiver shall be void. *Cal. Pub. Cont. Code § 7107(h).*

## **Prime to Sub – Public**

### ***Who's Covered***

Prime contractors and subcontractors who contract for public works projects.

### ***Entitlement to Payment***

Upon the contractor’s receipt of a progress payment from the state agency, the prime contractor’s subcontractors are entitled to the extent of each subcontractor’s interest in the work so far performed on the project. *Cal. Pub. Cont. Code § 10262.*

### ***Payment Period***

Absent a good faith dispute over the amount owed, the general rule is that a prime contractor is obligated to pay a subcontractor to the extent of the subcontractor’s interest in the work within 10 days of receiving a progress payment. *Cal. Pub. Cont. Code §§ 10262 & 10262.5.*

Notably, *Cal. Bus. & Prof. Code § 7108.5* also imposes a payment period of 10 days after receiving a progress payment; however, under this statute, the parties can agree to a different payment period in writing. Moreover, in the context of payments received by a contractor on a contract with a public utility, payment must be made within 15 days, as opposed to 10 days, of the contractor’s receipt of progress payments. *Cal. Civ. Code § 3262.5.*

### ***Grounds to Withhold Payments***

If a good faith dispute over amount due exists, a prime contractor may withhold an amount not to exceed 150 percent of the dispute amount from a progress payment. *Cal. Bus. & Prof. Code § 7108.5(c); Cal. Pub. Cont. Code § 10262.5(a); Cal. Civ. Code § 3262.5(a).*

### ***Interest***

Generally, a 2 percent monthly penalty will be applied to amounts wrongfully withheld by a contractor beyond the payment period. Some statutes discussing applicable interest to be charged include:

*Cal. Bus. & Prof. Code* § 7108.5(b) (stating that in addition to possible disciplinary action, a contractor is subject to 2% per month penalty on unpaid amounts);

*Cal. Civ. Code* § 3262.5(b) (stating that a contractor is subject to 2% per month penalty on disputed, unpaid amounts);

*Cal. Pub. Cont. Code* § 7107(f) (stating that a contractor is liable for 2% per month on improperly withheld amounts of retention, in lieu of any interest otherwise due); and

*Cal. Pub. Cont. Code* § 10262.5(a) (stating that a contractor is subject to a 2% per month penalty on any payment withheld in violation of *Cal. Pub. Cont. Code* § 10262.5).

Also, *Cal. Civ. Code* § 3262.5 and *Cal. Pub. Cont. Code* § 10262.5 specifically state that all other contractual, administrative, or judicial remedies for late payment or progress payment are not limited or impaired by provisions for interest within those sections.

### **Retainage**

A prime contractor shall release to each subcontractor its share or designated portion of retention within seven days after all or any portion of retention is received by prime. *Cal. Pub. Cont. Code* § 7107(d). However, a prime may withhold a portion of the retention proceeds up to 150% of the estimated value of the disputed amount if a bona fide dispute exists between the subcontractor and the prime. *Id.* § 7107(e).

### **Attorney's Fees**

Attorney's fees are recoverable by the prevailing party in an action to recover funds wrongfully withheld. *Cal. Bus. & Prof. Code* § 7108.5(e); *Cal. Civ. Code* § 3262.5(b); *Cal. Pub. Cont. Code* §§ 7107(f) & § 10262.5(a).

### **Noteworthy**

It is against public policy to require waiver of the provisions dealing with retention, and any such waiver shall be void. *Cal. Pub. Cont. Code* § 7107(h).

## **Owner to Prime – Private**

### **Who's Covered**

Prime contractors who contract with private owners for private work of improvement are protected. However, some protection is also available for an owner's construction lender(s) under the statutes.

### **Entitlement to Payment**

Contractors are entitled to payment in accordance with the terms of the applicable contract and the provisions of various codes described herein.

### **Payment Period**

Except as otherwise agreed in writing, owner must pay all amounts about which there is no bona fide dispute within 30 days following receipt of a demand for payment in accordance with the contract. *Cal. Civ. Code* § 3260.1.

### ***Grounds to Withhold Payments***

If a bona fide dispute over amount due exists, owner may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. *Cal. Civ. Code* § 3262.5.

### ***Interest***

The owner will be charged 2% per month in lieu of interest for progress payments or retention wrongfully withheld. *Cal. Civ. Code* §§ 3260(g) & 3260.1(a).

### ***Retainage***

Owner shall release retention within 45 days after the date of completion, defined as any of the following: (1) the date of issuance of any certificate of occupancy covering the work by the public agency issuing the building permit; (2) the date of completion indicated on a valid notice of completion recorded pursuant to Section 3093; or (3) the date of completion as defined in Section 3086. *Cal. Civ. Code* § 3260(c). However, release of retention withheld for any portion of the work of improvement which ultimately will become the property of a public agency may be conditioned upon the acceptance of the work by the public agency. *Id.* These retention rules do not apply to retentions withheld by lender in accordance with construction loan agreement. *Id.* § 3260(i).

Also, when there is a dispute between the owner and the prime contractor or the prime contractor and the subcontractor, either the owner or prime contractor may withhold from the final payment an amount not to exceed 150% of disputed amount. *Id.* §§ 3260(c), (e). Within 10 days of acceptance of the disputed work, however, either the owner or contractor must release the retained portion of the retention proceeds. *Id.* § 3260(f).

### ***Attorney's Fees***

Attorney's fees are recoverable by the prevailing party in an action to recover funds wrongfully withheld. *Cal. Civ. Code* § 3260(g).

### ***Noteworthy***

Waiver: It is against public policy to require any party to waive provisions of these sections governing progress payments and release of retention. § 3260(h).

Stop Work Order: Under *Cal. Civ. Code* § 3260.2(a), a prime contractor not paid amounts due from the owner within 35 days from the date payment is due may serve a 10-day stop work order upon the owner. This "order" really appears to be a notice to the owner that unless all amounts due to the prime contractor are paid within 10 days, the contractor will stop work on the project.

At least five days prior to the service of this order/notice to the owner, the contractor must post a notice of its intention to serve such a stop work order in a "conspicuous location at the job site" and at the job site's main office, if one exists. *Cal. Civ. Code* § 3260.2(a). A copy of this notice must be served on all subcontractors' having a direct contract with the prime contractor at the same time of service upon the owner. *Id.* Additionally, the statute requires that an *owner* forward a copy of the notice to its *construction lender* within five days of receiving the written notice from a contractor by first-class mail. *Id.* Upon resolution of the contractor's dispute with the owner or cancellation of the stop work order, notice of the resolution/cancellation must be posted and served upon subcontractors in like fashion as the original notice. *Id.* Notably, the contractor's right to stop work under *Cal. Civ. Code* § 3260.2(a) is in addition to any other rights that the contractor may

have under the law. *Id.* § 3260.2(b).

In addition to stopping work, if the contractor does not receive payment within 10 days of serving the notice, then either the original contractor or its surety may seek an expedited proceeding to determine liability for the amount not paid for the work performed. *Id.* § 3260.2(b), (d).

## **Prime to Sub – Private**

### ***Who's Covered***

Subcontractors who contract with prime contractors and other subcontractors on private works of improvement are protected.

### ***Entitlement to Payment***

Subcontractors are entitled to payment in accordance with the terms of the applicable contract and provisions of various codes described herein.

### ***Payment Period***

Unless otherwise agreed in writing, prime contractors and subcontractors must pay all amounts due to any subcontractor about which there is no bona fide dispute within 10 days following receipt of each progress payment. *Cal. Bus. & Prof. Code* § 7108.5.

### ***Grounds to Withhold Payments***

If a good faith dispute over an amount due exists, the prime or subcontractor may withhold from the progress payment an amount not to exceed 150 percent of the disputed amount. *Cal. Bus. & Prof. Code* § 7108.5(c); *Cal. Civ. Code* § 3260(e).

### ***Interest***

A penalty of 2% per month on retention wrongfully withheld will be assessed in lieu of any interest otherwise due. *Cal. Civ. Code* § 3260(g). With regard to withheld progress payments, interest may be assessed at the rate of 2% per month on unpaid amounts withheld in violation of *Cal. Bus. & Prof. Code* § 7108.5(b). Penalties assessed by *Cal. Bus. & Prof. Code* § 7108.5 are in addition to all other civil, administrative, or criminal remedies.

### ***Retainage***

See California Owner to Prime - Private.

### ***Attorney's Fees***

Attorney fees are recoverable by the prevailing party in an action to recover amounts wrongfully withheld. *Cal. Bus. & Prof. Code* § 7108.5(e); *Cal. Civ. Code* § 3260(g).

### ***Noteworthy***

It is against public policy to require any party to waive these provisions governing progress payments and release of retention. *Cal. Civ. Code* § 3260(h).

# Colorado

## Owner to Prime – Public

### *Who's Covered*

The Colorado public prompt pay act provides protection for contractors working with public entities within the State of Colorado. Under the statutes, the following terms, among others, are defined:

“Contractor“ means any person, company, firm, or corporation which is a party to a contract with a public entity to construct, erect, alter, install, or repair any highway, public building, public work, or public improvement, structure, or system. *Colo. Rev. Stat. § 24-91-102(2)*.

“Public entity“ means the state of Colorado or a county, city, city and county, town, or district, including any political subdivision thereof. *Colo. Rev. Stat. § 24-91-102(3)*.

“Subcontractor“ includes any person, company, firm, or corporation which is a party to a contract with a contractor to construct, erect, alter, install, or repair any highway, public building, public work, or public improvement, structure, or system and which, in connection therewith, furnishes and performs on-site labor with or without furnishing materials. *Colo. Rev. Stat. § 24-91-102(4)*.

### *Entitlement to Payment*

If a contractor “is satisfactorily performing the contract,” then the public entity must authorize partial payments under the terms of the contract at the end of each month, or as soon thereafter as practicable. *Colo. Rev. Stat. § 24-91-103(1)*. Upon a finding that satisfactory progress is being made in all phases of the contract, written request from the contractor, and approval from any surety furnishing a bond on the contract work, a public entity may authorize final payment to a contractor or subcontractor who has completed its work in a manner finally acceptable to the public entity. *Id.*

### *Payment Period*

Payments from the public entity to the contractor should be made at the end of each calendar month for the amount due, or as soon thereafter as practicable. *Colo. Rev. Stat. § 24-91-103(1)*.

### *Grounds to Withhold Payments*

Other than to condition payment on a contractor’s satisfactory performance, the Colorado public prompt pay act does not appear to explicitly identify grounds under which payment may be withheld.

### *Interest*

The Colorado prompt pay act does not appear to identify a rate of interest that may be withheld for payments not properly made by the public entity to a contractor. *But see Colo. Rev. Stat. § 5-12-102* (defining the statutory rate of interest to be 8% per annum for liquidated claims).

### *Retainage*

At least 90% of the value of any work completed shall be paid until 50% of the work required by the contract has been performed. *Colo. Rev. Stat. § 24-91-103*. Thereafter, the public entity shall pay any of the remaining installments without retaining additional funds if, in the opinion of the

public entity, satisfactory progress is being made in the work. *Id.* The withheld percentage of the contract price of any such work, improvement, or construction shall be retained until the contract is completed satisfactorily and finally accepted by the public entity. *Id.*

If a public entity takes over completion of a contract, then the amounts owed to a contractor, including retention, will be distributed according to the process outlined in *Colo. Rev. Stat.* § 24-91-104. If, following a series of distributions, there are still amounts remaining from the amount withheld from the contractor, then that amount is due to the contractor at the expiration of 30 days following the date of final acceptance by the public entity of the contract work. *Id.*

### ***Attorney's Fees***

The Colorado public prompt pay act does not appear to provide for the payment of attorney fees in the event of a wrongfully withheld payment or wrongfully withheld retainage.

### ***Noteworthy***

The provisions within title 24, article 91 will not apply where part of the contract price is to be paid with funds from the federal government or from some other source and if the federal government or such other source has requirements concerning retention or payment of funds that are applicable to the contract and that are inconsistent with this article. *Colo. Rev. Stat.* § 24-91-110.

## **Prime to Sub – Public**

### ***Who's Covered***

A prime contractor has obligations to its subcontractors as well as the sub-subcontractors, suppliers, laborers, and any other person who provides goods, materials, labor or equipment to a subcontractor.

See Colorado Owner to Prime - Public for applicable definitions.

### ***Entitlement to Payment***

As with payments to a prime contractor by an owner, the question is going to be whether a subcontractor is “satisfactorily performing under his contract with the contractor.” *Colo. Rev. Stat.* § 24-91-103(2).

### ***Payment Period***

Whenever a contractor receives payment from the public entity, the contractor must pay each of his subcontractors any amounts actually received that were included in the contractor’s request for payment to the public entity for such subcontracts. *Colo. Rev. Stat.* § 24-91-103(2). Such payments shall be made within seven calendar days of receipt of payment from the public entity. *Id.* Within seven calendar days of receipt of payment from the contractor, subcontractors shall pay all suppliers, second-tier subcontractors, laborers, and any other persons who provide goods, materials, labor, or equipment to the subcontractor any amounts actually received which were included in the subcontractor’s request for payment to the contractor for such persons. *Id.*

However, a contractor will not be required to pay the subcontractor within seven days until the subcontractor submits a list identifying the subcontractor’s suppliers, sub-subcontractors, and

laborers. *Id.* Under the statute, such a list is to be submitted with the subcontractor's request for payment to the contractor.

### ***Grounds to Withhold Payments***

Other than to condition payment on a subcontractor's satisfactory performance, the Colorado public prompt pay act does not appear to explicitly identify grounds under which payment may be withheld.

### ***Interest***

Contractors who fail to make timely payments to subcontractors and subcontractors who fail to make timely payments to second-tier subcontractors, suppliers, or laborers shall pay interest as specified by contract or at the rate of 15% per annum whichever is higher on the amount that is not timely paid. *Colo. Rev. Stat. § 24-91-103(2)*.

### ***Retainage***

*Colo. Rev. Stat. § 24-91-103(2)* specifically states that the statute should not be construed to affect any contract's retention provisions.

*Colo. Rev. Stat. § 24-91-109* states that all retained payments and interest disbursed to a contractor by a public entity are to be disbursed to subcontractors "in proportion to the respective amount of retained payments, if any, which the contractor theretofore has withheld from his subcontractors if the subcontractor has performed under his contract with the contractor.

### ***Attorney's Fees***

The Colorado public prompt pay act does not appear to provide for the payment of attorney fees in the event of a wrongfully withheld payment or wrongfully withheld retainage.

### ***Owner to Prime – Private***

Colorado does not appear to have a prompt payment act applicable to private construction contracts.

### ***Prime to Sub – Private***

Colorado does not appear to have a prompt payment act applicable to private construction contracts.

# Connecticut

## Owner to Prime – Public

### *Who's Covered*

Connecticut employs a general statutory scheme ensuring that those entities contracting with a state department or state agency are timely paid. Thus, prime contractors on a public contract will have protection in the same manner as any other state contractor.

### *Entitlement to Payment*

The contract between the contractor and the state department or agency will determine when payment is due in addition to any common law pronouncements of when payment is due under a construction contract.

### *Payment Period*

Under *Conn. Gen. Stat.* § 4a-71, payments are considered timely if a check or warrant is mailed by or delivered by the later of (1) the date specified in the contract or (2) within 45 days of receiving a properly completed claim or receipt of goods or services. Additionally, if state or federal law requires a payment to be withheld, payment will be timely if a check or warrant is mailed or delivered in the proper amount on the date the amount may be released under the applicable law. *Conn. Gen. Stat.* § 4a-71(b).

As indicated in *Conn. Gen. Stat.* § 4a-71, a properly completed claim is required for the contractor to be entitled to payment. However, if the claim is filled out incorrectly or there is otherwise a defect or impropriety in the claim, the state department or agency has a duty to contact the contractor within 10 days. *Id.* § 4a-73(c). If the contractor corrects the deficiency within five business days of being contacted, the state still has an obligation to pay him within the original 45 day time period for timely payment. *Id.*

*Conn. Gen. Stat.* § 4a-72(a) lists several exceptions to the requirement of prompt payment. However, in the context of public construction contracts, the most likely exceptions include the following:

- Claims subject to a good faith dispute if, before the date of timely payment, notice of the dispute is:
  - (A) sent by certified mail;
  - (B) personally delivered; or
  - (C) sent in accordance with any procedure in the contract, *id.* § 4a-71(3)
- Contracts related to highway or road construction, reconstruction or maintenance, *id.* § 4a-71(5); and
- Claims, contracts, or projects that are to be paid for exclusively with federal funds, *id.* § 4a-71(6).

Under *Conn. Gen. Stat.* § 4a-72(b), a “good faith dispute” exists if there is

- a contention by the state that goods delivered or services rendered were:
  - (A) of less quantity or quality than ordered or specified by contract;
  - (B) faulty; or
  - (C) installed improperly; or
- any other reason giving cause for the withholding of payment by the state until such dispute is settled.

### ***Grounds to Withhold Payments***

Federal or state law may authorize the withholding of payments for a period of time. *Conn. Gen. Stat.* § 4a-71(b). Moreover, a properly completed claim is required.

### ***Interest***

Late payments are subject to interest at a rate equal to the monthly effective yield for the Short Term Investment Fund administered by the Treasurer pursuant to *Conn. Gen. Stat.* §§ 3-27a to 3-27f. *Conn. Gen. Stat.* § 4a-71(a).

### ***Retainage***

In contracts for which a payment bond in the full amount of the contract price is required by *Conn. Gen. Stat.* § 49-41b, the awarding authority shall not retain more than 10% from any periodic or final payment. Moreover, contractors in such situations may only retain from subcontractors the lesser of 10% or the amount withheld by the awarding authority from the contractor. *Conn. Gen. Stat.* § 49-41b.

Special rules apply with regard to the Connecticut Department of Transportation and municipalities. For contracts with the state Department of Transportation, no more than 2.5% of any periodic or final payment may be retained by the department or by a contractor. If the awarding authority is a municipality, not more than 5% of any periodic or final payment may be retained. *Id.* § 49-41b.

### ***Attorney's Fees***

The Connecticut prompt pay statutes do not appear to provide for the award of attorney's fees

## **Prime to Sub – Public**

### ***Who's Covered***

Connecticut provides protection for subcontractors and sub-subcontractors on public contracts.

### ***Entitlement to Payment***

The contract between the contractor and its subcontractor or between a subcontractor and sub-subcontract will determine when payment is due in addition to any common law pronouncements of when payment is due under a construction contract.

### ***Payment Period***

Contractors must pay their subcontractors within 30 days of payment from the state for work performed by or materials furnished by such subcontractors. *Conn. Gen. Stat.* §§ 49-41a & 49-41c.

Moreover, public prime contracts valued at more than \$100,000 for which payment bonds are required under *Conn. Gen. Stat.* § 49-41 must include certain mandatory provisions. One required prime contract provision is that a general contractor must include a requirement in each of its subcontracts to the effect that its subcontractors must pay their subcontractors within 30 days of receiving payment from the general contractor. *Id.* §49-41a.

### ***Grounds to Withhold Payments***

A contractor may withhold payment from a subcontractor if the contractor has a bona fide reason for doing so and if the contractor notifies the affected subcontractor, in writing, of his reasons for withholding such payment and provides the state board, commission, department, office, institution, council or other agency through which such contractor had made the contract, with a copy of the notice, within the 30 day period. *Conn. Gen. Stat.* § 49-41c.

### ***Interest***

For public prime contracts valued at more than \$100,000 for which payment bonds are required under *Conn. Gen. Stat.* § 49-41, if payments are not timely made by the general contractor or any of its subcontractors, the subcontractor shall provide notice to the general contractor or subcontractor by registered or certified mail. Ten days after the receipt of that notice, the general contractor shall be liable to its subcontractor, and the subcontractor shall be liable to its subcontractor, for interest on the amount due at the rate of 1% per month.

Upon written demand by the subcontractor (sub-subcontractor), the general contractor (subcontractor) shall be required to place funds in the amount of the claim, plus 1% interest, in an interest-bearing escrow account in a bank in Connecticut. If the subcontractor (sub-subcontractor) has not substantially performed its work under its contract, the general contractor (subcontractor) may refuse to place funds in escrow. However, if it is determined in arbitration or litigation that the claimant substantially performed its work, then the general contractor or subcontractor must pay the claimant's attorney's fees. *Conn. Gen. Stat.* § 49-41a(c).

### ***Retainage***

*See Connecticut Owner to Prime - Public (Retainage).*

### ***Attorney's Fees***

*See Connecticut Prime to Sub - Public (Interest).*

### ***Noteworthy***

## **Owner to Prime – Private**

### ***Who's Covered***

The Connecticut private prompt pay act provides protection for contractors, subcontractors, or suppliers in direct contractual relationship with the owner, a contractor's subcontractors and suppliers, and second-tier subcontractors and suppliers. *Conn. Gen. Stat.* § 42-158j.

Under the statutes, the following relevant terms are defined:

“Owner“ means any individual, corporation, nonprofit corporation, partnership, limited partnership, limited liability company or other business entity that is the owner of record or lessee of real property upon which construction, renovation or rehabilitation is to be or is being performed pursuant to a construction contract regarding such real property.

“Construction contract“ or “contract“ means any contract for the construction, renovation or rehabilitation in this state on or after 10/1/99, including improvements to real property that are associated with such construction, renovation or rehabilitation between an owner and a contractor, or between a contractor and a subcontractor or subcontractors, or between a subcontractor and any other subcontractor. “Construction contract” or “contract” does not include:

- (A) any public works or other building contract entered into with the state, the United States, any other state, and any municipality or other political subdivision of Connecticut or any other state;
- (B) a contract or project funded or insured by the US Department of Housing and Urban Development;
- (C) a contract between an owner and a contractor for an amount of \$25,000 or less or a subcontract which results from such a contract; or
- (D) a contract for a building intended for residential occupancy containing 4 or less units.

“Retainage” means a sum withheld from progress payments to the contractor or subcontractor, otherwise payable to a contractor or subcontractor by an owner conditioned on substantial or final completion of all work in accordance with the terms of a written or verbal construction contract, but does not include any sum withheld due to the contractor’s or subcontractor’s failure to comply with construction plans and specifications.

*Id.* § 42-158i.

#### ***Entitlement to Payment***

A party will be entitled to payment according to the terms of its contract; however, payment may not be delayed beyond the time periods outlined in *Conn. Gen. Stat.* § 42-158j. Entitlement to payment arises upon substantial performance according to the terms of the construction contract. *See Conn. Gen. Stat.* § 158j(c)(4).

#### ***Payment Period***

An owner must pay a contractor, subcontractor or supplier in a direct contractual relationship with the owner not later than 30 days after a written request for payment has been made. *Conn. Gen. Stat.* § 42-158j. However, payment may be due earlier under the terms of the parties’ contract. *Id.*

#### ***Grounds to Withhold Payments***

The Connecticut statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### **Interest**

If an owner, contractor, subcontractor, or supplier fails to make timely payment, a protected party shall set forth its claim through notice by registered or certified mail to the owner, contractor, subcontractor, or supplier, as the case may be. *Conn. Gen. Stat.* § 42-158j(c)(1). Ten days after the receipt of such notice, the owner, contractor, subcontractor, or supplier will be liable for interest on the amount due at the rate of 1% per month. *Id.* § 42-158j(c)(4). Interest on the amount due will accrue beginning on the date notice is received. *Id.*

Upon written demand, an owner, contractor, subcontractor or supplier shall be required to place funds in the amount of the claim, plus such interest of 1% per month, in an interest-bearing escrow account. *Id.* Such a party may refuse to place the funds in escrow on the grounds that the party making such demand has not substantially performed the work or supplied the materials according to the terms of the contract. *Id.* However, if it is determined that payment was unreasonably withheld, then the refusing party will be liable to the claimant for his reasonable attorney fees plus interest on the amount due at the rate of 1% per month. *Id.* Moreover, the party who is found to have withheld payments in bad faith will be liable for 10% damages. *Id.*

### **Retainage**

No construction contract may provide for any retainage in an amount that exceeds 5% of the estimated amount of a progress payment for the life of the construction project. *Conn. Gen. Stat.* § 42-158k. An escrow account shall be established for all retainage as required under *Conn. Gen. Stat.* § 42-158p and the exclusions of *Conn. Gen. Stat.* § 42-158q.

### **Attorney's Fees**

Under *Conn. Gen. Stat.* § 42-158r, a court may award reasonable attorney's fees in an action to enforce the retainage provisions of *Conn. Gen. Stat.* §§ 42-158k, 42-158m, or 42-158p. *See also* Connecticut Owner to Prime - Private (Interest).

### **Noteworthy**

Required contract provisions are listed in *Conn. Gen. Stat.* § 42-158j(a).

Any payment requisition submitted in accordance with the requirements of *Conn. Gen. Stat.* § 42-158j(a) must contain a statement showing the status of all pending construction, along with information about any pending change directives and approved changes to the original contract or subcontract. *Conn. Gen. Stat.* § 42-158j(b).

No payment may be withheld from a subcontractor or supplier for work performed or materials furnished because of a dispute between a contractor and another contractor, subcontractor or supplier. *Conn. Gen. Stat.* § 42-158j(d).

If an owner fails or neglects to pay a contractor for labor and materials supplied under a contract, a person who has not been paid by such a party whom the owner has failed to pay may demand payment from the owner directly. *Conn. Gen. Stat.* § 42-158j(e). If the owner fails to make payment to that person, he or she will have a direct right of action against the owner. *Id.* However, the owner's obligations will be limited to the amount owed to the contractor by the owner for the work performed under the contract as of the date that the demand is made on the owner. *Id.*

## **Prime to Sub – Private**

### ***Who's Covered***

See Connecticut Owner to Prime - Private.

### ***Entitlement to Payment***

See Connecticut Owner to Prime - Private.

### ***Payment Period***

A contractor must pay its subcontractors or suppliers not later than 30 days after the date the contractor receives payment from the owner which encompasses labor performed or materials furnished by such subcontractor or material supplier. *Conn. Gen. Stat. § 42-158j*. Subcontractors must pay their subcontractors or suppliers not later than 30 days after the subcontractor receives payment from the contractor which encompasses labor performed or materials furnished. *Id.*

### ***Grounds to Withhold Payments***

The Connecticut statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

See Connecticut Owner to Prime - Private.

### ***Retainage***

See Connecticut Owner to Prime - Private.

### ***Attorney's Fees***

See Connecticut Owner to Prime - Private.

### ***Noteworthy***

See Connecticut Owner to Prime - Private.

# Delaware

## Owner to Prime – Public

### *Who's Covered*

Persons who provide services or materials in connection with a public works contract are covered. Under the statutes, applicable definitions include:

“Contractor” means any person, entity or business association that has a contract with an agency. *Del. Code Ann. tit. 29, § 6902(5)*.

“Subcontractor” means a person, entity or business association that has a contract with a Contractor. *Id. tit. 6, § 3501(6)*.

“Third-tier contractor” is defined as a firm that has contracted with a Subcontractor to provide services or materials in connection with a public works contract. *Id. tit. 29, § 6902(24)*.

### *Entitlement to Payment*

A Contractor is entitled to final payment after completion or filing of the notice of completion of the work. *Del. Code Ann. tit. 29, § 6516(f)*.

Progress payments must be made monthly for all contracts of 90 days or more. *Id. § 6516(f)(1)*.

### *Payment Period*

Final payment, including retainage, must be made within 60 days after completion or filing notice of completion of the contract or within 30 days of a required federal agency’s final approval or certification of complete performance, except that, upon a specific written finding by the Delaware agency, made within 10 days after completion of filing notice of completion and justifying the delay in payment, the agency may retain up to 150% of the necessary amount to pay or discharge the expenses determined by the agency in the finding justifying the retention of moneys. *Del. Code Ann. tit. 29, § 6516(f)(3)*.

For progress payments, an estimate of the work shall be approved or disapproved within seven days of receipt of an application for payment, notice of grounds for disapproval shall be made within 21 days from receipt of the application and payment shall be made on or before 21 days after certification and approval of the work covered by the estimate. If approval of a federal agency is required, payment must be made within 10 days of the required federal agency’s approval. *Id. § 6516(f)(1)*.

### *Grounds to Withhold Payments*

Under *Del. Code Ann. tit. 29, § 6516(f)(2)*, grounds to withhold payment in full or in part includes the following: unsatisfactory job progress; defective construction work or materials not remedied; disputed work or materials; failure to comply with material provisions of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure of the contractor or subcontractor to make timely payments for labor, equipment or materials; damage to the agency,

contractor or subcontractor; reasonable evidence that the construction cannot be completed for the unpaid balance of the construction contract; or retainage of funds.

### **Interest**

Progress payments delayed by more than 21 days after approval or final payments delayed by more than 60 days after the date of final submission bear interest starting on the 22nd or 61st day, respectively, on the unpaid balance at a rate not to exceed 2% above the prime interest rate as established by the Federal Reserve. Provided the agency timely notifies the contractor in writing, payments withheld on reasonable grounds do not bear interest. *Del. Code Ann.* tit. 29, § 6516(f)(4).

### **Retainage**

Under Delaware's statutes, 5% of the value of the work completed by the contractor under the contractor "shall be" retained by the public agency. *Del. Code Ann.* tit. 29, § 6962(d)(5)(a)(1). Up to 60% of retainage may be released upon completion of the work. *Id.* The balance will be held until (1) all reports required of the contract are received; (2) all subcontractors in trades listed on the bid form are paid by the contractor, unless disputed, in which case the agency may withhold 150% of the amount withheld by the contractor in its dispute with the subcontractor; and (3) final payment is authorized by the agency. *Id.* If the project is delayed beyond the contractually established completion date due to the contractor's failure to meet its responsibilities, all or part of the retainage may be declared forfeit by the agency in its discretion. *Id.* § 6962(d)(5)(a)(3).

### **Attorney's Fees**

The provision for attorney fees in *Del. Code Ann.* tit. 6, § 3509 is expressly not applicable to public works contracts awarded under *Del. Code Ann.* tit. 29, chapter 69. *Del. Code Ann.* tit. 6, § 3509(c)(1).

## **Prime to Sub – Public**

### **Who's Covered**

See Delaware Owner to Prime - Public.

### **Entitlement to Payment**

The Delaware statutes do not appear to impose requirements upon a subcontractor's entitlement to payment beyond the requirements of the parties' contract and "satisfactory performance.". *Del. Code Ann.* tit. 29, § 6516(f)(7) (referring to subcontractors and others rights to prompt payment under *Del. Code Ann.*, tit. 6, chapter 35).

### **Payment Period**

The Contractor shall pay the Contractor's Subcontractors or material suppliers and each Subcontractor shall pay the subordinate subcontractors or material suppliers within 21 days of receipt of each progress payment, unless otherwise agreed to in writing by the parties. *Del. Code Ann.* tit. 29, § 6516(f)(7). The payment amount is the respective amount allowed on account of work performed by subcontractors, subordinate subcontractors, or material suppliers, to the extent of their interest therein. *Id.*

### **Grounds to Withhold Payments**

See *Del. Code Ann.* tit. 29, § 6516(f)(7) and Delaware Owner to Prime - Public.

### ***Interest***

If payment is wrongfully delayed more than 21 days after receipt, interest shall be paid at 2% above the prime interest rate as established by the Federal Reserve. *Del. Code Ann.* tit. 29, § 6516(f)(7)(d).

### ***Retainage***

The Delaware statutes do not appear to restrict the right of a contractor to impose retention amounts in its subcontracts. *See, e.g., Del. Code Ann.* tit. 6, § 3506(d) (expressly allowing subcontract provisions which permit a contractor to withhold a specified amount of retainage without incurring interest).

### ***Attorney's Fees***

The provision for attorney fees in *Del. Code Ann.* tit. 6, § 3509 is expressly not applicable to public works contracts awarded under *Del. Code Ann.* tit. 29, chapter 69.

### ***Noteworthy***

## **Owner to Prime – Private**

### ***Who's Covered***

Any person who enters into a contract with another person to furnish labor or materials in connection with the erection, construction, completion, alteration or repair of a building or additions to a building. Applicable definitions under the statutes include:

A Contractor is defined as a person who enters into any contract with another person to furnish labor or materials in connection with the erection, construction, completion, alteration or repair of a building or additions to a building by such Contractor, or for the sale to another person of lands and premises, whether owned by such Contractor or by another, upon which such Contractor undertakes to erect, construct, complete, alter or repair any building or addition to a building. *Del. Code Ann.* tit. 6, § 3501(2).

A Subcontractor is defined as a person who enters into a contract to furnish labor or materials to a Contractor. *Id.* § 3501(6).

### ***Entitlement to Payment***

Final payment is due as specified in the contract, or if the contract does not specify, when the agreed upon work is fully completed. *Del. Code Ann.* tit. 6, § 3507. Progress payments are due at the end of a billing period for work already commenced but not fully completed and materials already supplied, to the extent completed or supplied at the end of the billing period. *Id.* The timing for submitting invoices may be modified by the parties in their contract. *Id.* Retainage is permitted by the statute. *Id.* § 3506(d).

### ***Payment Period***

Progress payments shall be made within 30 days after the end of the billing period or 30 days after delivery of the invoice, whichever is later. *Del. Code Ann.* tit. 6, § 3507(c). Final payment shall be paid within 30 days after the end of the billing period or 30 days after delivery of the final invoice, whichever is later. *Id.* Written notice as to why any portion of a payment is being withheld,

including for retainage, must be provided within seven days of the date required for payment. *Id.* § 3506(a)(3) Certain payment terms may be modified by the parties in their contract. *Id.* § 3507.

### **Grounds to Withhold Payments**

Grounds to withhold payments include retainage and good faith disputes. *See, e.g., Del. Code Ann. tit. 6, § 3506.*

### **Interest**

For late payments, from the day after the required payment date until the date when payment is made, interest will be owed at the legal rate in effect at the time the obligation to pay a late payment interest penalty accrues. *Del. Code Ann. tit. 6, § 3506(c).* Interest is computed monthly. *Id.* The amount of interest remaining unpaid at the end of each 30 day period is added to the principal amount of the debt and is thereafter included in calculating the interest penalty. *Id.*

### **Retainage**

Retainage is expressly permitted by statute. *Del. Code Ann. tit. 6, § 3506(a).* Notice of the amount being withheld must be provided within seven days of the date required for payment to the contractor. *Id.*

### **Attorney's Fees**

If it is determined by a court of competent jurisdiction that a payment was withheld not in good faith for a reasonable cause, the court may award reasonable attorney's fees to the prevailing party. *Del. Code Ann. tit. 6, §§ 3506(e) & 3509.* In any civil action brought pursuant to the statute, if the court determines after a hearing that the cause was initiated, a defense was asserted, or any motion or proceeding was done frivolously or in bad faith, the court shall require the party initiating the cause, asserting the defense, filing the motion, or causing the proceeding to pay the other party the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney's fees. *Id.* § 3506(e).

However, the provisions within *Del. Code Ann. tit. 6, § 3509* do not apply if the contract between a general contractor and subcontractor specify different terms regarding the payment of attorney fees and litigation costs in arbitration or litigation. *Del. Code Ann. tit. 6, § 3509(d).*

### **Noteworthy**

Under *Del. Code Ann. tit. 6, §§ 3502 – 3505*, payments to a contractor are trust funds in the hands of the contractor and must first be applied to the payment of all moneys due and owing by the contractor to all persons furnishing labor or materials for the erection, construction, completion, alteration or repair of, or for additions to, such building. Failure to pay in full or pro rata the lawful claims of such persons within 30 days after receipt of the moneys or funds is prima facie evidence of violation of the statute. A contractor or agent of the contractor who violates the statute shall be fined not more than \$1,000 or imprisoned not more than 3 years or both.

## **Prime to Sub – Private**

### **Who's Covered**

*See Delaware Owner to Prime - Private.*

### ***Entitlement to Payment***

See Delaware Owner to Prime - Private.

### ***Payment Period***

The statute contains facially inconsistent payment clauses - two requiring payment by a contractor of its subcontractors and suppliers within 30 days out of such amounts as are paid to the contractor, and the other requiring payment by a contractor of its subcontractors and suppliers within 15 days after receipt of payments. *Del. Code Ann.* tit. 6, §§ 3504 (30 days), 3506(b) (30 days), & 3507(d) (15 days). Written notice as to any amounts withheld, including for retainage, must be provided within seven days of the date required for payment. *Id.* § 3506(d).

### ***Grounds to Withhold Payments***

See Delaware Owner to Prime - Private.

### ***Interest***

See Delaware Owner to Prime - Private.

### ***Retainage***

See Delaware Owner to Prime - Private.

### ***Attorney's Fees***

See Delaware Owner to Prime - Private.

### ***Noteworthy***

A provision in a contingent payment clause in a construction contract that makes the obligation of a contractor and its surety under any payment or performance bond to make any payment to a claimant under such bond contingent on payment by the owner is contrary to public policy, void and unenforceable. *Del. Code Ann.* tit 6., §3507(e).

# Florida

## Owner to Prime – Public

### *Who's Covered*

Florida appears to have two applicable sets of prompt payment statutes. The first is contained in Sections 0705 through 078 of Chapter 255 (the “Florida Prompt Payment Act”), and the second is contained in Sections 72 through 80 of Chapter 318 (the “Local Government Prompt Payment Act”).

**Chapter 255:** Florida’s Prompt Payment Act provides protection for any contractor providing construction services to a public entity. Under the Act, relevant definitions include the following:

"Construction services" means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term "construction services" does not include contracts or work performed for the Department of Transportation.” *Fla. Stat. § 255.072(3)*.

"Contractor" means any person who contracts directly with a public entity to provide construction services.” *Fla. Stat. § 255.072(3)*.

"Public entity" means the state, or any office, board, bureau, commission, department, branch, division, or institution thereof, but does not include a local governmental entity as defined in s. 218.72.” *Fla. Stat. § 255.072(5)*.

**Chapter 218:** Florida’s Local Government Prompt Payment Act provides protection for any person who contracts directly with a local government entity to provide labor, services, and material in connection with construction, repair, demolition, reconstruction, or any other improvements to real property. *Fla. Stat. § 218.72*. Under the Act, relevant definitions include the following:

"Local governmental entity" means a county or municipal government, school board, school district, authority, special taxing district, other political subdivision, or any office, board, bureau, commission, department, branch, division, or institution thereof. *Fla. Stat. § 218.72(5)*.

"Construction services" means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. *Fla. Stat. § 218.72(2)*.

"Contractor" or "provider of construction services" means any person who contracts directly with a local governmental entity to provide construction services. *Fla. Stat. § 218.72(3)*.

### ***Entitlement to Payment***

**Chapter 255:** A state agency must submit a payment request to the state payment officer for payment within 20 days after receipt of the payment request, and receipt, inspection and approval of the goods or services provided, absent a bona fide dispute. *Fla. Stat.* § 255.074.

**Chapter 218:** The local governmental entity's obligation to pay arises when the contractor is entitled to payment under the contract, has submitted a proper payment request that complies with state law and the contract, and has provided all affidavits or waivers required by the contract or statute. *Fla. Stat.* § 218.735(1), (8). A local governmental entity may require all pay applications to be approved by a designated agent, such as an architect, project engineer, or other agency or person acting on its behalf. *Fla. Stat.* §§ 218.735(1) and 218.72(1).

### ***Payment Period***

**Chapter 255:** A state payment officer must approve payment of an invoice within 10 days of submittal by the state agency, unless the 10-day period contains less than 6 working days, and absent showing of exceptional circumstances justifying delay. *Fla. Stat.* §215.422(2).

**Chapter 218:** A local governmental entity must pay within 20 business days of the date a request or invoice for payment is stamped as received, unless the pay application is conditioned upon approval by an agent for the agency, in which case payment is due 25 business days after the payment request or invoice is stamped as received. *Fla. Stat.* § 218.735(1)(a). If a request or invoice for a local project does not meet the contract's requirements, the local agency must reject the payment request within 20 business days of receipt. *Fla. Stat.* § 218.735(2). The local governmental entity must provide written notice of rejection and specify the deficiency in the request or invoice and the action necessary to make such request or invoice proper. *Id.* In the event a request or invoice is rejected and the contractor submits a corrected request or invoice, it must be paid or rejected on the later of (i) ten business days after the date received or (ii) if the request or invoice requires approval by a governing body pursuant to ordinance, charter or other law, the first business day after the next regularly scheduled meeting after receipt of the corrected request or invoice. *Fla. Stat.* § 218.735(3). If a dispute continues, it must be resolved in accordance with the dispute resolution procedure set forth in the construction contract or any applicable ordinance. *Fla. Stat.* § 218.735(4). In the absence of a procedure in the construction contract or applicable ordinance, the dispute is resolved according to the established procedure adopted by the relevant local governmental entity to be commenced not later than 45 days after the date a request or invoice is received and a final decision not later than 60 days after a request or invoice is received. *Fla. Stat.* § 218.76(2).

### ***Grounds to Withhold Payments***

**Chapter 255:** In the event there is a bona fide dispute as to payment, the invoice submitted to the state payment officer must contain a statement of the dispute and authorize payment only in the amount not disputed. *Fla. Stat.* §§ 215.422(1) and 255.073(2).

**Chapter 218:** A local governmental entity has grounds to withhold payment to a contractor in the event there is a good faith dispute as to the amount owed. *Fla. Stat.* § 218.735.

### **Interest**

**Chapter 255:** After July 1, 2007, all payments due from a public entity not made within the applicable time period shall bear interest at a rate of 1% per month. *Fla. Stat.* § 255.073(4).

**Chapter 218:** Payments for local governmental contracts not made within the time periods set forth in the statutes bear interest at a rate of 1% per month or the rate specified by contract, whichever is greater. *Fla. Stat.* § 218.735(9).

No contract between a public entity or a local governmental entity and a contractor may prohibit collection of interest on late payments. *Fla. Stat.* §§ 218.75 & 255.075.

### **Retainage**

For purposes of retainage, state construction contracts and local governmental entity contracts are treated relatively the same by Chapters 255 and 218. For all contracts of \$200,000 or more, until the project is fifty-percent complete, the state agency may withhold up to ten-percent of each of the contractor's progress payments. *Fla. Stat.* §§ 218.735(8)(a) & 255.078(1). Once the project is fifty-percent or more complete, the state agency or local governmental entity may withhold no more than five-percent of each of the contractor's progress payments. *Fla. Stat.* § 218.735(8)(b) & §255.078(2). There is, however, an exception for smaller counties and municipalities, which may continue to withhold up to ten-percent of each progress payment throughout the project's duration. *Fla. Stat.* § 218.735(8)(b). Furthermore, retainage may not be held by a local governmental entity or contractor to secure payments of insurance premiums and final payment may not be delayed pending a final audit by an insurance provider. *Fla. Stat.* §§ 218.735(7)(g) & 255.077(7).

When the project reaches fifty-percent completion, the contractor may submit a payment request for half of the retainage the state agency or local governmental entity is currently withholding. *Fla. Stat.* §§ 218.735(8)(d) & 255.078(4). The state agency or local governmental entity must pay this amount, unless there is a good faith dispute as to the amount owed or whether the project is in fact fifty-percent complete. *Fla. Stat.* §§ 218.735(8)(d) & 255.078(4).

Also, a state agency must create a "punchlist" of the requirements a contractor must satisfy to render "complete, satisfactory, and acceptable" performance. The state may withhold retainage until the punch list items are satisfactorily completed. *Fla. Stat.* § 255.077(1). For local projects, a local governmental entity must also create a "punchlist" and may withhold payment for an amount not in excess of 150% of the total costs to complete punchlist items. *Fla. Stat.* § 218.735(7). Retainage may not be held by a local governmental entity or contractor to secure payments of insurance premiums and final payment may not be delayed pending a final audit by an insurance provider. *Fla. Stat.* § 218.735(7)(h).

The state agency or local governmental authority must create the punchlist within different time periods depending on how much money the contract involves. *Fla. Stat.* § 255.077(1). If the state agency fails to do so within the required time period, and the contractor did not attempt to thwart the state agency's ability to create the list, the contractor may submit a payment request for all withheld retainage. *Fla. Stat.* § 255.077(8). For construction projects with an estimated cost of less than \$10 million, the state agency must create the punch list within thirty calendar days after "substantial completion," which is either defined in the contract, or if the contract is silent "substantial completion" occurs upon beneficial occupancy or use. *Fla. Stat.* §§ 218.735(7)(a)(1) & 255.077(1)(a). For construction projects with an estimated cost of greater than \$10 million, the

state agency must create the punch list within thirty calendar days after “substantial completion,” unless the parties contractually extend the time period (a maximum of sixty days is permitted). *Fla. Stat.* §§ 218.735(7)(a)(2) & 255.077(1)(b). If the construction contract involves multiple stages, the state agency must create a punch list for each stage. *Fla. Stat.* §§ 218.735(7)(b) & 255.077(2).

Once the contractor completes the punch list items, it may submit a payment request for all remaining retainage. However, if the state agency or local governmental authority has a good faith dispute regarding satisfactory completion, it may continue to withhold up to 150-percent of the cost to satisfactorily complete the disputed project items. *Fla. Stat.* §§ 218.735(8)(d) & 255.077(4). Furthermore, the state agency’s failure to list particular items on the punch list does not relieve the contractor of its duty to satisfactorily complete the project. A contractor on any public project may withdraw all or part of the retainage amount by depositing with the Chief Financial Officer certain securities pursuant to the terms of the contract and the contractor shall have the right to receive all interest and income earned therefrom. *Fla. Stat.* § 255.052.

The Florida Department of Transportation may provide in its construction contracts for retaining a portion of the amount due a contractor for completed work until completion and final acceptance of the project. *Fla. Stat.* § 337.175. When using flexible start and finish time limits, the Florida Department of Transportation may retain up to 10 percent on completed work when the contractor either fails to begin or finish work on time. *Fla. Stat.* § 337.015.

### ***Attorney’s Fees***

**Chapter 255:** A prevailing contractor is entitled to recover reasonable fees and costs, if the court finds that the nonprevailing party agency withheld any part of the money owed without reasonable basis in law or fact. *Fla. Stat.* § 255.076.

**Chapter 218:** In an action to recover amounts due under the Local Government Prompt Pay Act, the court shall award court costs and reasonable attorney’s fees, including fees incurred through appeal, to the prevailing party. *Fla. Stat.* § 218.76(3).

## **Prime to Sub – Public**

### ***Who’s Covered***

**Chapter 255:** Any person providing labor, services or materials to a prime contractor for construction of or repairs to a public building, or for the prosecution, repair or completion of a public work. *Fla. Stat.* § 255.071(1).

**Chapter 218:** Florida’s Local Government Prompt Payment Act provides protection for any subcontractor or supplier to a contractor who contracts directly with a local government entity to provide labor, services, and material in connection with construction, repair, demolition, reconstruction, or any other improvements to real property, including any subcontractor’s subcontractors and suppliers. *Fla. Stat.* § 218.735(6).

### ***Entitlement to Payment***

**Chapter 255:** The prime contractor’s obligation to pay arises when the claimant is entitled to payment under the contract, has submitted a proper payment request under the applicable statutes and contract, the contractor has been paid by the owner for the work identified in

the claimant's pay request, and the claimant has submitted all requisite affidavits or waivers. *Fla. Stat.* § 255.071(1).

**Chapter 218:** A subcontractor or supplier is entitled to payment once the contractor (or subcontractor) receives payment for the labor or materials furnished by such subcontractor or supplier, unless such payment is disputed pursuant to the terms of a contract. *Fla. Stat.* § 218.735(6).

#### *Payment Period*

**Chapter 255:** The prime contractor must pay subcontractors on a state project all sums not in dispute 30 days after the subcontractors services were rendered, or within 10 days of the prime contractor's receipt of payment from the owner, whichever is later. *Fla. Stat.* §§ 255.071(2), 255.073(3).

**Chapter 218:** The prime contractor on a local project must pay its subcontractors and suppliers all undisputed sums within 10 days of the prime contractor's receipt of payment. Subcontractors who receive such payments on local jobs must pay their subcontractors and suppliers all undisputed sums within 7 days. *Fla. Stat.* § 218.735(6).

#### *Grounds to Withhold Payments*

**Chapter 255:** A prime contractor has grounds to withhold payment to a subcontractor or supplier on a state project in the event there is a good faith dispute, the subject of a claim brought pursuant to *Fla. Stat.* § 255.05, or otherwise the subject of a claim or demand by the public entity or contractor. *Fla. Stat.* § 255.078(6).

**Chapter 218:** A local governmental entity or prime contractor has grounds to withhold payment to a subcontractor or supplier in the event there is a dispute as to the amount owed, so long as such subcontractor or supplier is notified in writing of the amount in dispute and the actions required to cure the dispute. *Fla. Stat.* § 218.735(6).

#### *Interest*

**Chapter 255:** After July 1, 2006, payments due to subcontractors and suppliers not made within the applicable time limits bear interest at the rate of 1% per month to the extent the requirements of Section 073(4) of Chapter 255 are fulfilled. *Fla. Stat.* § 255.073(4).

**Chapter 218:** Payments for local governmental contracts not made within the time periods set forth in the statutes bear interest at a rate of 1% per month or the rate specified by contract, whichever is greater. *Fla. Stat.* § 218.735(9).

#### *Retainage*

For purposes of retainage, state construction contracts and local governmental entity contracts are treated relatively the same by Chapters 255 and 218. The prime contractor may withhold 10% of progress payments until 50% of completion of the work and, after 50% completion the prime contractor may elect to withhold up to 10%. *Fla. Stat.* §§ 218.735(8)(a) & 255.078(1) and (2). A contractor may elect to withhold retainage from payments to its subcontractors at a rate higher than 5% after the project is 50% complete so long as such retainage is determined on a case by case basis and the subcontractor is notified in writing. *Fla. Stat.* §§ 255.078(3) & 218.735(8)(c). The

deadlines for payment of undisputedly due retainage are the same as provided above; that is, upon payment by the owner, provision of proper invoices and waivers, etc.

### ***Attorney's Fees***

**Chapter 255**: The prevailing party is entitled to recover costs of trial and appeal, including reasonable attorneys' fees. *Fla. Stat. § 255.071(7)*.

**Chapter 218**: In an action to recover amounts due under the Local Government Prompt Payment Act, the court shall award court costs and reasonable attorney's fees, including fees incurred through appeal, to the prevailing party. *Fla. Stat. § 218.76(3)*.

### ***Noteworthy***

**Chapter 255**: Florida allows subcontractors and suppliers extraordinary relief to recover unpaid, undisputed funds on state projects if not paid within 30 days of the date due. Once the unpaid contractor files a sworn complaint alleging non-payment, the court must hold an evidentiary hearing upon at least 15 days notice to the owner. *Fla. Stat. §255.071(3), (4)*. A successful claimant may be entitled to any of the following nonexclusive remedies: an accounting, a temporary injunction, prejudgment attachment, and any other appropriate equitable and legal remedies. *Fla. Stat. § 255.071(4)*. The only defenses are proof of a bona fide dispute or that the claimant materially breached its contract with the owner. *Fla. Stat. § 255.071(6)*.

## **Owner to Prime – Private**

### ***Who's Covered***

Section 12 of Chapter 715 of Florida Statutes is the "Construction Contract Prompt Payment Law" and provides that any contractor in privity with an owner or its agent, who is entitled to receive payment under a written contract to improve real property, for which a construction lien is authorized under Florida law. *Fla. Stat. § 715.12(4)*.

### ***Entitlement to Payment***

When the contractor is entitled to payment under the terms of the contract, has submitted the requisite affidavits or lien waivers, and has submitted a proper pay request. *Fla. Stat. § 715.12(4)*.

### ***Payment Period***

Payment is due 14 days from receipt of properly documented pay application. If pay application is improper, the owner has to return the application within 14 days, accompanied by written explanation of the deficiencies. Once the corrected pay application is submitted, the 14 day clock begins again. *Fla. Stat. § 715.12(5)(b)*.

### ***Grounds to Withhold Payments***

The owner may withhold payment for an improper pay request, a bona fide dispute, or material breach of contract by the claimant. *Fla. Stat. § 715.12(4)*. Unless the contract specifically provides to the contrary, a dispute as to payment does not permit the owner to withhold payment for labor, services or material not subject to the dispute. *Fla. Stat. § 715.12(6)(e)*. An owner may withhold a portion of each progress payment until substantial completion or completion of the entire project if the owner and contractor agree and such right is set forth in the contract. *Fla. Stat. § 715.12(7)(a) & (b)*.

### ***Interest***

The statutory judgment rate established each year by Florida's chief financial officer, or the contract rate, whichever is greater. *See Fla. Stat. §§ 715.12(5)(a) & 55.03.*

### ***Retainage***

The owner and the contractor may contractually agree that the owner has the right to withhold a portion of each progress payment until the project is substantially complete. However, the owner must pay the contractor within fourteen days of the following, or interest begins to accrue: (1) Pursuant to the contract, the architect or engineer issues a certificate of substantial completion and the contractor "substantially completes" a timely submitted punch list; (2) The building inspector issues a certificate of occupancy and the contractor "substantially completes" a timely submitted punch list; or (3) The owner or their tenant takes possession of the property and the contractor "substantially completes" a timely submitted punch list. *Fla. Stat. § 715.12(7)(a), (b).*

A punch list is timely, if submitted in accordance with the contract. Where the contract is silent, the punch list is timely if submitted within fifteen days after the architect or engineer issues the certificate of substantial completion. If the owner fails to submit a punch list, then interest begins to accrue fourteen days after one of the following events, whichever occurs earlier: (1) Substantial completion; (2) The certificate of occupancy is issued; or (3) The owner or the owner's tenant takes possession. *Fla. Stat. § 715.12(7)(a).* For multi-stage projects, the prompt payment statute applies to each stage. *Id. § 715.12(7)(a).*

If the owner withholds retainage, the contractor may apply to exchange certain approved securities for retainage of equal or lesser value by supplying and executing all the documents needed to record the transfer and the contractor must pay the associated costs. The owner does not own the exchanged securities; rather, the owner merely holds them as a trustee securing a debt. Consequently, if the securities earn dividends or interest, the owner must disburse the earnings to the contractor within thirty days. *Fla. Stat. § 715.12(7)(c).*

### ***Attorney's Fees***

There does not appear to be a provision for attorney's fees under the Construction Contract Prompt Payment Law.

## **Prime to Sub – Private**

### ***Who's Covered***

Any contractor, subcontractor, sub-subcontractor, or materialman who is entitled to receive payments under a contract to improve real property. *Fla. Stat. §715.12 (2), (3).*

### ***Entitlement to Payment***

A subcontractor or supplier is entitled to payment once it has complied with all conditions for payment per the terms of the contract, it has submitted the requisite affidavits or lien waivers, has submitted a proper pay request, and the contractor with whom it contracted to do the work has been paid. *Fla. Stat. § 715.12 (4)(b).*

### ***Payment Period***

The payment deadlines applicable to payment of the prime contractor also apply to payment by the prime contractor to its subcontractors and suppliers.

### ***Grounds to Withhold Payments***

A contractor may withhold payment to a subcontractor for an improper pay request, a bona fide dispute, or material breach of contract by the claimant. *See Fla. Stat. § 715.12(4)*. Unless the contract specifically provides to the contrary, a dispute as to payment does not permit the contractor to withhold payment for labor, services or material not subject to the dispute. *Fla. Stat. § 715.12(6)(e)*. A contractor may withhold a portion of each progress payment until completion of the entire project if the contractor and subcontractor agree and such right is set forth in the contract. *Fla. Stat. § 715.12(7)(a), (b)*.

### ***Interest***

The statutory judgment rate established each year by Florida's chief financial officer, or the contract rate, whichever is greater. *See Fla. Stat. §§ 715.12(5)(a) & 55.03*.

### ***Retainage***

The same retainage provisions discussed with respect to owners and contractors on private projects are applicable to prime contractors and subcontractors.

### ***Attorney's Fees***

There does not appear to be a provision for attorney's fees under the Construction Contract Prompt Payment Law.

# Georgia

## Owner to Prime – Public

### *Who's Covered*

The Georgia Prompt Pay Act provides protection for contractors, subcontractors of all tiers, and materialmen of all tiers who contract to improve real property, perform construction services, or provide construction management services. The following terms, among others, are defined in the statutes:

“Contractor“ defined as one who contracts with any owner to improve real property, perform construction services or provide construction management services. *Ga. Code Ann* § 13-11-2(1).

“Improve“ means building, altering, repairing, or demolishing any improvement to real property as well as excavating, clearing, grading, filling, or landscaping any real property. The term improve also includes constructing driveways or private roadways, furnishing materials, and performing any labor on such improvements. *Id.* § 13-11-2 (3).

“Improvements” refers to all or parts of buildings, structures, erections, alterations, demolitions, excavations, clearings, gradings, fillings, or landscaping on real property. *Id.* § 13-11-2 (3).

“Owner“ is defined as private persons and entities as well as state, local, or municipal government agencies, instrumentalities, or entities. [Exception: Those counties with a population of less than 10,000 and those municipalities with a population of less than 2,500, according to the latest U.S. decennial census, are excluded from having to comply with the provisions of chapter 11.] *Id.* § 13-11-2(4).

“Subcontractor” means any person who has contracted to furnish labor or materials to, or has performed labor or supplied materials for, a contractor or another subcontractor in connection with a contract to improve real property. Additionally, the term “subcontractor” in the Georgia Prompt Pay Act includes materialmen furnishing materials, tools, appliances, machinery, or equipment used in making improvements to the real estate. *Id.* §§ 13-11-2(8) & 44-14-360(3)-(4).

### *Entitlement to Payment*

A contractor or subcontractor is entitled to payment upon (1) performance in accordance with the contract provisions, and upon (2) satisfaction of the contract conditions precedent to payment. *Ga. Code Ann.* § 13-11-3.

### *Payment Period*

An owner must pay a contractor within 15 days after receipt of the contractor’s pay request. *Ga. Code Ann.* § 13-11-4(a).

### ***Grounds to Withhold Payments***

An owner may withhold payment from its contractor or a contractor may withhold payment from a subcontractor for any of the following reasons: (1) unsatisfactory job progress, (2) defective construction, (3) disputed work, (4) third party claims have been filed or reasonable evidence a claim will be filed, (5) failure of the contractor or subcontractor to make timely payments for labor, equipment and materials, (6) damage caused by the contractor or subcontractor, or (7) reasonable evidence that the contract cannot be completed for the unpaid contract balance. *Ga. Code Ann.* § 13-11-5(a).

Reasonable amounts for retainage may be withheld by the owner if provided for in the contract between the owner and contractor. *Id.* § 13-11-5(b). A contractor or subcontractor may withhold retainage; however, the amount withheld cannot exceed the amount retained by the owner with regard to the subcontractor's the work. *Id.*

### ***Interest***

An owner, contractor, or subcontractor shall pay a contractor or subcontractor interest, beginning the day following the due date of any payment at the rate of 1% per month. No interest is due under the Act unless the person being charged with the interest has been notified of the interest provisions of the Act at the time the request for payment is made. An acceptance of a progress payment will release all claims for interest. *Ga. Code Ann.* § 13-11-7(a).

However, owners, contractors, and subcontractors may agree by contract to a different rate of interest or a different period when interest will begin to apply. *Id.* § 13-11-7(b). Those contract terms will apply unless there has been a willful breach of the contract provision as to the time of payment. *Id.* In such a situation, the rate set by *Ga. Code Ann.* § 13-11-7(a) applies. *Id.*

### ***Retainage***

Reasonable amounts for retainage may be withheld by the owner if provided for in the contract between the owner and contractor. *Id.* § 13-11-5(b).

### ***Attorney's Fees***

In any action to enforce a claim under the Act, the prevailing party will be entitled to recover reasonable attorneys' fees including trial, appeal, and arbitration. The amount awarded shall be determined by the court or arbitrators. *Ga. Code Ann.* § 13-11-8.

### ***Noteworthy***

The Act does not modify or abridge any remedies available under the terms of a contract or by another statute. *Ga. Code Ann.* § 13-11-9.

## **Prime to Sub – Public**

### ***Who's Covered***

See Georgia Owner to Prime - Public.

### ***Entitlement to Payment***

See Georgia Owner to Prime - Public.

### ***Payment Period***

A contractor or higher-tiered subcontractor must pay its subcontractors within 10 days after receiving payment from the appropriate upstream entity. *Ga. Code Ann.* § 13-11-4(b).

### ***Grounds to Withhold Payments***

See Owner to Prime - Public

### ***Interest***

See Georgia Owner to Prime - Public.

### ***Retainage***

A contractor or higher-tiered subcontractor may withhold retainage from a subcontractor; however, the amount withheld cannot exceed the amount retained by the owner with regard to the subcontractor's work. *Ga. Code Ann.* § 13-11-5(b).

The Georgia Prompt Pay Act requires the contractor to pass through to its subcontractors retainage received from the owner within 10 days after receipt and further requires the contractor to reduce each subcontractor's retainage in the same manner as the contractor's retainage is reduced by the owner. *Id.* § 13-11-6. A contractor is excused from both the time within which to pay a subcontractor's retainage and the mandatory reduction of retainage provisions for any of the following reasons: (1) the value of the subcontractor's work complete and in place does not equal 50% of the contract value, (2) the work of the subcontractor is not proceeding satisfactorily, and (3) the subcontractor has failed to provide satisfactory reasonable assurances of continued performance and financial responsibility, including but not limited to a payment and performance bond. *Id.*

### ***Attorney's Fees***

See Georgia Owner to Prime - Public.

### ***Noteworthy***

See Georgia Owner to Prime - Public.

## **Owner to Prime – Private**

### ***Who's Covered***

See Georgia Owner to Prime - Public.

### ***Entitlement to Payment***

See Georgia Owner to Prime - Public.

### ***Payment Period***

See Georgia Owner to Prime - Public.

### ***Grounds to Withhold Payments***

See Georgia Owner to Prime - Public.

### ***Interest***

See Georgia Owner to Prime - Public.

***Retainage***

See Georgia Owner to Prime - Public.

***Attorney's Fees***

See Georgia Owner to Prime - Public.

***Noteworthy***

See Georgia Owner to Prime - Public.

**Prime to Sub – Private**

***Who's Covered***

See Georgia Owner to Prime - Public.

***Entitlement to Payment***

See Georgia Owner to Prime - Public.

***Payment Period***

See Georgia Prime to Sub - Public.

***Grounds to Withhold Payments***

See Georgia Owner to Prime - Public.

***Interest***

See Georgia Owner to Prime - Public.

***Retainage***

See Georgia Prime to Sub - Public.

***Attorney's Fees***

See Georgia Owner to Prime - Public.

***Noteworthy***

See Georgia Owner to Prime - Public.

# Hawaii

## Owner to Prime – Public

### *Who's Covered*

Any person who makes satisfactory delivery of goods or performance of services pursuant to contract to any agency of the State or any County. *Haw. Rev. Stat. § 103-10(a)*.

### *Entitlement to Payment*

A contractor is entitled to payment following satisfactory delivery of the goods or performance of the services. *Haw. Rev. Stat. § 103-10(a)*.

### *Payment Period*

A contractor must be paid within 30 days of the state agency's or county's receipt of invoice. *Haw. Rev. Stat. § 103-10(a)*

### *Grounds to Withhold Payments*

Where delay is due to (1) a bona fide dispute between State or any County and the contractor concerning the services or goods contracted for; (2) labor dispute; (3) power or mechanical failure; (4) fire; (5) Acts of God; or (6) any similar circumstances beyond the control of the State or any County, then *Haw. Rev. Stat. § 103-10* will not apply. *Haw. Rev. Stat. § 103-10(b)*

### *Interest*

Interest on the principle unpaid balance will be owed for late payments at the prime rate plus 2%. *Haw. Rev. Stat. § 103-10(a)*. The statute defines the prime rate as being the interest rate posted in the *Wall Street Journal* on the first business day of the month preceding the calendar quarter. *Id.*

### *Retainage*

Up until the point that the project is 50% complete, no more than 5% of the total amount due may be withheld by the state from a contractor. *Haw. Rev. Stat. § 103-32.1(c)(1)*. After the 50% point, however, no more money may be withheld unless progress is not satisfactory. *Id.*

If a subcontractor provides evidence to the contractor of any of the following, then the contractor will not withhold as retainage more than the owner withholds from him: (1) A valid performance and a payment bond for the project that is acceptable to the contractor and executed by a surety company authorized to do business in this state; (2) Any other bond acceptable to the contractor; or (3) Any other form of collateral acceptable to the contractor, *Id. § 103-32.1(d)*. These same rules apply subcontractors who subcontract with other subcontractors. *Id.*

### *Attorney's Fees*

There does not appear to be a provision for attorney's fees in the Hawaii prompt pay statutes.

## ***Noteworthy***

### **Prime to Sub – Public**

#### ***Who's Covered***

A subcontractor who has met all terms and conditions of the subcontract is covered if no bona fide disputes exists upon which the procurement officer has withheld payment. *Haw. Rev. Stat.* § 103-10.5.

#### ***Entitlement to Payment***

To be entitled to payment, a subcontractor must have met all the terms and conditions of the subcontract and there must not be any bona fide disputes on which the procurement officer has withheld payment. *Haw. Rev. Stat.* § 103-10.5(a). In order to be entitled to receive retainage or other withheld payments, the subcontractor must satisfactorily complete all work and provide a properly documented final payment request and: (1) provide to contractor an acceptable performance and payment bond for the project; or (2) meet the following criteria: (A) 90 days have passed since the last of the labor was done and the last of the material was furnished or supplied and no claim has been given to the contractor and surety, and (B) provide to the contractor one of the following (i) an acceptable release of retainage bond in an amount of not more than two times the amount being retained or withheld by the contractor; (ii) any other bond acceptable to the contractor; or (iii) any other form of mutually acceptable collateral. *Id.* § 103-10.5(c).

#### ***Payment Period***

Any money paid to a contractor must be disbursed within 10 days after receipt. *Haw. Rev. Stat.* § 103-10.5(a).

#### ***Grounds to Withhold Payments***

No provision. *But see* Hawaii Owner to Prime - Public (detailing proper reasons for the government to withhold money from a prime contractor).

#### ***Interest***

A penalty of 1.5% per month is imposed on outstanding amount due that were not timely paid. *Haw. Rev. Stat.* § 103-10.5(c).

#### ***Retainage***

*See* Hawaii Owner to Prime - Public; *Haw. Rev. Stat.* § 103-10.5(c) (discussing general rules as to retainage that is withheld),

#### ***Attorney's Fees***

*See* Hawaii Owner to Prime – Public.

## ***Noteworthy***

*Haw. Rev. Stat.* § 103-10.5(f) states that nothing within the section shall be construed to impair the right of a contractor or a subcontractor at any tier to negotiate and to include in their respective subcontracts provisions that provide for additional terms and conditions that are requested to be met before the subcontractor shall be entitled to receive final payment under subsection 103-10.5(c);

provided that any such payments withheld shall be withheld from the contractor by the procurement officer.

### **Owner to Prime – Private**

Hawaii does not appear to have a prompt payment act applicable to prime contractors on a private construction contract.

### **Prime to Sub – Private**

#### ***Who's Covered***

A subcontractor who has provided goods and services and who has provided a proper statement that goods have been delivered and services performed is entitled to payment. *Haw. Rev. Stat.* § 444-25.

Relevant definitions within the statute include the following, among others:

“Contractor“ means any person who offers to undertake, or holds oneself out as being able to undertake, or does undertake to alter, add to, subtract from, improve, enhance, or beautify any realty or construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, railroad, excavation, or other structure, project, development, or improvement, or do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. *Id.* § 444-1.

Additionally, for the purposes of chapter 444, the term contractor also includes subcontractors, specialty contractors, and anyone else who provides any of the above mentioned activities directly or indirectly for the federal government, to the extent allowed under federal law. *Id.*

#### ***Entitlement to Payment***

A contractor must pay its subcontractors within 60 days after receipt of proper statement that goods were delivered and services were performed. *Haw. Rev. Stat.* § 444-25.

#### ***Payment Period***

As noted above, the typical payment period is no more than 60 days after invoice. However, if payment is contingent on receipt of funds held in escrow or trust, a bid solicitation must state that time of payment is contingent upon receipt of funds from escrow or trust. In such a situation, interest will not begin to accrue on unpaid balances until the later of 60 days after receipt of the subcontractor's invoice or 30 days after receipt of escrow or trust funds. *Haw. Rev. Stat.* § 444-25.

#### ***Grounds to Withhold Payments***

Delay may be justified if a bona fide dispute exists concerning goods and services contracted for. *Haw. Rev. Stat.* § 444-25.

#### ***Interest***

Interest accrues at 1% per month commencing on the later of the sixtieth day after a subcontractor's invoice or the thirtieth day after a contractor receives funds from an escrow or trust account, if all notice requirements are met. *Haw. Rev. Stat.* § 444-25.

#### ***Retainage***

No provision

*Attorney's Fees*

No provision

*Noteworthy*

*Haw. Rev. Stat.* § 444-2 exempts a number of people from the provisions of chapter 444, certain projects valued at \$1000 or less, and certain types of public and private projects.

# Idaho

## Owner to Prime – Public

### *Who's Covered*

The Idaho prompt pay statutes declare broadly that it is the State of Idaho's policy to pay all bills owed by the State or a taxing district within the State promptly. *Idaho Code Ann.* § 67-2302(1).

### *Entitlement to Payment*

The statutes do not specifically identify any standard which will be applied to determine when a bill is deemed due and owing. Presumably, therefore, the parties' contract or common law principles will apply to determine entitlement to payment.

### *Payment Period*

Absent a contrary agreement in the contract made *prior* to the time the order was placed, payment must be made within 60 days of receipt of invoice. *Idaho Code Ann.* § 67-2302(2). The statute defines an invoice as "a written account or itemized statement of merchandise shipped, sent or delivered to the purchaser with quantity, value or price, and charges set forth, and is a demand for payment of the charges set forth." *Id.*

Notably, if there is an error in the invoice or other impropriety, the government must contact the vendor within 10 days of receipt. *Id.* § 67-2302(12). If the error is corrected by the vendor within 5 working days of being contacted, the vendor shall not be paid late. *Id.*

### *Grounds to Withhold Payments*

The statutes do not appear to specifically identify grounds upon which payment may be withheld. Presumably, therefore, the parties' contract or common law principles will apply to determine when payment may be withheld.

### *Interest*

Absent contract terms to the contrary, interest is allowed on late payments at the rate provided for in *Idaho Code Ann.* § 63-3045. *Idaho Code Ann.* § 67-2302(3), (7). Interest penalties accrue on retained amounts beginning 30 calendar days after work is completed by the contractor, unless otherwise provided in the contract. *Id.* § 67-2302(16). This interest compounds each month. *Id.* § 67-2302(8).

Although interest penalties are due automatically upon a bill becoming overdue, each vendor is responsible for calculating and invoicing interest at the time payment is due on the principal. *Id.* § 67-2302(3).

In the event, however, of a dispute between a contractor and the government, the payment of interest penalties may be postponed until the dispute is resolved. *Id.* § 67-2302(15).

### *Retainage*

Public bodies requiring a performance bond or payment bond in excess of 50% of the total contract amount shall not be authorized to withhold from the contractor or subcontractor any amount

exceeding 5% of the total amount payable as retainage. *Idaho Code Ann.* § 54-1926(3). Further, retainage held in connection with portions of the project that are accepted by the contracting body and the contractors as complete must be released within 30 days of such acceptance. *Id.*

### **Attorney's Fees**

If a vendor brings “formal administrative action” or judicial proceedings to collect interest due under *Idaho Code Ann.* § 67-2302, then the state must pay the any reasonable attorney fees to a prevailing vendor. *Id.* § 67-2302(18).

### **Prime to Sub – Public**

Idaho’s public prompt pay act does not appear to impose requirements on public contractors or public owners as to subcontractors. However, as detailed below, there are limitations on retainage that may be withheld from a subcontractor and requirements on when that retainage must be released.

#### **Retainage**

Contractors, contracting with subcontractors pursuant to contract work with a public body, shall not be authorized to withhold from the subcontractor any amount exceeding 5% of the total amount payable to the subcontractor as retainage. *Idaho Code Ann.* § 54-1926(3).

### **Owner to Prime – Private**

Idaho does not appear to impose requirements on private owners as to contractors. However, as detailed below, there are limitations on retainage that may be withheld from a contractor and requirements on when that retainage must be released.

#### **Retainage**

Under *Idaho Code Ann.* § 29-115, the maximum retainage that may be withheld from a contractor or subcontractor by the owner or contractor on a private work of improvement is 5% of the payment. In no event shall the total retention withheld exceed 5% of the contract price. These amounts do not apply, however, if the contractor or subcontractor fails to provide a performance bond as requested by the owner or contractor respectively. Maximum retainage amounts do not apply to any contract for the performance of a private work of improvement to residential real property consisting of 1-4 units occupied or to be occupied by the owner. *Idaho Code Ann.* § 29-115(2).

Within 35 days from the date on which the work is substantially complete, as agreed to in the contract, the retention withheld by the owner shall be reduced to the lesser of 150% of the estimated value of work yet to be completed or the retention then withheld by the owner, not to exceed 5% of the contract price. *Idaho Code Ann.* § 29-115(3).

Within 35 days from the date of final completion of the work, the retention withheld by the owner shall be released. *Idaho Code Ann.* § 29-115(3). However, in the event of a dispute between the owner and the original contractor, the owner may withhold from the final retention payment an amount not to exceed 150% of the estimated value of the issue in dispute. *Id.* Additionally, the

owner may condition the final release of the retention upon receipt of satisfactory lien waivers from all persons with actual or potential lien claims on the work. *Id.*

Within 10 days of the date a retention payment is received from the owner, a contractor must pay its subcontractors unless a bona fide dispute exists. *Id.* § 29-115(4), (5). If a bona fide dispute exists, the amount retained may not exceed 150% of the estimated to be incomplete or in dispute. *Id.* § 29-115(5). Notably, however, the owner may designate a retention payment for a particular subcontractor. *Id.* § 29-115(4).

These provisions may not be waived. *Id.* § 29-115(6).

### **Prime to Sub – Private**

Idaho does not appear to impose requirements on private owners or contractors as to subcontractors. However, as detailed below, there are limitations on retainage that may be withheld from a subcontractor and requirements on when that retainage must be released.

#### ***Retainage***

*See* Idaho Owner to Prime - Private.

# Illinois

## Owner to Prime – Public

### *Who's Covered*

Chapter 30, para. 540 of the Illinois State Prompt Payment Act applies to vendors' and contractors' claims against any State official or agency authorized to provide for payment from State funds, by virtue of any appropriation of the General Assembly, for goods or services furnished to the State. 30 *Ill. Comp. Stat.* 540/1.

Chapter 50, para. 505 of the Illinois Local Government Prompt Payment Act applies to vendors' and contractors' claims against every county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district and all other local governmental units. 50 *Ill. Comp. Stat.* 505/2.

### *Entitlement to Payment*

The statutes do not appear to outline when a contractor is entitled to payment. Presumably, therefore, such entitlement will arise pursuant to the parties' contract or principles of common law.

### *Payment Period*

Payments due from the State of Illinois must be paid within 60 days of receipt of a proper bill or invoice. 30 *Ill. Comp. Stat.* 540/3-2(1). If a bill contains a defect, the agency shall notify the vendor of construction related invoices not later than 30 days after the invoice was submitted. *Id.* at 540/3.2(1.1). Such notice shall identify the defect and any additional information necessary to correct the defect. *Id.* If one or more items on a construction related invoice are disapproved, but not the entire invoice, then the portion that is not disapproved shall be paid. *Id.*

Local governmental officials and agencies must approve or disapprove an invoice within 30 days and pay approved invoices within 30 days from approval (maximum of 60 days total). 50 *Ill. Comp. Stat.* 505/3 & 505/4. If safety or quality assurance testing is needed before approval or disapproval of the goods provided, and such testing cannot be completed within the initial 30-day approval period, approval or disapproval must be made immediately upon the earlier of the completion of the testing or within 60 days of receiving the goods. *Id.* at 505/3.

However, the time periods relevant to contracts with local governments may be superseded by greater time periods agreed to by the local government agency and the contractor. *Id.* at 505/6.

### *Grounds to Withhold Payments*

The statutes do not appear to specifically identify grounds upon which payment may be withheld. Presumably, therefore, the parties' contract or common law principles will apply to determine when payment may be withheld.

### *Interest*

Late payments by the State are subject to an interest penalty of 1% per month of any amount approved but not timely paid. 30 *Ill. Comp. Stat.* 540/3-2(1). Aggregated interest penalties of \$50

or more shall be automatically paid by the agency or State official. All interest which has accrued at the end of the fiscal year shall be paid, even if less than \$50. *Id.* at 540/3-2(2).

Local governmental officials and agencies must pay interest in the amount of 1% per month on late payments. *50 Ill. Comp. Stat. 505/4.*

### ***Retainage***

The statutes do not appear to contain restrictions on the amount of retainage that may be withheld; however, both the state and local acts recognize that amounts may be withheld from contractors. *See 30 Ill Comp. Stat. 540/7(a); 50 Ill. Comp. Stat. 505/9.*

### ***Attorney's Fees***

These prompt pay acts do not provide for attorney fees in the event of late payment. Thus, any right to collect attorney fees would depend upon the parties' agreement (and Illinois common law as to whether such an agreement is allowed) or another, applicable statute.

### ***Noteworthy***

A State official or agency may not request any vendor or contractor to waive his rights under the Act to recover a penalty for late payment as a condition of, or inducement to enter into, any contract for goods or services. *30 Ill Comp. Stat. 540/6.*

## **Prime to Sub – Public**

### ***Who's Covered***

The Illinois State Prompt Payment Act and the Illinois Local Government Prompt Payment Act both apply to protect a contractor's subcontractors and material suppliers as well as any lower-tiered subcontractors or material suppliers. *30 Ill. Comp. Stat. 540/7; 50 Ill. Comp. Stat. 505/9.*

### ***Entitlement to Payment***

Subcontractors and material suppliers are entitled to payment in proportion to the work completed by them on the project and materials supplied, less any retention, absent a contractor's or higher-tiered subcontractor's "reasonable cause" to withhold payment. *30 Ill. Comp. Stat. 540/7(a), (b); 50 Ill. Comp. Stat. 505/9.*

### ***Payment Period***

Contractors on a State or local project shall pay subcontractors and material suppliers (and subcontractors shall pay their subcontractors and material suppliers) within 15 days after receipt of payment under the contract. *30 Ill. Comp. Stat. 540/7(b); 50 Ill. Comp. Stat. 505/9.* Such payments to subcontractors and material suppliers shall be in proportion to the work completed by each, plus interest received under the applicable prompt payment act, less any retainage. *30 Ill. Comp. Stat. 540/7(b); 50 Ill. Comp. Stat. 505/9.*

Generally, a contractor is obliged to make disbursements on a pro rata basis to itself, its subcontractors, and material suppliers based on the amount of payment. *30 Ill. Comp. Stat. 540/7(b); 50 Ill. Comp. Stat. 505/9.* However, if full payment is not made because of specific areas of work or materials, then those specific subcontractors or suppliers are not to be paid for rejected

work or work that is “deemed not suitable for payment.” 30 *Ill. Comp. Stat.* 540/7(b); 50 *Ill. Comp. Stat.* 505/9.

### ***Grounds to Withhold Payments***

The statutes do not appear to specifically identify grounds upon which payment may be withheld. Presumably, therefore, the parties’ contract or common law principles will apply to determine when payment may be withheld.

### ***Interest***

Late payments are subject to interest at the rate of 2% per month calculated from the expiration of the 15-day period until fully paid. 30 *Ill. Comp. Stat.* 540/7(b); 50 *Ill. Comp. Stat.* 505/9.

### ***Retainage***

The statutes do not appear to contain restrictions on the amount of retainage that may be withheld; however, both the state and local acts recognize that amounts may be withheld from contractors. See 30 *Ill Comp. Stat.* 540/7; 50 *Ill. Comp. Stat.* 505/9.

### ***Attorney’s Fees***

These prompt pay acts do not provide for attorney fees in the event of late payment. Thus, any right to collect attorney fees would depend upon the parties’ agreement (and Illinois common law as to whether such an agreement is allowed) or another, applicable statute.

### ***Noteworthy***

Under the Illinois State Prompt Payment Act (*i.e.*, not the Local Government Prompt Payment Act), if a contractor fails to make payments to subcontractors and material suppliers within 15 days after receipt of payment, any subcontractor or material supplier to whom payments are owed may file a written notice with the State official or agency setting forth the amount owed and the contractor’s failure to timely pay. 30 *Ill Comp. Stat.* 540/7(b)(1). Within 15 days of receiving such notice, the State official or agency must hold a hearing to determine whether the contractor withheld the payment without reasonable cause from the subcontractor or material supplier. *Id.* at 540/7(b)(2). Addition, the State official or agency must determine what amount, if any, is due. *Id.* If the administrative law judge finds that the contractor failed to make payment in full, without reasonable cause, then he or she shall direct the contractor to pay the amount due plus interest within 15 days after the finding. *Id.* at 540/7(b)(3). If a contractor fails to make full payment within 15 days thereafter, the contractor shall be barred from entering into a State public construction contract for a period of one year beginning on the date of the administrative law judge’s finding. *Id.* at 540/7(b)(4).

### **Owner to Prime – Private**

NOTE: The Illinois Contractor Prompt Payment Act is only effective for contracts entered into on or after August 31, 2007. 815 *Ill. Comp. Stat.* 603/99.

### ***Who’s Covered***

The Illinois Contractor Prompt Payment Act provides protection on Construction Contracts for prime contractors, a contractor’s subcontractors and materialmen, and sub-subcontractors, suppliers, and others who are entitled to mechanics liens under the Illinois Mechanics Lien Act.

Applicable definitions under the Act include the following:

“Construction contract” means a contract or subcontract, entered into after August 31, 2007, for the design, construction, alteration, improvement, or repair of Illinois real property, except for contracts that require the expenditure of public funds and contracts for the design, construction, alteration, improvement, or repair of single family residences or multiple family residences with 12 or fewer units in a single building. 815 Ill. Comp. Stat. 603/5(b).

“Contractor” and “subcontractor” have the meanings ascribed to them by the Illinois Mechanics Lien Act and cases decided under that Act. 815 Ill. Comp. Stat. 603/5(c); see also 770 Ill. Comp. Stat. 60/0.01 – 60/39 (Illinois Mechanics Lien Act).

### **Entitlement to Payment**

A contractor is entitled to payment if it has performed in accordance with the construction contract and its payment application has been approved by the owner or the owner’s agent. 815 Ill. Comp. Stat. 603/10.

### **Payment Period**

Payment must be made pursuant to the payment application within 15 days of approval. 815 Ill. Comp. Stat. 603/10(1). Unless the owner provides a written statement of any amount withheld and the reason for withholding payment within 25 days of receiving the application, the application will be deemed approved on the 25<sup>th</sup> day. *Id.* If the owner only has grounds to withhold part of the payment, the remaining amount on the payment application must still be paid. *Id.*

Under the Act, a payment application “means, in accordance with the terms and definitions of the applicable contract, any invoice, bill or other request for periodic payment, final payment, payment of change order or request for release of retainage from the contractor to the owner.” *Id.* at 603/5(a).

### **Grounds to Withhold Payments**

The statutes do not appear to specifically identify grounds upon which payment may be withheld. Presumably, therefore, the parties’ contract or common law principles will apply to determine when payment may be withheld.

### **Interest**

If payment is not made in a timely manner, the “delinquent party” will be liable for interest at a rate of 10% per year. 815 Ill. Comp. Stat. 603/15(a). However, this interest may not be duplicative of any interest charged under the Illinois Mechanics Lien Act. *Id.* at 603/15(c)

### **Retainage**

No provision.

### **Attorney’s Fees**

Like the public prompt pay acts, this private prompt pay act does not provide for attorney fees in the event of late payment. Thus, any right to collect attorney fees would depend upon the parties’ agreement (and Illinois common law as to whether such an agreement is allowed) or another, applicable statute.

### **Noteworthy**

A contractor or subcontractor that is not paid as required by the Act may suspend performance without penalty for breach of contract until payment is made as required by the Act, so long as the

contractor or subcontractor has first provided seven calendar days written notice to the delinquent party. 815 Ill. Comp. Stat. 603/15.

## **Prime to Sub – Private**

### ***Who's Covered***

See Illinois Owner to Prime - Private.

### ***Entitlement to Payment***

See Illinois Owner to Prime - Private.

### ***Payment Period***

A subcontractor that has performed in accordance with the parties' contract, and that has had its work accepted by the owner, the owner's agent, or the contractor, must be paid within 15 calendar days of the (sub)contractor's receipt of a periodic payment, final payment, or retainage money from the owner, contractor, or other subcontractor. 815 Ill. Comp. Stat. 603/10(2).

### ***Grounds to Withhold Payments***

See Illinois Owner to Prime - Private.

### ***Interest***

See Illinois Owner to Prime - Private.

### ***Retainage***

See Illinois Owner to Prime - Private.

### ***Attorney's Fees***

See Illinois Owner to Prime - Private.

### ***Noteworthy***

See Illinois Owner to Prime - Private.

# Indiana

## Owner to Prime – Public

### *Who's Covered*

Indiana does not have a single Prompt Payment Act—it has multiple statutes that provide for the payment of contractors and subcontractors.

**For state public works contracts (Title 4 and 5 of the Indiana Code) and contracts with local government entities (Title 36):** “Contractor” is generally defined as an entity who is a party to a contract with the state or local government entity. *Ind. Code* §§ 4-13.6-1-3; 5-16-5.5-1..

**For contracts with the Indiana Department of Transportation (Title 8):** Title 8 does not define the term “contractor” for contracts with the Department of Transportation.

### *Entitlement to Payment*

**For contracts with the state (Titles 4 and 5) or local government entity (Title 36):** Contractors are entitled to payment after substantial completion of the contract. *Ind. Code* §§ 4-13.6-7-8; 5-16-5.5-6; 36-1-12-14(f).

**For contracts with the Indiana Department of Transportation (Title 8):** Contractors are entitled to payment after final acceptance of the contract pursuant. *Ind. Code* § 8-23-9-18. Final acceptance may be made after the work has been inspected to ensure it was performed according to the plans and specifications. *Ind. Code* § 8-23-9-18.

### *Payment Period*

Unless the contract provides otherwise, payment is prompt if mailed or delivered within thirty five (35) days of the receipt of goods and services or receipt of a properly completed claim. *Ind. Code* § 5-17-5-1(b). However, a contractor must be paid in full including all escrowed principal and escrowed income by the state agency within 180 days of acceptance of the contract for contracts with the Department of Transportation, *Ind. Code* § 8-23-9-18, or within 61 days following the date of substantial completion of the project for all other contracts with the state or local government entity, *Ind. Code* §§ 4-13.6-7-8; 5-16-5.5-6; 36-1-12-14(f).

### *Grounds to Withhold Payments*

**For state public works contracts (Title 4):** Payment may be withheld if any of the following conditions are met:

- (1) the prime contractor fails to materially fulfill all of its obligations under the contract;
- (2) the agency has received claims from subcontractors or suppliers under the statute; or
- (3) the prime contractor fails to furnish satisfactory evidence showing full payment of all subcontractors and suppliers for the performance of the contract.

*See Ind. Code* § 4-13.6-7-8.

**For local public works contracts (Title 36):** Payment may be withheld until the contractor has paid the subcontractors, material suppliers, laborers, or those furnishing services. *Ind. Code* § 36-1-12-12(a). Additionally, if within 61 days after substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. *Id.* § 36-1-12-14(f).

**For contracts with the Indiana Department of Transportation (Title 8):** There is no provision for the withholding of payments.

**For all other non-Title 4 contracts with the state (Title 5):** Payment may be withheld until the contractor has paid all subcontractors and materialmen for labor and materials furnished, provided that the contractor is owed a sufficient sum to pay such subcontractors and materialmen, and such subcontractors and material men have filed proper notice with the appropriate state entity *Id.* § 5-16-5-1. If within 61 days following substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. *Id.* § 5-16-5.5-6.

### ***Interest***

Every state agency shall pay a late penalty at a rate of one percent (1%) per month on amounts due on written contracts for public works, personal services, goods and services, equipment and travel whenever the state agency fails to make a timely payment. *Ind. Code* § 5-17-5-1(a). While this provision falls under Title 5, it may provide an additional obligation for the state or local government entity under Titles 4, 8, and 36 because this statute applies to “every state agency and political subdivision.” *Id.*

### ***Retainage***

**For state public works contracts (Title 4):** the agency will retain either

- (1) 6% of the dollar value of all work satisfactorily completed until the public work is 50% complete, and nothing further after that; or
- (2) 3% of the dollar value of all work satisfactorily completed until the contract is substantially complete.

*Ind. Code* § 4-13.6-7-3.

Additionally, if the estimated cost of the project is less than or equal to two hundred thousand dollars (\$200,000), the agency may be required by its director to withhold retainage in an amount of 10% of the dollar value of all payments made to the contractor until the public work is substantially completed. *Id.* § 4-13.6-7-6(f)(2).

**For contracts with the Indiana Department of Transportation (Title 8):** Title 8 does not require a specific sum be retained.

**For all other non-Title 4 contracts with the state (Title 5) or local public works contracts (Title 36):** The retainage will be either

- (1) between 6-10% of the dollar value of all work satisfactorily completed until the public work is 50% complete, and nothing further after that; or

(2) between 3-5% of the dollar value of work satisfactorily completed until the public work is substantially complete.

*Id.* §§ 5-16-5.5-3.5(a); 36-1-12-14(c).

#### *Attorney's Fees*

There is no fees provision within the prompt pay statutes.

#### *Noteworthy*

### **Prime to Sub – Public**

#### *Who's Covered*

**For state public works contracts (Title 4 and 5 of the Indiana Code) and contracts with local government entities (Title 36):** “Subcontractor“ is defined as an entity who is a party to a contract with the contractor. This definition includes materialmen who supply both the contractor and the subcontractor. *Ind. Code* §§ 4-13.6-1-18; 5-16-5.5-1; 36-1-12-12.

**For contracts with the Indiana Department of Transportation (Title 8):** Title 8 does not define the term “subcontractor” for contracts with the Department of Transportation.

#### *Entitlement to Payment*

**For state public works contracts (Title 4 and 5):** A subcontractor is entitled to payment upon the prime contractor’s receipt of payment from the state. *Ind. Code* §§ 4-13.6-7-4(a); 5-16-5.5-5.

#### *Payment Period*

**For state public works contracts (Title 4 and 5):** Within ten (10) days. *Ind. Code* §§ 4-13.6-7-4; 5-16-5.5-5.

#### *Grounds to Withhold Payments*

There does not appear to be a statutory provision relating to when payment may be withheld; thus, the parties’ contract will likely govern this issue.

#### *Interest*

A rate of one percent (1%) per month on the amount due the subcontractor after the contractor receives payment paid by the state. *Ind. Code* § 5-17-5-4.

#### *Retainage*

There does not appear to be a retainage provision for private contracts.

#### *Attorney's Fees*

*See* Indiana Owner to Prime - Public.

#### *Noteworthy*

Although Title 8 of the *Indiana Code*, addressing projects with the Department of Transportation, does not appear to have statutes requiring a contractor to pay a subcontractor within a certain period

of time, there are key provisions within the Indiana statutes that protect subcontractors on such a project.

These provisions include *Ind. Code* §§ 8-23-9-26 to 39. In summary, these provisions provide that a payment claim against a contractor may be filed within 60 days of last furnishing labor, materials, or services and within 30 days after final acceptance of the improvement. If this claim is made, the Department will withhold the amount claimed for 90 days, giving the claimant time to file suit. If suit is filed and the Department is notified of that suit, the Department will continue to hold the funds pending adjudication and will pay the clerk of the court where the action is filed any amount awarded to the claimant.

### **Owner to Prime – Private**

Indiana does not appear to have a prompt payment act applicable to prime contractors on a private construction contract.

### **Prime to Sub – Private**

#### *Who's Covered*

Indiana does not appear to have a prompt payment act applicable to subcontractors on a private construction contract.

# Iowa

## Owner to Prime – Public

### *Who's Covered*

The Iowa public prompt pay statutes primarily provide protection for contractors and contractors' subcontractors on public improvement projects involving a public corporation. Some protection is also provided for entities contracting with a subcontractor.

Under the statutes, the following terms are defined:

“Public corporation“ includes the state, all counties, cities, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements.

“Public improvement“ is an improvement, the cost of which is payable from taxes or other funds under the control of the public corporation, except in cases of public improvement for drainage or levee purposes the provisions of the drainage law in cases of conflict shall govern.

“Construction,“ in addition to its ordinary meaning, includes repair, alteration and demolition.

*Iowa Code § 573.1.*

### *Entitlement to Payment*

Contractors are entitled to payment on progress payments that are approved as payable by the public corporation's project architect or engineer. *See Iowa Code § 573.12(2)(a)*. The statutes do not outline when a progress payment should be approved, so, presumably, the parties' contract and/or Iowa common law would apply.

### *Payment Period*

Payments shall be made on the basis of monthly estimates of labor performed and material delivered. *Iowa Code § 573.12(1)*. Approved progress payments are due within 14 days of receipt of the payment request. *Id.* § 573.12(2). The contract may provide for a payment period longer than 14 days, but the contract may not provide for payment periods exceeding 30 days. *Id.* § 573.12(2)(a)(1). If the contract provides for a period longer than 30 days, then presumably the 14 day period appears to apply. *Id.*

Final payments must be made within 40 days, unless a greater period not exceeding 50 days is specified in the contract, after the work under the contract has been completed and accepted. *Iowa Code § 573.14.*

### *Grounds to Withhold Payments*

The Iowa statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

Late payments are subject to interest at the rate set forth in *Iowa Code* § 573.14.

### ***Retainage***

The public corporation shall not retain more than 5% of each monthly payment due. *Iowa Code* § 573.12.

### ***Attorney's Fees***

The court may award reasonable attorney's fees in favor of any claimant for labor or materials who has, in whole or in part, established a claim. *Iowa Code* § 573.21.

## **Prime to Sub – Public**

### ***Who's Covered***

See Iowa Owner to Prime - Public.

### ***Entitlement to Payment***

A subcontractor is entitled to a progress or final payment upon "satisfactory performance" of the subcontractor's work. *Iowa Code* § 573.12(2)(b).

### ***Payment Period***

A progress or final payment to a subcontractor shall be made not later than:

- (1) Seven days after the contractor receives payment for that subcontractor's work; or
- (2) A reasonable time after the contractor could have received payment for the subcontractor's work, if the reason for nonpayment is not the subcontractor's fault.

*Iowa Code* § 573.12(b).

### ***Grounds to Withhold Payments***

The Iowa statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

The Iowa prompt payment statutes do not appear to provide a specific rate of interest that may be charged on a late payment from a contractor. If the contractor receives an interest payment, however, the contractor shall pay the subcontractor a share of the interest payment proportional to the payment for that subcontractor's work. *Iowa Code* § 573.12(3)(a).

### ***Retainage***

The contractor may retain from each payment to a subcontractor not more than the lesser of 5% or the amount specified in the contract. *Iowa Code* § 573.12(1).

### ***Attorney's Fees***

See Iowa Owner to Prime - Public.

### ***Noteworthy***

Under *Iowa Code* § 573.15A(1), upon completion of 95% of the contract, any entity having a contract with the contractor or a subcontractor who has performed labor or furnished materials, services, or transportation in the construction of a public improvement may file a claim for such

items with the public corporation either (1) before the expiration of 30 days following completion of 95% of the contract or (2) at any time after the 30 day period if the public corporation has not paid the full contract price and no action is pending to adjudicate rights in and to the unpaid portion of the contract price.

### **Owner to Prime – Private**

Iowa does not appear to have a prompt payment act applicable to contractors on a private construction contract.

### **Prime to Sub – Private**

Iowa does not appear to have a prompt payment act applicable to subcontractors on a private construction contract.

# Kansas

## Owner to Prime – Public

### *Who's Covered*

Kansas appears to have two prompt payment acts that are applicable to public contracts: The Kansas Prompt Payment Act and the Kansas Fairness in Public Construction Contract Act. The Kansas Prompt Payment Act (“KPPA”) provides protection for those contracting to provide, among others, architectural, engineering, consulting, construction, and other professional and personal services and/or goods with the State of Kansas, state and government agencies, departments, divisions, or authorities. *Kan. Stat. Ann.* § 75-6402. Relevant definitions under the KPPA include the following:

“State agency” means the state and any state agency, department, division or authority thereof.

“Government agency” means any state agency, library, community college or unified school district.

“Vendor” means any person, corporation, association or other business concern engaged in a trade or business, either on a profit or not-for-profit basis, and providing any goods or services to a government agency.

“Goods” means any goods, supplies, materials, equipment or other personal property, but does not mean any real property.

“Services” means any contractual services including architectural, engineering, medical, financial, consulting or other professional services, any construction services and any other personal services, but does not mean any services performed as an officer or employee of any government agency. Services shall not include construction contracts subject to *Kan. Stat. Ann.* §§ 16-1901 through 16-1908.

*Id.*

The Kansas Fairness in Public Construction Contract Act (“KFPCCA”) was enacted in 2007. The KFPCCA applies to all owners, contractors, and subcontractors who enter into a contract for public construction after the effective date of the Act, July 1, 2007. *Id.* § 16-1903. All tiers of subcontractors are protected. However, the KFPCCA does not apply to construction projects that are required to comply with section 109 of the Kansas department of transportation special provisions to the standard specifications, 1990 edition (90P-205-R6) or any subsequent editions. *Id.* § 16-1908.

Under the KFPCCA, the following terms are defined:

“Construction” means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, water or waste water treatment facility, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation of a building.

“Construction” shall not mean the design, construction, alteration, renovation, repair or maintenance of a road, highway or bridge.

“Contract” means a contract or agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor or a subcontractor and another subcontractor.

“Contractor” means a person performing construction and having a contract with an owner of the real property or with a trustee or agent of an owner.

“Owner” means a public entity that holds an ownership interest in real property.

“Public entity” means the state of Kansas, political subdivisions, cities, counties, state universities or colleges, school districts, all special districts, joint agreement entities, public authorities, public trusts, nonprofit corporations and other organizations which are operated with public money for the public good.

“Retainage” or “retention” means money earned by a contractor or subcontractor but withheld to ensure timely performance by the contractor or subcontractor.

“Subcontractor” means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.

“Substantial completion” means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that the owner can occupy or utilize the constructed project for its intended use.

“Undisputed payment” means payments which all parties to the contract agree are owed to the contractor.

*Id.* § 16-1902.

#### ***Entitlement to Payment***

**KPPA:** Under *Kan. Stat. Ann.* § 75-6403(b), a contractor is entitled to payment upon the government’s receipt of the goods or services. “Receipt” is deemed to have occurred when all such goods or services are completely delivered and finally accepted by the government agency. *Id.*

**KFPCCA:** The KFPCCA appears to leave entitlement to payment up to the terms of the parties’ contract. *Id.* 16-1903(c).

#### ***Payment Period***

**KPPA:** Unless otherwise agreed to in writing by the parties, each government agency shall make payment of the full amount due for such goods or services on or before the 30th calendar day after the date of receipt by the government agency of the goods and services or the date of receipt by the government agency of the bill therefor, whichever is later. *Kan. Stat. Ann.* § 75-6403(b).

**KFPCCA:** All contracts for public construction must provide that payment of amounts due a contractor from an owner, except retainage, be made within 30 days after the owner receives a

timely, properly completed, undisputed request for payment according to terms of the contract, unless extenuating circumstances exist which would preclude approval of payment within 30 days. If such extenuating circumstances exist, then payment shall be made within 45 days after the owner receives such payment request. *Kan. Stat. Ann.* § 16-1903(c). The architect or engineer of record or agent of the owner must review, approve, and forward undisputed requests for payment to the owner within seven business days of receipt from the contractor. *Id.* § 16-1903(d).

### **Grounds to Withhold Payments**

The Kansas statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control. *But see Kan. Stat. Ann.* § 75-6403(e) (stating that a state agency may allege unspecified grounds for denying liability for payment).

### **Interest**

**KPPA:** Interest will compound and accrue at the rate of 1.5% per month on the amount of the payment that is due but unpaid. *Kan. Stat. Ann.* § 75-6403(d). Interest will begin to accrue beginning on the day after the required payment date and will stop accruing seven days after the voucher for payment is sent to the director of accounts and reports that requests payment. *Id.* § 75-6403(c)(2). However, no interest will be paid if full payment on the goods or services provided is made on or before the fifteenth calendar day after the required payment date. *Id.*

To obtain interest, a request must be made by the contractor within four months after payment was due. *Id.* § 75-6403(f).

For purposes of determining whether a payment was made in accordance with this subsection, a payment by a government agency shall be considered to be made on the date on which the warrant or check for such payment is dated. *Id.* § 75-6403(b).

**KFPCCA:** If an owner fails to timely pay a contractor, the owner shall pay interest at a rate of 18% per year on the undisputed amount, beginning on the day following the end of the applicable time period. *Id.* § 16-1903(e).

If the owner, contractor, or subcontractor fails to pay retainage when due, interest will be due at the rate of 18% per annum beginning on the first business day after the payment was due. *Id.* § 16-1904(i).

### **Retainage**

**KPPA:** No provision applicable to retainage appears to be in the KPPA.

**KFPCCA:** Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance of the contract (e.g. if the contractor or subcontractor are not performing according to schedule, or show poor workmanship). *Kan. Stat. Ann.* § 16-1904. Retainage, however, shall not exceed 10% of the value of the contract or subcontract. *Id.*

An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of the contractor. *Id.* at § 16-1904(c). Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular

payment cycle. *Id.* The same value and time limits apply to contractor and subcontractor held retainage. *Id.* at § 16-1904(d), (e).

### *Attorney's Fees*

**KPPA:** No provision applicable to attorney's fees appears to be in the KPPA.

**KFPCCA:** In any action to enforce *Kan. Stat. Ann.* §§ 16-1903, 16-1904 or 16-1905, including arbitration, between a contractor and subcontractors or subcontractors and subcontractors, the court or arbitrator shall award costs and reasonable attorney's fees to the prevailing party. *Kan. Stat. Ann.* § 16-1906.

### *Noteworthy*

**KPPA:** Special rules under the KPPA apply in the case of a contract with a unified school district. *Kan. Stat. Ann.* § 75-6403(c)(3).

**KFPCCA:** Under the KFPCCA, the following provisions in a public construction contract are unenforceable:

- (1) A provision that purports to waive, release or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation except that a contract may require nonbinding alternative dispute resolution as a prerequisite to litigation;
- (2) a provision that purports to waive, release or extinguish rights to file a claim against a payment or performance bond, except that a contract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and
- (3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance or a builder's risk policy.

*Kan. Stat. Ann.* § 16-1903(b).

Additionally, under *Kan. Stat. Ann.* § 16-1905, a contractor or subcontractor of any tier may suspend performance if any undisputed payment is not made within seven business days after the payment date established in a contract for public construction or in the KFPCCA. However, the suspending party must first provide seven additional business days' written notice to the owner (in the case of a delinquent contractor) or the contractor (in the case of a delinquent subcontractor). *Id.* Further performance may be suspended until payment, including applicable interest, is made. *Id.* The contract time for each contract affected by the suspension shall be extended appropriately, and the contract sum for each affected contract shall be increased by the suspending party's reasonable costs of demobilization, delay, and remobilization. *Id.*

Any provision in a contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract shall be void, unenforceable and against

public policy. *Id.* § 16-1907. However, this provision does not create a contract between parties where a contract did not otherwise exist. *Id.*

## Prime to Sub – Public

### *Who's Covered*

See Kansas Owner to Prime - Public.

### *Entitlement to Payment*

See Kansas Owner to Prime - Public.

### *Payment Period*

See Kansas Owner to Prime - Public.

### *Grounds to Withhold Payments*

See Kansas Owner to Prime - Public.

### *Interest*

**KPPA**: No applicable provision.

**KFPCCA**: If the contractor fails to pay a subcontractor within seven business days, the contractor shall pay interest to the subcontractor beginning on the eighth business day after receipt of payment by the contractor, computed at the rate of 18% per annum on the undisputed amount. *Kan. Stat. Ann.* § 16-1903(g). This rule also applies to payments due from subcontractors to subcontractors. *Id.* § 16-1903(h).

### *Retainage*

**KPPA**: No applicable provision.

**KFPCCA**: If it is determined by the owner, the contractor, and the project architect or engineer that a subcontractor has satisfactorily completed its work and that the subcontractor can be released prior to substantial completion of the entire project without risk or additional cost to the owner or contractor, then retainage may be released early. *Kan. Stat. Ann.* § 16-1904(j). See also Kansas Owner to Prime - Public.

### *Attorney's Fees*

See Kansas Owner to Prime - Public.

### *Noteworthy*

See Kansas Owner to Prime - Public.

## Owner to Prime – Private

*NOTE: The Kansas Fairness in Private Construction Contract Act only applies to contracts entered into after July 1, 2005.*

### **Who's Covered**

The Kansas Fairness in Private Construction Contract Act applies to private construction contracts, other than single family residential projects, small multi-family residential projects, or public works projects. *Kan. Stat. Ann.* §§ 16-1803 & 16-1807. The Act provides protection for contractors, subcontractors, and sub-subcontractors of all tiers. *Id.* §§ 16-1802(b), (c), and (g) & 16-1803(h).

Under the statutes, relevant definitions include the following:

“Construction“ means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, structure, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation.

“Contractor“ means a person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner.

“Owner“ means a person who holds an ownership interest in real property.

“Retainage“ means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor.

“Subcontractor“ means any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.

“Substantial completion” means the stage of a construction project where the project, or a designated portion thereof, is sufficiently complete in accordance with the contract, so that portion thereof can be used for its intended purpose.

*Kan. Stat. Ann.* § 16-1802.

### **Entitlement to Payment**

Entitlement to payment will be determined by the terms of the contract between the parties. *Kan. Stat. Ann.* § 16-1803(a).

### **Payment Period**

Payments shall be made within 30 days after the owner receives a timely, properly completed, undisputed request for payment. *Kan. Stat. Ann.* § 16-1803(d). However, this 30 day time limit does not apply to retainage. *Id.*

### **Grounds to Withhold Payments**

The Kansas statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### **Interest**

Late payments for undisputed amounts will accrue interest at the rate of 18% per annum beginning on the 31st day after receipt of the request for payment. *Kan. Stat. Ann.* § 16-1803(e).

### *Retainage*

Retainage shall not exceed 5% of the value of the contract or subcontract unless the owner or contractor determines that a higher rate of retainage is required to ensure performance of the contract (e.g. if the contractor or subcontractor is not performing according to schedule or there is a problem with workmanship). *Kan. Stat. Ann.* § 16-1804. Retainage, however, shall not exceed 10% of the value of the contract or subcontract.

An owner shall release all remaining retainage on any undisputed payment due to a contractor within 30 days after substantial completion of the project; however, if any contractor or subcontractor is still performing work on the project, an owner may withhold that portion of the retainage attributable to such work until 30 days after such work is completed. *Id.* § 16-1804(c).

An owner may withhold not more than 150% of the value of incomplete work, provided that the incomplete work is due to the fault of the contractor. Any amounts retained for incomplete work shall be paid within 45 days after completion of the work as a part of the regular payment cycle. *Id.* § 16-1804(d). The same value and time limits apply to retainage withheld by contractors and subcontractors. *Id.* § 16-1804(e), (f).

If an owner, contractor, or subcontractor fails to pay retainage pursuant to the terms of the contract or as required by the Act, such owner, contractor or subcontractor shall be liable for interest at the rate of 18% per annum beginning on the first business day after the payment was due. §16-1804(j).

### *Attorney's Fees*

In an action to enforce the provisions of the Act, the court or arbitrator shall award costs and reasonable attorney's fees to the prevailing party. *Kan. Stat. Ann.* § 16-1806.

### *Noteworthy*

Suspension of performance allowed under *Kan. Stat. Ann.* § 16-1805. If undisputed payments are not received within seven days of when due, then, upon seven additional business days notice to the owner (in the case of a delinquent contractor) or the contractor (in the case of a delinquent subcontractor), the claimant is entitled to suspend performance until payment of principle and interest is made. *Id.* Moreover, the contract time will be extended appropriately and the contract price will be increased according to the suspending party's costs of demobilization, delay, and remobilization. *Id.*

The rights and duties prescribed under the Act shall not be waived or varied by contract and any attempt to do so will be unenforceable. *Id.* § 16-1801

A list of prohibited provisions can be found in *Kan. Stat. Ann.* §16-1803(b). These provisions include:

- (1) a provision that purports to waive, release or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation except that a contract may require binding arbitration as a substitute for litigation or require non-binding alternative dispute resolution as a prerequisite to litigation;
- (2) a provision that purports to waive, release or extinguish rights provided by article 11 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto, except that a contract

may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of payment received; and

- (3) a provision that purports to waive, release or extinguish rights of subrogation for losses or claims covered or paid by liability or workers compensation insurance except that a contract may require waiver of subrogation for losses or claims paid by a consolidated or wrap-up insurance program, owners and contractors protective liability insurance, or project management protective liability insurance, unless otherwise prohibited under *Kan. Stat. Ann.* § 40-5403(b)(5).

*Id.*

## **Prime to Sub – Private**

### ***Who's Covered***

See Kansas Owner to Prime – Private.

### ***Entitlement to Payment***

See Kansas Owner to Prime – Private.

### ***Payment Period***

Contractors shall pay their subcontractors and subcontractors shall pay their subcontractors within seven business days of receipt of payment, including retainage, if the subcontractor has provided a timely, properly completed and undisputed request for payment to the contractor. *Kan. Stat. Ann.* § 16-1803(f).

### ***Grounds to Withhold Payments***

The Kansas statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

Late, undisputed payments will accrue interest at the rate of 18% per annum beginning on the eighth business day. *Kan. Stat. Ann.* § 16-1803(g).

### ***Retainage***

See Kansas Owner to Prime - Private.

### ***Attorney's Fees***

See Kansas Owner to Prime - Private.

### ***Noteworthy***

The Kansas statute contains an anti-"pay-if-paid" provision. Under the Act,

Any provision in a contract for private construction providing that a payment from a contractor or subcontractor to a subcontractor is contingent or conditioned upon receipt of a payment from any other private party, including a private owner, is no defense to a claim to enforce a mechanic's lien or bond to secure payment of claims

pursuant to the provisions of article 11 of chapter 60 of the Kansas Statutes  
Annotated,  
*Kan. Stat. Ann. § 16-1803(c).*  
*See also* Kansas Owner to Prime - Private.

# Kentucky

## Owner to Prime – Public

### *Who's Covered*

Kentucky appears to have two prompt payment acts that are applicable to government contracts. Likely, construction contracts entered into before June 26, 2007, are subject to the provisions within Title IV, chapter 45 of the Kentucky Revised Statutes, while contracts entered into after that date are subject to the Kentucky Fairness in Construction Act (“KFCA”).

The statutes within chapter 45 declare that it is Kentucky’s policy to pay its bills on time. *Ky. Rev. Stat. Ann.* § 45.451. These statutes apply to contracts with “purchasing agencies,” which are defined as “any state organizational unit or administrative body as defined in KRS 12.010 that actually receives goods or services from a vendor.” *Id.* § 45.452. Thus, only those entities having contracts with Kentucky are protected by the statutes in chapter 45.

The KFCA applies to construction contracts entered into after June 26, 2007, regarding public construction and public works projects and private construction projects, excluding residential construction. *Id.* § 371.425. Other excluded projects are identified in *Ky. Rev. Stat. Ann.* § 371.425.

The KFCA also applies to payments due from contractors to subcontractors and from subcontractors to their subcontractors. Applicable definitions under the KFCA include, among many others, the following:

“Construction” means the process of building, altering, repairing, improving, or demolishing any structures or buildings, or other improvements of any kind to any real property, but does not include processing equipment used for the process of manufacturing or the routine maintenance of existing structures, buildings, or real property;

“Contract” means a contract or agreement concerning construction made and entered into by and between a contracting entity and a contractor, a contractor and a subcontractor, or a subcontractor and another subcontractor;

“Contracting entity” means an owner of real property; a trustee or agent of an owner of real property; or a public official, public authority, or other public entity authorized to contract under the Kentucky Revised Statutes;

“Contractor” means a person performing construction and having a contract with a contracting entity;

“Disputed amount” means to question in good faith the validity, either in whole or part, of a request for payment asserted by any party.

“Retainage” means money earned by a contractor or subcontractor but withheld to ensure proper performance by the contractor or subcontractor and that shall be paid upon completion of contractual obligations;

“Subcontractor” means any person performing construction covered by a contract between a contracting entity and a contractor who does not have a contract with the contracting entity; and

“Undisputed amount” means a good faith, valid, accurate, timely request for payment which has been submitted to any entity owing money, that the recipient of the request for payment has reviewed and agrees that the money is due and owing.

*Id.* § 371.400.

### ***Entitlement to Payment***

**Chapter 45:** No applicable provision.

**KFCA:** A contractor or subcontractor will be entitled to payment depending on the terms of its contract and after submitting a “timely, properly completed, undisputed request for payment.” *Ky. Rev. Stat. Ann.* §371.405(1), (6).

### ***Payment Period***

**Chapter 45:** All bills shall be paid within 30 working days of receipt of goods and services or a contractor’s invoice except when the purchasing agency has transmitted a rejection notice to the contractor. *Ky. Rev. Stat. Ann.* § 45.453.

**KFCA:** All construction contracts shall provide that payments shall be made within 30 business days after the contracting entity receives a timely, properly completed, undisputed request for payment. *Id.* §371.405(6). However, a postsecondary institution and a board of education shall have 45 business days to make payment required. *Id.* § 371.405(7).

### ***Grounds to Withhold Payments***

Neither Chapter 45 nor the KFCA appears to have an applicable provision outlining grounds to withhold payments other than retainage. Thus, such grounds are likely established in the parties’ contract or Kentucky common law.

### ***Interest***

**Chapter 45:** Interest of 1% on any amount approved and unpaid shall be added to the amount approved for each month or fraction thereof after the thirty (30) working days which followed receipt of the goods or services or contractor’s invoice by a purchasing agency. *Ky. Rev. Stat. Ann.* § 45.454.

**KFCA:** Late payments will accrue interest at the rate of 12% per annum beginning on the 31st business day after receipt of the request for payment. *Id.* § 371.405(6). If payment has not been received within 25 business days following the submission of a timely, properly completed, undisputed request for payment, the contractor shall notify the contracting entity by certified mail. *Id.* The notice shall also include the date on which interest shall begin to accrue. *Id.* In the case of a postsecondary institution and a board of education, interest begins to accrue on the 46th day after receipt of the payment request. *Id.* § 371.405(7).

### ***Retainage***

**Chapter 45:** No applicable provision.

**KFCA**: Until 50% of the construction project has been completed in accordance with the contract, a contracting entity, contractor, or subcontractor may withhold no more than 10% retainage from the amount of any undisputed payment due. *Ky. Rev. Stat.* § 371.410(1). Retainage held after 51% of the construction project has been completed shall not be more than 5% of the total contract amount. *Id.*

Within 30 days after substantial completion of a construction project, the contracting entity or contractor shall release the retainage less an amount equal to 200% of the contracting entity's reasonably estimated cost of the balance of any contractor's or subcontractor's contractually obligated, yet uncompleted, work remaining. *Id.* § 371.410(2).

Within 15 business days after the retainage has been released by the contracting entity to the contractor, the contractor shall release to the subcontractors their proportional shares of the retainage. *Id.*

For the purposes of § 371.410(2), "substantial completion" is defined as the point at which, as certified in writing by the contracting entity, a project is at the level of completion, in strict compliance with the contract, where: (1) necessary approval by public regulatory authorities has been given; (2) the owner has received all required warranties and documentation; and (3) the owner may enjoy beneficial use or occupancy and may use, operate, and maintain the project in all respects, for its intended purpose. *Id.* § 371.410(2). Notably, partial use or occupancy is not evidence of substantial completion. *Id.*

#### *Attorney's Fees*

**Chapter 45**: No applicable provision.

**KFCA**: In an action to enforce the provisions of the KFCA, including arbitration, a court or arbitrator shall award costs and reasonable attorney's fees to the prevailing party if the losing party is deemed to have acted in bad faith. *Ky. Rev. Stat. Ann.* § 371.415. For public construction contracts, recovery of attorney's fees shall be limited to the public contract rate for attorney's fees. §371.415

#### *Noteworthy*

The KFCA addresses several specific types of contract provisions. The following provisions were declared to be against Kentucky's public policy and void and unenforceable:

- (a) A provision that purports to waive, release, or extinguish the right to resolve disputes through litigation in court or substantive or procedural rights in connection with such litigation, except that a contract may require binding arbitration as a substitute for litigation or require nonbinding alternative dispute resolution as a prerequisite to litigation;
- (b) A provision that purports to waive, release, or extinguish rights provided by KRS Chapter 376, with the exception of partial waivers of lien rights provided by the contractor or subcontractor for progress payments; or

- (c) A provision that purports to waive, release, or extinguish the right of a contractor or subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for delays in performing the contract that are, in whole or part, within the control of the contracting entity. Unusually bad weather that cannot be reasonably anticipated, fire, or other act of God shall not automatically entitle the contractor to additional compensation under this paragraph.

*Ky. Rev. Stat. Ann.* § 371.405(2). However, the statutes also state that subsection (2)(c) does not render the following provisions null, void, and/or unenforceable:

- (a) Permits a contractor or subcontractor to recover that portion of delay costs caused by acts or omissions of the contracting entity;
- (b) Requires notice of any delay by the party affected by the delay;
- (c) Provides for reasonable liquidated damages;
- (d) Provides for arbitration or any other procedure designed to resolve contract disputes; or
- (e) Specifies which costs are recoverable by a contractor or subcontractor for delay.

*Id.* § 371.405(3).

## **Prime to Sub – Public**

Note: The provisions within Chapter 45 of the Kentucky Revised Statutes do not appear to have any application with regard to subcontracts. Thus, only provisions with the Kentucky Fairness in Construction Act (“KFCA”) will be discussed in this section.

### ***Who’s Covered***

*See* Kentucky Owner to Prime - Public.

### ***Entitlement to Payment***

*See* Kentucky Owner to Prime - Public.

### ***Payment Period***

A contractor or subcontractor shall pay its subcontractors any undisputed amounts within 15 business days of receipt of payment from the contracting entity, including payment of retainage if retainage is released by the contracting entity, if the subcontractor has provided a timely, properly completed, and undisputed request for payment to the contractor. *Ky. Rev. Stat. Ann.* § 371.405(8)-(10).

### ***Grounds to Withhold Payments***

*See* Kentucky Owner to Prime - Public.

### ***Interest***

Late payments are subject to interest at the rate of 12% per annum beginning on the 16th business day after receipt of payment by the contractor. *Ky. Rev. Stat.* § 371.405(9). This provision also applies to payments from subcontractors to their subcontractors. *Id.*

### ***Retainage***

*See* Kentucky Owner to Prime - Public.

### ***Attorney's Fees***

See Kentucky Owner to Prime - Public.

### ***Noteworthy***

See Kentucky Owner to Prime - Public.

## **Owner to Prime – Private**

*Note: The provisions within Chapter 45 of the Kentucky Revised Statutes do not have any application with regard to private contracts. Thus, only provisions with the Kentucky Fairness in Construction Act (“KFCA”) are applicable to the issues discussed in this section.*

### ***Who's Covered***

See Kentucky Owner to Prime - Public.

### ***Entitlement to Payment***

See Kentucky Owner to Prime - Public.

### ***Payment Period***

See Kentucky Owner to Prime - Public.

### ***Grounds to Withhold Payments***

See Kentucky Owner to Prime - Public.

### ***Interest***

See Kentucky Owner to Prime - Public.

### ***Retainage***

See Kentucky Owner to Prime - Public.

### ***Attorney's Fees***

See Kentucky Owner to Prime - Public.

### ***Noteworthy***

See Kentucky Owner to Prime - Public.

## **Prime to Sub – Private**

*Note: The provisions within Chapter 45 of the Kentucky Revised Statutes do not have any application with regard to private contracts. Thus, only provisions with the Kentucky Fairness in Construction Act (“KFCA”) are applicable to the issues discussed in this section.*

### ***Who's Covered***

See Kentucky Prime to Sub - Public.

### ***Entitlement to Payment***

See Kentucky Prime to Sub - Public.

### ***Payment Period***

See Kentucky Prime to Sub - Public.

***Grounds to Withhold Payments***

See Kentucky Prime to Sub - Public.

***Interest***

See Kentucky Prime to Sub - Public.

***Retainage***

See Kentucky Prime to Sub - Public.

***Attorney's Fees***

See Kentucky Prime to Sub - Public.

***Noteworthy***

See Kentucky Prime to Sub - Public.

# Louisiana

## Owner to Prime – Public

### *Who's Covered*

Various statutes apply to protect prime contractors on government contracts, including *La. Rev. Stat. Ann.* §§ 38:2191 (most government contracts) & 48:251.5 (contracts with the Louisiana Department of Transportation and Development).

### *Entitlement to Payment*

Neither statute appears to identify when a contractor is entitled to payment; thus, the parties' contract will likely govern this issue.

### *Payment Period*

Public entities, other than the Department of Transportation and Development, shall promptly pay all obligations when due and payable under the contract. *La. Rev. Stat.* § 38:2191(A). Final payments are due within 45 days following receipt of a clear lien certificate. *Id.* § 38:2191(B).

The Department of Transportation and Development shall promptly pay all obligations arising under public contracts within 30 days of the date the obligations become due and payable under the contract. *Id.* § 48:251.5(A). All progressive stage payments and final payments shall be paid when they, respectively, become due and payable under the contract. *Id.* Final payments are due within 45 days following receipt of a clear lien certificate. *Id.* § 48:251.5(B)(1).

### *Grounds to Withhold Payments*

None specified.

### *Interest*

If the Department of Transportation and Development fails to make any final payments after recordation of formal final acceptance and within 45 days following receipt of a clear lien certificate by the department, the department shall be liable for legal interest on the balance due. *La. Rev. Stat. Ann.* § 48:251.5(B)(1).

*La. Rev. Stat. Ann.* § 38:2191 does not have a provision for interest.

### *Retainage*

A public body cannot withhold more than 10% of the contract price on projects of less than \$500,000. *La. Rev. Stat. Ann.* §§ 38:2248(A) & 48:256.1(A)(1). On projects valued at \$500,000 or more, the government may withhold only 5% of the contract price until the expiration of 45 days after the recordation of formal acceptance of such work, or notice of default by the contractor or subcontractor. *La. Rev. Stat. Ann.* §§ 38:2248(A) & 48:256.1(A)(1).

### *Attorney's Fees*

Failure of a public entity to make final payment after formal final acceptance and within 45 days after receipt of a clear lien certificate will result in the public entity being held liable for reasonable attorneys fees. *La. Rev. Stat. Ann.* § 38:2191(B).

Failure by the Department of Transportation & Development to make final payment as provided or to promptly ascertain the final estimated quantities under the contract in bad faith entitles the contractor to attorney's fees if mandamus to perform such acts is necessary. *Id.* § 48:251.5(B)(3).

### ***Noteworthy***

The *Louisiana Revised Statutes* identify numerous prohibited contract provisions including those listed in §§ 9:2775, 9:2778, 9:2779, 38:2195, 38:2196, 48:251.7, 48:251.8.

## **Prime to Sub – Public**

### ***Who's Covered***

*La. Rev. Stat. Ann.* § 9:2784 appears to protect subcontractors as well as a sub-subcontractor and sub-supplier.

### ***Entitlement to Payment***

Upon receipt of payment by the contractor or subcontractor, the subcontractor is entitled to payment in proportion to the percentage of work completed by it prior to the issuance of the receipt of payment, absent “reasonable cause” not to pay. *La. Rev. Stat. Ann.* § 9:2784(A), (C).

### ***Payment Period***

Payments to subcontractors are due within 14 days of receipt of payment. *La. Rev. Stat. Ann.* § 9:2784(C).

### ***Grounds to Withhold Payments***

None specified.

### ***Interest***

Late payments are subject to a penalty of 0.5% of the amount due per day not to exceed 15% of the outstanding balance due. The total interest penalty shall not exceed fifteen percent of the outstanding balance due. *La. Rev. Stat. Ann.* § 9:2784(C).

### ***Retainage***

Nothing specified.

### ***Attorney's Fees***

The contractor or subcontractor shall be liable for reasonable attorney's fees for the collection of payments due. *La. Rev. Stat. Ann.* § 9:2784(C). However, any claim found to be without merit shall subject the claimant to all reasonable costs and attorney's fees for the defense against such claim. *Id.*

### ***Noteworthy***

See Louisiana Owner to Prime - Public.

## **Owner to Prime – Private**

Louisiana does not appear to have a prompt payment statute applicable to contractors on a private construction project.

### ***Noteworthy***

See Louisiana Owner to Prime - Public.

## **Prime to Sub – Private**

### ***Who's Covered***

See Louisiana Prime to Sub - Public.

### ***Entitlement to Payment***

See Louisiana Prime to Sub - Public.

### ***Payment Period***

See Louisiana Prime to Sub - Public.

### ***Grounds to Withhold Payments***

See Louisiana Prime to Sub - Public.

### ***Interest***

See Louisiana Prime to Sub - Public.

### ***Retainage***

See Louisiana Prime to Sub - Public.

### ***Attorney's Fees***

See Louisiana Prime to Sub - Public.

### ***Noteworthy***

See Louisiana Prime to Sub - Public.

# Maine

## Owner to Prime – Public

### *Who's Covered*

Under the Maine prompt pay statutes, contractors, subcontractors (at all tiers), and material suppliers (at all tiers) who perform or supply materials for work on real property, with the exception of contracts involving the Department of Transportation, are protected. *Me. Rev. Stat. Ann.* tit. 10, §§ 1111-1112. Additionally, the statutes will not apply to contracts relating to the purchase of materials by a person who is performing work on his or her own property. *Id.* § 1120.

Under the statutes, the following relevant terms are defined, among others:

“Billing period” means the time period for payment agreed to by two parties or, in the absence of an agreement, the calendar month within which work is performed. *Id.* § 1111(1).

“Construction Contract” means any agreement, whether written or oral, to perform or supply materials for work on any real property. *Id.* § 1111(2).

“Contractor” means a person or entity that contracts with an owner to perform work on real property. *Id.* § 1111(3).

“Material supplier” means any person or entity that has furnished or contracted to furnish materials or supplies in connection with a construction contract. *Id.* § 1111(5).

“Owner” means a person or entity having an interest in real property on which work is performed or to which materials for performing work are delivered, if the person or entity has agreed to or requested that work. “Owner” includes successors in interest of the owner and agents of the owner acting within their authority, as well as the State and instrumentalities and subdivisions of the State including municipalities, school districts and school administrative districts having an interest in that real property. *Id.* § 1111(6).

“Subcontractor” means any person or entity that has contracted to perform work for or provide services to a contractor or another subcontractor in connection with a construction contract. *Id.* § 1111(8).

“Work” means to build, alter, repair or demolish any improvement on, connected with or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, to construct driveways, private roadways, highways and bridges, drilled wells, septic systems, sewage systems or utilities, to furnish materials for any of those purposes or to perform labor upon real property. “Work” also includes any design or other professional or skilled services rendered by architects, engineers, land surveyors, landscape architects and construction engineers. *Id.* § 1111(9).

### ***Entitlement to Payment***

Payment shall be made strictly in accordance with the terms of the contract. *Me. Rev. Stat. Ann.* tit. 10, § 1113(1). The Maine statutes do not appear to otherwise set a standard for when a contractor is entitled to payment. Thus, presumably, the contract and Maine common law will govern when a contractor has sufficiently performed to warrant payment.

### ***Payment Period***

Payment shall be made strictly in accordance with the terms of the contract. If the contract does not govern the terms of payment, the contractor may invoice the owner for progress payments at the end of the billing period, which is defined as the end of the month in which the work is performed, and submit a final invoice for payment in full upon completion of the agreed-upon work. *Me. Rev. Stat. Ann.* tit. 10, §§ 1111(1) & 1113(2). Except as otherwise agreed, payment of invoices is due from the owner 20 days after the end of the billing period or 20 days after delivery of the invoice, whichever is later. *Id.* § 1113(3).

### ***Grounds to Withhold Payments***

Grounds to withhold payment include unsatisfactory job progress, defective construction or materials, disputed work and third party claims. A payment is not wrongfully withheld if it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor, or subcontractor against which an invoicing contractor, subcontractor, or material supplier is seeking to recover payment. *Me. Rev. Stat. Ann.* tit. 10, § 1118.

### ***Interest***

Late payments on unpaid progress and/or final payments will accrue interest at the rate indicated in Title 14 §1602-C beginning on the day after payment is due. *Me. Rev. Stat. Ann.* tit. 10, § 1113(4). Under *Me. Rev. Stat. Ann.* tit. 14, § 1602-C(1)(A), in actions involving contracts that specify an applicable interest rate, interest will accrue at the greater of the contract rate or the rate specified in § 1602-C(1)(B). Under subsection (B), the interest rate is set at the one-year U.S. Treasury Bill rate plus 6%.

If arbitration or litigation is commenced to recover payment due under the prompt payment statutes and it is determined that an owner, contractor, or subcontractor has failed to comply with the payment terms, the arbitrator or court shall award an amount equal to 1% per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due and as a penalty. *Me. Rev. Stat. Ann.* tit. 10, § 1118(2).

### ***Retainage***

Amounts retained during the performance of the contract and due to be released to the contractor upon final completion must be paid within 30 days after final acceptance of the work. *Me. Rev. Stat. Ann.* tit. 10 § 1116(1).

### ***Attorney's Fees***

The substantially prevailing party in any proceeding to recover payment under the prompt payment statutes must be rewarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses. *Me. Rev. Stat. Ann.* tit. 10, § 1118(4). A contract term to the contrary will not prevail. *Id.*

### ***Noteworthy***

If an invoice is incorrectly or incompletely filled out or there is some other defect, the owner, contractor, or subcontractor must notify the entity submitting the invoice in writing within 10 days of receiving the invoice. *Me. Rev. Stat. Ann. tit. 10, § 1115(1)*. Otherwise, all errors are deemed waived. Moreover, so long as the work was completed in a timely manner, an error on the invoice will not affect the requirement for timely payment to be made. *Id. § 1115(2)*. However, the date on which the corrected invoice is delivered will be considered the end of the billing period. *Id. § 1115(3)*.

## **Prime to Sub – Public**

### ***Who's Covered***

*See* Maine Prime to Sub - Public.

### ***Entitlement to Payment***

*See* Maine Prime to Sub - Public.

### ***Payment Period***

Payment shall be made strictly in accordance with the terms of the subcontractor's or material supplier's contract. *Me. Rev. Stat. Ann. tit. 10, § 1114(1)*. The contractor or subcontractor must disclose the due date for receipt of payments from the owner to a subcontractor or material supplier before entering the contract. *Id. § 1114(2)*. If the contractor fails to make the required disclosure, payment is due as though the 20-day due dates were met. *Id.*

When a subcontractor or material supplier has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor or material supplier, and each subcontractor shall in turn pay to its subcontractors or material suppliers, within 7 days after receipt of each progress or final payment or 7 days after receipt of the subcontractor's or material supplier's invoice, whichever is later. *Id. § 1114(3)*.

These statutory payment provisions apply notwithstanding contrary agreements in the parties' contract. *Id. § 1114(3)*.

### ***Grounds to Withhold Payments***

*See* Maine Owner to Prime - Public.

### ***Interest***

*See* Maine Owner to Prime - Public.

### ***Retainage***

If an owner is not withholding retainage for a subcontractor's work, a contractor may withhold retainage from its subcontractor or material supplier in accordance with their agreement. *Me. Rev. Stat. Ann. tit. 10, § 1116(2)*. The retainage must be paid within 30 days after final acceptance of the work. *Id.*

A contractor must pay to its subcontractors or material suppliers, and each subcontractor shall in turn pay to its subcontractors or material suppliers, within 7 days after receipt of the retainage, the full amount due to each subcontractor or material supplier. *Id.* § 1116(3)

***Attorney's Fees***

See Maine Owner to Prime - Public.

***Noteworthy***

See Maine Owner to Prime - Public.

**Owner to Prime – Private**

***Who's Covered***

See Maine Owner to Prime - Public.

***Entitlement to Payment***

See Maine Owner to Prime - Public.

***Payment Period***

See Maine Owner to Prime - Public.

***Grounds to Withhold Payments***

See Maine Owner to Prime - Public.

***Interest***

See Maine Owner to Prime - Public.

***Retainage***

See Maine Owner to Prime - Public.

***Attorney's Fees***

See Maine Owner to Prime - Public.

***Noteworthy***

See Maine Owner to Prime - Public.

**Prime to Sub – Private**

***Who's Covered***

See Maine Prime to Sub - Public.

***Entitlement to Payment***

See Maine Prime to Sub - Public.

***Payment Period***

See Maine Prime to Sub - Public.

***Grounds to Withhold Payments***

See Maine Prime to Sub - Public.

***Interest***

See Maine Prime to Sub - Public.

***Retainage***

See Maine Prime to Sub - Public.

***Attorney's Fees***

See Maine Prime to Sub - Public.

***Noteworthy***

See Maine Prime to Sub - Public.

# Maryland

## Owner to Prime – Public

### *Who's Covered*

The Maryland public prompt pay statutes protect those having a contract with a “unit” of the State of Maryland. *See generally Md. Code Ann.*, State Fin. & Procurement §§ 15-101 through 15-111. Under the statutes, a “unit” is defined as “an officer or other entity that is in the Executive Branch of the State government and is authorized by law to enter into a procurement contract.” *Id.* § 11-101(x)(1). However, a unit does not include the following entities:

- (i) a bistate, multistate, bicounty, or multicounty governmental agency; or
  
- (ii) a special tax district, sanitary district, drainage district, soil conservation district, water supply district, or other political subdivision of the State.

### *Entitlement to Payment*

The statutes do not appear to specify what will entitle a contractor to payment; thus, the parties’ contract and Maryland common law will likely apply.

### *Payment Period*

The government has an obligation to pay a contractor within 30 days after either the day on which payment becomes due under the contract or, if later, the date the invoice is received. *Md. Code Ann.*, State Fin. & Procurement § 15-103.

### *Grounds to Withhold Payments*

In addition to retainage, payments may be withheld if the public body reasonably believes it necessary to protect the public body’s interest. *Md. Code Ann.*, State Fin. & Procurement § 17-110(b)(3). The statutes do not indicate, however, that the contract between the parties would not justify withholding payments based upon specified grounds. Thus, the parties’ contract and Maryland common law on this issue are likely still relevant.

### *Interest*

Interest in the amount of 9% per annum will accrue on any amount that is due and payable by law under the contract and remains unpaid more than 45 days after receipt of invoice. *Md. Code Ann.*, State Fin. & Procurement § 15-104(a).

Interest begins to accrue on the 31st day after the day on which payment is due under the contract or, if later, the day the invoice is received. *Md. Code Ann.*, State Fin. & Procurement § 15-104(b).

However, there will be no liability for interest (1) unless the contractor submits an invoice for the interest within 30 days after the date on the State’s check for the amount on which the interest accrued, (2) if a contract claim has been filed with the appeals board under sections 15-201 through 15-226 of title 15, (3) accruing more than 1 year after the 31st day after the unit receives an invoice, or (4) on an amount that represents unpaid interest. *Id.* §§ 15-104 & 15-105.

### **Retainage**

Generally, if a contractor furnishes both 100% payment and 100% performance bonds on a construction contract, retainage cannot exceed 10% of the total amount for the first 50% of the contract. *Md. Code Ann.*, State Fin. & Procurement § 17-110(b). After first 50%, the government can only retain more than 5% if it demonstrates a need for retaining a greater amount. *Id.*

Generally, retainage must be released within 120 days of satisfactory completion of a construction contract. *Id.* § 17-110(b)(4). However, in the event of a dispute or contract claim between the contractor and public body regarding satisfactory completion, retainage need only be released within 120 days of resolving the dispute or contract claim. *Id.* § 17-110(b)(5).

*See also id.* § 13-225 (addressing retainage for procurement contracts, but applying similar rules; also stating the section should not be read to limit the application of Title 11, subtitle 1 of the State Finance & Procurement Article); *id.* §§ 15-107 & 15-108 (detailing the availability of interest bearing escrow accounts on retainage and related procedures).

### **Attorney's Fees**

The statutes do not appear to provide for attorney's fees in the prompt pay statutes. However, if a claim is filed with the Appeals Board, the Appeals Board may award attorney's fees to the contractor if it finds that the unit personnel processing the claim acted in bad faith or without substantial justification. *Md. Code Ann.*, State Fin. & Procurement § 15-221.2.

### **Noteworthy**

## **Prime to Sub – Public**

### **Who's Covered**

The Maryland statutes provide protection to subcontractors of all tiers with regard to undisputed amounts owed. *Md. Code Ann.*, State Fin. & Procurement § 15-226(b). Under the statutes, the term "undisputed amount" means an amount owed for which there is no good faith dispute, including any retainage withheld. *Id.* § 15-226(a).

### **Entitlement to Payment**

A subcontractor's entitlement to payment appears to be based upon the contract between the parties. *See, e.g., Md. Code Ann.*, State Fin. & Procurement § 15-226(c) (stating generally that a contractor should pay a subcontractor undisputed amounts to which the subcontractor is entitled).

### **Payment Period**

A contractor shall pay a subcontractor an undisputed amount to which it is entitled within 10 days of receiving a progress or final payment from the State. *Md. Code Ann.*, State Fin. & Procurement § 15-226(c). If a contractor elects to withhold a payment, it must notify the subcontractor in writing of the reason for any withheld payment and provide a copy of the notice to the procurement officer. *Id.*

The subcontractor may also elect to give written notice of the non-payment to the procurement officer, which would obligate the procurement officer to intervene on the subcontractor's behalf within 2 business days to determine with the contractor whether the amount is undisputed. *Id.* § 15-

226(d), (e). If the unit determines that the withheld payment involves an undisputed amount, it will order the contractor to pay the subcontractor within three days. *Id.* § 15-226(e).

A contractor's continued failure to pay in such a situation will trigger a meeting to address disputes no later than 10 days after a subcontractor's notice to the procurement officer that the contractor is still refusing the pay. *Id.* § 15-226(e), (f). If the unit determines that the non-payment is not justified, further progress payments to the contractor may be withheld until the subcontractor is paid. *Id.* § 15-226 (f).

If a second meeting is necessary due to continued non-payment, the unit shall order that any further payments to the contractor will not be processed until payment to the subcontractor is verified, may order that the contract work be suspended, and may require the contractor to pay penalties to the subcontractor of \$100 (or less) per day from the date that payment was required after the initial meeting. *Id.* § 15-226(f)(6). However, that penalty will not be ordered for periods where the subcontractor is found not to have been diligent in reporting nonpayment to the procurement officer. *Id.* § 15-226(f)(7).

Although this payment resolution process is identified in the statutes as referring only to payment disputes between a contractor and a subcontractor, the Maryland statutes require that a contract provision be included in each State procurement contract for construction a provision that both governs prompt payment to subcontractors and that establishes procedures and remedies for the resolution of payment disputes in a process similar to that identified above. *Id.* § 15-226(j). Thus, it appears that subcontractors should have the benefit of similar processes.

#### ***Grounds to Withhold Payments***

In addition to retainage, payments may be withheld if the contractor (or subcontractor) determines that a subcontractor's performance under the subcontract provides reasonable grounds for withholding the additional amount. *Md. Code Ann., State Fin. & Procurement* § 17-110(c), (d). The statutes do not indicate, however, that the contract between the parties would not justify withholding payments based upon specified grounds. Thus, the parties' contract and Maryland common law on this issue are likely still relevant.

#### ***Interest***

As described in greater detail above in the section on payment period, late payments may be subject to a penalty in an amount not exceeding \$100 per day from the date payment was initially ordered to be made by a procurement officer (or other relevant entity if a lower-tiered subcontractor, presumably). However, the statutes do not appear to set a statutory rate of interest on late payments.

#### ***Retainage***

A contractor (or subcontractor) may not retain a percentage of payments from a subcontractor that exceeds the percentage of payments being retained by the public body (or contractor or higher-tiered subcontractor). *Md. Code Ann., State Fin. & Procurement* § 17-110(c), (d). *See also id.* § 13-225 (addressing retainage for procurement contracts, but applying similar rules; also stating the section should not be read to limit the application of Title 11, subtitle 1 of the State Finance & Procurement Article).

## ***Attorney's Fees***

No provision.

## **Owner to Prime – Private**

### ***Who's Covered***

Maryland provides protection for contractors, subcontractors of all tiers, and suppliers of all tiers who are involved on a construction contract. However, the provisions discussed below do not apply to contracts for the construction and sale of a single-family residential dwelling and other types of contracts as specified in *Md. Rev. Stat. Ann. Real Property* § 9-304.

Under the statutes, the following relevant terms are defined, among others:

“Contract” means an agreement of any kind or nature, express or implied, for doing work or furnishing materials, or both, for or about a building, including agreements involving:

- (i) The erection, repair, rebuilding, or improvement of a building;
- (ii) The drilling and installation of wells to supply water;
- (iii) The construction or installation of any swimming pool or fencing;
- (iv) The grading, filling, landscaping, and paving of the premises;
- (v) The installation of waterlines, sanitary sewers, storm drains, or streets; or
- (vi) The erection, repair, rebuilding, or improvement of a wharf.

*Id.* § 9-301(b)

“Contractor” means a person who has a contract with an owner. *Id.* § 9-301(c).

“Owner” means the owner of the land or an owner’s tenant for life or years, provided the tenant enters into the contract with the contractor. *Id.* § 9-301(d).

“Subcontractor” means a person who has a contract with anyone except the owner or the owner’s agent, including a supplier. *Id.* § 9-301(e).

“Undisputed amount” means an amount owed on a contract for which there is no good faith dispute, including any retainage withheld. *Id.* § 9-301(f).

### ***Entitlement to Payment***

The parties’ contract will likely determine entitlement to payment. *See generally Md. Rev. Stat. Ann. Real Property* § 9-302(a), (b) (contractors or subcontractors who perform work or furnish material “shall be entitled to prompt payment”).

### ***Payment Period***

An owner shall pay a contractor undisputed amounts owed within 7 days after the date specified in the contract. *Md. Rev. Stat. Ann. Real Property* § 9-302(b)(1)(ii).

If the contract does not specify a payment date, an owner shall pay a contractor within 30 days of the earlier of the day on which the occupancy permit is granted or the day on which the owner or owner’s agent takes possession. *Id.* § 9-302(b)(1)(i).

### ***Grounds to Withhold Payments***

The Maryland statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

The court may award equitable relief, interest, and reasonable costs that are incurred in obtaining payment for undisputed amounts. *Md. Rev. Stat. Ann. Real Property* § 9-303(a).

### ***Retainage***

No provision.

### ***Attorney's Fees***

Attorney's fees are available upon a finding of bad faith for failure to pay undisputed amounts. *Md. Rev. Stat. Ann. Real Property* § 9-303(b).

### ***Noteworthy***

## **Prime to Sub – Private**

### ***Who's Covered***

See Maryland Owner to Prime - Private.

### ***Entitlement to Payment***

See Maryland Owner to Prime - Private.

### ***Payment Period***

A contractor or subcontractor shall pay undisputed amounts to its subcontractors within 7 days after receipt by the contractor or subcontractor of each payment received for its subcontractors' work or materials. *Md. Rev. Stat. Ann. Real Property* § 9-302(b)(3).

### ***Grounds to Withhold Payments***

See Maryland Owner to Prime - Private.

### ***Interest***

See Maryland Owner to Prime - Private.

### ***Retainage***

See Maryland Owner to Prime - Private.

### ***Attorney's Fees***

See Maryland Owner to Prime - Private.

### ***Noteworthy***

## Massachusetts

### Owner to Prime – Public

#### *Who's Covered*

Prime contractors engaged in the “construction, reconstruction, alteration, remodeling, repair or demolition of any public building” will have protection under a public prompt pay statute, if the contract exceeds a set value. *Mass. Gen. Laws* ch. 30, § 39K. If the project is with Massachusetts, then the amount of the project must exceed \$5,000 for protection to apply. *Id.* If the amount is with a county, city, town, district, board, commission or other public body, then the contract must exceed \$2,000 to be covered by the statute. *Id.* For the purposes of this section on Massachusetts, § 39K will be referred to as the Public Building PPA.

Prime contractors engaged in the “construction, reconstruction, alteration, remodeling, repair or improvement of public ways, including bridges and other highway structures, sewers and, water mains, airports and other public works” will have protection under a separate public prompt pay statute. *Id.* § 39G. For the purposes of this section on Massachusetts, § 39G will be referred to as the Public Works PPA.

#### *Entitlement to Payment*

##### **Periodic Payments:**

***Public Building PPA:*** A contractor is entitled to a periodic payment for work performed during the preceding month and/or for materials not incorporated into the work but delivered and suitably stored onsite or at another location that is mutually agreed upon in writing.

***Public Works PPA:*** A contractor is entitled to a periodic payment for the preceding periodic estimate period for work performed and/or for materials not incorporated into the work but delivered and suitably stored onsite or at another location that is mutually agreed upon in writing.

##### **Final Payments:**

***Public Building PPA:*** A contractor is entitled to a final payment upon the earlier of when (a) the contractor fully completes the work or substantially completes the work so that the value of the work remaining to be done is, in the estimate of the awarding authority, less than one per cent of the original contract price, or (b) the contractor substantially completes the work and the awarding authority takes possession for occupancy.

With regard to substantial completion, certificate of the architect to the effect that the contractor has fully or substantially completed the work shall, subject to the provisions of *Mass. Gen. Laws* ch. 30, § 39J, be conclusive. Section 39J operates to make the architect’s decision not final if that decision was made in bad faith, fraudulently, capriciously, or arbitrarily, is unsupported by substantial evidence, or is based upon error of law.

***Public Works PPA:*** A contractor is entitled to final payment for the work upon substantial completion, which is defined in the statute to “mean either that the work required by the contract has been completed except for work having a contract price of less than one per cent of the then adjusted total contract price, or substantially all of the work has been

completed and opened to public use except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract.”

### *Payment Period*

#### **Periodic Payments:**

***Public Building PPA:*** In the case of Massachusetts and local housing authorities, periodic payments must be made within 30 days of receiving a periodic estimate requesting payment of the amount due for the preceding month for work performed and/or for materials not incorporated into the work but delivered and suitably stored onsite or at another location that is mutually agreed upon in writing. In the case of all other government agencies, the periodic payment must be made within 15 days.

***Public Works PPA:*** In the case of Massachusetts, periodic payments must be made within 30 days of receiving a periodic estimate requesting payment of the amount due for the preceding periodic estimate period for work performed and/or for materials not incorporated into the work but delivered and suitably stored onsite or at another location that is mutually agreed upon in writing. In the case of all other government agencies, the periodic payment must be made within 15 days.

Notably, the Public Works PPA does not specify what constitutes a “periodic estimate period;” thus, it appears likely that either the parties’ contract or Massachusetts common law will define this period of time. A court may take guidance from the Public Building PPA to determine that a periodic estimate period equals one month, or it could also determine that the statute’s failure to define the period was an intentional determination to leave it up to the parties.

#### **Final Payments:**

***Public Building PPA:*** Payment must be made within 65 days of when the government entity receives a periodic estimate requesting final payment to which the contractor is entitled. *But see* Massachusetts Owner - Prime (Interest) (interest begins accruing immediately and will be assessed if not paid within 15 days for most government authorities and 24 days if the State).

***Public Works PPA:*** This statute sets forth a series of deadlines leading to final payment, resulting in the final payment period that is anything but certain. It appears that final payment less 1% retainage, amounts on disputed items, and amounts estimated to fix or complete work will be due within 121 days of the contractor’s certification that the work has been substantially completed, with the remaining amount due anywhere from the next day, to 90 days or longer.

First, the contractor must submit to the awarding authority a written certification that the work has been substantially completed. Within 21 days, the awarding authority must either present a written declaration that the work is substantially completed or an itemized list of incomplete or unsatisfactory work items sufficient to demonstrate that the work has not been substantially completed (*i.e.*, the government doesn’t have to list everything, it just has to list enough to show that the contractor has not met the definition of substantial completion stated in the statute). If the government fails to act within that 21 day period, then the awarding authority will be found to have issued a written declaration that the work has been substantially completed.

Second, within 65 days of a declaration that the work has been substantially completed, the awarding authority must send the contractor a substantial completion estimate for the quantity and price of work done and payment for all but 1% retainage on that work, amounts on work items in dispute, amounts for the estimated costs of completing incomplete and/or unsatisfactory work items, the total amount of periodic payments made to date, and amounts equal to demands for direct payment filed by subcontractors. This amount must be paid within 35 days after receipt of written acceptance for such estimate from the contractor.

However, within 15 days of the declaration of substantial completion, the awarding authority must send the contractor a complete list of all incomplete or unsatisfactory work items. The contractor must either complete this work within 45 days (unless delayed by causes beyond his control) or before the contract completion date existing at that time, whichever is later. If the contractor fails to complete the work within that time, the authority may terminate the contract, complete the incomplete or unsatisfactory work, and charge the contractor for the same.

Third, within 30 days of the contractor's notice to the authority that the work was completed, the government must send a final estimate for the quantity and price of the work done and all retainage on that work, less payments made to-date, unless the authority determines that work items required by the contract are incomplete or unsatisfactory or that documentation required by the contract is not completed. The amount due on the final estimate must be paid within 35 days of the contractor's written acceptance of the same.

Notably, the statute does not appear to specify when amounts remaining to be paid by the government after substantial completion estimate must be paid to the contractor in a situation where the contractor elects not to complete the work and is terminated by the authority. While it seems unlikely that the government would be able to complete the work for an amount less than what they retained from the contractor, it is possible. Thus, this situation would likely be governed by the parties' contract or the common law should it arise.

### ***Grounds to Withhold Payments***

See Massachusetts Owner to Prime – Public (Payment Period & Retainage)

### ***Interest***

Both the Public Works PPA and the Public Building PPA specify an interest rate of three percentage points over the rediscount rate charged by the Federal Reserve Bank of Boston.

***Public Building PPA:*** Daily interest is added at the specified rate commencing on the first day after the payment is due and continuing until payment is delivered or mailed to the contractor. However, no interest will be due on a final payment due from the State of Massachusetts until 24 days after receive of a periodic estimate from the contractor at the designated location, if any. In the case of all other government agencies, no interest will be due on a final payment until 15 days after receipt of the periodic estimate.

***Public Works PPA:*** Interest begins accruing on the date after an applicable payment is due. Notably, the Public Works PPA does not specify whether this interest is added on daily as in the case of the Public Building PPA.

### ***Retainage***

Under both the Public Works PPA and the Public Building PPA, the government may not retain more than 5% of the approved periodic payment prior to substantial completion. However, as recognized above, additional amounts may be retained based upon the government's claims against the contractor. Following substantial completion the amount of retainage is reduced to 1% plus other applicable amounts as discussed above.

### ***Attorney's Fees***

No provision is made for attorney's fees under either the Public Works PPA or the Public Building PPA.

## **Prime to Sub – Public**

### ***Who's Covered***

Massachusetts provides protection to specified categories of first-tier subcontractors depending upon the method in which the prime contract was awarded. *Mass. Gen. Laws* ch. 30, § 39F. Under the statute, a subcontractor is defined as follows:

- (i) For contracts awarded as provided in *Mass. Gen. Laws* ch. 149, §§ 44A – 44H, inclusive: The term “subcontractor” means a person who files a sub-bid and receives a subcontract as a result of that filed sub-bid or who is approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor.
- (ii) For contracts awarded as provided in paragraph (a) of *Mass. Gen. Laws* ch. 30, § 39M: The term “subcontractor” means a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor.
- (iii) For contracts with the commonwealth not awarded as provided in *Mass. Gen. Laws* ch. 149, §§ 44A – 44H, inclusive: The term “subcontractor” means a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.

### ***Entitlement to Payment***

A subcontractor is entitled to be paid the amount paid to the general contractor for the labor performed by and materials furnished by that subcontractor, less any amount specified in court proceedings barring such payment and less any amount claimed due from the subcontractor by the general contractor.

### ***Payment Period***

The contractor must pay the subcontractor “forthwith” after receiving payment from owner for subcontractor's work.

### ***Grounds to Withhold Payments***

A contractor is entitled to withhold amounts specified in court proceedings barring such payment and amounts claimed due from the subcontractor by the general contractor. Additionally, the

contractor will not be forced to pay amounts that have been withheld by the awarding authority as the estimated costs of completing the subcontractor's incomplete or unsatisfactory work

### **Interest**

None specified in *Mass. Gen. Laws* ch. 30, § 39F.

### **Retainage**

See Massachusetts Owner to Prime - Public.

### **Attorney's Fees**

None specified in *Mass. Gen. Laws* ch. 30, § 39F.

### **Noteworthy**

Subcontractor may be able to state a claim for direct payment from owner. *Mass. Gen. Laws* ch. 30, § 39F.

## **Owner to Prime – Private**

### **Who's Covered**

The statute applies to all contractors, subcontractors, and materialmen. See *Mass. Gen. Laws* ch. 149 § 29E(a) & ch. 254 § 2.

Massachusetts' private prompt pay statute covers all "contracts for construction".

"Contract for construction" is defined as a contract for which a lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of \$3,000,000 or more. *Mass. Gen. Laws* ch. 149, § 29E(a).

The term "construction contract" does not include projects containing or designed to contain at least 1 but not more than 4 dwelling units. *Id.*

### **Entitlement to Payment**

The statute does not specify when a contractor is entitled to payment. Thus, this issue will likely be governed by the terms of the contract.

### **Payment Period**

Periodic pay requests must be accepted at least every 30 days. An owner has 15 days, from the receipt of a payment request, to approve or reject such request. Upon approval, the owner has 45 days to make the payment. Thus, an owner has a maximum of 60 days from receipt of a payment request from the prime contractor until the payment due date. An application which is neither approved or rejected before the payment due date is deemed approved. *Mass. Gen. Laws* ch. 149 § 29E(c).

### **Grounds to Withhold Payments**

The statute does not specify what grounds justify withholding of payment. Thus, this issue will likely be governed by the parties' contract.

### **Interest**

The statute does not expressly provide address of interest on late payments. This issue will likely be governed by the parties contract.

### ***Retainage***

The statute does not expressly address retainage. This issue will likely be governed by the parties contract.

### ***Attorney's Fees***

The statute does not expressly address retainage. This issue will likely be governed by the parties contract and applicable common law.

### ***Noteworthy***

The statute also mandates time sensitive approval requirements for change orders. *Id.* § 29E(d).

## **Prime to Sub – Private**

### ***Who's Covered***

See Massachusetts Owner to Prime – Private.

### ***Entitlement to Payment***

See Massachusetts Owner to Prime – Private.

### ***Payment Period***

See Massachusetts Owner to Prime – Private.

The basic payment period is the same as that required for owner to prime contractor payments. With respect to approval or rejection of payment requests, however, an additional 7 days is allowed for each tier below the owner. *Mass. Gen. Laws* ch. 149, § 29E(c). Thus, a prime contractor has a maximum of 67 days from receipt of a payment request from a subcontractor until the payment due date.

### ***Grounds to Withhold Payments***

See Massachusetts Owner to Prime – Private.

### ***Interest***

See Massachusetts Owner to Prime – Private.

### ***Retainage***

See Massachusetts Owner to Prime – Private.

### ***Attorney's Fees***

See Massachusetts Owner to Prime – Private.

### ***Noteworthy***

See Massachusetts Owner to Prime – Private.

The statute places extensive limitations on the enforceability of conditional payment clauses (e.g. pay-if-paid, pay-when-paid). *Mass. Gen. Laws* ch. 149, § 29E(e).

# Michigan

## Owner to Prime – Public

### *Who's Covered*

The Michigan prompt pay statutes provides protection for public contractors on projects that either have a value of at least \$30,000 or provide for more than three payments. Under the statutes, the following relevant terms are defined, among others:

“Construction contract“ or “contract“ means a written agreement between a contractor and a public agency for the construction, alteration, demolition, or repair of a facility, other than a contract having a dollar value of less than \$30,000 or a contract that provides for 3 or fewer payments.

“Contractor“ means an individual, sole proprietorship, partnership, corporation, or joint venture, that is a party to a construction contract with a public agency.

“Progress payment” means a payment by a public agency to a contractor for work in place under the terms of a construction contract.

“Public agency“ means the state, or a county, city, township, village, assessment district, or other political subdivision, corporation, commission, agency, or authority created by law. Public agency does not include the state transportation department, a school district, junior or community college, the Michigan state housing development authority, and a municipal electric utility or agency.

*Mich. Comp. Laws § 125.1561.*

### *Entitlement to Payment*

The Michigan statutes appear to leave entitlement issues up to the parties’ contract and the common law. *See generally Mich. Comp. Laws § 125.1562(2)* (stating that payment may be delayed until work required in the contract documents is in place and approved).

### *Payment Period*

Progress payments are due by the later of:

- (1) 30 days after the architect or professional engineer has certified to the public agency that the work is in place in the portion of the facility covered by the applicable request for payment in accordance with the contract documents, or
- (2) 15 days after the public agency has received the funds with which to make the progress payment from a department or agency of the federal or state government, if any funds are to come from either of those sources.

*Mich. Comp. Laws § 125.1562(3).*

### *Grounds to Withhold Payments*

While the Michigan statutes do refer to withholding payments in relationship to retainage, beyond that, the Michigan statutes do not appear to specify additional grounds upon which payment may be withheld, so the contract and case law will likely control.

### **Interest**

If a public agency fails to make timely payment, the contractor may include reasonable interest on amounts past due in the next request for payment. *Mich. Comp. Laws* § 125.1562(4).

### **Retainage**

Retainage by a public agency shall be limited to the following:

- (1) Until the first 50% of the work is in place: No more than 10% of the dollar value of all work in place may be withheld;
- (2) After the work is 50% in place: Additional retainage shall not be withheld unless the public agency determines that the contractor is not making satisfactory progress or that other specific cause relating to the contractor's performance under the contract exists.

If the public agency so determines, the public agency may retain not more than 10% of the dollar value of work more than 50% in place.

*Mich. Comp. Laws* § 125.1563(2).

Retainage shall be deposited into an interest-bearing account (unless the retained funds are to be provided under a state or federal grant and the retained funds have not been paid to the public agency). *Id.* § 125.1563(3).

At any time after 94% of work under the contract is in place and at the request of the contractor, the public agency shall release the retainage plus interest to the contractor only if the contractor provides an irrevocable letter of credit in the amount of the retainage plus interest, issued by a bank authorized to do business in the state, containing terms mutually acceptable to the contractor and the public agency. *Id.* § 125.1563(5).

### **Attorney's Fees**

No provision is made for attorney's fees incurred in collecting a late payment under the prompt pay statutes.

### **Noteworthy**

*Mich. Comp. Laws* 125.1564 addresses dispute resolution procedures with regard to retention of progress payments.

## **Prime to Sub – Public**

To date, Michigan does not appear to have public prompt pay statutes applicable to subcontractors.

### **Noteworthy**

Publications by groups such as the Mason Contractors' Association, Inc., indicate that both the Mason Contractors' Association and the American Subcontractors' Association – Southeaster Michigan Chapter have made previous efforts to pass prompt pay legislation applicable to subcontractors. *MCA Supports Pending "Construction Performance Payment Bills in Michigan Legislature, ON THE LEVEL* (Mason Contractors' Association, Livonia, Michigan), Spring-Summer 2005 (detailing Michigan House Bills 4509 and 4510); *see also* Posting of Peter J. Cavanaugh to

Michigan Construction Law Update,  
<http://michiganconstructionlaw.blogspot.com/search/label/Legislation> (Sept. 30, 2007) (relating to prompt pay legislation that had been endorsed by the AGC of Michigan).

### **Owner to Prime – Private**

To date, Michigan does not appear to have private prompt pay statutes applicable to contractors.  
*But see* Michigan Prime to Sub - Public (Noteworthy).

### **Prime to Sub – Private**

To date, Michigan does not appear to have private prompt pay statutes applicable to subcontractors.  
*But see* Michigan Prime to Sub - Public (Noteworthy).

# Minnesota

## Owner to Prime – Public

### *Who's Covered*

**State Contracts:** On state contracts, all those contracting with a state agency for all agency purchases, leases, rentals, and contracts for services, including construction and remodeling contracts, have protection under Minnesota's prompt payment statute. However, the statutes do not apply fully (or in some cases, at all) to (1) purchases from or contracts for service with a public utility or a telephone company that has on file with the Public Utilities Commission an approved practice regarding late fees and (2) provider billings to and contracts with the commissioner of human services for health care services. *Minn. Stat.* § 16A.124, subd. 8.

Under the statute, a "state agency" is defined as any state officer, employee, board, commission, authority, department, or other agency of the executive branch of state government, but not including the Minnesota State Colleges and Universities. *Id.* §§ 16A.124 & 16B.01. The University of Minnesota, however, "may" comply with the prompt payment statute. *Id.* § 16A.124, subd. 5a.

**Local Government Contracts:** On local government contracts, those contracting with a municipality for the purchase of all goods, leases and rents, and contracts for services, construction, repairs, and remodeling have protection. *Id.* § 471.425, subd. 5.

Under the statute, the term "municipality" means any home rule charter or statutory city, county, town, school district, political subdivision or agency of local government and the Metropolitan Council or any board or agency created under chapter 473. *Id.* § 471.425, subd. 1(d).

### *Entitlement to Payment*

**State Contracts:** A contractor is entitled to payment based upon estimates of work completed as approved by the public contracting agency. *Minn. Stat.* § 15.72, subd. 1.

**Local Government Contracts:** The Minnesota statutes do not appear to specify when a contractor is entitled to request and/or receive payment. Thus, it seems that entitlement to payment will be governed by the parties' contract and/or the common law.

### *Payment Period*

**State Contracts:** The general rule is that a public contracting agency has a duty to make monthly progress payments for public improvements; however, the parties' contract may provide otherwise. *Minn. Stat.* § 15.72, subd. 1.

State agencies must pay each valid vendor obligation within the vendor's early payment discount period. If there is no early payment discount period, the state agency must pay the vendor within 30 days following the receipt of the invoice for the completed delivery of the product or service. *Id.* § 16A.124, subd. 3.

For purposes of the interest penalty, a state agency must pay a vendor's undisputed billings within 30 days following receipt of the invoice, merchandise, or service whichever is later; however, if an audit is required, then the vendor's invoice will not be considered past due until 30 days after the completion of the audit by the state agency. *Id.* § 16A.124, subd. 5.

**Local Government Contracts:** A municipality must pay each vendor obligation according to the terms of the contract or, if no contract terms apply, within the standard payment periods established by statute. *Minn. Stat.* § 471.425, subd. 2. Generally, these standard payment periods are defined with reference to the type of municipality:

(a) For municipalities who have governing boards that have regularly scheduled meetings at least once a month, the standard payment period is defined as within 35 days of the date of receipt.

(b) For municipalities whose governing boards do not regularly meet at least once a month, the standard payment period is defined as 45 days after receipt of the goods or services or the invoice for the goods or services, whichever is later.

(c) For joint powers organizations established under *Minn. Stat.* § 471.59, the standard payment period is within 45 days of the date of receipt.

*Id.* § 471.425, subd. 2.

However, in the case of a required audit, this standard payment period may be extended. If an audit is required by the municipality before acceptance and payment of the vendor's invoice, the standard payment period for a negotiated contract or agreement will not begin until the completion of the audit by the municipality. *Id.* § 471.425, subd. 4(a).

### ***Grounds to Withhold Payments***

While the Minnesota statutes do refer to withholding payments in relationship to retainage, beyond that, the statutes do not appear to specify additional grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

**State Contracts:** Undisputed bills not paid within 30 days will accrue 1.5% interest per month. *Minn. Stat.* § 16A.124, subd. 5(b). However, this interest will only be paid upon invoicing by the vendor to the state agency for the interest. *Id.* § 16A.124, subd. 5(a). Moreover, interest will not accrue against an agency that delays payment of a bill due to a disagreement with the vendor; provided, that the dispute must be settled within 30 days after the bill became overdue. Upon the dispute's resolution, however, the agency must pay the vendor accrued interest on all proper invoices for which payment was not timely received. *Id.* § 16A.124, subd. 5(e).

**Local Government Contracts:** A municipality must calculate and pay interest at 1.5% per month to a vendor if the municipality has not paid the obligation according to the terms of the contract or, if no contract terms apply, within the standard payment period. *Id.* § 471.425, subd. 4.

If an invoice is incorrect, defective, or otherwise improper, the municipality must notify the vendor within ten days of the date of receipt. Upon receiving a corrected invoice from the vendor, the municipality must pay the obligation within the standard payment period. *Id.* § 471.425, subd. 3. No interest penalties may accrue against a purchaser who delays payment of a vendor obligation due to a good faith dispute with the vendor regarding the fitness of the product or service, contract compliance, or any defect, error or omission related thereto. *Id.* § 471.425, subd. 4(c).

### **Retainage**

**State and Local Contracts:** A state agency or any state political subdivision may not withhold more than 5% of the payment due to the contractor. *Minn. Stat.* §§ 15.71, subd. 3 & 15.72, subd. 2. However, this amount may be reduced or eliminated on any monthly contract payment if the work is progressing satisfactorily. *Id.* § 15.72, subd. 2. The determination to reduce or eliminate retainage is to be made in the agency's opinion. *Id.*

However, at the contractor's option, it may deposit bonds or securities with the public agency or in a bank or trust company to be held in lieu of cash retainage. *Id.* § 15.73.

### **Attorney's Fees**

**State Contracts:** An award of attorney fees (as a component of costs and disbursements) is mandatory for a vendor who prevails in a civil action to collect interest penalties from a state agency. *Minn. Stat.* § 16A.124, subd. 5(d).

**Local Government Contracts:** If the municipality delays payment not in good faith, the vendor may recover costs and attorney's fees. *Id.* § 471.425, subd. 4(c).

### **Noteworthy**

**State Contracts:** Contracts with the Minnesota Department of Transportation for the construction, improvement, or repair of trunk highways are governed by *Minn. Stat.* § 161.322, which provides for interest linked to bond yields and does not allow interest until 90 days after all work is completed to the Department's satisfaction. However, these rules do not apply if the delay is caused by the contractor or if the contract of over \$2 million specifically provides for a different period of time in which to make the final estimate. *Minn. Stat.* § 161.322

**Local Government Contracts:** Contracts for local street and utility improvements with a city, town, and (in certain instances) a county are governed by *Minn. Stat.* § 429.041, subd. 6, which provides for interest linked to bond yields and requires interest on payments not made within 30 days of a monthly estimate or 90 days of the final estimate. Similar statutes apply for contracts with county boards for the construction or improvement of any county state-aid highway which is not federally financed, *Minn. Stat.* § 162.04, and contracts for cities for the construction or improvement of municipal state-aid streets, *Minn. Stat.* § 162.10.

## Prime to Sub – Public

### *Who's Covered*

**State Contracts:** First-tier subcontractors on a contract between a prime contractor and a state agency are protected by *Minn. Stat.* § 16A.1245.

**Local Government Contracts:** First-tier subcontractors on a “contract“ with a “municipality“ are protected by *Minn. Stat.* § 471.425, subd. 4a.

### *Entitlement to Payment*

The Minnesota statutes do not appear to specify when a subcontractor is entitled to request and/or receive payment. The only question is whether the contractor was paid by the state or municipality for undisputed services provided by the subcontractor. Thus, it seems that entitlement to payment will be governed by the parties' contract and/or the common law.

### *Payment Period*

**State Contracts:** Each state agency contract must require the prime contractor to pay any subcontractor within 10 days of the prime contractor's receipt of payment from the state for undisputed services provided by the subcontractor. *Minn. Stat.* § 16A.1245.

**Local Government Contracts:** Each contract of a municipality must require the prime contractor to pay any subcontractor within 10 days of the prime contractor's receipt of payment from the municipality for undisputed services provided by the subcontractor. *Id.* § 471.425, subd. 4a.

### *Grounds to Withhold Payments*

The statutes do not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### *Interest*

**State and Local Government Contracts:** Undisputed amounts not timely paid will accrue interest at 1.5% per month. *Minn. Stat.* §§ 16A.1245, subd. 5 & 471.425, subd. 4a. However, the minimum interest penalty on an unpaid balance of amounts greater than or equal to \$100 is \$10. *Id.*

### *Retainage*

The statutes do not appear to specify limits upon retainage, so the contract and case law will likely control.

### *Attorney's Fees*

**State and Local Government Contracts:** An award of attorney fees (as a component of costs and disbursements) is mandatory for a subcontractor who prevails in a civil action to collect interest penalties from a prime contractor under the statute. *Minn. Stat.* §§ 16A.1245 subd. 5(d) & 471.425, subd. 4a.

## Owner to Prime – Private

### *Who's Covered*

The Minnesota private prompt pay statute applies to provide protection for prime contractors on building and construction contracts other than those for professional services.. *Minn. Stat.* § 337.10, subd. 4. Under the statute, professional services include architecture, professional engineering, land surveying, landscape architecture, professional geoscience, certified interior design services. *Id.* §§ 326.02 to 326.15.

A “building and construction contract” means “a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges.” However, “contracts for the maintenance or repair of machinery, equipment or other such devices used as part of a manufacturing, converting or other production process, including electric, gas, steam, and telephone utility equipment used for production, transmission, or distribution purposes” are not included in this definition. *Id.* §§ 337.10, subd. 5 & 337.01, subd. 2.

It should be emphasized that many of the provisions within this statute may be contracted around. *See, e.g. id.* § 337.10, subd. 4 (stating “Unless the building and construction contract provides otherwise” with regard to two different provisions).

### *Entitlement to Payment*

The Minnesota statutes do not appear to specify when a contractor is entitled to a monthly progress payment. Thus, the parties contract and common law will likely govern entitlement issues.

### *Payment Period*

Unless the building and construction contract states otherwise, an owner must make a monthly progress payment as the work progresses based upon estimates of the work completed as approved by the owner or the owner’s agent. *Minn. Stat.* § 337.10, subd. 4.

### *Grounds to Withhold Payments*

With the exception of referencing retainage, the statute does not appear to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### *Interest*

None specified in the prompt pay statute.

### *Retainage*

Unless the building and construction contract states otherwise, an owner may retain no more than 5% from any progress payment. *Minn. Stat.* § 337.10, subd. 4. This amount may be reduced or eliminated from any monthly contract payment if, in the owner’s opinion, the work is progressing satisfactorily. *Id.*

### *Attorney's Fees*

None specified in the prompt pay statute.

### **Noteworthy**

An attempt to make a building or construction contract to be performed in Minnesota subject to a choice of law or choice of venue provision in favor of a State other than Minnesota is void and unenforceable. *Minn. Stat.* § 337.10, subd. 1.

## **Prime to Sub – Private**

### **Who's Covered**

Under *Minn. Stat.* § 337.10, subd. 3, subcontractors and material suppliers at all levels have protection for work performed on or materials supplied to a building and construction contract other than those for professional services. *See also* Minnesota Owner to Prime - Private.

Moreover, under *Minn. Stat.* § 514.02, any person contributing to an improvement to real estate who receives the proceeds of payments must hold those proceeds in trust for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement of real estate. *Minn. Stat.* § 514.02, subd. 1. Applicability of this section is defined by reference to the mechanic's lien statute, *Minn. Stat.* § 541.01.

### **Entitlement to Payment**

The Minnesota statutes do not appear to specify when a subcontractor is entitled to request and/or receive payment. The only question under *Minn. Stat.* § 337.10, subd. 3, is whether the contractor was paid for undisputed services provided by the subcontractor or undisputed materials provided by a supplier. Thus, it seems that entitlement to payment under § 337.10, subd. 3, will be governed by the parties' contract and/or the common law.

*Minn. Stat.* § 514.02 operates more as a penalty provision against the person failing to pay than it does a provision that affirmatively states when the payee must use the funds to pay the person performing the labor or providing the skills, materials, or machinery. Under this statute, if the person receiving payment does not use the proceeds for the improvement or for the payment for labor, skill, material, and machinery contributed to the improvement, knowing that the cost of the labor performed, or skill, material, or machinery furnished remains unpaid (and does not furnish a valid lien waiver or payment bond to the person making the payment), the person receiving payment is guilty of theft and may also be pursued in a civil action for damages. *Minn. Stat.* § 514.02, subd. 1(b). The statute doesn't really address when payment is due to such a person (*i.e.*, the statute doesn't indicate that when the subcontractor's work is deemed substantially complete, the contractor must release payments.) Such questions seem to be left to an applicable contract or the common law.

### **Payment Period**

Under *Minn. Stat.* § 337.10, subd.3, a building and construction contract is deemed to require both the prime contractor and subcontractors to promptly pay any subcontractor or material suppliers within 10 days of receiving payment for undisputed services from that subcontractor or material supplier.

Under *Minn. Stat.* § 514.02, subd. 3, a person receiving payment must pay the subcontractor and/or material supplier within 15 days after receiving notice that the subcontractor and/or material supplier remain unpaid. Failure to make this payment will be sufficient to sustain a finding that the proceeds of such payment were used for a purpose other than the payment for labor, skill, material,

and machinery for such improvement, knowing that the costs of labor performed, or skill, material, or machinery furnished remains unpaid, unless the person:

(1) Establishes that all proceeds received from the person making such payment have been applied to the cost of labor, skill, material, or machinery furnished for the improvement; or

(2) Within 15 days after receiving notice shall give a bond or make a deposit with the court administrator of district court, in an amount and form approved by a judge of district court, to hold harmless the owner or person having the improvement made from any claim for payment of anyone furnishing labor, skill, material, or machinery for such improvement.

### ***Grounds to Withhold Payments***

Neither statute appears to specify grounds upon which payment may be withheld, so the contract and case law will likely control.

### ***Interest***

Under *Minn. Stat.* § 337.10, subd. 3, undisputed amounts not paid on time accrue interest at a rate of 1.5% per month. However, the minimum interest penalty on an unpaid balance of amounts greater than or equal to \$100 is \$10. *Id.*

As noted in the discussion regarding entitlement to payment *Minn. Stat.* § 514.02 does not appear to have the purpose of ensuring prompt payment through traditional methods of charging interest or other penalties. Rather, the “bite” of that statute, so to speak, lies in the civil penalties that may be applied against a payee deemed to have committed theft or a person representing any entity who received proceeds of the payment as salary, dividend, loan repayment, or otherwise (*i.e.*, personal liability may result from violating this statute). *See, e.g., Minn. Stat.* § 514.02, subd. 1a.

### ***Retainage***

Under *Minn. Stat.* § 337.10, a maximum of 5% may be withheld from each progress payment at owner’s option, unless the contract provides otherwise. *Minn. Stat.* § 337.10, subd. 4. *Minn. Stat.* § 514.02 does not address retainage issues.

### ***Attorney’s Fees***

Under *Minn. Stat.* § 337.10, subd. 3, an award of attorney’s fees (as a component of costs and disbursements) is mandatory for a subcontractor or material supplier that prevails in a civil action to collect interest penalties under the statute.

Under *Minn. Stat.* § 514.02, subd. 1a, a person injured by a failure to use proceeds of a payment to pay for labor, skills, materials, and machinery contributed to the improvement as required may recover reasonable attorney’s fees (as a component of costs and disbursements) in a civil action for damages.

# Mississippi

## Owner to Prime – Public

### *Who's Covered*

The Mississippi public prompt pay statutes, *Miss. Code Ann.* §§ 31-5-25 & 31-5-27, apply to all public construction contracts entered into by all state agencies, commissions, boards and districts and by all municipalities, counties and other political subdivisions of the State of Mississippi. *Miss. Code Ann.* § 31-5-29. These statutes provide protection for those contracting directly with the state or state subdivision as well as first-tier subcontractors and material suppliers.

Notably, however, *Miss. Code Ann.* § 19-13-15 also appears to include protections for contractors in situations involving Mississippi counties with regard to work for building or repairing a bridge, or for doing any work on a public road, building, or other public work.

### *Entitlement to Payment*

Under *Miss. Code Ann.* § 31-5-25 (1)(a), partial, progress, or interim payments are to be paid “when due and payable under the terms of the contract.”

Under *Miss. Code Ann.* § 31-5-25 (1)(b), final payment is due and payable upon the earliest of the following:

- (i) upon the completion of the project or substantial completion of the work in accordance with contract terms;
- (ii) when the owner is beneficially occupying or using the project (except for renovations or alterations where owner maintains beneficial use or occupancy during the course of the project);
- (iii) when the project is certified as having been completed by the architect or engineer authorized to make certification; or
- (iv) when the project is certified as having been completed by the contracting authority representing the State of Mississippi or any of its political subdivisions.

However, final payment will not become due until written consent of contractor’s surety has been obtained and delivered to the proper public contracting authority. *Miss. Code Ann.* § 31-5-25 (1)(b).

Under *Miss. Code Ann.* § 19-13-15, a county board *may* contract to provide for making partial payments to the contractor on public works projects exceeding \$1,000 for work performed and materials used upon written certification to the board by the architect or engineer on the project.

### *Payment Period*

With regard to partial, progress, or interim payments, the parties’ contract will determine the payment period. *Miss. Code Ann.* § 31-5-25 (1)(a). This rule also appears to apply in contracts governed by *Miss. Code Ann.* § 19-13-15.

### ***Grounds to Withhold Payments***

Other than retainage, the statutes do not specify grounds upon which payments may be withheld. Thus, the parties' contract and common law will likely control.

### ***Interest***

Under *Miss. Code Ann.* § 31-5-25(b), progress payments not paid within 45 calendar days of when they became due and payable and a final payment that is not paid within 45 calendar days of the earliest of above-mentioned dates bear interest at the rate of 1% per month from due date until fully paid. Under the statute, a payment that is 45 days late bears no statutory interest; however, a payment that is 46 days late will bear 46 days of statutory interest.

*Miss. Code Ann.* § 19-13-15 does not provide for statutory interest.

### ***Retainage***

Under *Miss. Code Ann.* § 31-5-33(1), the general rule is that 5% must be withheld from progress payments on any contract for the construction, repair, alteration or demolition of any building, structure or facility awarded by the State of Mississippi, or any agency, unit or department of the State of Mississippi, or by any political subdivision thereof.

However, if the prime contract is \$250,000 or more, then a slightly different rule applies. While 5% must still be retained until the work is at least 50% complete, on schedule, and satisfactory in the architect's and/or engineer's opinion, when this point is reached, one-half of the retainage withheld to-date must be returned to the contractor for distribution to the appropriate subcontractors and suppliers. Moreover, at this point, future retainage is reduced to 2.5%. *Id.*

Notably, these retainage provisions do not apply to contracts let by the Mississippi Transportation Commission for construction, improvement, or maintenance of roads and bridges. *Id.* §31-5-33 (2).

With regard to the county public works projects, retainage must be withheld in an amount not less than 2.5%, but not more than 10% from any partial payment. *Id.* § 19-13-15(1). However, the statute also states that—with the exception of contracts equal to or exceeding \$750,000 for building or repairing a bridge or doing any work on a public road—10% shall be retained until the work is at least 50% complete, on schedule, and satisfactory in the architect's and/or engineer's opinion. *Id.* § 19-13-15(3). At that point, one-half of the retainage held must be returned to the prime contractor for distribution to the appropriate subcontractors and suppliers who are on schedule and performing satisfactorily in the prime contractor's opinion. *Id.* At that point, a 5% retainage “shall be withheld.” *Id.* Thus, for most contracts falling under this statute, retainage will be either 5% or 10%.

### ***Attorney's Fees***

No statutory provision is contained within the public prompt pay statutes.

### ***Noteworthy***

There is no exception for disputed amounts. Statutory prejudgment interest applies to qualifying amounts ultimately determined to be “due and payable“, even though legitimately contested. *Southland Enterprises, Inc. v. Newton County*, 940 So.2d 937, 944 (Miss. App. 2006).

It is still an open question as to whether statutory interest is added to consensual interest set forth in contract or legal rate of interest for liquidated sums not paid when due

Currently, by Standard Specification, the Mississippi Department of Transportation does not hold retainage on prime contractors, and primes may not hold retainage on subs and suppliers. *Red Book* § 109.06.3.

## **Prime to Sub – Public**

### ***Who's Covered***

See Mississippi Owner to Prime - Public.

### ***Entitlement to Payment***

Under *Miss. Code Ann.* § 31-5-27, payment must be made by a contractor in proportion to the percentage of work completed by each subcontractor and supplier. If contractor receives less than full payment, he must disburse the received funds on a pro rata basis to subcontractors and material suppliers “based on the amount due on the payment.” *Id.* However, if the contractor has “reasonable cause” for not making a payment within the time specified in the statute, interest penalties will not be assessed. *Id.*

*Miss. Code Ann.* § 19-13-15, does not appear to have an applicable provision for subcontractors with regard to entitlement to payment.

### ***Payment Period***

Absent “reasonable cause,” a contractor must pay subcontractors and suppliers within 15 days of when the contractor receives payment under a public construction contract. *Miss. Code Ann.* § 31-5-27.

*Miss. Code Ann.* § 19-13-15, does not appear to have an applicable provision for subcontractors with regard to an applicable payment period from a contractor to a subcontractor.

### ***Grounds to Withhold Payments***

A contractor may withhold a payment based on “reasonable cause.” *Miss. Code Ann.* § 31-5-27. Additionally, amounts for retainage may be withheld under *Miss. Code Ann.* §§ 31-5-33(1) and 19-13-15.

### ***Interest***

Absent reasonable cause for the delay, a “penalty“ of 0.5% will be assessed per day of delinquency calculated from expiration of 15 day period until fully paid, but not to exceed 15% of outstanding balance due. *Miss. Code Ann.* § 31-5-27.

### ***Retainage***

Under *Miss. Code Ann.* § 31-5-33(1), the amount retained by prime contractor from subcontractor’s payment shall not exceed retainage held on prime contractor by public owner. However, the statute also provides that “on any contract with a subcontractor, regardless of amount” 5% shall be retained until the work is at least 50% complete, on schedule, and satisfactory in the architect’s and/or

engineer's opinion, at which time 50% of the retainage held to date shall be returned to the prime contractor for distribution to the appropriate subcontractors and suppliers.

Thus, if prime contractor's retainage is reduced at 50% completion to 2½%, but work of a subcontractor is not itself 50% complete or is either behind schedule or unsatisfactory, it appears prime can keep subcontractor's retainage at 5%, despite general rule that prime's withholding from subcontractor cannot exceed retainage being held on prime contractor by public owner.

Under *Miss. Code Ann.* § 19-13-15(1), the amount retained by a prime contractor from a subcontractor may not exceed the percentage withheld by the board of supervisors from the prime contractor.

#### ***Attorney's Fees***

Under *Miss. Code Ann.* § 31-5-57, an attorney's fees may be awarded in the discretion of trial judge for reasonable amount in actions on a public works payment bond. The judge may exercise this discretion if the judge finds the defenses to payment to be unreasonable, not in good faith, or merely for purpose of delaying payment or if payment bond claims are asserted which trial judge finds to be without just cause or in bad faith. *Miss. Code Ann.* § 31-5-57.

This provision does not affect right to recover attorney's fees as provided by contract or bond. *Id.*

#### ***Noteworthy***

Contractors must submit monthly certification to project engineer or architect indicating payments to subcontractors on prior payment request. *Miss. Code Ann.* § 31-5-25(1).

### **Owner to Prime – Private**

#### ***Who's Covered***

*Miss. Code Ann.* § 87-7-3 provides protection for contractors under all construction contracts, except public construction contracts.

#### ***Entitlement to Payment***

Partial, progress, and interim payments are to be paid when "due and payable under the terms of the contract." *Miss. Code Ann.* § 87-7-3(a).

Final payment is "due and payable" upon the earliest of:

- (i) upon completion of the project or substantial completion of the work in accordance with contract terms;
- (ii) when the owner beneficially uses or occupies the project (except for renovations or alterations where owner maintains beneficial use or occupancy); or
- (iii) upon certification of completion by the architect or engineer authorized to make certification.

*Id.* § 87-7-3(b). However, if the project is bonded, final payment will not become due until written consent of contractor's surety has been delivered to "proper contracting authority." *Id.*

### ***Payment Period***

Partial payments must be made within 30 calendar days from day on which they become due and payable under the terms of the contract. *Miss. Code Ann.* § 87-7-3(a).

Final payment must be made within 30 calendar days from first occurrence of the three events listed under Entitlement to Payment. *Id.* § 87-7-3(b).

### ***Grounds to Withhold Payments***

Other than retainage, the statutes do not specify grounds upon which payments may be withheld. Thus, the parties' contract and common law will likely control. *See generally Miss. Code Ann.* § 87-7-3 (stating that progress payments are due and payable pursuant to terms of contract).

### ***Interest***

Progress payments not paid within 30 calendar days of contract due date and final payment not paid within 30 days of earliest of dates specified under Entitlement to Payment bear interest at the rate of 1% per month from the due date until fully paid. *Miss. Code Ann.* § 87-7-3(a). For example, a payment made 30 days late will not bear statutory interest; however, a payment made 31 days late will bear 31 days of statutory interest.

### ***Retainage***

There is no statute concerning retainage on private construction contracts.

### ***Attorney's Fees***

There is no statute concerning attorney's fees on private construction contracts. Thus, any entitlement to attorney's fees would be determined by Mississippi common law or other statute.

### ***Noteworthy***

Mississippi's Construction Industry Arbitration Act, *Miss. Code Ann.* §§11-15-101 *et seq.*, authorizes arbitrators to award attorney's fees and costs to a prevailing party. *Miss. Code Ann.* §11-15-119(4).

## **Prime to Sub – Private**

### ***Who's Covered***

*Miss. Code Ann.* § 87-7-5 provides protection for each subcontractor and each supplier to a contractor receiving payment from the owner under a construction contract, other than a public construction contract or a contract for the construction of a single-family dwelling.

### ***Entitlement to Payment***

A subcontractor or supplier is entitled to payment in proportion to the percentage of work completed by it. *Miss. Code Ann.* § 87-7-5. If a contractor receives less than full payment, then the supplier or subcontractor is entitled to its pro rata share "based on the amount due on the payment." *Id.* However, the contractor may withhold payment for "reasonable cause." *Id.*

### ***Payment Period***

Absent reasonable cause, a subcontractor is entitled to payment 15 days after the contractor receives payment from the owner under the construction contract. *Miss. Code Ann.* § 87-7-5.

### ***Grounds to Withhold Payments***

A contractor may withhold a payment based on “reasonable cause.” *Miss. Code Ann. § 87-7-5.*

### ***Interest***

A “penalty“ of 0.5% is assessed per day of delinquency, calculated from expiration of 15 day period until fully paid, but not to exceed 15% of outstanding balance due. *Miss. Code Ann. § 87-7-5.*

### ***Retainage***

There is no statute concerning retainage on private construction contracts.

### ***Attorney’s Fees***

There is no statute concerning attorney’s fees on private construction contracts. Thus, any entitlement to attorney’s fees would be determined by Mississippi common law or other statute.

# Missouri

## Owner to Prime – Public

### *Who's Covered*

The Missouri prompt payment statutes apply to all public works contracts made and awarded by the appropriate officer, board, or agency of the state, or of a political subdivision of the state, or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction, or alteration of any public works project. *Mo. Rev. Stat. § 34.057.1*. Protection ensuring prompt payment is provided to the contractor as well as subcontractors and suppliers of all tiers. *Id.*

### *Entitlement to Payment*

Contractors, subcontractors, and suppliers are entitled to payment based upon the terms of the contract, which may include progress payments or be on a lump-sum basis. *Mo. Rev. Stat. § 34.057.1(1)*. If not a lump sum contract, a contractor, subcontractor, or supplier will be entitled to payment based upon the periodic estimates prepared by the project architect or engineer as to the amount of work performed and/or materials delivered.

### *Payment Period*

Although a public contract may be drafted to require only a lump sum payment, contracts requiring periodic payments must be made at least on a monthly basis as the work progresses. Payment will be due from the owner to the contractor, less retainage, within 30 days following the latter of the following:

- (a) The date of delivery of materials or construction services purchased;
- (b) The date, as designated by the public owner, upon which the invoice is duly delivered to the person or place designated by the public owner; or
- (c) In those instances in which the contractor approves the public owner's estimate, the date upon which such notice of approval is duly delivered to the person or place designated by the public owner.

*Mo. Rev. Stat. § 34.057.1(1)*.

Final payment, less any offsets or deductions authorized, is due within 30 days of the due date.

Final payment is considered due upon the earliest of the following events:

- (1) completion of the project and filing with the owner of all required documentation and certifications,
- (2) certification by the architect or engineer authorized to make such certification including filing of all documentation and certifications required, or
- (3) certification by the contracting authority, including the filing of all documentation and certifications required.

*Mo. Rev. Stat.* § 34.057.1(8).

### ***Grounds to Withhold Payments***

Reasons to withhold shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment, or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner. *Mo. Rev. Stat.* § 34.057.5.

### ***Interest***

Late payments are subject to interest at the rate of 1.5% per month calculated from the expiration of the 30-day period until fully paid. *Mo. Rev. Stat.* §§ 34.057.1(5), 34.057.4, & 34.057.6. However, interest will not accrue on payments that are withheld in good faith for reasonable cause pursuant to *Mo. Rev. Stat.* § 34.057.5. *Id.* § 34.057.6.

### ***Retainage***

Retainage withheld on public works projects shall not exceed 5% of the value of the contract or subcontract unless the public owner and the architect or engineer determine that a higher rate (but not higher than 10% of the value of the contract or subcontract) is required to ensure performance. *Mo. Rev. Stat.* § 34.057.1(1).

In the discretion of the owner, the project architect or engineer, and the contractor, the amount of retainage held by the owner may be adjusted to allow a subcontractor to be paid in full if releasing the subcontractor would not result in risk to the public owner. *Id.* § 34.057.1(3).

Retainage on any contract payment may be reduced or eliminated if the work is proceeding satisfactorily in the public owner's opinion. *Id.*

Retainage must be paid, less offsets or deductions authorized by the contract or other applicable law, after substantial completion of the work and acceptance by the owner's authorized contract representative within 30 days after acceptance and proper documentation is provided. *Id.* § 34.057.1(4). If punch list items remain, however, 200% of each item's value may be withheld until it is completed. *Id.*

### ***Attorney's Fees***

If a court determines that payment was not withheld in good faith for reasonable cause, then reasonable attorney fees may be awarded to the prevailing party. *Mo. Rev. Stat.* § 34.057.6. Likewise, if a claim is brought, or a defense is asserted, that is frivolous and in bad faith, such a party will be required to pay the other party costs, reasonable expenses, and reasonable attorney fees. *Id.*

### ***Noteworthy***

*Mo. Rev. Stat.* § 34.058 makes no-damage-for-delay provisions within a public works contract void and unenforceable. Under this section, a public works contract is defined as follows:

[A] contract of the state, county, city and other political subdivisions of the state, except the Missouri transportation department, for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other works dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.

*Mo. Rev. Stat.* § 34.058.1. However, the statute makes clear that it is not to render void any provision that:

- (1) Precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;
- (2) Requires notice of any delay by the party responsible for such delay;
- (3) Provides for reasonable liquidated damages; or
- (4) Provides for arbitration or any other procedure designed to settle contract disputes.

## **Prime to Sub – Public**

### ***Who's Covered***

See Missouri Owner to Prime - Public.

### ***Entitlement to Payment***

See Missouri Owner to Prime - Public.

### ***Payment Period***

Upon receiving payment, a contractor or higher-tiered subcontractor shall pay each subcontractor and material supplier in proportion to the work completed by each, less any retention not to exceed 10%, within 15 days. *Mo. Rev. Stat.* § 34.057.1(7). If the contractor or higher-tiered subcontractor received less than the full payment due, the contractor or higher-tiered subcontractor shall disburse payments on a pro-rata basis the funds received. *Id.*

### ***Grounds to Withhold Payments***

Reasons to withhold shall include, but not be limited to the following: unsatisfactory job progress, defective construction work or material not remedied, disputed work, failure to comply with other material provisions of the contract, third party claims filed or reasonable evidence that a claim will be filed, failure of the subcontractor to make timely payments for labor, equipment and materials, damage to the contractor or another subcontractor or material supplier, reasonable evidence that the contract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner. *Mo. Rev. Stat.* § 34.057.2.

### ***Interest***

Late payments are subject to interest at the rate of 1.5% per month calculated from the expiration of the 30-day period until fully paid. *Mo. Rev. Stat.* §§ 34.057.1(7) & 34.057.6. However, interest will not accrue on payments that are withheld in good faith for reasonable cause pursuant to *Mo. Rev. Stat.* § 34.057.5. *Id.* § 34.057.6.

### ***Retainage***

See Missouri Owner to Prime - Public.

### ***Attorney's Fees***

See Missouri Owner to Prime - Public.

### ***Noteworthy***

See Missouri Owner to Prime - Public.

## **Owner to Prime – Private**

### ***Who's Covered***

*Mo. Rev. Stat.* § 431.180 provides protection for any person who is not paid pursuant to the terms of a contract for private design or construction work entered into after August 28, 1995. *Mo. Rev. Stat.* §§ 431.180.1 & 431.180.2. However, contracts for private construction work for the building, improvement, repair, or remodeling of owner-occupied residential property of four units or less are excluded. *Id.* § 431.180.3.

Design or construction work is specifically stated to include the “design, construction, alteration, repair or maintenance of any building, roadway or other structure or improvement to real property, or demolition or excavation connected therewith, and shall include the furnishing of surveying, architectural, engineering or landscape design, planning or management services, labor or materials, in connection with such work.” *Id.* § 431.180.4.

Additionally, *Mo. Rev. Stat.* § 436.300 provides that all parties to any contract for private construction work that is between an owner and a contractor, a contractor and a subcontractor, a subcontractor and any sub-subcontractor, or any supplier at whatever tier for construction , reconstruction, maintenance, alteration, or repair for a private owner of any building, improvement, structure, private road, appurtenance, or appliance, including moving, demolition, or any excavating connected therewith, shall make payment in accordance with the terms of such contract or agreement, provided such terms are not inconsistent with the provisions of sections 436.300 to 436.336.

### ***Entitlement to Payment***

The parties’ contract will likely determine entitlement to payment. *See generally Mo. Rev. Stat.* §§ 431.180.1 & 436.300 (requiring parties to make payments in accordance with the terms of the contract).

### ***Payment Period***

The payment period, and whether periodic payments are required at all, will be governed by the parties’ contract. *Mo. Rev. Stat.* §§ 431.180.1, 431.180.2, & 436.300.

### ***Grounds to Withhold Payments***

The statutes do not specify grounds upon which payments may be withheld. Thus, the parties’ contract and common law will likely control.

### ***Interest***

Failure to pay in accordance with the contract’s terms may result in an award of interest at the rate of 1.5% per month from the date payment was due. *Mo. Rev. Stat.* § 431.180.2.

If retainage is withheld in violation of *Mo. Rev. Stat.* §§ 436.300 to 436.336, a court may, in addition to any other award for damages, award interest at the rate of up to 1.5% per month from the date of such wrongful or improper withholding of retainage. *Id.* § 436.333.

### **Retainage**

*NOTE: The retainage statutes discussed below apply only to contracts entered into after August 28, 2002. Mo. Rev. Stat. § 436.336. Moreover, these provisions apply to all private construction projects, except single-family residential construction and other residential construction consisting of four or fewer units. Id.*

Contracts may include a provision for retainage that does not exceed 10% of the payment due from the owner to the contractor to ensure proper performance with the contract. *Mo. Rev. Stat.* § 436.303. However, the contract may provide that an owner may retain additional sums to protect the owner's interest in satisfactory performance of the contract if the contractor is not performing in accordance with the contract. *Id.* These retainage amounts are to be held in trust by the owner for the benefit of the contractor, the contractor's subcontractors, sub-subcontractors, and suppliers at whatever tier that are not in default in proportion to their respective interests. *Id.*

Contractors and subcontractors at all tiers may substitute alternative forms of security in place of cash retention. *Id.* § 436.12.

Within 30 days of when the project attains substantial completion, all retainage or substitute security must be released by the owner to the contractor, less deductions equal to 150% of the costs to complete any remaining items. *Id.* § 436.324. Substantial completion is defined upon the earlier of the two following dates:

- (1) The architect or engineer issuing a certificate of substantial completion in accordance with the terms of the contract documents; or
- (2) The owner accepting the performance of the full contract.

*Id.* § 436.327.

### **Attorney's Fees**

Failure to pay in accordance with the contract's terms may result in an award of reasonable attorney's fees. *Mo. Rev. Stat.* § 431.180.2.

In an action brought to enforce the retainage provisions in *Mo. Rev. Stat.* §§ 436.300 to 436.336, a court or arbitrator may award reasonable attorney's fees to the prevailing party. *Id.* § 436.333.

### **Noteworthy**

Any contract or agreement formed after August 28, 2002, will be unenforceable to the extent that it is inconsistent with the retainage statutes, *Mo. Rev. Stat.* §§ 436.300 to 436.336. *Mo. Rev. Stat.* § 436.333.

## Prime to Sub – Private

### *Who's Covered*

See Missouri Owner to Prime - Private.

### *Entitlement to Payment*

See Missouri Owner to Prime - Private.

### *Payment Period*

See Missouri Owner to Prime - Private.

### *Grounds to Withhold Payments*

See Missouri Owner to Prime - Private.

### *Interest*

See Missouri Owner to Prime - Private.

### *Retainage*

See Missouri Owner to Prime - Private.

Additionally, under *Mo. Rev. Stat. § 436.315*, a contractor may not withhold retainage from any subcontractor in excess of the retainage withheld from the contractor by the owner for the subcontractor's work, unless the subcontractor's performance is not in accordance with the terms of the subcontract. If the subcontractor is not performing according to the contract, then, subject to the terms of the subcontract, the contractor may retain additional sums to ensure the subcontractor's satisfactory performance of the subcontract. *Mo. Rev. Stat. § 436.315*.

The contractor must pay each subcontractor the subcontractor's ratable share of the retainage released upon the owner's release of retainage to the contractor (not including the release of substituted security pursuant to *Mo. Rev. Stat. §§ 436.306 & 436.312*), provided that all conditions of the subcontract for release of retainage to the subcontractor have been satisfied. *Id. § 436.318*.

If a subcontractor has satisfactorily completed its performance, and it is determined that releasing the subcontractor will not create risk to the owner with regard to the subcontractor's work, the contractor must request a retainable adjustment from the owner as necessary to enable the contractor to pay the subcontractor in full, and the owner shall as part of the next contractual payment cycle release the subcontractor's retainage to the contractor, who shall in turn as part of the next contractual payment cycle release such retainage as is due the subcontractor. *Id. § 436.321*.

Upon substantial completion, the contractor must release each subcontractor's share of the retainage received from the owner within seven days of receipt. *Id. § 436.324*.

These retainage provisions apply to subcontractors and sub-subcontractors of all tiers. *Id. § 436.330*.

### *Attorney's Fees*

See Missouri Owner to Prime - Private.

### *Noteworthy*

See Missouri Owner to Prime - Private.

# Montana

## Owner to Prime – Public

### *Who's Covered*

The Montana prompt pay statutes provide protection for prime contractors as well as first and second tier subcontractors who are performing work on a contract with a government or private entity to construct, improve, or provide construction management for the construction or improvement of an improvement to real property. However, these provisions do not apply to residential projects or improvements to real property intended for residential purposes with a total cost of less than \$400,000. *Mont. Code Ann.* § 28-2-2107.

Notably, *Mont. Code Ann.* § 28-2-2101 broadly defines the term subcontractor to include all tiers of subcontractors; however, only those with subcontracts with the contractor and subcontracts with a subcontractor to the contractor are protected under the provisions of *Mont. Code Ann.* §§ 28-2-2103(2), (3) & 28-2-2104(2). However, a lower-tiered subcontractor may find some relief in the form of limitations on retainage under *Mont. Code Ann.* § 28-2-2110.

Under the statutes, the following terms are defined,:

”Construction contract” means a written agreement between an owner and a contractor for the contractor to construct or improve or to provide construction management for the construction or improvement of an improvement to real property.

“Contractor” means a person who has signed a construction contract with an owner.

“Government entity” means a city, town, county, consolidated municipal-county government, school district, or other special district.

“Improve” means to build, alter, demolish, repair, construct, expand, cover, excavate, grade, fill, clear, plant, landscape, or furnish material or labor, or both for an improvement.

“Improvement” means all or a part of a residential or commercial building, structure, area of real property, quantity of earth or fill material, tree or shrubbery, driveway, roadway, or parking area.

“Owner” means a governmental entity or private entity that has a legal interest in the real property improved or to be improved by the performance of the construction contract. An owner may, in the contract, designate another person to represent the owner for the purpose of overseeing the performance of the construction contract and in handling administrative tasks respecting the construction contract.

“Receipt” or “receive” means actual receipt.

“Subcontract” means a contract between a contractor and a subcontractor or between a subcontractor and another subcontractor, the purpose of which is the performance of all or a part of the construction contract.

“Subcontractor” means a person who has contracted with a contractor or another subcontractor for the purposes of performance of all or a part of a subcontract.

*Mont. Code Ann.* § 28-2-2101.

### ***Entitlement to Payment***

A contractor or subcontractor is entitled to payment upon performance in accordance with the provisions of the contract. *Mont. Code Ann.* § 28-2-2102. Additionally, a monthly payment request must be based upon actual or estimated work performed and materials supplied during the preceding monthly billing cycle. *Id.* § 28-2-2103(1)(a).

Payment will not be required by an owner, however, until the contractor provides a billing statement or estimate for work performed or material supplied as required by the parties’ contract. *Id.* § 28-2-2103(1)(g).

### ***Payment Period***

The construction contract must either (1) define a monthly billing cycle for the contractor to submit monthly progress payment requests and final payment requests to the owner, *Mont. Code Ann.* § 28-2-2103(1)(a), or (2) meet the notice requirements in *Mont. Code Ann.* § 28-2-2115 required to establish a billing cycle other than monthly cycle. *Mont. Code Ann.* § 28-2-2103(1)(a).

A payment request is considered approved by the owner 21 days after receipt of the request unless the owner provides the contractor a written statement containing specific items in the request for payment that are being disapproved by the owner prior to the expiration of that 21 day period. *Id.* § 28-2-2103(1)(b).

If all or a portion of a contractor’s request for payment is approved, the owner must pay the contractor the approved amount within 7 days after the contractor’s request for payment is approved. *Id.* § 28-2-2103(1)(f).

### ***Grounds to Withhold Payments***

An owner may disapprove the request for payment or a portion of the request based upon a claim of (1) unsatisfactory job progress, (2) failure to remedy defective construction work or materials, (3) disputed work or materials, (4) failure to comply with material provisions of the construction contract or accompanying documents, (5) failure of a contractor to make timely payment for claims, (6) damage to the owner , or (7) the existence of reasonable evidence that the construction cannot be completed for the unpaid balance of the contract sum. *Mont. Code Ann.* § 28-2-2103(1)(c).

An owner may only withhold amounts sufficient to pay direct expenses reasonably anticipated to be necessary to remedy the claim based on one or more of the reasons identified in *Mont. Code Ann.* § 28-2-2103(1)(c). *Id.* § 28-2-2103(1)(d). That reason must be specifically identified in a written statement by the owner to the contractor. *Id.* § 28-2-2103(1)(e).

### ***Interest***

If a periodic or final payment is delayed by more than 30 days from the date that payment is required by contract to have been made, the owner must pay the contractor interest beginning on the day following the date payment was due at the rate of 1.5% per month. *Mont. Code Ann.* § 28-2-2104(1). If a contractor receives interest from an owner under this provision, it must be distributed to subcontractors on a pro rata basis. *Id.* However, acceptance of the final payment releases any claim for interest on the payment. *Id.* § 28-2-2104(3).

### ***Retainage***

No more than 5% may be withheld as retainage from any construction contract subject to the prompt pay statutes, and no more than the percentage withheld by an owner from a construction contractor may be withheld from a subcontractor. *Mont. Code Ann.* § 28-2-2110(1), (2). Retainage must be released upon final acceptance of each portion of work for which a separate price is stated in the construction contract. *Id.* § 28-2-2110(3).

### ***Attorney's Fees***

The prevailing party in a civil action on contract to enforce an obligation imposed by the Act is entitled to reasonable attorney's fees and costs, both for trial and appeal. *Mont. Code Ann.* § 28-2-2105. In the event that arbitration is used, an arbitrator may award fees and costs. *Id.*

### ***Noteworthy***

The remedies provided in title 28, chapter 2, part 21 ("Payment of Construction Contractors and Subcontractors") are not exclusive of other remedies provided by law or contract. *Mont. Code Ann.* § 28-2-2106.

With certain statutorily prescribed exceptions, a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of Montana. *Id.* § 28-2-2111.

A choice of law or choice of venue provision in favor of a state other than Montana in connection with a Montana construction project is void and unenforceable. *Id.* § 28-2-2116(1).

Performance by a contractor or subcontractor may be suspended or the contract or subcontract terminated for non-payment following the provision of certain required notices. *Id.* § 28-2-2117.

## **Prime to Sub – Public**

### ***Who's Covered***

See Montana Owner to Prime - Public.

### ***Entitlement to Payment***

See Montana Owner to Prime - Public.

Similarly to provisions for the owner and contractor, payment will not be required to be made to a subcontractor until a billing statement or invoice is provided for work performed or material supplied in accordance with the terms of the parties' contract. *Mont. Code Ann.* §§ 28-2-2103(2)(b) & 28-2-2103(3)(b).

#### ***Payment Period***

Within 7 days of receiving a periodic or final payment from an owner, the contractor shall pay the subcontractor the full amount due the subcontractor in accordance with subcontract. *Mont. Code Ann.* § 28-2-2103(2)(a). Likewise, within 7 days after receiving a periodic or final payment from a contractor, the subcontractor shall pay its subcontractors. *Mont. Code Ann.* § 28-2-2103(3)(a).

#### ***Grounds to Withhold Payments***

See Montana Owner to Prime - Public.

However, rather than 21 days, a contractor must disapprove of a subcontractor's request for payment based on one of the stated reasons in *Mont. Code Ann.* § 28-2-2103(1)(c) prior to submitting a monthly or final pay application to the owner. *Mont. Code Ann.* § 28-2-2103(2)(c).

#### ***Interest***

Payments delayed by more than 30 days from the date payment is required will accumulate interest at the rate of 1.5% per month beginning on the day following the date when payment is due. *Mont. Code Ann.* § 28-2-2104(2). Subcontractors receiving interest from contractors for late payments shall distribute accrued interest to other subcontractors on a pro-rata basis. *Id.* However, acceptance of the final payment releases any claim for interest on the payment. *Id.* § 28-2-2104(3).

#### ***Retainage***

See Montana Owner to Prime - Public.

#### ***Attorney's Fees***

See Montana Owner to Prime - Public.

#### ***Noteworthy***

See Montana Owner to Prime - Public.

Under *Mont. Code Ann.* § 28-2-2103(g), an owner must notify the subcontractor of a progress payment or final payment made to the general contractor upon the written request of a subcontractor who has not been paid for work.

### **Owner to Prime - Private**

#### ***Who's Covered***

See Montana Owner to Prime - Public.

#### ***Entitlement to Payment***

See Montana Owner to Prime - Public.

#### ***Payment Period***

See Montana Owner to Prime - Public.

***Grounds to Withhold Payments***

See Montana Owner to Prime - Public.

***Interest***

See Montana Owner to Prime - Public.

***Retainage***

See Montana Owner to Prime - Public.

***Attorney's Fees***

See Montana Owner to Prime - Public.

***Noteworthy***

See Montana Owner to Prime - Public.

**Prime to Sub – Private**

***Who's Covered***

See Montana Prime to Sub - Public.

***Entitlement to Payment***

See Montana Prime to Sub - Public.

***Payment Period***

See Montana Prime to Sub - Public.

***Grounds to Withhold Payments***

See Montana Prime to Sub - Public.

***Interest***

See Montana Prime to Sub - Public.

***Retainage***

See Montana Prime to Sub - Public.

***Attorney's Fees***

See Montana Prime to Sub - Public.

***Noteworthy***

See Montana Prime to Sub - Public.

# Nebraska

## Owner to Prime – Public

### *Who's Covered*

Nebraska has two sets of statutes which are relevant for public construction projects. The first is the Nebraska Prompt Payment Act (“NPPA”), which applies to contracts with the state and state agencies. The second is the Nebraska Construction Prompt Pay Act (“NCPPA”), which applies to all other contracts, both public and private.

The Nebraska Prompt Payment Act, *Neb. Rev. Stat.* §§ 81-2401 to 81-2408, provides protection for those contracting with a state agency. Under the statutes, the following relevant terms are defined, among others:

“Agency“ means the state and any agency, department, office, commission, board, panel, or division of the state. Agency shall include the University of Nebraska and the Nebraska state colleges.

“Bill“ means an invoice which requests payment and which is supplemented by all necessary verification and forms required by agency rules and regulations to process payments.

“Good Faith Dispute“ means a contention by the agency that goods delivered or services rendered were of less quantity or quality than ordered or specified by contract, faulty, or installed improperly, or any other reason giving cause for the withholding of payment by the agency until the dispute is settled. Note: failure to give notice shall preclude an agency from claiming a good faith dispute in the case of defective or improper billing.

“Services“ means any contractual services, including, but not limited to, architectural, engineering, medical, financial consulting, or other professional services, any construction services, and any other personal services but shall not mean any services performed as an officer or employee of any agency.

*Neb. Rev. Stat.* § 81-2402.

However, the Prompt Payment Act does not apply to highway, or road construction, reconstruction, or maintenance projects. *Id.* § 81-2407(2). Nebraska Department of Roads projects are subject to a special statutory prompt payment provision that prescribes interest on retainage and on final payment amounts commencing 60 days after tentative acceptance or, if there has been no determination of tentative acceptance, 60 days after completion of the work. *Id.* § 39-1349(1).

The Nebraska Construction Prompt Pay Act, *Neb. Rev. Stat.* §§ 45-1201 to 45-1210 provides protection for prime contractors, subcontractors (all tiers), and materialmen on both public and private projects. The NCPPA applies to contracts or subcontracts entered into on or after October 1, 2010. *Neb. Rev. Stat.* § 45-1208. The NCPPA does not, however, provide protection for prime contractors working for the state. Moreover, the NCPPA does not apply to improvement to real

property intended for residential purposes when the residence consists of no more than four residential units. *Id.* § 45-1207. Under the statutes, the following relevant terms are defined, among others:

“Contractor” includes any entity engaged in the business of the construction, alteration, repairing, dismantling, ordemolition of buildings, roads, bridges, viaducts, sewers, water and gas mains, streets, disposal plants, water filters, tanks and towers, airports, dams, levees and canals, water wells pipelines, transmission and power lines, and every other type of structure, project, development, or improvement coming within the definition of real property and personal property, including such construction, repairing, or alteration of such property to be held either for sale or rental. Contractor also includes any subcontractor engaged in the business of such activities and any person who is providing or arranging for labor for such activities, either as an employee or as an independent contractor, for any contractor or person.

“Owner” means a person (a) who has an interest in any real property improved, (b) for whom an improvement is made, or (c) who contracted for an improvement to be made. Owner includes a person, an entity or any political subdivision of this state. Owner does not include the State of Nebraska.

“Subcontractor” means a person or an entity that has contracted to furnish labor or materials to, or performed labor or supplied materials for, a contractor or another subcontractor in connection with a contract to improve real property. Subcontractor includes materialmen and suppliers.

### ***Entitlement to Payment***

**NPPA:** A contractor is entitled to payment for goods delivered or services rendered. *Neb. Rev. Stat.* § 81-2403(1).

**NCPPA:** A contractor is entitled to payment when it has performed work in accordance with the provisions of a contract. *Neb. Rev. Stat.* § 45-1203(1).

### ***Payment Period***

**NPPA:** Unless otherwise agreed to in writing, an agency shall make payment in full on or before the 45th calendar day after the later of the date of receipt of the goods or services or the date of receipt of the bill. *Neb. Rev. Stat.* § 81-2403(1). Goods and services will be deemed received when they are completely delivered and finally accepted by the agency. *Id.* § 81-2403(3).

Notably, if a bill is filled out incorrectly or has some other defect or impropriety, the agency must notify the contractor in writing prior to the date on which the bill is due. *Id.* § 81-2405. This notice must specify the defect and any other information necessary to allow the contractor to correct the error. *Id.* The payment period is restarted as of the date on which the corrected bill is received. *Id.* So, if the agency did not notify the contractor of an error until the 43rd day, and the contractor corrected the bill that day, payment would still not be due for another 45 days.

These requirements do not apply to the following:

- (1) claims subject to a good faith dispute provided that notice of the dispute is provided to the creditor in writing before the time required for payment,
- (2) contracts related to highway or road construction, reconstruction, or maintenance, and

(3) claims, contracts, or projects which are to be paid for exclusively with federal funds.

*Neb. Rev. Stat. § 81-2407.*

**NCPPA:** Owners must pay contractors within 30 days after the owner or owner's representative's receipt of a payment request made pursuant to the contract. *Neb. Rev. Stat. § 45-1203(1)*

#### ***Grounds to Withhold Payments***

**NPPA:** Grounds for withholding payments are not specified by the statute. Thus, presumably, the parties' contract and/or case law will apply to determine proper grounds for a good faith dispute.

**NCPPA:** Payment may only be withheld in a reasonable amount, to the extent such withholding is allowed in the contract, for the following reasons:

- (1) Reasonable evidence showing that the contractual completion date will not be met due to unsatisfactory job progress;
- (2) Third-party claims filed or reasonable evidence that such a claim will be filed with respect to work under the contract; or
- (3) Failure of the contractor to make timely payments for labor, equipment, subcontractors, or materials

*Neb. Rev. Stat. § 45-1204(2).*

Payment may also be withheld for retainage, both before and after substantial completion. *See* "Retainage," *supra*.

#### ***Interest***

**NPPA:** Interest charges, at the rate specified in *Neb. Rev. Stat. § 45-104.02*, will begin to accrue on the 31st calendar day after the later of (1) the date of receipt of the goods and services or (2) the date of receipt of the bill. *Neb. Rev. Stat. § 81-2404.*

Interest will not be owed if the bill is the subject of a good faith dispute between the agency and the creditor. *Id.* Additionally, no claim for interest will be allowed unless a request for interest charges is made within 90 calendar days from the date on which payment in full is due. *Id.*

With regard to highway or bridge contracts, interest at the rate of 3% above the Federal Reserve composite prime lending rate for the previous calendar year will begin accruing on a final payment that is due to the contractor 60 days after the work is completed as indicated by the Nebraska Department of Roads's letter of tentative acceptance or, if a letter is not issued, 60 days after the completion of the work. *Id. § 39-1349.*

**NCPPA:** If a periodic or final payment to a contractor is delayed by more than 30 days after receipt of a properly submitted periodic or final payment request by the owner or owner's representative, the owner shall pay the contractor interest due until such amount is paid, beginning on the day following the payment due date at the rate of 1% per month or a pro rata fraction thereof on the unpaid balance. Interest is due only after the person charged the interest has been notified of the provisions of this section by the party seeking the interest. *Neb. Rev. Stat. § 45-1205.*

### **Retainage**

**NPPA:** Under *Neb. Rev. Stat.* § 39-1349, retained funds that are not paid to the contractor on a highway or bridge contract within 60 days after final completion will be subject to an interest rate of 3% above the Federal Reserve composite prime lending rate for the previous calendar year.

**NCPPA:** Retainage may be withheld in an amount not to exceed the amount specified in the contract, if applicable, until the work is substantially complete. After substantial completion, payment may be withheld in an amount not to exceed 125% of the estimated cost to complete the work remaining on the contract.

### **Attorney's Fees**

Neither the NPPA nor the NCPPA provide for the award of attorney's fees.

### **Noteworthy**

**NPPA:** See also *Neb. Rev. Stat.* §§ 16-626, 17-520, 17-925, 17-975, 17-995, 18-2003, 19-2406, 19-2412, 19-2419, 23-3624, 39-1619, and 39-1645.

**NCPPA:** The following provisions in any contract or subcontract for construction work performed within the State of Nebraska shall be against public policy and shall be void and unenforceable:

- (1) A provision that purports to waive, release, or extinguish rights to file a claim against a payment or performance bond, except that a contract or subcontract may require a contractor or subcontractor to provide a waiver or release of such rights as a condition for payment, but only to the extent of the amount of the payment received.
- (2) A provision that purports to make any state law other than that of Nebraska applicable to or governing any contract for construction within the state.
- (3) A provision that purports to require that venue for a court or arbitration hearing be held at any location outside of the state.

*Neb. Rev. Stat.* § 45-1209.

Claims for payment from any political subdivision must comply with the statutory procedure set forth in *Neb. Rev. Stat.* § 45-1210.

### **Prime to Sub – Public**

The NPPA does not appear to offer protection for subcontractors. Subcontractors are offered protection, however, under the NCPPA.

### **Who's Covered**

See Nebraska Owner to Prime - Public

### **Entitlement to Payment**

A subcontractor is entitled to payment when it has performed work in accordance with the provisions of a subcontract and all conditions precedent to payment contained in the subcontract have been satisfied. *Neb. Rev. Stat. § 45-1203(2)*.

### ***Payment Period***

The contractor shall pay the subcontractor and the subcontractor shall pay its subcontractor within 10 days after receipt by the contractor or subcontractor of each periodic or final payment.

### ***Grounds to Withhold Payments***

See Nebraska Owner to Prime – Public.

### ***Interest***

See Nebraska Owner to Prime – Public.

### ***Retainage***

See Nebraska Owner to Prime – Public.

### ***Attorney's Fees***

See Nebraska Owner to Prime – Public.

### ***Noteworthy***

A prime contractor, who fails to pass payment to the subcontractor when the prime contractor has received payment in whole or in part for a subcontractor's work, is guilty of a misdemeanor. *Neb. Rev. Stat. §§ 52-123 & 52-124*. Notwithstanding the existence of potential criminal sanctions for nonpayment, no express trust arises under these statutes. See *Devaney v. Dloogoff*, 600 F.2d 166, 170 (8th Cir. 1979).

See also Nebraska Owner to Prime – Public.

## **Owner to Prime – Private**

Private construction contracts are governed by the NCPPA. See Nebraska Owner to Prime - Public

## **Prime to Sub – Private**

Private construction subcontracts are governed by the NCPPA. See Nebraska Prime to Sub – Public.

### ***Noteworthy***

See Nebraska Prime to Sub - Public.

# Nevada

## Owner to Prime – Public

### *Who's Covered*

Title 28, chapter 338 of the *Nevada Revised Statutes* provides various protections for contractors entering into a written contract with a public body for the provision of labor, materials, equipment, or supplies for a public work. The statutes also provide protection for subcontractors and suppliers of all tiers.

However, the statutes do not apply to contracts relating to the normal maintenance of property, *Nev. Rev. Stat.* § 338.011(1), contracts awarded in response to an emergency that threatens the public's health, safety, or welfare, *id.* § 338.011(2), or contracts in which a private developer for the benefit of a private development constructs a water or sewer line that would qualify as a public work and for which the developer will receive reimbursement in part from the public body, *id.* § 338.011(3) .

Additionally, the payment provisions of *Nev. Rev. Stat.* §§ 338.400 to 338.645 do not apply to contracts entered into by the Department of Transportation pursuant to chapter 408 of the *Nevada Revised Statutes*. *Id.* § 338.480.

Under the statutes, the following relevant definitions are applicable, among others:

“Contract” means a written contract entered into between a contractor and a public body for the provision of labor, materials, equipment or supplies for a public work.

“Contractor” means:

- (a) A person who is licensed pursuant to the provisions of chapter 624 of NRS or performs such work that he is not required to be licensed pursuant to chapter 624 of NRS.
- (b) A design-build team.

“General contractor” means a person who is licensed to conduct business in one, or both, of the following branches of the contracting business:

- (a) General engineering contracting, as described in subsection 2 of NRS 624.215.
- (b) General building contracting, as described in subsection 3 of NRS 624.215.

“Governing body” means the board, council, commission or other body in which the general legislative and fiscal powers of a local government are vested.

“Local government” means every political subdivision or other entity which has the right to levy or receive money from ad valorem or other taxes or any mandatory assessments, and includes, without limitation, counties, cities, towns, boards, school districts and other districts organized pursuant to [chapters 244A, 309, 318, 379, 474, 538, 541, 543](#) and [555](#) of the *Nevada Revised Statutes*, [Nev. Rev. Stat. §§ 450.550 to 450.750](#), inclusive, and any agency or department of a county or city which prepares a budget separate from that of the

parent political subdivision. The term includes a person who has been designated by the governing body of a local government to serve as its authorized representative.

“Prime contractor” means a contractor who:

- (a) Contracts to construct an entire project;
- (b) Coordinates all work performed on the entire project;
- (c) Uses his own workforce to perform all or a part of the public work; and
- (d) Contracts for the services of any subcontractor or independent contractor or is responsible for payment to any contracted subcontractors or independent contractors.

The term includes, without limitation, a general contractor or a specialty contractor who is authorized to bid on a project pursuant to NRS 338.139 or 338.148.

“Public body” means the State, county, city, town, school district or any public agency of this State or its political subdivisions sponsoring or financing a public work.

“Public work” means any project for the new construction, repair or reconstruction of:

- (a) A project financed in whole or in part from public money for (1) Public buildings; (2) Jails and prisons; (3) Public roads; (4) Public highways; (5) Public streets and alleys; (6) Public utilities; (7) Publicly owned water mains and sewers; (8) Public parks and playgrounds; (9) Public convention facilities which are financed at least in part with public money; and (10) All other publicly owned works and property.

- (b) A building for the Nevada System of Higher Education of which 25 percent or more of the costs of the building as a whole are paid from money appropriated by this State or from federal money.

“Subcontract” means a written contract entered into between (a) A contractor and a subcontractor or supplier; or (b) A subcontractor and another subcontractor or supplier, for the provision of labor, materials, equipment or supplies for a construction project.

“Subcontractor” means a person who: (a) Is licensed pursuant to the provisions of chapter 624 of NRS or performs such work that he is not required to be licensed pursuant to chapter 624 of NRS; and (b) Contracts with a contractor, another subcontractor or a supplier to provide labor, materials or services for a construction project.

“Supplier” means a person who provides materials, equipment or supplies for a construction project.

*Nev. Rev. Stat. § 338.010. See also id. §§ 338.400 to 338.435 (defining “progress bills,” “progress payments,” “retainage,” “retainage bills,” and “retainage payments”).*

### ***Entitlement to Payment***

The statutes do not appear to specify when a contractor or subcontractor is entitled to payment for work performed, services provided, or materials furnished. Thus, the parties’ contract and case law will likely govern this issue.

### ***Payment Period***

Contractors must submit progress bills indentifying the portion of supplies, work performed, or services provided by a contractor, subcontractor, or supplier at least once a month, or more frequently if the contract so provides. *Nev. Rev. Stat.* § 338.510 & § 338.415.

Progress payments must be made within 30 days after the date on which the public body received the progress bill or within a shorter period if the provisions of the contract so provide. *Id.* § 338.515.1. Final payment, including retainage and interest, is due within 30 days after the earliest of occupancy (including partial), use of the public work in full or in part, or the filing of a notice of completion. *Id.* § 338.520.

### ***Grounds to Withhold Payments***

A public body may, but is not required to, withhold from a progress payment or retainage payment an amount sufficient to pay the expenses the public body reasonably expects to incur as a result of the failure of the contractor to comply with the contract or applicable building code, law or regulation. *Nev. Rev. Stat.* § 338.525(1). The public body must give written notice to the contractor within 20 days and comply with the provisions of *Nev. Rev. Stat.* § 338.525. *Id.* § 338.525(2). However, if a written notice of correction is sent to the public body, the amount withheld must be paid within 30 days after the public body receives the next progress or retainage bill after the public body has confirmed that the condition has been corrected. *Id.* § 338.525(3).

### ***Interest***

To avoid interest charges, a public body must either pay a contractor or give proper written notice to the contractor that payments will be withheld within 30 days. *Nev. Rev. Stat.* § 338.530. Otherwise, interest will be charged from the 30th day at a rate equal to the rate quoted by at least three insured banks, credit unions, or savings and loan associations in Nevada as the highest rate paid on a certificate of deposit whose duration is approximately 90 days on the first day of the quarter. *Id.* & § 338.515. Similarly, interest may be charged at the same rate if the owner fails to make a payment pursuant to a proper correction notice within 30 days and also fails to object to the scope and manner of the correction within that time frame with specified reasons in writing. *Id.* § 338.530.

### ***Retainage***

At least 10% of each progress payment must be withheld until 50% of the work required by the contract has been performed. *Nev. Rev. Stat.* § 338.515(1). Thereafter, the public body may pay any of the remaining progress payments without withholding additional retainage if satisfactory progress is being made. *Id.* Interest must be paid on amounts withheld on a quarterly basis to the contractor, as specified in the section on “Interest” above, unless the amount due to a contractor is less than \$500. *Id.* § 338.515(3). In such a case, the interest may be held until (1) the end of a subsequent quarter after which the amount of interest due is \$500 or more; (2) the end of the fourth consecutive quarter for which no interest has been paid to the contractor; or (3) the amount withheld under the contract is due as part of the final payment. *Id.*

However, the actual cost of goods, materials or equipment that are specially made or in short supply may have to be paid in full to the contractor within 30 days of receiving a progress bill for such items if they are identified in the contract and have been delivered as specified in the contract or subcontract. *Id.* § 338.515(2).

Additional amounts may be withheld at the request of the Labor Commissioner in the event that a workman is owed wages by a contractor or subcontractor. *Id.* § 338.515(4).

### ***Attorney's Fees***

The court or arbitrator shall award reasonable costs and attorney's fees to a contractor, subcontractor or supplier who is the prevailing party in a civil action or an arbitration proceeding to recover an amount that was required to be paid to him. *Nev. Rev. Stat.* § 338.640. Notably, the statutes also indicate that the public body may include a provision in its contract for public work governing attorney's fees. *Id.*

### ***Noteworthy***

The Nevada statutes authorize an action by a contractor for an alternate writ of mandamus to compel performance by a public body under *Nev. Rev. Stat.* § 338.630. The actions that may be compelled by this statute include (1) making a payment, (2) providing written notice of any withholding, or (3) providing information on a request relating to any payment with respect to a contract that hasn't been fully performed.

Provisions required to be in public contracts are identified in *Nev. Rev. Stat.* §§ 338.150 (use of arbitration under the AAA or the Nevada Arbitration Association), 338.153 (requiring virtually everyone working on a contract to comply with state and local laws), & 338.155 (setting forth rules specific to design professionals who are not members of a design-build team).

*Nev. Rev. Stat.* § 338.485 establishes limitations on the ability to waive certain rights, obligations, and liabilities.

*Nev. Rev. Stat.* § 338.645 provides that the provisions of *Nev. Rev. Stat.* §§ 338.400 to 338.645, inclusive, do not impair or affect the rights of a contractor, subcontractor or supplier to whom any amount may be owed for work performed or materials, equipment or supplies furnished to maintain a civil action or to submit any controversy arising under the contract to arbitration to recover that amount.

## **Prime to Sub – Public**

### ***Who's Covered***

See Nevada Owner to Prime - Public.

### ***Entitlement to Payment***

See Nevada Owner to Prime - Public.

### ***Payment Period***

Contractors shall pay their subcontractors and suppliers within 10 days after receipt of payments from the public body in an amount proportionate to the subcontractors' and suppliers' basis in the progress or retainage bill and interest thereon. *Nev. Rev. Stat.* § 338.550; *see also id.* §§ 338.560(4) & 338.600(4) (relating to payments of amounts withheld by the owner, contractor, or subcontractor from a subcontractor).

Subcontractors shall pay their subcontractors and suppliers within 10 days after the subcontractor receives payment. *Id.* § 338.590.1.

### **Grounds to Withhold Payments**

A contractor may withhold from a progress payment or retainage payment an amount sufficient to pay: (1) the expenses the contractor reasonably expects to incur as a result of the failure of his subcontractor or supplier to comply with the subcontract or applicable building code, law or regulation; (2) an amount withheld from payment to the contractor by a public body pursuant to §338.515 for a claim for wages against the subcontractor. *Nev. Rev. Stat.* § 338.560(1). If the contractor withholds payment for one of these reasons, he must notify the subcontractor or supplier in a signed writing within 10 days, stating the amount to be withheld and the reason for the withholding. *Id.* § 338.560(2), (3).

With regard to withholding by a subcontractor from a sub-subcontractor or a supplier, similar provisions apply under *Nev. Rev. Stat.* § 338.600, although amounts are not withheld by the public body based on claims for wages.

### **Interest**

Failure of a contractor to make timely payment or failure to give proper notice of withheld payments will result in an interest charge at a rate equal to the lowest daily prime rate at the three largest banks or other financial institutions of the United States on the date the contract was executed plus 2% until payment is made to the subcontractor or supplier. *Nev. Rev. Stat.* § 338.565 This amount will begin to accrue on the 10th day on the amount delayed. *Id.*

*See also id.* § 338.605 (applying similar provisions in favor of sub-subcontractors and sub-suppliers).

### **Retainage**

No more than 10% may be withheld from any progress payment made by a contractor or a subcontractor prior to when 50% of the work has been completed under the subcontract. *Nev. Rev. Stat.* §§ 338.555 & 338.595. After that point, additional progress payments will be made without any withholding if in the opinion of the contractor or higher-tiered subcontractor that satisfactory progress is being made on the work. *Id.* §§ 338.555 & 338.595. The payment made must be equal to that made by the public body to the contractor or the contractor to the subcontractor, as the case may be, for work performed or materials provided by the subcontractor (or supplier in the case of a subcontractor – supplier situation). *Id.* §§ 338.555 & 338.595. If the contractor or the subcontractor receives an interest payment, such amount must be disbursed within 10 days after the money is received by the contractor or the subcontractor, on a proportional basis. *Id.* §§ 338.555 & 338.595.

### **Attorney's Fees**

*See Nevada Owner to Prime - Public.*

### **Noteworthy**

*See Nevada Owner to Prime - Public.*

Additionally, a subcontractor or supplier has a cause of action to remedy unjustified or excessive withholding under *Nev. Rev. Stat.* § 338.635.

## Owner to Prime – Private

### *Who's Covered*

Nevada's prompt pay statutes provide protection to contractors, as well as subcontractors and suppliers of all tiers who are involved in a "work of improvement," which is defined as follows:

"Work of improvement" means the entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon, whether under multiple prime contracts or a single prime contract except as follows:

1. If a scheme of improvement consists of the construction of two or more separate buildings and each building is constructed upon a separate legal parcel of land and pursuant to a separate prime contract for only that building, then each building shall be deemed a separate work of improvement; and
2. If the improvement of the site is provided for in a prime contract that is separate from all prime contracts for the construction of one or more buildings on the property, and if the improvement of the site was contemplated by the contracts to be a separate work of improvement to be completed before the commencement of construction of the buildings, the improvement of the site shall be deemed a separate work of improvement from the construction of the buildings and the commencement of construction of the improvement of the site does not constitute the commencement of construction of the buildings. As used in this subsection, "improvement of the site" means the development or enhancement of the property, preparatory to the commencement of construction of a building, and includes:
  - (a) The demolition or removal of improvements, trees or other vegetation;
  - (b) The drilling of test holes;
  - (c) Grading, grubbing, filling or excavating;
  - (d) Constructing or installing sewers or other public utilities; or
  - (e) Constructing a vault, cellar or room under sidewalks or making improvements to the sidewalks in front of or adjoining the property.

*Nev. Rev. Stat. §§ 624.029 & 108.22188.* Additionally, other relevant defined terms include the following:

"Higher-tiered contractor" means a prime contractor or subcontractor who has entered into an oral or written agreement with a lower-tiered subcontractor pursuant to which the lower-tiered subcontractor has agreed to provide work, materials or equipment for a work of improvement.

"Lower-tiered subcontractor" means a subcontractor who has agreed in an oral or written agreement with a higher-tiered contractor to provide work, materials or equipment for a work of improvement.

"Owner" means an owner or lessee of real property or any improvement who enters into an oral or written agreement with a prime contractor pursuant to which the prime contractor agrees to provide work, materials or equipment for a work of improvement. The term

includes, without limitation, an owner of a planned unit development who enters into one or more oral or written agreements to construct a work of improvement in the planned unit development in the manner described in §624.020.

“Prime contractor“ means a contractor who enters into an oral or written agreement with an owner pursuant to which the prime contractor agrees to provide work, materials or equipment for a work of improvement.

*Id.* §§624.607 to 624.6086

### ***Entitlement to Payment***

The statutes do not appear to specify when a contractor or subcontractor is entitled to payment for work performed, services provided, or materials furnished. Thus, the parties’ contract and case law will likely govern this issue.

### ***Payment Period***

Payment during the performance of the agreement is due pursuant to a schedule established in the written contract or, if no such schedule is established, within 21 days after the date the prime contractor submits a request for payment. *Nev. Rev. Stat.* § 624.609(1).

Final payment is due to the prime contractor within 30 days after: (1) occupancy or use of the work of improvement by the owner or by a person acting with the authority of the owner; or (2) the availability of a work of improvement for its intended use if the prime contractor has provided to the owner: (a) a written notice of availability on or before the date on which he claims that the work of improvement became available for use or occupancy; or (b) a certificate of occupancy issued by the appropriate building inspector or other authority. *Id.* § 624.620(1).

### ***Grounds to Withhold Payments***

With regard to either a progress or final payment, an owner may withhold payment for the amount of: (1) any work or labor that has not been performed or materials or equipment that has not been furnished for which payment is sought; (2) the costs and expenses reasonably necessary to correct or repair any work that is not materially in compliance with the agreement to the extent that such costs and expenses exceed 50% of the amount of retention being withheld pursuant to the terms of the agreement; and (3) money the owner has paid or is required to pay pursuant to an official notice from a state agency, or employee benefit trust fund, for which the owner is liable for the prime contractor or his lower-tiered subcontractors in accordance with chapter 608, 612, 616A to 616D, inclusive, or 617 of the *Nevada Revised Statutes*. *Nev. Rev. Stat.* §§ 624.609 & 624.620. The owner must give written notice to the prime contractor of any amounts withheld. *Nev. Rev. Stat.* §§ 624.609 & 624.620. Such notice shall comply with the provisions of *Nev. Rev. Stat.* §§ 624.609 & 624.620.

### ***Interest***

Any money payable to a prime contractor, higher-tiered contractor or lower-tiered subcontractor pursuant to §§624.609, 624.610, 624.624, 624.626, or 624.628 accrues interest from the time it becomes due at a rate equal to the higher of:

- (1) the rate agreed upon in the agreement between the parties; or

(2) the rate equal to the prime rate at the largest bank in Nevada, as determined by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding:

- (a) the time at which the agreement was signed, or
- (b) if the agreement was oral, the time at which the terms of the agreement were agreed to by the parties, plus 4% until the date of payment.

*Nev. Rev. Stat.* § 624.630.

### **Retainage**

Retention, if allowed by agreement, is not to exceed 10% of the amount of payment to be made. *Nev. Rev. Stat.* § 624.609. Notably, if an owner intends to withhold retention, the owner is not obligated to give written notice to the prime contractor as specified above. *Id.* §624.609(2), (3).

### **Attorney's Fees**

In any action brought to enforce the rights or obligations described above, the trier of fact may award reasonable attorney's fees to the prime contractor and his lower-tiered subcontractors and suppliers, as well as the lower-tiered subcontractor and his lower-tiered subcontractors and suppliers. *Nev. Rev. Stat.* §§ 624.610(6), 624.626(6). Or, if the trier of fact determines that the prime contractor (or lower-tiered subcontractor) stopped work or terminated the agreement without a reasonable basis in law or fact, the trier of fact may award reasonable attorney's fees and costs, including court and arbitration costs, to the owner (or higher-tiered contractor). *Id.*

### **Noteworthy**

*Nev. Rev. Stat.* §§ 624.610 & 624.626 allow contractors and subcontractors to suspend work upon non-payment in certain situations. These sections also address grounds for terminating the agreement, change orders, and limitations on liability. With regard to pay-if-paid and pay-when-paid provisions, while a lower-tiered subcontractor may have a right to stop work on a project, he may not statutorily terminate its agreement with a higher-tiered contractor who also has not been paid. *Id.* § 624.626.

*Nev. Rev. Stat.* § 624.622 outlines certain required notices, identifies prohibited provisions in contracts (including no-damage-for-delay provisions), and prohibits waivers of certain rights and remedies.

## **Prime to Sub – Private**

### **Who's Covered**

See Nevada Owner to Prime - Private.

### **Entitlement to Payment**

See Nevada Owner to Prime - Private.

### **Payment Period**

For written contracts that include a schedule for payments, payment is due on or before the date listed in the contract, or within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor, whichever is earlier. *Nev. Rev. Stat.* § 624.624.

For written contracts without a schedule for payments and for oral agreements, payment is due within 30 days after the date the lower-tiered subcontractor submits a request for payment, or within 10 days after the date the higher-tiered contractor received payment for all or a portion of the work, labor, materials, equipment or services described in a request for payment submitted by the lower-tiered subcontractor, whichever is earlier. *Id.*

### ***Grounds to Withhold Payments***

If the higher-tiered contractor has complied with the notice requirements in *Nev. Rev. Stat.* § 624.624(3), it may withhold the following amounts from any payment owed to the lower-tiered subcontractor:

- (1) a retention amount that the higher-tiered contractor is authorized to withhold pursuant to the agreement, but not exceeding 10% of the payment that is required;
- (2) an amount equal to the sum of the value of:
  - (a) any work or labor that has not been performed or materials or equipment that has not been furnished for which payment is being sought, unless the agreement otherwise allows or requires such a payment to be made; and
  - (b) costs and expenses reasonably necessary to correct or repair any work which is the subject of the request for payment and which is not materially in compliance with the agreement to the extent that such costs and expenses exceed 50% of the retention amount withheld; and
- (3) the amount the owner or higher-tiered contractor has paid or is required to pay pursuant to an official notice from a state agency or employee benefit trust fund, for which the owner or higher-tiered contractor is or may reasonably be liable for the lower-tiered subcontractor or his lower-tiered subcontractors in accordance with chapter 608, 612, 616A to 616D, inclusive, or 617 of the *Nevada Revised Statutes*.

*Nev. Rev. Stat.* § 624.624(2).

### ***Interest***

See Nevada Owner to Prime - Private.

### ***Retainage***

Retention, if allowed by agreement, is not to exceed 10% of the amount of payment to be made.

*Nev. Rev. Stat.* § 624.624(2)(a)(1). Notably, if an owner intends to withhold retention, the owner is not obligated to give written notice to the prime contractor as specified above. *Id.* §624.624(2), (3).

### ***Attorney's Fees***

See Nevada Owner to Prime - Private.

### ***Noteworthy***

See Nevada Owner to Prime - Private.

## **New Hampshire**

### **Owner to Prime – Public**

New Hampshire does not appear to have a prompt pay act applicable to prime contractors on a public contract.

### **Prime to Sub – Public**

New Hampshire does not appear to have a prompt pay act applicable to subcontractors on a public contract.

### **Owner to Prime – Private**

New Hampshire does not appear to have a prompt pay act applicable to prime contractors on a private contract.

### **Prime to Sub – Private**

New Hampshire does not appear to have a prompt pay act applicable to subcontractors on a private contract.

# New Jersey

## Owner to Prime – Public

### *Who's Covered*

The New Jersey public construction payment laws provide protection for prime contractors, subcontractors, and suppliers. Under the statutes, the following terms are defined:

“Prime contractor” means any person who has a construction contract with a State agency and who subcontracts all or part of that contract. *N.J. Stat. Ann.* § 52:32-40. *But see id.* § 2A:30A-1, which defines “Prime contractor” to mean a person who contracts with an owner to improve real property.

“Subcontractor” means any person who enters into a contract with a prime contractor to perform a specific part of the work for which the prime contractor is responsible under a construction contract with a state agency. *Id.* § 52:32-40. *But see id.* § 2A:30A-1, which defines “Subcontractor” to mean any person who has contracted to furnish labor, materials or other services to a prime contractor in connection with a contract to improve real property.

“Subsubcontractor” means any person who has contracted to furnish labor, materials or other services to a subcontractor in connection with a contract to improve real property. *Id.* § 2A:30A-1.

### *Entitlement to Payment*

A prime contractor is entitled to payment if it has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved by the owner. *N.J. Stat. Ann.* § 2A:30A-2(a). Prior to payment by a State agency, a prime contractor must certify that its subcontractors and suppliers have been paid any amounts due under previous progress payments, or the prime contractor must state that there is a valid basis under the terms of the subcontracts to withhold such payments. *Id.* §§ 52:32-41(a) & 2A:30A-2(b).

### *Payment Period*

The owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing date, which for a periodic billing, shall be the periodic billing date specified in the contract. The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment, except that in the case of a public or governmental entity that requires the governing body to vote on authorization for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity’s governing body, and paid during the entity’s subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents. *N.J. Stat. Ann.* § 2A:30A-2(a).

### ***Grounds to Withhold Payments***

The statutes do not appear to specify grounds upon which payment may be withheld. Therefore, the parties' contract and common law will likely determine when such grounds are available.

### ***Interest***

A party failing to make payment is liable for interest at a rate equal to the prime rate plus 1%. *N.J. Stat. Ann.* § 2A:30A-2(c).

### ***Retainage***

No more than 2% may be withheld from any payment by a public body. *N.J. Stat. Ann.* § 40A:11-16.3.a. Within 45 days of the final acceptance date, all retained funds must be returned. *Id.* § 40A:11-16.3.b.

Retainage is subject to the same payment and interest requirements as other payments. *Id.* § 2A:30A-2.

### ***Attorney's Fees***

The prevailing party shall be awarded reasonable costs and attorney fees. *N.J. Stat. Ann.* § 2A:30A-2(f).

### ***Noteworthy***

New Jersey appears to have two Prompt Payment Acts. The statutes found at *N.J. Stat. Ann.* §§ 2A:30A-1 through 2A:30A-2 were adopted more recently, and apply to contracts entered after September 1, 2006. These statutes appear to have displaced the New Jersey Prompt Payment Act found at *N.J. Stat. Ann.* § 52:32-32 et seq. with respect to its applicability to construction projects. *See N.J. Stat. Ann.* § 2A:30A-2(e)(1) (stating that the provisions of this section supersede any other provision that provides narrower rights for prime contractors, subcontractors, and subsubcontractors).

## **Prime to Sub – Public**

### ***Who's Covered***

*See* New Jersey Owner to Prime - Public.

### ***Entitlement to Payment***

A subcontractor or subsubcontractor is entitled to payment if it has performed under its contract and its work has been accepted by the owner or the prime contractor. *N.J. Stat. Ann.* § 2A:30A-2(b).

### ***Payment Period***

The prime contractor or subcontractor has 10 days from the date of payment by the owner or contractor to make payment to subcontractors and suppliers, unless otherwise agreed in writing. *N.J. Stat. Ann.* § 2A:30A-2(b). This same rule applies to subcontractors

### ***Grounds to Withhold Payments***

The Prompt Payment Act does not describe the grounds for withholding payment; however, if the prime contractor does withhold payment, the prime contractor shall give written notice stating the reasons for and the amount of the withholding. *N.J. Stat. Ann.* § 2A:30A-2(d).

***Interest***

See New Jersey Owner to Prime - Public.

***Retainage***

See New Jersey Owner to Prime - Public.

***Attorney's Fees***

See New Jersey Owner to Prime - Public.

***Noteworthy***

See New Jersey Owner to Prime - Public.

**Owner to Prime – Private**

***Who's Covered***

See New Jersey Owner to Prime - Public.

***Entitlement to Payment***

See New Jersey Owner to Prime - Public.

***Payment Period***

See New Jersey Owner to Prime - Public.

***Grounds to Withhold Payments***

See New Jersey Owner to Prime - Public.

***Interest***

See New Jersey Owner to Prime - Public.

***Retainage***

See New Jersey Owner to Prime - Public.

***Attorney's Fees***

See New Jersey Owner to Prime - Public.

***Noteworthy***

See New Jersey Owner to Prime - Public.

**Prime to Sub – Private**

***Who's Covered***

See New Jersey Prime to Sub - Public.

***Entitlement to Payment***

See New Jersey Prime to Sub - Public.

***Payment Period***

See New Jersey Prime to Sub - Public.

***Grounds to Withhold Payments***

See New Jersey Prime to Sub - Public.

***Interest***

See New Jersey Prime to Sub - Public.

***Retainage***

See New Jersey Prime to Sub - Public.

***Attorney's Fees***

See New Jersey Prime to Sub - Public.

***Noteworthy***

See New Jersey Prime to Sub - Public.

# New Mexico

## Owner to Prime – Public

### *Who's Covered*

The New Mexico Prompt Payment Act provides protection for contractors and subcontractors of all tiers who are performing construction on a private or public project, not including projects for the department of transportation and residential construction projects with four or fewer dwelling units. Under the act, the following relevant terms are defined:

“Construction” means building, altering, repairing, installing or demolishing in the ordinary course of business any: (1) road, highway, bridge, parking area or related project; (2) building, stadium or other structure; (3) airport, subway or similar facility; (4) park, trail, athletic field, golf course or similar facility; (5) dam, reservoir, canal, ditch or similar facility; (6) sewage or water treatment facility, power generating plant, pump station, natural gas compression station or similar facility; (7) sewage, water, gas or other pipeline; (8) transmission line; (9) radio, television or other tower; (10) water, oil or other storage tank; (11) shaft, tunnel or other mining appurtenance; (12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditions; (13) air conditioning conduit, heating or other similar mechanical work; (14) leveling or clearing land; (15) excavating earth; (16) drilling wells of any type, including seismographic shot holes or core drilling; and (17) similar work, structures or installations.

“Contractor” means a person performing construction through a contract with an owner.

“Owner” means a person, local public body or state agency other than the department of transportation;

“Subcontractor” means a person performing construction for the owner not through a contract with the owner.

*N.M. Stat. § 57-28-2.*

### *Entitlement to Payment*

The statutes do not appear to specify when a contractor or subcontractor is entitled to payment for work performed, services provided, or materials furnished. Thus, the parties’ contract and case law will likely govern this issue.

### *Payment Period*

Generally, an owner must pay a contractor within 21 days of receiving an undisputed request for payment. *N.M. Stat. § 57-28-5(A)*. However, if a submitted invoice is improperly completed, then the owner must notify the sender within seven days, detailing how the invoice was in error. *Id.* There is no duty to pay on an improper invoice until it is resubmitted as complete. *Id.* However, the statute does not specify whether the payment period restarts on the date of the resubmission, whether the payment period is tolled until the new invoice is submitted, etc.

Exception: Where grant money is the source of funding, a local public body may make payment within 45 days after submission of an undisputed request for payment if the construction contract provides a clear and conspicuous manner for payment later than 21 days and a legend substantially similar to “This contract allows the owner to make payment within \_\_\_\_ days after submission of an undisputed request for payment.” *Id.* § 57-28-5(B).

Final Payment shall be made within 10 days after a certification of completion upon presentation of (1) a properly executed release and payment voucher, (2) a release, if required, of all claims and claims of lien against the owner except those specifically excepted by the contractor or subcontractor, and (3) proof of completion. *Id.* § 57-28-8.

### **Grounds to Withhold Payments**

Grounds to withhold payments are not specified under the New Mexico Prompt Pay Act. Thus, the parties’ contract and applicable common law will likely govern this issue.

### **Interest**

Interest will begin to accrue on the day after payment was due at the rate of 1.5% of the undisputed amount per month or fraction of a month until payment is issued. *N.M. Stat.* § 57-28-5(A).

### **Retainage**

New Mexico does not allow for retainage to be withheld. *N.M. Stat.* § 57-28-5(E). The statute states: “When making payments, an owner, contractor or subcontractor shall not retain, withhold, hold back or in any other manner not pay amounts owed for work performed.”

### **Attorney’s Fees**

In an action to enforce the provisions of the Prompt Payment Act the court may award court costs and reasonable attorney fees. *N.M. Stat.* § 57-28-11.

### **Noteworthy**

Creditors may not collect, enforce a security interest against, garnish or levy execution on progress payments or other payments by an owner, contractor or subcontractor to a person who has furnished labor or material pursuant to a construction contract. *N.M. Stat.* § 57-28-5(D). The prohibition also applies to payments to the owner’s, contractor’s or subcontractor’s surety. *Id.*

Materials and work which have been paid for become the property of the owner; however, prior to when the owner assumes occupancy or use of the work, contractors or subcontractors are not relieved of sole responsibility for care and protection of the materials and work. *Id.* 57-28-7.

## **Prime to Sub – Public**

### **Who’s Covered**

See New Mexico Owner to Prime - Public.

### **Entitlement to Payment**

See New Mexico Owner to Prime - Public.

***Payment Period***

Prime contractors and subcontractors shall make payment to subcontractors or suppliers within seven days after receipt of payment. These payment provisions apply to all tiers of contractors, subcontractors, and suppliers. *N.M. Stat. § 57-28-5(C)*.

***Grounds to Withhold Payments***

See New Mexico Owner to Prime - Public.

***Interest***

See New Mexico Owner to Prime - Public.

***Retainage***

See New Mexico Owner to Prime - Public.

***Attorney's Fees***

See New Mexico Owner to Prime - Public.

***Noteworthy***

See New Mexico Owner to Prime - Public.

**Owner to Prime – Private**

***Who's Covered***

See New Mexico Owner to Prime - Public.

***Entitlement to Payment***

See New Mexico Owner to Prime - Public.

***Payment Period***

See New Mexico Owner to Prime - Public.

***Grounds to Withhold Payments***

See New Mexico Owner to Prime - Public.

***Interest***

See New Mexico Owner to Prime - Public.

***Retainage***

See New Mexico Owner to Prime - Public.

***Attorney's Fees***

See New Mexico Owner to Prime - Public.

***Noteworthy***

See New Mexico Owner to Prime - Public.

## **Prime to Sub – Private**

### ***Who's Covered***

See New Mexico Prime to Sub - Public.

### ***Entitlement to Payment***

See New Mexico Prime to Sub - Public.

### ***Payment Period***

See New Mexico Prime to Sub - Public.

### ***Grounds to Withhold Payments***

See New Mexico Prime to Sub - Public.

### ***Interest***

See New Mexico Prime to Sub - Public.

### ***Retainage***

See New Mexico Prime to Sub - Public.

### ***Attorney's Fees***

See New Mexico Prime to Sub - Public.

### ***Noteworthy***

See New Mexico Prime to Sub - Public.

# New York

## Owner to Prime – Public

*Note: New York has passed numerous prompt payment acts that may be applicable to a construction project, including an act relating to payment by state agencies, contained in the N.Y. State Fin. Law, by municipal agencies, contained in the N.Y. General Municipal Law, and by public authorities, contained in the N.Y. Public Authorities Law. Additionally, the New York City Procurement Policy Board has passed prompt payment rules applicable for the city. New York City, N.Y. Rules, tit. 9, § 4-06. However, this Survey will not address the New York City rules.*

## Who's Covered

**State Agencies:** *N.Y. State Fin. Law §§ 179-e to 179-p* provide protection for contractors who have entered into an agreement with a state agency. However, the laws in this section do not apply in the situations identified in *N.Y. State Fin. Law § 179-p*.

Under the statute, the following relevant terms are defined:

"Contract" means an enforceable agreement entered into by a contractor and a state agency.

"Contractor" means any person, partnership, firm, corporation, or association that sells or leases materials, equipment, or supplies to a state agency; constructs, reconstructs, rehabilitates, or repairs buildings or highways for, or on behalf of, a state agency; or renders or provides services pursuant to a contract with a state agency.

"Receipt of an invoice" means (a) the date on which a proper invoice is actually received in the designated payment office, or (b) the date on which the state agency receives the purchased goods, property, or services covered by the proper invoice, whichever is later, or (c) in regard to final payments on highway construction contracts, the date determined in accordance with the provisions *N.Y. High. Law § 38(7)(g)*.

"Required payment date" means the date by which a contract payment must be made in order for the state government not to become liable for interest payments, pursuant to *N.Y. State Fin. Law § 179-f(2)*, or (5).

"State agency" means any department, board, bureau, commission, division, office, council, institution, or committee in the executive, legislative, or judicial branches of state government; the city university of New York when acting on behalf of any of its senior colleges; the facilities development corporation; or the state university construction fund.

*N.Y. State Fin. Law § 179-e.*

**Municipal Agencies:** *N.Y. Gen. Mun. Law §§ 100 & 106-b* provide protection for contractors who have entered into an agreement with a municipal agency.

Under *N.Y. Gen. Mun. Law* § 100, the term “political subdivision” is defined to mean a municipal corporation, school district, district corporation and board of cooperative educational services.

**Public Authorities:** *N.Y. Pub. Auth. Law* § 2880 provides protection for contractors who have entered into an agreement with a public authority.

Under the statute, the following relevant terms are defined:

“Corporation” means every public authority and public benefit corporation a majority of the governing board members of which are either appointed by the governor or serve as members by virtue of their service as an officer of a state department, division, agency, board or bureau, or combination thereof.

“Contract” means an enforceable agreement entered into between a corporation and a contractor.

“Contractor” means any person, partnership, private corporation or association: (i) selling materials, equipment, or supplies or leasing property or equipment to a corporation; (ii) constructing, reconstructing, rehabilitating or repairing buildings, highways or other improvements for or on behalf of a corporation; or (iii) rendering or providing services to a corporation pursuant to a contract.

“Prompt payment” means payment of a debt due and owing by a corporation before interest accrues thereon.

“Proper invoice” means a written request for a contract payment that is submitted by a contractor setting forth the description, price and quantity of goods, property, or services delivered or rendered, in such form and supported by such other substantiating documentation as the corporation may reasonably require.

“Receipt of an invoice” means (i) the date on which a proper invoice is actually received in the designated payment office, or (ii) the date on which the corporation receives the purchased goods, property, or services covered by the proper invoice, whichever is later.

“Set-off” means the reduction by the corporation of a payment due to a contractor by an amount equal to the amount of an unpaid legally enforceable debt owed by the contractor to the corporation.

“Statement” means the rules and regulations adopted by a corporation pursuant to subdivision two (2) of section two thousand eight hundred eighty (§ 2880) of the public authorities law.

*N.Y. Pub. Auth. Law* § 2880(1).

### ***Entitlement to Payment***

**State Agencies:** Entitlement to payment appears to be governed by the parties’ contract. *N.Y. State Fin. Law* § 179-f(1) (referring to a state agency that is required to make a payment under a

contract). However, a proper invoice is required to initiate payment, unless the contract provides that payment will be made at pre-determined intervals without the need for an invoice. *Id.* § 179-f(5).

**Municipal Agencies:** Periodically, the contractor, in accordance with the terms of the contract, must submit to the municipal agency requisitions for a progress payment for the work performed and/or materials furnished to the date of the requisition less any amount the municipal agency previously paid to the contractor. In accordance with the terms of the contract, the municipal agency shall approve and “promptly” pay the requisition for the progress payment less amounts necessary to satisfy any claims, liens or judgments against the contractor. *N.Y. Gen. Mun. Law § 106-b(1)(a).*

**Public Authorities:** A proper invoice submitted by the contractor shall be required to initiate any payment, except where the contract provides that the contractor will be paid at predetermined intervals without having to submit an invoice for each such scheduled payment. *N.Y. Pub. Auth. Law § 2880(10).*

#### **Payment Period**

**State Agencies:** Payments generally must be made 30 calendar days, excluding legal holidays, after receipt of an invoice for the amount of the contract payment due. *N.Y. State Fin. Law § 179-f(2).* However, in the case of a final payment or a highway construction project, payment must be made in 75 calendar days, excluding legal holidays. *Id.*

However, these payment dates will not apply where one of the grounds to withhold payment specified in *N.Y. State Fin. Law § 179-f(2)(a)-(h)* is specified. *See discussion infra* “Grounds to Withhold Payment.” Additionally, any time to investigate whether one of these grounds applies, or to rectify the situation if it does exist, will extend the required payment date equally. *N.Y. State Fin. Law § 179-f(2).*

The state agency to whom the invoice is submitted has 15 days to notify the contractor of any impropriety or defect that would prevent the commencement of the time period. *N.Y. State Fin. Law § 179-f(3).* Failure to give notice during this time will result in the number of days allowed for payment on the corrected invoice being reduced by the number of days that the agency’s notice was overdue. *Id.* However, if the state agency fails to provide reasonable grounds for the defect or impropriety, then the required payment date will be calculated from the date of the original invoice. *Id.*

**Municipal Agencies:** If the municipal agency is other than the city of New York, the term “promptly pay” means payment within thirty days, excluding legal holidays, of receipt of the requisition unless such requisition is not approvable in accordance with the terms of the contract. Furthermore, where the municipal agency is other than the city of New York and is a municipal corporation which requires an elected official to approve progress payments, “promptly pay” means payment within forty-five days, excluding legal holidays, of receipt of the requisition unless such requisition is not approvable in accordance with the terms of the contract. *N.Y. Gen. Mun. Law § 106-b(1)(a).*

**Public Authorities:** Generally, the corporation must make payment within thirty calendar days, excluding legal holidays, after receipt of an invoice for the amount of the contract payment due. *N.Y. Pub. Auth. Law § 2880(7)*.

The corporation has 15 calendar days after receipt of an invoice to notify the contractor of (a) defects in the delivered goods, property or services, (b) defects in the invoice, or (c) suspected improprieties of any kind; and the existence of such defects or improprieties shall prevent the commencement of the time period specified in *N.Y. Pub. Auth. Law § 2880(7)*. If the corporation fails to notify a contractor of such defects or suspected improprieties within 15 calendar days of receiving the invoice, the number of days allowed for payment of the corrected proper invoice will be reduced by the number of days between the fifteenth day and the day that notification was transmitted to the contractor. *N.Y. Pub. Auth. Law § 2880(8)*.

### *Grounds to Withhold Payments*

**State Agencies:** Under *N.Y. State Fin. Law § 179-f(2)(a)-(h)*, grounds to withhold payment include the following:

(1) in the course of an audit it is determined that there is reasonable cause to believe that payment may not properly be due, in whole or in part; (2) the statute or the contract requires an audit or inspection prior to payment to determine the resources applied or used by a contractor in fulfilling the terms of the contract; (3) the necessary state government appropriation required to authorize payment has yet to be enacted; (4) the cash balance of the fund or sub-fund from which the payment is to be made is insufficient to finance the payment; (5) a proper invoice must be examined by the federal government prior to payment; (6) the goods or property have not been delivered or the services have not been rendered by the contractor in compliance with the terms or conditions of the contract; (7) the required payment date is modified as a result of defects in (a) the goods, property, or services, (b) the invoice, or (c) any other suspected impropriety; or (8) in the case of final payments on highway construction contracts, it is determined that the contractor has failed to properly submit the necessary documents and other submissions required by contract, statute, or other law.

**Municipal Agencies:** The municipal agency may withhold an amount necessary to satisfy any claims, liens or judgments against the contractor that have not been suitably discharged. *N.Y. Gen. Mun. Law § 106-b(1)(a)*.

**Public Authorities:** The corporation may reduce its payment to the contractor by the amount of unpaid legally enforceable debt the contractor owes the corporation. *N.Y. Pub. Auth. Law § 2880(1)(h)*. Payment may also be withheld under the conditions set out in *N.Y. Pub. Auth. Law § 2880(8)*.

### *Interest*

**State Agencies:** If a state agency does not make a contract payment by the required payment date, then interest will be owed on the unpaid amount at the rate equal to the overpayment rate set by the commissioner of taxation and finance pursuant to *N.Y. Tax Law § 1096(e)*. *N.Y. State Fin. Law § 179-f(1) & 179-g*. Interest will begin on the day after the required payment date and paid at the rate of interest in effect on the date when the interest payment is made. *Id.* § 179-g.

However, interest will not be applied if payment is withheld as the result of a lien, attachment, or other legal process against the money due a contractor. *Id.* § 179-f(1). Additionally, interest will not be paid if the amount of interest computed to be owed is less than \$10.00. *Id.*

Any interest paid must be distributed on a pro rata basis to each subcontractor or materialman in proportion to their share of the contract payment. *Id.* The interest owed to such a subcontractor or materialman will be computed daily. *Id.*

*See also id.* § 179-o (relating to the agency's liability for interest payment when a notice or claim or the commencement of a lawsuit).

**Municipal Agencies:** A municipal agency, other than the city of New York, which is required to make a payment from public funds pursuant to a contract and which does not make such contract payment by the required payment date, must make an interest payment to the contractor on the amount of the contract payment that is due. An interest payment is not required if the failure to make the contract payment is the result of a lien, attachment, or other legal process or if the interest payment is less than \$10.00.

The interest shall be paid at the rate of interest in effect on the date when the interest payment is made, and the interest rate, notwithstanding any other provision of law to the contrary, shall be computed at the rate equal to the overpayment rate set by the commissioner of taxation and finance pursuant to *N.Y. Tax Law* § 1096(e). *Gen. Mun. Law* § 106-b(1)(b). *See also N.Y. Gen. Mun. Law* § 106-b(1)(c) (regarding interest payments when state funds are involved).

**Public Authorities:** If the corporation fails to make payment within the payment period, interest will be computed at the rate equal to the overpayment rate set by the commissioner of taxation and finance pursuant to *N.Y. Tax Law* § 1096(e). The corporation does not have to pay interest if it is less than \$10.00. *N.Y. Pub. Auth. Law* § 2880(7)(c) & (d).

### **Retainage**

**State Agencies:** The state *shall* retain 5% of each progress payment, *N.Y. State Fin. Law* § 139(1). However, the state may not retain any more than 5% when payment and performance bonds are provided, other than in the case of highway work. *Id.* §139-f; *N.Y. High. Law* § 38 (allowing for 20% retainage on highway contracts). If performance and payment bonds are not provided, 5% to 10%, inclusive, may be withheld from each payment. *N.Y. State Fin. Law* § 139-f.

*See also id.* § 139-f for discussion on when retainage may be withdrawn and what amounts may be withheld after substantial completion.

**Municipal Agencies:** A municipal agency may not retain more than 5% of each progress payment; however, if the municipal agency does not require the contractor to have performance and payment bonds in the full amount of the contract, then a municipal agency may retain in excess of 5%, but not more than 10% of each progress payment. *N.Y. Gen. Mun. Law* § 106-b(1)(a).

**Public Authorities:** There does not appear to be a statutory provision applicable to retainage under this section of the statutes.

#### *Attorney's Fees*

**State Agencies:** There does not appear to be a provision for attorney's fees in the New York state agency prompt pay statutes.

**Municipal Agencies:** There does not appear to be a provision for attorney's fees in the New York municipal agency prompt pay statutes.

**Public Authorities:** There does not appear to be a provision for attorney's fees in the New York public authorities prompt pay statutes.

#### *Noteworthy*

##### **State Agencies:**

A contractor's acceptance of payment, in whole or in part, will not be deemed as a waiver of interest otherwise due. *N.Y. State Fin. Law* § 179-k.

Any contract provision requiring payment of interest in a manner other than as established by the prompt payment act and any provision purporting to waive the right to interest is void as against public policy. *Id.* § 179-l.

**Public Authorities:** Each corporation must promulgate rules and regulations detailing its prompt payment policy. *N.Y. Pub. Auth. Law* § 2880(2). For details on what the statement shall include see *N.Y. Pub. Auth. Law* § 2880(3).

A statement in effect at the time of a contract is incorporated into and made part of that contract. *N.Y. Pub. Auth. Law* § 2880(6).

A contractor doing business with a corporation shall be given a copy of that corporation's statement. *N.Y. Pub. Auth. Law* § 2880(12)(b).

## **Prime to Sub – Public**

#### *Who's Covered*

**State Agencies:** *N.Y. State Fin. Law* § 139-f(2) provides protection for the subcontractors and materialmen of a prime contractor. Additionally, those subcontractors and materialmen must also pay their subcontractors and materialmen in accordance with the statute. *N.Y. State Fin. Law* § 139-f(2).

**Municipal Agencies:** All subcontractors and materialmen are covered under the statute. *N.Y. Gen. Mun. Law* § 106-b(2).

**Public Authorities:** *N.Y. Pub. Auth. Law* § 2880 does not appear to provide provisions to protect subcontractors and/or materialmen.

### *Entitlement to Payment*

**State Agencies:** The subcontractor or materialman is entitled to his pro rata share of any payment in proportion to the value of the work performed or the materials provided by him. *N.Y. State Fin. Law § 139-f(2)*. These amounts must have been approved by the owner. *Id.*

**Municipal Agencies:** Subcontractors/materialmen are entitled to the proceeds from the municipal agency's payment representing the value of the work performed and/or materials furnished by the subcontractor/materialmen and reflecting the percentage of the subcontractor's work completed or the materialmen's materials supplied in the requisition approved by the municipal agency. *N.Y. Gen. Mun. Law § 106-b(2)*.

### **Public Authorities:**

### *Payment Period*

**State Agencies:** The subcontractor/materialman must be paid within seven days of when the contractor or higher-tiered subcontractor/materialman received payment. *N.Y. State Fin. Law § 139-f(2)*.

**Municipal Agencies:** Within seven calendar days of the receipt of any payment from the municipal agency, the contractor must pay its subcontractors/materialmen their portion of the proceeds. *N.Y. Gen. Mun. Law § 106-b(2)*.

### **Public Authorities:**

### *Grounds to Withhold Payments*

**State Agencies:** Amounts necessary to satisfy any claims, liens, or judgments against the subcontractor or materialman which have not been suitably discharged as well as retainage may be withheld. *N.Y. State Fin. Law § 139-f(2)*.

**Municipal Agencies:** The contractor may withhold an amount necessary to satisfy any claims, liens or judgments against the subcontractor/materialmen which have not been suitably discharged. *N.Y. Gen. Mun. Law § 106-b(2)*.

### **Public Authorities:**

### *Interest*

**State Agencies:** Interest will begin to accrue on unpaid amounts on the eighth day after the contractor or higher-tiered subcontractor received payment. *N.Y. State Fin. Law § 139-f(2)*. Interest shall be paid at the rate of interest in effect on the date payment is made by the contractor at the rate established in *N.Y. Gen. Bus. Law § 756-b(1)(b)*, notwithstanding any other provision of law to the contrary. *Id.*

**Municipal Agencies:** If the contractor does not pay the subcontractor/materialmen within seven calendar days of the receipt of payment from the municipal agency, the contractor will be responsible for paying interest on the payment owed to the subcontractor/materialmen. The

interest must be paid at the rate of interest in effect the date payment is made by the contractor. The interest rate, notwithstanding any other provision of law to the contrary, shall be computed at the rate established in *N.Y. Gen. Bus. Law* § 756-b(1)(b). *N.Y. Gen. Mun. Law* § 106-b(2).

In addition to the Owner-to-Prime material above, it is important to note that a pro rata share of the interest that the municipal agency owes the contractor shall be paid by the contractor, once the contractor receives such interest payment, to the contractor's subcontractors/materialmen in a proportion equal to the percentage of the subcontractor/materialmen's pro rata share of the past-due contract payment. *N.Y. Gen. Mun. Law* § 106-b(1)(b).

**Public Authorities:** No Provision.

#### *Retainage*

**State Agencies:** A contractor must pay any subcontractor or materialman within seven calendar days or receiving a retainage payment from the owner, and failure to do so will result in interest being charged to the contractor at the rate specified in *N.Y. Gen. Bus. Law* § 756-b(1). *N.Y. State Fin. Law* § 139-f(2).

A contractor may not retain more than 5% of each payment from a subcontractor and/or materialman if the subcontractor has provided performance and payment bonds. *Id.* If the subcontractor is unwilling or unable to provide such bonds in the full amount of the subcontract, then up to 10% may be withheld. *Id.*

**Municipal Agencies:** *See* New York Owner to Prime - Public.

**Public Authorities:** No Provision.

#### *Attorney's Fees*

**State Agencies:** There does not appear to be a provision for attorney's fees in the New York state agency prompt pay statutes.

**Municipal Agencies:** There does not appear to be a provision for attorney's fees in the New York state agency prompt pay statutes.

**Public Authorities:**

#### *Noteworthy*

**Municipal Agencies:** If a contractor fails to submit a requisition for payment of the remaining amount of the contract balance within ninety (90) days of substantial completion, then any "paid-if-paid" clause in the subcontract is considered invalid. *N.Y. Gen. Mun. Law* § 106-b(2).

Within seven days of the receipt of payment from the contractor, the subcontractors/materialmen shall pay each of their subcontractors/materialmen in the same

manner and under the same conditions as discussed in this Prime-to-Sub section. *N.Y. Gen. Mun. Law* § 106-b(2).

## Owner to Prime – Private

### *Who's Covered*

The New York private prompt pay statutes were passed in 2002, and they apply to construction contracts valued at or more than \$250,000. Under the statutes, the following terms are defined, among many others:

"Construction contract" means a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars. The definition of construction contract within the private prompt pay statutes expressly excludes public contracts with governmental entities and any subcontract that is a part of such a project. Additionally, the term excludes contracts relating to certain types of residential developments

"Contractor" means any person, firm, partnership, corporation, association, company, organization or other entity, including a construction manager, or any combination thereof, which enters into a construction contract with an owner.

"Owner" means any person, firm, partnership, corporation, company, association or other organization or other entity, or a combination of any thereof, (with an ownership interest, whether the interest or estate is in fee, as vendee under a contract to purchase, as lessee or another interest or estate less than fee) that causes a building, structure or improvement, new or existing, to be constructed, altered, repaired, maintained, moved or demolished or that causes land to be excavated or otherwise developed or improved.

"Subcontractor" means any person, firm, partnership, corporation, company, association, organization or other entity, or any combination thereof, which is a party to a contract with a contractor or another subcontractor to perform a portion of work pursuant to a construction contract.

"Material supplier" means any person, firm, partnership, corporation, company, association, or other organization or entity, or any combination thereof, which is party to a contract with an owner, contractor or subcontractor, for the provision of construction materials and/or equipment necessary to the completion of a construction contract.

*N.Y. Gen. Bus. Law* § 756.

### *Entitlement to Payment*

The owner's payment of a contractor's invoice is based on a duly approved invoice for work performed and material supplied during the billing cycle. *N.Y. Gen. Bus. Law* § 756-a(3)(a).

Unless the prompt payment act otherwise provides, payment is to be made in strict accordance with the terms of the parties' contract. *Id.*

### **Payment Period**

In the absence of a different agreement, the billing cycle shall be the calendar month within which the work was performed for the submission of invoices. *N.Y. Gen. Bus. Law § 756-a(1).*

Contractors are entitled to submit invoices for "interim payments" at the end of each billing cycle and a final invoice upon performance of all of the contractor's obligations under the contract. *Id.* § 756-a(2)(a).

Upon delivery of the invoice and any other contractually required documentation, the owner must approve or disapprove of the invoice, in whole or in part, within 12 days. *Id.* § 756-a(2)(a)(i). If an invoice is declined, the owner must identify its reasons for withholding payment. *Id.* See discussion "Grounds to Withhold Payments," *infra*.

Unless otherwise agreed by the parties, payment of an interim or final invoice is due no later than 30 days after the invoice's approval. *N.Y. Gen. Bus. Law § 756-a(3)(a).*

### **Grounds to Withhold Payments**

Under *N.Y. Gen. Bus. Law § 756-a(2)(a)(i)* an owner may decline to approve an invoice for the following: (1) Unsatisfactory or disputed job progress; (2) Defective construction work or material not remedied; (3) Disputed work materials; (4) Failure to comply with other material provisions of the construction contract; (5) Failure of the contractor to make timely payments for labor including collectively bargained fringe benefit contributions, payroll taxes and insurance, equipment and materials, damage to the owner, or reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or (6) Failure of the owner's architect to certify payment for any or all of the reasons set forth in this section so long as the reasons are included in the owner's written statement of disapproval.

Only an amount sufficient to pay the costs and expenses an owner reasonably expects to incur to cure the defect or correct any of the items set forth above may be withheld. *N.Y. Gen. Bus. Law § 756-a(3)(a)(iv)* The schedule of values and agreed to liquidated damages may determine the amount withheld. *Id.*

### **Interest**

If an interim or final payment is late, the owner shall pay the contractor interest beginning on the next day at the rate of 1% per month on the unpaid balance, or at a higher rate consistent with the construction contract. *N.Y. Bus. Law § 756-b(1)(a)*

### **Retainage**

By mutual agreement of the "relevant parties" an owner may withhold a "reasonable" amount of the contract sum as retainage. *N.Y. Bus. Law § 756-c.* Any retainage withheld must be released within 30 days of when the contract work is finally approved. *Id.* Failure to timely release retainage will subject the payment to interest at the rate of 1% per month on the date that the retention was due and owing. *Id.*

### **Attorney's Fees**

The prompt pay act does not appear to have a provision for the payment of attorney's fees.

### ***Noteworthy***

A contractor may suspend performance after providing the owner written notice and an opportunity to cure upon non-payment of an undisputed amount. *N.Y. Gen. Bus. Law* § 756-b(2)(a).

A subcontractor may suspend performance after providing written notice and an opportunity to cure upon non-payment of an undisputed amount. *N.Y. Gen. Bus. Law* § 756-b(2)(b).

*N.Y. Gen. Bus. Law* § 757 prohibits certain contract provisions, including:

1. A choice of law or choice of venue provision in favor of a State other than New York.
2. A provision prohibiting suspension of performance upon failure to make prompt payment.

There are two additional exceptions to the prompt pay act. *See N.Y. Gen. Bus. Law* §§ 756-d (relating to exceptions for failure of lender to disburse funds) & 756-e (relating to exceptions for lower Manhattan reconstruction in connection with the September 11th attacks).

## **Prime to Sub – Private**

### ***Who's Covered***

*See* New York Owner to Prime - Private.

### ***Entitlement to Payment***

The contractor's or subcontractor's payment of a subcontractor's or material supplier's invoice is based on a duly approved invoice for work performed and material supplied during the billing cycle. *N.Y. Gen. Bus. Law* § 756-a(3)(b). Unless the prompt payment act otherwise provides, payment is to be made in strict accordance with the terms of the parties' contract. *Id.* Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with which it contracts. *Id.*

### ***Payment Period***

Upon delivery of an invoice and all contractually required documentation, a contractor or subcontractor shall approve or disapprove all or a portion of such invoice within twelve business days. Under *N.Y. Gen. Bus. Law* § 756-a(2)(a)(ii). Contractor and subcontractor approval of invoices shall not be unreasonably withheld nor shall a contractor or subcontractor, in bad faith, disapprove all or a portion of an invoice. *Id.*

When a subcontractor has performed in accordance with the provisions of its construction contract, the contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportionate amount of funds received from the owner for each subcontractor's work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment, provided all contractually required documentation and waivers are received. *Id.* § 756-a(3)(b)(ii).

### ***Grounds to Withhold Payments***

Under *N.Y. Gen. Bus. Law* § 756-a(2)(a)(ii), the contractor or subcontractor, at the time of application to the owner or contractor, from withholding such application to the owner or contractor for payment to the subcontractor or material supplier for the following: (1) Unsatisfactory or disputed job progress; (2) Defective construction work or material not remedied; (3) Disputed work;

(4) Failure to comply with other material provisions of the construction contract; or (5) Failure of the subcontractor to make timely payments for labor including collectively bargained fringe benefit contributions; payroll taxes and insurance, equipment and materials, damage to contractor or another subcontractor or material supplier, or reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

Only an amount sufficient to pay the costs and expenses a contractor or subcontractor reasonably expects to incur to cure the defect or correct any of the items set forth above may be withheld. *N.Y. Gen. Bus. Law § 756-a(3)(b)(iii)* The schedule of values and agreed to liquidated damages may determine the amount withheld. *Id.*

#### ***Interest***

If an interim or final payment is late, the contractor or subcontractor shall pay the subcontractor interest beginning on the next day at the rate of 1% per month on the unpaid balance, or at a higher rate consistent with the construction contract. *N.Y. Bus. Law § 756-b(1)(b)*

#### ***Retainage***

A contractor or subcontractor may retain a “reasonable” amount of the contract sum not to exceed the percentage retained by the owner. *N.Y. Bus. Law § 756-c*. Any retainage withheld must be released within 30 days of when the contract work is finally approved. *Id.* Failure to timely release retainage will subject the payment to interest at the rate of 1% per month on the date that the retention was due and owing. *Id.*

#### ***Attorney’s Fees***

*See New York Owner to Prime - Private.*

#### ***Noteworthy***

*See New York Owner to Prime - Private.*

# North Carolina

## Owner to Prime – Public

### *Who's Covered*

The North Carolina prompt pay statutes apply to protect contractors on all public construction contracts that are let by a board or governing body of the State government or any political subdivision, except for contracts let by the Department of Transportation under *N.C. Gen. Stat.* § 136-28.1. *N.C. Gen. Stat.* § 143-134.1(a).

### *Entitlement to Payment*

The statutes do not appear to specify when a contractor or subcontractor is entitled to payment for work performed, services provided, or materials furnished. Thus, the parties' contract and case law will likely govern this issue.

### *Payment Period*

Progress Payments are to be paid in accordance with the statute and with the payment provisions of the contract that do not conflict with the statute. *N.C. Gen. Stat.* § 143-134.1(a). However, the statute does not appear to require that periodic payments be made absent a contractual provision for such payments.

Final Payment is to be made within 45 days after the prime contract has been accepted by the owner, certified by the architect, engineer or designer to be completed in accordance with terms of the plans and specifications, or occupied by the owner and used for the purpose for which the project was constructed, whichever occurs first. *Id.* However, if delay completing the project was caused by the contractor, as determined by the architect or consulting engineer, then the project may be occupied and used for the purposes for which it was constructed without payment of interest on any amount withheld past the 45 day limit. *Id.*

### *Grounds to Withhold Payments*

The owner may withhold additional sums from payments otherwise owed to the contractor for unsatisfactory job progress, defective construction not remedied, disputed work, third-party claims against the owner or reasonable evidence that such claims will be filed. *N.C. Gen. Stat.* § 143-134.1(e)

### *Interest*

Final payments made more than 45 days after due will be subject to interest at 1.0% per month (unless a lower rate is agreed upon), beginning on the 46th day. *N.C. Gen. Stat.* § 143-134.1(a) Progress payments will accrue interest at 1% per month, beginning on the date the payment is due and continuing until the date on which payment is made. *Id.* The due date may be established by the terms of the contract. *Id.*

### *Retainage*

No retainage may be held by either an owner or prime contractor where the total project costs are less than \$100,000. *N.C. Gen. Stat.* § 143-134.1(b1).

For projects valued at greater than or equal to \$100,000, retainage may be withheld, but it may not exceed 5% at any time. *Id.* § 143-134.1(b1)(1). *Id.* § 143-134.1(b1)(1). When the project is 50% complete, as determined by statutory formula, upon the written consent of the surety, the owner (or contractor) will not withhold any further retainage if the contractor (or subcontractor) continues to perform its work satisfactorily and if any nonconforming work prior to that time—which was previously identified in writing by the owner, the architect, or the engineer—has been corrected and accepted by the owner, architect, or engineer. *Id.* § 143-134.1(b1)(2), (3). If the contractor (or subcontractor) does not continue to perform satisfactorily, the owner and/or contractor may reinstate retainage up to a maximum of 5%. *Id.*

Moreover, under *N.C. Gen. Stat.* § 143-134.1(b3), the owner is authorized to withhold additional retainage—even after the 50% point is reached—if needed to retain 2.5% total retainage on the completion of the project. However, at no point may the owner withhold more than 5%. *Id.* § 143-134.1(b3). If the owner does this, a contractor may also withhold additional amounts from subcontractors in an amount sufficient to offset the additional retainage held by the owner.

All retainage on payments must be released by the owner to the contractor when any of the following occurs, as specified within the contract documents, within 60 days of the submission of a pay request: (i) the owner receives a certificate of substantial completion from the architect, engineer, or designer in charge of the project; or (ii) the owner receives beneficial occupancy or use of the project. *Id.* § 143-134.1(b1)(4). However, the owner may retain funds sufficient to secure completion of the project and needed corrections to the work. *Id.* However, this amount may not exceed 250% of that combined amount. *Id.*

Reducing the amount of retainage withheld on payments requires the consent of the contractor's surety. *Id.*

#### ***Attorney's Fees***

There is no provision for attorney's fees under the public prompt pay statute.

#### ***Noteworthy***

No-damage-for-delay clauses will not be enforced in a construction contract. *N.C. Gen. Stat.* § 143-134.3.

## **Prime to Sub – Public**

#### ***Who's Covered***

*See* North Carolina Owner to Prime - Public.

#### ***Entitlement to Payment***

*See* North Carolina Owner to Prime - Public.

#### ***Payment Period***

Payment to a subcontractor is to be made within seven days of receipt by the prime contractor of each progress or final payment. *N.C. Gen. Stat.* § 143-134.1(b)

### ***Grounds to Withhold Payments***

The contractor may exclude a subcontractor's work from the contractor's pay applications to the owner as a result of the subcontractor's unsatisfactory job progress, defective construction not remedied, disputed work, third-party claims against the owner or reasonable evidence that such claims will be filed, failure to pay lower-tier subcontractors and suppliers, damage to the contractor or other subcontractors, reasonable evidence that the subcontract cannot be completed for the unpaid balance of the contract sum, or a reasonable amount of retainage not to exceed the initial percentage retained by the owner. *N.C. Gen. Stat. § 143-134.1(d)*.

### ***Interest***

If any progress or final payment to the subcontractor is delayed by more than seven days after receipt of progress or final payment by the prime contractor, the prime contractor shall pay the subcontractor interest, beginning on the eighth day, at the rate of 1% per month on the unpaid balance. *N.C. Gen. Stat. § 143-134.1(b)*. See North Carolina Prime to Sub - Public ("Retainage") for discussion of interest charged on wrongfully withheld retainage.

### ***Retainage***

See North Carolina Owner to Prime - Public.

Additionally, the percentage of payments withheld on a subcontract may not exceed the percentage retained by the owner from the prime contractor. *N.C. Gen. Stat. § 143-134.1(b1)(3)*. Any percentage of retainage on payments made by the prime contractor to the subcontractor that exceeds the percentage of retainage on payments made by the owner to the prime contractor shall be subject to interest to be paid by the prime contractor to the subcontractor at the rate of 1% per month or fraction thereof. *Id.*

Full payment, less 0.5% and other authorized deductions, must be made to subcontractors who have completed 100% of their contract prior to when the contract is 50% complete if the architect or engineer approves or certifies to the owner that the subcontractor's work is acceptable and in accordance with contract documents. *Id. § 143-134.1(b2)*. Payments for "early finishing trades" must be made within 60 days of the subcontractor's request for such payment, or immediately upon the surety's consent, whichever occurs later. *Id.*

### ***Attorney's Fees***

There is no provision for attorney's fees under the public prompt pay statute.

### ***Noteworthy***

See North Carolina Owner to Prime - Public.

## **Owner to Prime - Private**

North Carolina does not appear to have a prompt pay statute applicable to prime contractors on a private construction contract.

## Prime to Sub – Private

### *Who's Covered*

Chapter 22C of the *North Carolina General Statutes* provides protections for subcontractors on a contract to improve real property. *N.C. Gen. Stat.* §§ 22C-1 & 22C-2. Under the statute, relevant definitions include the following:

“Contractor” means a person who contracts with an owner to improve real property.

“Improve” means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapters 83A, 89C or 89A of the General Statutes.

“Improvement” means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

An “owner” is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. “Owner” includes successors in interest of the owner and agents of the owner acting within their authority.

“Real property” means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

“Subcontractor” means any person who has contracted to furnish labor or materials to, or has performed labor for, a contractor or another subcontractor in connection with a contract to improve real property.

*Id.* § 22C-1.

### *Entitlement to Payment*

A subcontractor is entitled to payment when it has performed in accordance with the provisions of its contract. *N.C. Gen. Stat.* § 22C-2. Payment by the owner to the contractor is not a condition precedent for payment to a subcontractor, and payment by a contractor to a subcontractor is not a condition precedent for payment to any other subcontractor. *Id.* Any agreement to the contrary will be unenforceable. *Id.*

### *Payment Period*

Payment to subcontractor is to be made within seven days of receipt by the prime contractor or higher-tiered subcontractor of each progress or final payment. *N.C. Gen. Stat.* § 22C-3.

### *Grounds to Withhold Payments*

The contractor may exclude a subcontractor’s work from the contractor’s pay applications to the owner as a result of the subcontractor’s unsatisfactory job progress, defective construction not remedied, disputed work, third-party claims against the owner or reasonable evidence that such claims will be filed, failure to pay lower tier subcontractors and suppliers, damage to the contractor or other subcontractors, reasonable evidence that the subcontract cannot be completed for the

unpaid balance of the contract sum, or a reasonable amount of retainage not to exceed the initial percentage retained by the owner. *N.C. Gen. Stat. § 22C-4.*

***Interest***

If any progress or final payment to the subcontractor is delayed by more than seven days after receipt of progress or final payment by the prime contractor or higher-tiered subcontractor, interest will be paid, beginning on the eighth day, at the rate of 1% per month (or a fraction thereof) on the unpaid balance. *N.C. Gen. Stat. § 22C-5.*

***Retainage***

A reasonable amount of retainage not to exceed the initial percentage retained by an owner from the contractor may be withheld. *N.C. Gen. Stat. § 22C-4.*

***Attorney's Fees***

There is no provision for attorney's fees under this prompt pay statute.

***Noteworthy***

Chapter 22C does not apply to residential contractors or to certain improvements to real property intended for residential purposes. *N.C. Gen. Stat. § 22C-6.*

# North Dakota

## Owner to Prime – Public

### *Who's Covered*

North Dakota appears to have two applicable sets of prompt payment statutes. The first is contained in Chapter 13-01.1 (“Interest on Delinquent Accounts”), and the second is contained in Chapter 48-01.2 (“Public Improvement Bids and Contracts”).

**Chapter 13-01.1:** This chapter provides protection for contractors who contract with a state agency, political subdivision, or school district within the State.

**Chapter 48-01.2:** This chapter provides protection for contractors and subcontractors who provide work or render a service on a public improvement contract. Under the statute, relevant definitions include, among many others:

“Construction” means the process of building, altering, repairing, improving, or demolishing any public structure or building or other improvement to any public property. The term does not include the routine operation or maintenance of existing facilities, structures, buildings, or real property or demolition projects costing less than \$100,000.

“Contract” means a type of agency agreement for the procurement of services under this chapter.

“Contractor” means any person, duly licensed, that undertakes or enters a contract with a governing body for the construction or construction management of any public improvement, including multiple prime contracts.

“Public improvement” means any improvement undertaken by a governing body for the good of the public and which is paid for with public funds and constructed on public land or within a public building and includes an improvement on public or nonpublic land if any portion of the construction phase of the project is paid for with public funds. The term does not include a county road construction and maintenance, state highway, or public service commission project governed by title 11, 24, or 38 of the *North Dakota Century Code*.

*N.D. Cent. Code* § 48-01.2-01.

### *Entitlement to Payment*

**Chapter 13-01.1:** Contractors are entitled to payment for each completely delivered item of property or service. *N.D. Cent. Code* § 13-01.1-01. However, what constitutes “complete” delivery will likely be determined by the parties’ contract or the common law.

**Chapter 48-01.2:** Contractors are entitled to the estimated value of the labor and materials furnished plus materials adequately stored. *Id.* § 48-01.2-13.

### *Payment Period*

**Chapter 13-01.1:** If no payment period is specified in the contract, payment must be made within 45 days after receipt of the invoice covering the delivered items or services. *N.D. Cent. Code* § 13-01.1-01.

**Chapter 48-01.2:** The governing body must receive and consider partial payment estimates prepared by the architect or engineer at least once a calendar month. *N.D. Cent. Code* § 48-01.2-13. If an architect or engineer is not employed by the governing body for administration of the contract, the contractor, at the end of each calendar month during the continuance of work, may furnish a payment estimate to the governing body. *Id.* Upon review and approval, this amount must be “promptly transmitted” to the contractor. *Id.* Though, to avoid interest penalties, payment must be made within 30 days from the date of approval of the estimate. *Id.* § 48-01.2-14.

### *Grounds to Withhold Payments*

Other than retainage, the statutes do not appear to specify when payment may be withheld. Thus, applicable grounds will likely be determined by the parties’ contract or the common law.

### *Interest*

**Chapter 13-01.1:** Unless a different rate is specified in the contract, overdue payments will accrue interest at the rate of 1.75% per month. *N.D. Cent. Code* § 13-01.1-02. If a payment due date is specified in the contract, interest on a late payment will begin to accrue the day after the due date. *Id.* If no payment due date is specified in the contract, and payment is not made within 45 days of receipt of the invoice, interest begins to accrue beginning the day the invoice is received. *Id.*

Any interest which remains unpaid at the end of any 45-day period or which remains unpaid at the end of any specified period provided in the contract must be added to the principal amount of the debt and must thereafter accumulate interest. *Id.* § 13-01.1-03.

If an agency or business fails to pay interest as the result of a dispute between the agency and the business, or a dispute between a business and a subcontractor or supplier, over the amount due or over compliance with the contract, Chapter 13-01.1 does not apply. *Id.* § 13-01.1-05. If the settlement of a dispute is found in favor of the business, or the subcontractor or supplier, interest must be paid as provided in section 13-01.1-03. *Id.*

**Chapter 48-01.2:** If a progress or final payment is held for a period of more than 30 days from the date of approving the estimate or the completion and acceptance date, interest will be paid from the date of approval at the rate of 2% per annum below the Bank of North Dakota’s prime interest rate. *Id.* § 48-01.2-14.

### *Retainage*

**Chapter 13-01.1:** No provision.

**Chapter 48-01.2:** A partial payment estimate must include retainage of 10% from each estimate until the project is 50% complete. *N.D. Cent. Code* § 48-01.2-13. At that point, no further retainage may be withheld unless unsatisfactory progress or performance is documented. *Id.* Upon completion of 95% of the contract, the governing body may pay to the contractor up to 95% of the amount retained from previous estimates. *Id.*

### *Attorney’s Fees*

There does not appear to be a provision for attorney’s fees under the prompt pay statutes.

## Prime to Sub – Public

### *Who's Covered*

Chapter 48-01.2 does not appear to have a prompt pay statute applicable to subcontractors on a public contract. However, Chapter 13-01.1 provides protection for subcontractors and suppliers having a contract with a general contractor.

### *Entitlement to Payment*

With regard to subcontractors, the statute only states that subcontractors are to be paid following payment to a contractor or higher-tiered subcontractor. *N.D. Cent. Code* § 13-01.1-06. Thus, the parties contract and common law will likely govern when a subcontractor is entitled to payment.

### *Payment Period*

Payment is due within 45 days after payment from the state agency, political subdivision, school district, or United States agency. *N.D. Cent. Code* § 13-01.1-06.

### *Grounds to Withhold Payments*

See North Dakota Owner to Prime - Public.

### *Interest*

Interest at the rate of 1.75% accrues and is due any subcontractor or supplier who is not paid within 45 days after the business receives payment from the owner unless otherwise provided by contract. *N.D. Cent. Code* § 13-01.1-06 & § 13-01.1-02.

### *Retainage*

The statutes do not appear to have an applicable provision with regard to the amount that may be withheld as retainage from subcontractors on a public project.

### *Attorney's Fees*

There does not appear to be a provision for attorney's fees under the prompt pay statutes.

### *Noteworthy*

## Owner to Prime – Private

North Dakota does not appear to have an applicable prompt pay act for prime contractors on a private project.

### *Retainage*

Under *N.D. Cent. Code* § 43-07-23, retainage may be withheld up to a maximum of 10% of each estimate until the project is 50% complete, at which point no further retainage is allowed during the continuance of the project. Interest earned on any funds retained by the owner is payable to the contractor at the time of final payment. *Id.*

However, this section does not apply to contracts subject to *N.D. Cent. Code* §§ 40-22-37 or 48-01.2-13, or contracts governed by federal statutes or regulations which require other provisions with respect to retention. *Id.*

### **Prime to Sub – Private**

North Dakota does not appear to have an applicable prompt pay act for subcontractors on a private project.

# Ohio

## Owner to Prime – Public

### *Who's Covered*

Ohio provides protection for contractors contracting for the construction of projects, improvements, and public buildings for the state, state agencies, counties, townships, municipal corporations, school districts, and other political subdivisions, as well as public boards, commissions, authorities, instrumentalities, or special purpose districts of the state or of a political subdivision. *Ohio Rev. Code Ann.* §§ 153.12(A), 153.14 & 123.01.

*See also Ohio Rev. Code Ann.* § 126.30 (creating a general prompt payment act for the payment of goods and services provided to a state agency).

### *Entitlement to Payment*

The parties' contract will determine when a contractor is entitled to payment. *Ohio Rev. Code Ann.* § 153.13. The contractor must also provide a full, accurate, and detailed estimate of the various kinds of labor performed and materials furnished since the prior estimate for the owner to approve. *Id.*

### *Payment Period*

Under *Ohio Rev. Code Ann.* §153.13, payment is to be made in accordance with the parties' contract terms. However, *Ohio Rev. Code Ann.* §§ 153.12(A) and 153.14 offer additional guidance as to what those contract terms should (or can) be.

Under § 153.12(A), partial payments on lump sum contracts are to be made based on a schedule prepared by the contractor and approved by the architect or engineer who will apportion the lump sum price against the major components underlying the work. With regard to unit price work, § 153.12 indicates that partial payments may be made, but the statute does not specifically identify how often payment should occur or who determines the payment schedule. Thus, unit price contracts will likely be governed by § 153.14.

Section 153.14 specifies that when the rate of work and amounts are large, and either the contractor *or* owner consider it advisable, estimates and payments shall be made twice each month. Section 153.14 also provides that payment on approved estimates filed with the owner or its representative shall be made within 30 days.

### *Grounds to Withhold Payments*

Other than retainage, the Ohio prompt payment statutes do not appear to specify grounds upon which payment may be withheld. Thus, such grounds will likely be determined by the parties' contract and common law.

### *Interest*

If an owner fails to make a payment within 30 days or withholds retainage without authorization, the contractor is entitled to interest on the unpaid amount, in addition to any other remedy available under the law. *Ohio Rev. Code Ann.* § 153.14. The interest rate will be the average of the prime

rate established at the commercial banks in the city of over one hundred thousand population that is nearest the construction project. *Id.*

### **Retainage**

Generally, an owner may withhold retainage in an amount equal to 8% of each progress payment until the job is 50% complete. *Ohio Rev. Code Ann.* §§ 153.12 to 153.14. After the 50% point, no further funds may be retained.

Retainage must be distributed when the “there exists no other reason to withhold retainage” and a “major portion of the project” is (1) substantially complete and (2) occupied, in use or otherwise accepted. *Id.* § 153.13. An amount necessary to assure completion may be retained, however. *Id.* These amount must be released to the contractor within 30 days from the date of completion, the owner’s use, or the owner’s occupancy.

### **Attorney’s Fees**

There is no provision for the payment of attorney fees under the public prompt pay statutes.

### **Noteworthy**

## **Prime to Sub – Public**

### **Who’s Covered**

*Ohio Rev. Code Ann.* § 4113.61 provides protections for subcontractors and material suppliers at all tiers. However, the statute does not apply to any construction or improvement of any single-, two-, or three-family detached dwelling houses.

Under the statute, the following relevant terms are defined, among others:

“Contractor“ means any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of a structure of improvement under a contract with an owner, or a “construction manager“ as defined in §9.33.

“Lower tier subcontractor” means a subcontractor who is not in privity of contract with a contractor but is in privity of contract with another subcontractor.

“Lower tier material supplier” means a material supplier who is not in privity of contract with a contractor but is in privity of contract with another subcontractor or a material supplier. However, the materials supplied must be (1) furnished with the intent that the materials are to be used on a particular structure or improvement; (2) incorporated into the improvement or consumed in the course of the improvement; or (3) specifically fabricated for incorporation into the improvement and not readily resalable in the ordinary course of the fabricator’s business.

“Owner“ includes the state, and a county, township, municipal corporation, school district, or other political subdivision of the state, and any public agency, authority, board, commission, instrumentality, or special district of or in the state or a county, township, municipal corporation, school district, or other political subdivision of the state, and any

officer or agent thereof and relates to all interests either legal or equitable, which a person may have in the real estate upon which improvements are made, including interests held by any person under contracts of purchase, whether in writing or otherwise.

*Ohio Rev. Code Ann.* § 4113.61(E), (F).

#### ***Entitlement to Payment***

The subcontractor or material supplier must submit an application, payment request, or invoice for materials in sufficient time to allow the contractor or higher-tiered subcontractor to include that amount in its payment request. *Ohio Rev. Code Ann.* § 4113.61(A)(1), (2). Generally, however, the parties' contract will determine when a subcontractor or material supplier is entitled to submit that application, request, or invoice. *Id.* § 4113.61(D)(2).

#### ***Payment Period***

Contractors and subcontractors shall pay their subcontractors and material suppliers within 10 calendar days after receipt of payment from the owner, contractor, or other subcontractor, provided that a request for payment is timely made by the subcontractor or material supplier. *Ohio Rev. Stat.* § 4113.61(A)(1), (2).

Contractors and subcontractors shall pay laborers wages due within 10 days of receipt of payment or retainage from the owner, contractor or subcontractor. *Id.* § 4113.61(A)(5).

#### ***Grounds to Withhold Payments***

In addition to retainage, amounts may be withheld as necessary to resolve disputed liens or claims involving the work, labor performed, or materials furnished by the subcontractor or material supplier. *Id.* § 4113.61(A)(1), (2).

#### ***Interest***

Late payments are subject to interest in the amount of 18% per annum, beginning on the 11th day following receipt of any payment from the owner, contractor or subcontractor and ending on the date of full payment of the payment due plus interest. *Ohio Rev. Stat.* § 4113.61(A)(1)-(5).

#### ***Retainage***

The contractor or subcontractor may reduce the amount paid by any retainage provision contained in the contract, invoice, or purchase order. *Ohio Rev. Stat.* § 4113.61(A)(1), (2). Additionally, a contractor or subcontractor may withhold amounts as necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor or material supplier. *Id.*

If a contractor or subcontractor receives any final retainage payment from the owner, a contractor, or a higher-tiered subcontractor, as the case may be, subcontractors and material suppliers must be paid their proportion of the retainage amount within 10 calendar days after receipt of the retainage, or within the time period provided in a contract, whichever is shorter. *Id.* § 4113.61(A)(3), (4).

#### ***Attorney's Fees***

In a court action filed to recover payments due plus interest, the court shall award the prevailing party reasonable attorney's fees and court costs unless doing so would be inequitable. *Ohio Rev. Code Ann.* § 4113.61(B)(1), (3). In determining whether fees should be awarded, the court will consider the following non-exclusive factors:

- (a) The presence or absence of good faith allegations or defenses asserted by the parties;

(b) The proportion of the amount of recovery as it relates to the amount demanded; and  
(c) The nature of the services rendered and the time expended in rendering the services.  
*Id.* § 4113.61(B)(2).

***Noteworthy***

Parties may not waive entitlement to interest, attorney fees, or court costs by agreement, and any such term in any contract or agreement is void and unenforceable as against public policy. *Ohio Rev. Code Ann.* § 4113.62(D)(1).

Any attempt to establish payment periods longer or interest rates smaller than those specified in § 4113.61(A)(1) – (5) will be unenforceable. *Id.* § 4113.62(D)(2).

**Owner to Prime – Private**

Ohio does not appear to have a prompt pay act applicable to prime contractors on a private contract.

**Prime to Sub – Private**

***Who's Covered***

*See* Ohio Prime to Sub - Public.

***Entitlement to Payment***

*See* Ohio Prime to Sub - Public.

***Payment Period***

*See* Ohio Prime to Sub - Public.

***Grounds to Withhold Payments***

*See* Ohio Prime to Sub - Public.

***Interest***

*See* Ohio Prime to Sub - Public.

***Retainage***

*See* Ohio Prime to Sub - Public.

***Attorney's Fees***

*See* Ohio Prime to Sub - Public.

***Noteworthy***

*See* Ohio Prime to Sub - Public.

# Oklahoma

## Owner to Prime – Public

### *Who's Covered*

The Oklahoma Fair Pay for Construction Act (“FPCA”), *Okla. Stat.* tit. 61, §§ 221 to 227, provides protection for contractors on construction contracts exceeding \$25,000. However, the FPCA does not apply to the following:

- (1) Highway, railroad, or turnpike construction. *Okla Stat.* tit. 61, § 227(A)(1).
- (2) Unless as a portion of a construction contract, as defined below: Roads, bridges, utilities, traffic control, drainage construction, sanitary sewer construction, or waterline construction. *Id.* § 227(A)(2).
- (3) Any contract relating to a single-, two-, three-, or four-family dwelling. *Id.* § 227(A)(3).

Additionally, the FPCA provides protections for material suppliers, subcontractors, and sub-subcontractors on such projects. Under the Act, the following relevant terms are defined, among others:

“Construction contract” means a written contract or subcontract awarded by an owner or contracting entity for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same.

“Material supplier” means any entity that supplies materials, services, or equipment to be used in conjunction with the performance of work on a construction contract.

“Prime contractor” means any entity that has a direct contract with an owner to perform work under a construction contract.

“Owner” means any state government entity, municipality, township, public trust or an instrumentality of a state government entity, municipality, township or public trust in this state, or any entity designated by the owner to act on the owner’s behalf, that requests work to be performed by a contractor under a construction contract.

“Subcontractor” means any entity that has a direct contract with a prime contractor to perform a portion of the work under a construction contract.

“Sub-subcontractor” means any entity that has a direct contract with another subcontractor to perform a portion of the work under a construction contract.

*Okla. Stat.* tit. 61 § 222.

### ***Entitlement to Payment***

Generally, entitlement to payment will depend on performance of the work in accordance with the provisions of a construction contract and submission of a proper invoice. *See, e.g., Okla Stat.* tit. 61, §§ 223(A) & 224.

### ***Payment Period***

An owner must make progress payments to the prime contractor for work performed and materials properly stored, within 30 calendar days after a proper invoice is submitted. *Okla Stat.* tit. 61, § 223(A).

### ***Grounds to Withhold Payments***

Neither an owner nor its representative may reduce a proper invoice of a prime contractor without detailing and forwarding the reasons for reduction, in writing, to the prime contractor within 14 calendar days of receipt of the proper invoice. *Okla Stat.* tit. 61, § 223(B). The reduction may not be more than an amount that is reasonable to correct the work, as set forth in writing. *Id.*

If a contracting entity has had their proper invoice reduced by another entity, all other affected entities having a construction contract with the contracting entity shall be notified within seven (7) calendar days. *Id.* § 223(C).

### ***Interest***

If a payment is received by a prime contractor later than as specified under the FPCA, then interest will be awarded as determined by the Oklahoma Office of State Finance under *Okla. Stat.* tit. 62, § 41-4b. *Okla. Stat.* tit. 61, § 225(E). Under *Okla. Stat.* tit. 62, § 41-4b, interest is paid from the 30th day after receipt of a proper invoice for which payment has not been delivered by the close of business on the 45th day.

Additionally, *Okla. Stat.* tit 61, § 113.3 establishes a statutory interest rate of 1.5% per month on wrongfully withheld retainage and final payments (for school districts, though, the rate is 0.75%). Section 113.3 also establishes different periods for when this rate will apply, depending on whether the contract is a “lump sum” contract or a “unit price” contract.

However, the statutes are at least somewhat ambiguous as to which rate will apply when a required payment is not made as specified by the FPCA, but is also classifiable a retainage payment or as a final payment.

### ***Retainage***

A construction contract may include a provision for the retainage; however, the amount retained may not exceed 10% of the amount of the payment due. *Okla. Stat.* tit. 61, § 113.1(A). When 50% of the total contract is complete, the amount of retainage is to be reduced to 5% of the amount earned to date if the owner or owner’s representative determines that satisfactory progress is being made and the surety approves. *Id.* However, the Department of Transportation or the Oklahoma Turnpike Authority may not withhold retainage on public construction contracts awarded by either entity or on projects awarded to railroads on the railroad’s privately owned or operated property. *Id.* § 113.1(B), (C).

No later than 21 calendar days after a certificate of substantial completion is issued for the project or separate usable phase of the project and upon adequate performance of the prime contractor and

with approval of any applicable surety, retainage shall be released by the owner to the prime contractor less an amount no greater than 150% of the estimated costs to correct any incomplete or defective work as identified, itemized, and attached to the certificate of substantial completion. *Id.* § 226(C). As a deficiency is corrected, those amounts shall be released. *Id.*

For retainage provisions applicable to county governments, see *Okla. Stat.* tit. 19, § 8(A).

### ***Attorney's Fees***

The prompt payment statutes do not appear to have a provision for attorney's fees.

### ***Noteworthy***

*Okla. Stat.* tit. 61, § 225 allows for the suspension or termination in the event of non-payment, subject to certain notice requirements.

*Okla. Stat.* tit. 61, § 227(B) provides that a choice of law or choice of venue provision within a construction contract in favor of another state is void and unenforceable. Likewise, any provision disallowing or altering the rights of a contractor, subcontractor, sub-subcontractor, or material supplier under this Act are also void and unenforceable.

## **Prime to Sub – Public**

### ***Who's Covered***

See Oklahoma Owner to Prime - Public.

### ***Entitlement to Payment***

See Oklahoma Owner to Prime - Public.

### ***Payment Period***

If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the prime contractor shall make payment to the subcontractor or material supplier no later than 10 calendar days after the prime contractor receives its corresponding payment for the work performed. *Okla. Stat.* tit. 61, § 224(A).

If a sub-subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the sub-subcontractor or material supplier shall be entitled to receive payment no later than seven calendar days after a subcontractor receives its corresponding payment for the work performed. *Id.* § 224(B).

### ***Grounds to Withhold Payments***

Except as affected by a prior reduction, a prime contractor or subcontractor may not reduce the proper invoice of another subcontractor, sub-subcontractor, or material supplier without detailing and forwarding the reasons for reduction within seven calendar days of receipt of the proper invoice. *Okla. Stat.* tit. 61, § 223(C). A prime contractor, subcontractor, or sub-subcontractor may also reduce a payment of a contracted party from a previous proper invoice. *Id.* Any such reductions may not be more than an amount that is reasonable to correct the reasons for reduction, as set forth in writing. *Id.* However, notification need not be given to a party if the reduction is less than 1% of its net proper invoice or is due to mathematical errors.

### ***Interest***

If a prime contractor fails to timely pay a subcontractor, such payment to a subcontractor shall bear interest at the rate of 1.5% per month. *Okla. Stat. tit. 61, § 225(E)*.

### ***Retainage***

A subcontract may include a provision for the retainage of a portion of payment due. *Okla. Stat. tit. 61, § 226(B)*. Such retainage is not to exceed 10% of the amount of the payment due. *Id.* When the subcontract is at least 50% complete, the retainage percentage withheld shall not exceed the percentage withheld from the entity withholding retainage. *Id.*

### ***Attorney's Fees***

There does not appear to be a provision for attorney's fees under the prompt pay statute.

## **Owner to Prime – Private**

Oklahoma has recently adopted a statute which does provide some protection for contractors and subcontractors on private construction projects. *Okla. Stat. tit. 15, § 820*.

### ***Who's Covered***

The statute applies to all private construction projects in which a set of plans or specifications or both plans and specifications are issued for bid. *Okla. Stat. tit. 15, § 820(A)(1)*. Accordingly, the statute does not apply to privately negotiated contracts. *Id.* § 820(B). Moreover, the statute doesn't apply to any contract relating to a single, two, three, or four-family dwelling. *Id.* § 821. The statute provides protection for "contractors" and "subcontractors," though neither term appears to be specifically defined for purposes of the statute. *Id.* § 820.

### ***Entitlement to Payment***

There do not appear to be any specific statutory requirements which must be met in order for a contractor to be entitled to payment. Thus, the contract itself will likely govern this issue.

### ***Payment Period***

The general specifications and the first page of all bid plans shall include the following, or substantially similar language:

OWNER SHALL ISSUE PAYMENTS WITH A FREQUENCY OF \_\_\_\_\_.

OWNER SHALL ISSUE EACH PAYMENT TO THE PRIME CONTRACTOR WITHIN \_\_\_\_\_ DAYS AFTER RECEIPT OF THE CONTRACTOR'S BILLING.

Any resulting contract shall include the payment frequency and time period prescribed in the general specifications and bid plans. *Okla. Stat. tit. 15, § 820(A)(1)*.

If the owner does not include such a provision, the following rules shall apply:

- (1) the owner shall make monthly progress payments, and
- (2) payments shall be due within 28 calendar days after receipt of billing.

*Id.* § 820(A)(2).

### **Grounds to Withhold Payments**

The owner may reduce the progress payment as provided for in the contract. *Okla. Stat.* tit. 15, § 820(A)(3).

### **Interest**

There do not appear to be any provisions specifically allowing or requiring interest accrual on late payments.

### **Retainage**

There do not appear to be any provisions specifically allowing, requiring, or limiting retainage.

### **Attorney's Fees**

There do not appear to be any provisions allowing for awarding of attorney's fees for claims made under the statute.

### **Noteworthy**

The prime contractor may suspend work: (1) when payment has not been received within 10 calendar days of the date payment should have been received; (2) if the prime contractor has complied with the contract; and (3) if the prime contractor has given the owner 10 calendar days written notice of work suspension delivered by certified mail or other verifiable service. *Okla. Stat.* tit. 15, § 820(C)(1).

The prime contractor shall not be required to resume work until: (1) receipt of full payment of undisputed portions of outstanding billing; (2) the contracted work schedule is extended the number of days of delay; and (3) a change order is issued for the verifiable direct cost of suspension, delay and start-up.

*Okla. Stat.* tit. 15, § 820(D).

In addition, certain contract clauses will be void against public policy and unenforceable. *See Id.* § 821(B)(1) (foreign forum selection clause); *Id.* 821(B)(2) (any clause which alters rights under the statute).

## **Prime to Sub – Private**

### **Who's Covered**

*See* Oklahoma Owner to Prime - Private.

### **Entitlement to Payment**

*See* Oklahoma Owner to Prime - Private.

### **Payment Period**

Subcontractors shall be paid by the prime contractor within 10 days of payment from the owner, or as otherwise agreed to by the parties. *Okla. Stat.* tit. 15, § 820(A)(4).

***Interest***

*See* Oklahoma Owner to Prime - Private.

***Retainage***

*See* Oklahoma Owner to Prime - Private.

***Attorney's Fees***

*See* Oklahoma Owner to Prime - Private.

***Noteworthy***

Subcontractors may suspend work: (1) when payment has not been received within 10 calendar days of the date payment should have been received; (2) if the subcontractor has complied with the subcontract, and (3) if the subcontractor has given the prime contractor 10 calendar days written notice of work suspension delivered by certified mail or other verifiable service.

*Okla. Stat. tit. 15, § 820(C)(2).*

*See also* Oklahoma Owner to Prime – Private.

# Oregon

## Owner to Prime – Public

### *Who's Covered*

The stated policy of the State of Oregon is that all payments due on a public improvement contract and owed by a contracting agency will be paid promptly. *Or. Rev. Stat. § 279C.570(1)*. Thus, chapter 279C of the *Oregon Revised Statutes* provides a broad spectrum of protections for contractors who contract with a contracting agency for a public improvement, as well as first-tier subcontractors and those with subcontractors and material suppliers that contract with a first-tier subcontractor on such a project.

Under the statutes, the following relevant terms are defined, among others:

“Contracting agency” means a public body authorized by law to conduct a procurement.

“Contracting agency” includes, but is not limited to, the Director of the Oregon Department of Administrative Services and any person authorized by a contracting agency to conduct a procurement on the contracting agency’s behalf. “Contracting agency” does not include the judicial department or the legislative department.

“Public contracting” means procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering public contracts or price agreements.

“Public Contracting Code” or “code” means ORS chapters 279A, 279B and 279C.

“Public improvement” means a project for construction, reconstruction or major renovation on real property by or for a contracting agency. “Public improvement” does not include:

- (A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or
- (B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

“Public improvement contract” means a public contract for a public improvement. “Public improvement contract” does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

“Substantial completion” means the date when the contractee accepts in writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee.

*Or. Rev. Stat. §§ 279C.005; 279A.010; 279C.465; 12.135.*

### ***Entitlement to Payment***

Contractors are entitled to monthly progress payments based upon the estimates of work that are approved by the contracting agency. *Or. Rev. Stat. § 279C.570(2)*.

### ***Payment Period***

The contracting agency must pay the contractor monthly as work progresses. *Or. Rev. Stat. § 279C.570(2)*. To avoid interest penalties, these payments must be made within the earlier of (1) 30 days after the invoice is received from the contractor or (2) 15 days after payment is approved by the contracting agency. *Id.*

If an incorrect invoice is submitted, the contracting agency must notify the contractor within 15 days and state the reasons the invoice is incorrect. *Id. § 279C.570(4)*. If the error is corrected within seven days of this notification, payment must still be made within the original time frame. *Id.*

### ***Grounds to Withhold Payments***

A contracting agency may withhold payment if (1) the estimate of work completed is not approved by the contracting agency, *Or. Rev. Stat. § 279C.570(2)*, or (2) there is a good faith dispute, *id. § 279C.570(4)*, or (3) there is a defect or impropriety in any submitted invoice, *id.*

### ***Interest***

A late progress payment will incur interest beginning on the date after payment was due at a rate equal to three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon. *Or. Rev. Stat. § 279C.570(2)*. However, the rate of interest may not exceed 30%. *Id.* This interest must be paid *automatically* when payment is made on the principle by the contracting agency. *Id. § 279C.570(3)*. No request for interest is necessary. *Id.* Payment of interest may be postponed if a principal payment is delayed due to a dispute between the contracting agency and the contractor. *Id. § 279C.570(6)*.

With regard to final payment, interest will accrue at 1.5% per month, beginning 30 days after the contract work has been completed and accepted. *Id. § 279C.570(8)*. The contractor must notify the agency in writing when it considers the work complete, and the contracting agency must either accept the work within 15 days or notify the contractor of work that remains to be completed. *Id.* If the agency fails to act within that time, interest will begin to accrue 30 days after the 15-day period. *Id.*

Upon settlement or judgment in favor of the contractor on a dispute as to compensation, the rate of interest charged to the contracting agency on the amount due shall equal two times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon accruing from the later of the due date on a progress payment or 30 days after the date on which the disputed payment claim was presented to the contracting agency in writing or in accordance with the contract's terms. *Id. § 279C.570(9)(a)*.

Notably, the statutes are not clear on which of the two interest rates contained in *Or. Rev. Stat. §§ 279C.570(8) & (9)* will apply when there's a settlement or judgment as to the amount of final payment that must be made. The context indicates that subsection 8 will apply in situations where the payment is merely late, but subsection 9 will apply in situations where there's a full dispute over whether an amount is actually owed. Given the costs associated with asserting a claim to payment,

this reading would make sense; but, the result is by no means compelled under the plain reading of the statutes.

### ***Retainage***

No more than 5% may be retained from a progress payment by a contracting agency. *Or. Rev. Stat. § 279C.570(7)*. As the work progresses, the retainage amount may be reduced. *Id.* At the point when 50% of the contract work is completed, retainage may be eliminated if, in the contracting agency's opinion, such work is progressing satisfactorily. *Id.*

However, the contractor's written request and the approval of the contractor's surety is required for the elimination or reduction of retainage. *Id.* When the contract work is 97.5% complete, however, the contracting agency may reduce the retained amount to 100% of the work remaining to be done without application by the contractor. *Id.*

### ***Attorney's Fees***

Whenever a contractor brings formal administrative or judicial action to collect interest due, the prevailing party is entitled to costs and reasonable attorney fees. *Or. Rev. Stat. § 279C.570(6)*.

## **Prime to Sub – Public**

### ***Who's Covered***

See Oregon Owner to Prime - Public.

### ***Entitlement to Payment***

Subcontractors and suppliers at all tiers are entitled to payment for satisfactory performance out of amounts paid to the contractor or subcontractor, as appropriate. *Or. Rev. Stat. § 279C.580(3), (4)*.

### ***Payment Period***

Payments must be made no later than 10 days after the payor receives payment. *Or. Rev. Stat. § 279C.580(3)(a), (4)*.

### ***Grounds to Withhold Payments***

A contractor and/or a subcontractor at any tier may negotiate for and include in the subcontract a provision allowing the contractor or subcontractor to retain up to 150% of any amount subject to a "good faith dispute," without incurring an interest penalty. *Or. Rev. Stat. § 279C.580(5)(a)(A)*. However, recognition should be given to a subcontractor's ability to provide a performance or payment bond. *Id.* Likewise, the parties' contract may include a provision allowing the contractor or subcontractor to withhold part or all of the subcontractor's payment in accordance with the agreement. *Id. § 279C.580(5)(a)(B)*. Certain notice provisions outlined in subdivision (C) of this section must be met to prevent the accrual of interest. *Id. § 279C.580(5)(a)(C)*.

Under the statute, the term "good faith dispute" means a documented dispute concerning: (1) Unsatisfactory job progress; (2) defective work not remedied; (3) third-party claims filed or reasonable evidence that claims will be filed; (4) failure to make timely payments for labor, equipment and materials; (5) damage to the prime contractor or subcontractor; and (6) reasonable

evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum. *Id.* § 279C.580(5)(b).

### **Interest**

If payment is not made within 30 days of when payment is received from the contracting agency or the contractor, then interest on a late payment will commence at the end of the 10-day period on which payment is due under *Or. Rev. Stat.* § 279C.580(4), unless the payment is subject to a good faith dispute. *Or. Rev. Stat.* § 279C.515(2). The rate of interest charged to the contractor or first-tier subcontractor on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from the contracting agency or from the contractor, but the rate of interest may not exceed 30 percent. *Id.*

### **Retainage**

The ability of a contractor or subcontractor to withhold retainage on a public contract is governed by the same statutes applicable to private contracts, *Or. Rev. Stat.* §§ 701.420 & 701.430, unless an agency's charter requires that it retain more than 5% of the contract price of the work completed. *Or. Rev. Stat.* § 279C.555.

Under *Or. Rev. Stat.* §§ 701.420(1) & 701.430(2), no more than 5% may be withheld as retainage if the contractor or subcontractor has obtained a performance bond. However, if a performance bond has not been obtained, then retainage may be held as agreed in the parties' contract. *Id.* § 701.430(2).

Once a contractor has paid a subcontractor in full, including any amount that it withheld as retainage, then the owner will pay the contractor a sum equal to the retainage paid by the contractor to the subcontractor. *Id.* § 701.420(3).

### **Attorney's Fees**

There does not appear to be a provision in the statute for the provision of attorneys' fees.

## **Owner to Prime – Private**

### **Who's Covered**

The Oregon Private Prompt Payment Act provides protection for contractors, subcontractors, and suppliers in connection with a construction contract. Under the Act, a "construction contract" is defined as a written or oral construction agreement, including all plans, specifications and addenda relating to:

- (a) Excavating, landscaping, demolishing and detaching existing structures, leveling, filling in and other preparation of land for the making and placement of a building, structure or superstructure;
- (b) Creation or making of a building, structure or superstructure; and

(c) Alteration, partial construction and repairs done in and upon a building, structure or superstructure.

*Or. Rev. Stat.* § 701.620(1).

However, the following contracts are not subject to the Act:

(1) A contract for the construction, alteration, repair, maintenance, moving or demolition of a building that is subject to the Low-Rise Residential Dwelling Code;

(2) A public contract under ORS 279.835 to 279.855 or ORS chapter 279A, 279B or 279C;  
or

(3) Housing in which all or part of the dwelling units are reserved for rental to persons having an income equal to or less than 80 percent of the median household income for the area as determined by the Housing and Community Services Department.

*Id.* § 701.645.

Additionally, the following terms are defined under the statute, among many others:

“Contractor“ means a person who contracts on predetermined terms to be responsible for the performance of all or part of a job of preparation or construction in accordance with established specifications or plans, retaining control of means, method and manner of accomplishing the desired result, and who provides: (1) labor at the site; or (2) materials, supplies and labor at the site. *Id.* §§ 701.620(2) & 87.005(4).

“Material supplier” means any person providing materials or products under a construction contract by any contractual means including oral authorization, written contract, purchase order, price agreement or rental agreement. *Id.* § 701.620(4).

“Original contractor” means a contractor who has a contractual relationship with the owner. *Id.* §§ 701.620(5) & 87.005(7).

“Owner” includes a person who is or claims to be the owner in fee or a lesser estate of the land, building, structure or superstructure on which construction is performed and who enters into an agreement with a contractor for the construction. *Id.* §§ 701.620(6) & 701.410.

“Subcontractor” means a contractor who has no direct contractual relationship with the owner. *Id.* §§ 701.620 & 87.005(11).

### ***Entitlement to Payment***

Contractors are entitled to progress payments, unless the project is anticipated to take less than 60 days. *Or. Rev. Stat.* § 701.625(1). However, if the project is anticipated to take less than 60 days, the owner and original contractor may still agree that progress payments will be made. *Id.*

Generally, the progress payments are to be based on certified billings or estimates for the work performed and/or materials supplied on a 30-day billing cycle. *Id.* However, an alternative billing cycle may be established under the provisions of *Or. Rev. Stat.* § 701.625(2).

Payment will not be required unless the original contractor provides the owner with a billing or estimate for the work performed or the materials supplied in accordance with the terms of the parties' contract. *Id.* § 701.625(9).

### **Payment Period**

Generally, the progress payments are to be based on certified billings or estimates for the work performed and/or materials supplied on a 30-day billing cycle. *Or. Rev. Stat.* § 701.625(1). However, an alternative billing cycle may be established under the provisions of *Or. Rev. Stat.* § 701.625(2). *Id.*

Generally, progress payments are to be made to the original contractor within 14 days after the date on which the billing is submitted. *Id.* However, a progress payment may be made beyond this 14 day deadline if certain notice requirements have been met under *Or. Rev. Stat.* § 701.625(3).

A billing or estimate is deemed to have been certified 10 days after the billing or estimate is submitted to the person designated by the owner unless the owner has previously given written notice that the items submitted are not approved. *Id.* § 701.625(4).

An owner and original contractor may modify the number of days following certification during which the owner may make payment to the original contractor or during which payment must be certified; however, any original contractor, subcontractor, or material supplier that doesn't consent in writing to the change will continue to be paid as indicated in the plans and specifications. *Id.* § 701.625(7). However, under subsection (10), the right of any original contractor, subcontractor, or material supplier to receive prompt and timely progress payments may not be altered by a construction contract. *Id.* § 701.625(10). Thus, it appears that the time periods identified in § 701.625 are a "floor" that may not be breached.

Final payment must be made within seven days after the original contractor completes and the owner approves all work under a construction contract. *Id.* § 701.625(8).

### **Grounds to Withhold Payments**

An owner may withhold payment for: (1) Unsatisfactory work progress; (2) defective construction work, materials or products not remedied; (3) disputed work, materials or products, not to exceed 150 percent of the amount in dispute; (4) Failure to comply with other material provisions of the construction contract; (5) third party claims filed or reasonable evidence that such a claim will be filed; (6) failure of the original contractor or a subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products; (7) damage to the owner; (8) reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or (9) other items as allowed under the contract terms and conditions. *Or. Rev. Stat.* § 701.625(4).

Additionally, an owner may withhold amounts sufficient to pay the owner's direct expenses that it reasonably expects to incur to collect any of the above mentioned items. *Id.* § 701.625(5). Reasonable retainage may also be withheld. *Id.*

### **Interest**

The rate of interest on the unpaid balance is 1.5% per month, or at a higher rate as the parties may agree. *Or. Rev. Stat.* § 701.625(11).

### ***Retainage***

See Oregon Prime to Sub - Public.

### ***Attorney's Fees***

The prevailing party shall be awarded reasonable costs and attorney fees in any action, claim, or arbitration brought to collect payments or interest. *Or. Rev. Stat.* § 701.625(13).

### ***Noteworthy***

*Or. Rev. Stat.* § 701.635 addresses the ability of an original contractor or subcontractor to suspend performance or terminate a construction contract if not timely paid.

*Or. Rev. Stat.* § 701.640 prohibits a choice of law or choice of venue provision in favor of a State other than Oregon or that prohibits a party from suspending performance or terminating the agreement.

*Or. Rev. Stat.* § 701.992 establishes civil penalties and other sanctions for the violation of the prompt payment act, which include monetary fines as well as suspension or termination of a license in the event of habitual offenders.

## **Prime to Sub – Private**

### ***Who's Covered***

See Oregon Prime to Sub - Private.

### ***Entitlement to Payment***

Subcontractors and suppliers at all tiers are entitled to payments from the party with whom they contract if that subcontractor or supplier has performed in accordance with the provisions of the construction contract. *Or. Rev. Stat.* § 701.630(1).

However, payment is not required unless the subcontractor or material supplier provides the original contractor or subcontractor a billing or invoice for the work performed or materials supplied in accordance with the parties' contract. *Id.* § 701.630(2). Additionally, appropriate lien waivers must be provided by the subcontractor or supplier if required by the contract. *Id.*

### ***Payment Period***

The original contractor shall pay its subcontractors and material suppliers, and each subcontractor shall pay its subcontractors or material suppliers, the full amount received for a subcontractor's work and for materials supplied within seven days of receiving payment. *Or. Rev. Stat.* § 701.630.

However, if the owner and original contractor are a single entity, that entity shall pay subcontractors and material suppliers within 14 days after the billing or estimate is received unless the deadlines for certification or payment have been modified pursuant to subsection (3) or (6) of *Or. Rev. Stat.* § 701.625. *Id.* § 701.625(14).

### ***Grounds to Withhold Payments***

A higher-tier payor may withhold payment for: (1) unsatisfactory work progress; (2) defective construction work, materials or products not remedied; (3) disputed work, materials or products, not

to exceed 150 percent of the amount in dispute; (4) failure to comply with other material provisions of the construction contract; (5) third party claims filed or reasonable evidence that such a claim will be filed; (6) Failure of the subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products; (7) damage to an original contractor, subcontractor or material supplier; (8) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; (9) a reasonable amount for retainage, as defined in *Or. Rev. Stat.* § 701.410, that does not exceed the actual percentage allowed by the subcontract or purchase order; or (10) other items as allowed under the subcontract or purchase order terms and conditions. *Or. Rev. Stat.* § 701.630(4).

### ***Interest***

If a progress or final payment is delayed by more than seven days after receipt of a progress or final payment by an original contractor or subcontractor, then interest will be applied beginning on the eighth day at the rate of 1.5% per month on the unpaid balance, or at a higher rate as the parties may agree. *Or. Rev. Stat.* § 701.630(5). However, interest will not be owed on amounts withheld for one of the reasons identified above in *Or. Rev. Stat.* § 701.630(4). *Id.*

### ***Retainage***

See Oregon Prime to Sub - Public.

### ***Attorney's Fees***

The prevailing party is entitled to reasonable costs and attorney fees in any action, claim, or arbitration brought to collect payments or interest. *Or. Rev. Stat.* § 701.630(6).

### ***Noteworthy***

See Oregon Owner to Prime - Private.

# Pennsylvania

## Owner to Prime – Public

### *Who's Covered*

The procurement statutes pertaining to contracts for public works provide protection for anyone who enters into a contract with a state agency, including state-aided institutions, and local government units. Additionally, the statutes provide protections for subcontractors of all levels.

Under the statutes, the following relevant terms are defined, among others:

“Contract.” A contract exceeding \$50,000 for construction as defined in section 103 (relating to definitions), including heating or plumbing contracts but excluding Department of Transportation contracts under section 301(c)(1) (relating to procurement responsibility).

“Contractor.” A person who enters into a contract with a government agency.

“Government agency.” Includes any State-aided institutions.

“Local government unit.” Any county, city, borough, incorporated town, township, school district, vocational school district, county institution, local authority or any joint or cooperative body of local government units or any instrumentality, authority or corporation thereof which has authority to enter into a contract.

“State-aided institution.” Any institution which receives State funds directly or indirectly for construction as defined in section 103 (relating to definitions).

“Subcontractor.” A person who has contracted to furnish labor or materials to or has performed labor for a contractor or another subcontractor in connection with a contract.

“Substantial completion.” Construction that is sufficiently completed in accordance with the contract and certified by the architect or engineer of the government agency, as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is completed.

*62 Pa. Cons. Stat. § 3902.*

### *Entitlement to Payment*

Performance by a contractor in accordance with the provisions of a contract shall entitle the contractor to payment by the government agency. *62 Pa. Cons. Stat. § 3931.*

### *Payment Period*

Payment shall be made in strict accordance with the contract. *62 Pa. Const. Stat. § 3932(a).* If the contract does not contain a term governing the time for payment, the payment period for a public owner to a prime contractor on a public contract is 45 calendar days from receipt of payment

application. *Id.* § 3932(b). *See also id.* § 3941(a) (establishing a 45 day payment period following an architect's or engineer's final inspection for contract's containing a retainage provision).

### **Grounds to Withhold Payments**

The government agency may withhold payment for "deficiency items" according to terms of the contract. *62 Pa. Const. Stat.* § 3934(a). A deficiency item is defined as "work performed but which the design professional, the contractor or the inspector will not certify as being completed according to the contract." *Id.* § 3902. If a government agency withholds payment from a contractor for a deficiency item, it shall notify the contractor of the deficiency item within the time period specified in the contract or 15 calendar days of the date that the application for payment is received. *Id.* § 3934(b).

### **Interest**

If an arbitrator, Board of Claims or court determines that the government agency or contractor had failed to comply with the payment terms set forth in the statutes, it may award, in addition to all other damages, a penalty equal to 1% per month of any amount withheld in bad faith. *62 Pa. Const. Stat.* § 3935(a). An amount shall be deemed to have been held in bad faith if it was "arbitrary or vexatious." *Id.* "Vexatious" conduct has been defined by the Pennsylvania courts to be conduct that was engaged in without any grounding in the law or in fact with the purpose of causing annoyance. *A.G. Cullen Const., Inc. v. State System of Higher Educ.*, 898 A.2d 1145 (Pa. Commw. 2006).

Unless otherwise agreed by the parties, if any progress payment is not made by the due date established in the contract or within 45 days of a payment application, then interest will be assessed on the amount due. *62 Pa. Const. Stat.* §§ 3932(c) & 3921. The rate of interest shall be calculated as determined by the Secretary of Revenue for interest on overdue taxes or the refund of taxes as provided in Sections 806 and 806.1 of the Fiscal Code.

In the event the contract does not contain a grace period and payment is not made as required, no interest penalty will be charged if payment is made on or before the 15th calendar day after the required payment date. *Id.* § 3932(d).

The final payment due from a governmental agency after substantial completion of a contract containing a retainage provision will bear interest at a rate of 6% per year, beginning on the day after payment becomes due and payable. *62 Pa. Const. Stat.* § 3941(b). If a contract does not contain a retainage provision, interest will accrue at a 10% rate per year. *Id.* Special interest rates are specified by statute in the event that the project is financed with bonds. *Id.*

### **Retainage**

A provision for retainage is allowed in a construction contract, but the amount withheld by the government may be no more than 10% of the amount due up until the point that 50% of the contract is completed. *62 Pa. Const. Stat.* § 3921(a) At the 50% completion point, one-half of the retainage shall be paid to the contractor, provided that the following conditions are met (1) the architect and engineer approve the application for payment, (2) the contractor is making satisfactory progress, and (3) there is no specific cause for greater withholding. *Id.* After the 50% completion point, no more than 5% of each monthly progress request may be withheld. *Id.* If more than one prime contractor is involved, and delay claims or other actions are brought by one prime against the other, then additional retainage in the amount of 1.5 times the amount of possible liability may be

withheld. *Id.* All money retained by the government agency may be withheld until substantial completion. *Id.*

In the case of a contract with the Department of General Services, the amount withheld during the first 50% period may not be more than 6%. After the 50% point, the amount of retainage withheld may not exceed 3% of the original contract amount. *Id.* § 3921(b).

### ***Attorney's Fees***

If it is determined that the government agency, contractor or subcontractor acted in bad faith, then, notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims, court or arbitrator, together with expenses. *62 Pa. Const. Stat.* § 3935(b). An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was “arbitrary or vexatious.” *Id.* “Vexatious” conduct has been defined by the Pennsylvania courts to be conduct that was engaged in without any grounding in the law or in fact with the purpose of causing annoyance. *A.G. Cullen Const., Inc. v. State System of Higher Educ.*, 898 A.2d 1145 (Pa. Commw. 2006).

### ***Noteworthy***

A choice of law or choice of venue provision in favor of a State other than Pennsylvania is unenforceable. *62 Pa. Const. Stat.* § 3937.

*62 Pa. Const. Stat.* § 3938 provides exceptions for when § 3932 (relating to the government agency’s progress payment obligations) will apply and excludes distressed municipalities, distressed school districts, cities of the first class that have entered into intergovernmental cooperation agreement and have outstanding and payable bonds, a corporate entity or school district as defined in the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class, and a metropolitan transportation authority.

*62 Pa. Const. Stat.* § 3942 authorizes the arbitration of disputes, if agreed to in the parties’ contract.

## **Prime to Sub – Public**

### ***Who's Covered***

See Pennsylvania Owner to Prime - Public.

### ***Entitlement to Payment***

Performance by a subcontractor in accordance with the provisions of a contract shall entitle the subcontractor to payment from the party with whom the subcontractor contracted. *62 Pa. Const. Stat.* §§ 3931(b) & 3933(a).

### ***Payment Period***

When a subcontractor has performed in accordance with the provisions of the contract, a contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor’s subcontractors, the full or proportional amount received for each subcontractor’s work and material, based on work completed or services provided under the contract, 14 days after receipt of a progress

payment. 62 *Pa. Const. Stat.* § 3933(c). Payment must be made in accordance with this statute unless it is being withheld for a good faith claim under 62 *Pa. Const. Stat.* § 3934.

### ***Grounds to Withhold Payments***

The contractor may withhold payment from any subcontractor responsible for a deficiency item. 62 *Pa. Const. Stat.* § 3934(a). If a contractor withholds payment from a subcontractor for a deficiency item, it must notify the subcontractor or supplier and the government agency of the reason within 15 calendar days of the date after receipt of the notice of the deficiency item from the government agency. *Id.* § 3934(b).

### ***Interest***

See Pennsylvania Owner to Prime - Public.

Additionally, if a progress payment is not made by the due date established in the contract or within 14 days after receipt of a progress payment, the contractor will be charged interest in the amount as described above. 62 *Pa. Const. Stat.* § 3933(d).

In the event the contract does not contain a grace period and payment is not made as required, no interest penalty will be assessed if payment is made on or before the 15th calendar day after the required payment date. *Id.* § 3933(e).

### ***Retainage***

In the absence of sufficient reason, within 20 days of the receipt of payment by the contractor, the contractor shall pay all subcontractors with which it has contracted their earned share of the payment that the contractor received. 62 *Pa. Const. Stat.* § 3922.

### ***Attorney's Fees***

See Pennsylvania Owner to Prime - Public.

### ***Noteworthy***

See Pennsylvania Owner to Prime - Public.

Under 62 *Pa. Const. Stat.* § 3939(b), once a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred.

## **Owner to Prime – Private**

### ***Who's Covered***

The Pennsylvania Contractor and Subcontractor Payment Act ("PCSPA") provides protection to contractors and subcontractors on construction contracts executed on or after April 17, 1994, 73 *Pa. Stat. Ann.* § 515, as well as all lower-tiered subcontractors.

The Payment Act does not apply to improvements of real property which consist of six or fewer residential units that are under construction simultaneously or to contracts for the purchase of materials by a person performing work on his or her own real property. 73 *Pa. Stat. Ann.* § 503.

Additionally, if the project involves federal aid, the PCSPA will not operate to prevent the receipt of federal aid. *Id.* § 513.

Applicable definitions under the statute include the following:

"Billing period" is the payment cycle agreed to by the parties or, in the absence of an agreement, the calendar month within which work is performed.

"Construction Contract" is defined as an agreement written or oral, to perform work on any real property located within the Commonwealth of Pennsylvania.

"Contractor" is defined as a person authorized or engaged by an owner to improve real property.

"Deficiency item" means work performed but which the owner, the contractor or the inspector will not certify as being completed according to the specifications of a construction contract.

"Improve" means to design, effect, alter, provide professional or skilled services, repair or demolish any improvements upon, connected with, or on or beneath the surface of any real property, to excavate, clear, grade, fill or landscape any real property, to construct driveways and private roadways, to furnish materials, including trees and shrubbery for any of these purposes, or to perform any labor upon improvements.

"Improvement" is defined as: (1) All or part of a building or structure; (2) the erection, alteration, demolition, excavation, clearing, grading or filing of real property; or (3) landscaping, including the planting of trees and shrubbery, and constructing driveways and private roadways on real property.

"Owner" is defined as a person who has the interest in the real property that is improved and who ordered the improvement to be made. The term owner includes successors in interest and agents of the owner acting with their authority.

"Real Property" means real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon.

"Subcontractor" means a person who has contracted to furnish labor or materials to, or has performed labor for, a contractor or another subcontractor in connection with a contract to improve real property.

73 Pa. Stat. Ann. § 502.

### ***Entitlement to Payment***

Performance by a contractor or subcontractor in accordance with the provisions of a contract shall entitle the contractor or subcontractor to payment from the party with whom it contracted in accordance with the contract's terms. 73 Pa. Stat. Ann. §§ 504, 505(a), 507(a), (c).

### ***Payment Period***

Unless otherwise specified by agreement, a contractor is entitled to invoice the owner for progress payments at the end of a billing period and to submit a final invoice at the completion of the work.

73 Pa. Stat. Ann. § 505(b). Payment must then be made within 20 days after the end of the billing period or delivery of the invoice, whichever is later, unless otherwise agreed by the parties. *Id.* § 505(c).

If an invoice has an error, is incomplete, or is otherwise deficient, the person receiving the notice must give written notice to the person submitting the invoice within 10 days of receipt. *Id.* § 508. The person who received the incorrect invoice, however, must still pay the amount due in accordance with the provisions of the prompt pay act. *Id.*

### ***Grounds to Withhold Payments***

The owner may withhold payment for deficiency items according to the terms of the construction contract. 73 Pa. Stat. Ann. § 506(a). If the owner withholds payment from a contractor for a deficiency item, it must notify the contractor of the deficiency within seven calendar days of the day the invoice is received. *Id.* § 506(b).

### ***Interest***

Unless otherwise agreed, progress or final payments must be made within seven days of the due date, or the owner will owe the contractor interest at the rate of 1% per month on the unpaid balance, beginning on the eighth day. 73 Pa. Stat. Ann. § 505(d).

If an arbitration or litigation is commenced to recover payment due under The Payment Act and it is determined that the owner has failed to comply with the payment terms of this act, the arbitrator or court shall award in addition to all other damages due a penalty equal to 1% per month of the amount that was wrongfully withheld. An amount shall not be deemed to have been wrongfully withheld to the extent it bears a reasonable relation to the value of any claim held in good faith by the owner against whom the owner is seeking to recover payment. *Id.* § 512(a).

### ***Retainage***

The prompt pay statutes do not appear to set a maximum rate that may be established in a contract or subcontract for retainage. However, any amounts that are retained, must be released within 30 days of the work's final acceptance. 73 Pa. Stat. Ann. § 509(a).

Contractors and subcontractors must pay their subcontractors the full amount due to them within 14 days after receiving retainage. *Id.* § 509(c)

If an owner, contractor, or subcontractor unreasonably withholds acceptance of work or fails to pay retainage as required by this section, the owner, contractor or subcontractor shall be subject to the payment of interest at the rate of 1% on the balance due and owing on the date acceptance was unreasonably withheld or the date the retainage was due and owing, whichever is applicable. *Id.* § 509(d).

### ***Attorney's Fees***

Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under the PCSPA shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses. 73 Pa. Stat. Ann. § 512(b).

### ***Noteworthy***

Under 73 Pa. Stat. Ann. § 514, a choice of law or choice of venue provision in favor of a State other than Pennsylvania is unenforceable.

## Prime to Sub – Private

### *Who's Covered*

See Pennsylvania Owner to Prime - Private.

### *Entitlement to Payment*

See Pennsylvania Owner to Prime - Private.

### *Payment Period*

A contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to the subcontractor's subcontractors, the full or proportional amount received for each such subcontractor's work and materials, based on work completed or service provided under the subcontract, 14 days after receipt of each progress or final payment, or 14 days after receipt of the subcontractor's invoice, whichever is later. *73 Pa. Stat. Ann. § 507(b).*

If an invoice has an error, is incomplete, or is otherwise deficient, the person receiving the notice must give written notice to the person submitting the invoice within 10 days of receipt. *Id. § 508.* The person who received the incorrect invoice, however, must still pay the amount due in accordance with the provisions of the prompt pay act. *Id.*

### *Grounds to Withhold Payments*

The contractor or subcontractor may withhold payment from any subcontractor responsible for a deficiency item. *73 Pa. Stat. Ann. § 511(a).* If a contractor or subcontractor withholds payment for a deficiency item, it must notify the subcontractor or supplier and the owner of the reason within seven calendar days of the date after receipt of the notice of the deficiency item. *Id. § 511(b).*

### *Interest*

If any progress or final payment to a subcontractor is delayed, the contractor or subcontractor shall pay the subcontractor interest, beginning on the next day at the rate of 1% per month on the unpaid balance. *73 Pa. Stat. Ann. § 507(d).*

See also Pennsylvania Owner to Prime - Private.

### *Retainage*

The prompt pay statutes do not appear to set a maximum rate that may be established in a contract or subcontract for retainage. However, any amounts that are retained, must be released within 30 days of the work's final acceptance. *73 Pa. Stat. Ann. § 509(a), (b).* A contractor may withhold retainage from a subcontractor in accordance with the parties' agreement, even if the owner does not withhold retainage. *Id. § 509(b).*

See also Pennsylvania Owner to Prime - Private.

### *Attorney's Fees*

See Pennsylvania Owner to Prime - Private.

### *Noteworthy*

See Pennsylvania Owner to Prime - Private.

# Rhode Island

## Owner to Prime – Public

### *Who's Covered*

The Rhode Island prompt pay statutes, *R.I. Gen. Laws* §§ 42-11.1-1 to 42-11.1-16, 37-13-5, provide protection for those contracting directly with a state agency, a prime contractor's suppliers and subcontractors, and a subcontractor's material suppliers. However, the statutes do not apply to those situations outlined in *R.I. Gen. Laws* § 42-11.1-14.

Under the statutes, the following relevant terms are defined, among others:

"Contract" means an enforceable agreement entered into by a contractor and a state agency.

"Contractor" means any person, partnership, firm, corporation, or association:

- (1) selling materials, equipment, or supplies or leasing property or equipment to a state agency;
- (2) constructing, reconstructing, rehabilitating, or repairing buildings or highways for, or on behalf of, a state agency; or
- (3) rendering or providing services pursuant to a contract with a state agency, including without limitation, services which help people in need.

"Proper invoice" means a written request for a contract payment that is submitted by a contractor setting forth the description, price, and quantity of goods, property or services delivered or rendered, in such form and supported by such other substantiating documentation as the state controller or individual state agency may reasonably require. In the case of state highway and bridge construction contracts, periodic payment estimates prepared by the department of transportation shall be considered proper invoices for purposes of this chapter and such estimates shall be prepared monthly or more often and shall include the total amount of work done from the date of the prior estimate.

"Receipt of an invoice" means the date on which a proper invoice is actually received in the designated payment office or the date on which the state agency receives the purchased goods, property, or services covered by the proper invoice, whichever is later.

"State agency" means any department, board, bureau, commission, division, office, council, institution, authority or committee in the executive, legislative, or judicial branches of the state government; including the university of Rhode Island and all other quasi-public bodies created by state law whose purpose and function are directly related to the health, safety, and welfare of the general populace of the state, including the Rhode Island lottery.

*R.I. Gen. Laws* § 42-11.1-2.

### *Entitlement to Payment*

The statutes do not appear to specify when a contractor, subcontractor, or material supplier is entitled to payment; thus, the parties' contract and the common law will likely define this issue.

Unless the contract specifies that the contractor will be paid at predetermined intervals without the need to submit an invoice, a proper invoice must be submitted by the contractor to initiate payment. *R.I. Gen. Laws* § 42-11.1-5(g).

### **Payment Period**

All bills shall be paid within 30 working days of receipt of a proper invoice or other contractual dates for periodic payments, except when a contractor has failed to submit a bill in accordance with contractually imposed time frames. *R.I. Gen. Laws* § 42-11.1-3(a). However, *R.I. Gen. Laws* § 42-11.1-3 does not apply to a contract awarded by the department of transportation, unless the subcontractor provides a payment and performance bond in an amount equal to the value of the subcontract. *Id.* § 42-11.1-3(c).

Partial payments are to be made by the state on partial delivery or partial completion of services under the terms of the contract. *Id.* § 42-11.1-4.

The required payment date will be extended if necessary to satisfy or correct any of the conditions described below in “Grounds to Withhold Payment.”

Under *R.I. Gen. Laws* § 42-11.1-5(d), each state agency shall have five working days after receipt of any invoice by the state agency at its designated payment office to notify the contractor of defects in the delivered goods, property, or services. Defects in the invoice or improprieties shall delay the commencement of the time period for payment. *Id.* Failure to notify the contractor of any suspected improprieties within this five working day period will result in a reduction in the number of days for the state to make a payment. *Id.* This process is described in more detail in the statute.

### **Grounds to Withhold Payments**

Exceptions to the required payment due date include: (1) the state controller determines that there is reasonable cause to believe that payment is not properly due in whole or in part; (2) in accordance with statutory or contractual provisions, payment must be preceded by an inspection period or by an audit to determine the resources applied or used by a contractor in fulfilling the terms of the contract; (3) the necessary state government appropriation required to authorize payment has yet to be enacted; (4) the cash balance of the fund or sub-fund from which payment is to be made is insufficient to finance the payment; (5) a proper invoice must be examined by the federal government prior to payment; (6) the goods or property have not been delivered or the services have not been rendered by the contractor in compliance with the terms or conditions of the contract; (7) the required payment date is modified in accordance with *R.I. Gen. Laws* § 42-11.1-5(d). *R.I. Gen. Laws* § 42-11.1-5(b).

### **Interest**

Interest charges will apply if a state agency fails to make a payment as required by the contract, unless the failure to make a payment is the result of a lien, attachment, other legal process against the money due to the contractor, or for one of the reasons stated above in “Grounds to Withhold Payment.” *R.I. Gen. Laws* § 42-11.1-5(a), (b). Additionally, interest will not be assessed if the computed interest payment owed is less than \$10. *Id.*

Late payments are subject to interest, beginning on the date after payment was due and ending on day that an invoice is approved for payment by the controller’s office, at a rate equal to the prime interest rate as reported on the money market page of the *Wall Street Journal* published on the first

regular business day of each month. *Id.* § 42-11.1-6(a), (d). Unpaid interest shall compound every month overdue. *Id.* § 42-11.1-6(e). Agencies shall not require companies to petition, invoice, bill, or wait any additional days to receive interest due. *Id.* § 42-11.1-6(c).

A contractor's acceptance of payment will not be deemed a waiver of interest otherwise due. *Id.* § 42-1.1-10.

*See also id.* § 42-11.1-13 (relating to the accrual of interest following a notice of a claim or the commencement of legal action).

### **Retainage**

On contracts valued at or over \$500,000, retainage may not exceed 5% of the contract price. *R.I. Gen. Laws* § 37-12-10(a). Unless otherwise agreed by the parties, retention on contracts valued at less than \$500,000 also may not exceed 5%. *Id.*

Retainage must be released within 90 days of the date on which the work is accepted, absent a dispute. *Id.* § 37-12-10(b). Failure to release the payment within this time for reasons other than a dispute or the fault of the contractor will result in interest being assessed at the rate of 10% per year. *Id.*

With respect to projects located within the town of Warren, the withholding authority *shall* withhold a reasonably sufficient amount to pay the estimated costs of municipal police traffic control. The withholding authority shall pay to the town of warren within 72 hours of written demand the actual costs of police traffic control associated with said project on an ongoing basis. *Id.* § 37-12-10(e).

### **Attorney's Fees**

There does not appear to be a provision applicable to the payment of attorney's fees under the prompt pay statutes.

### **Noteworthy**

The right to interest payments under the statute may not be waived by contract, and any provision requiring payment of interest in a manner that differs from the prompt pay statute is void. *R.I. Gen. Laws* § 42-11.1-11.

*R.I. Gen. Laws* § 42-11.1-16 contains special provisions applicable to a non-profit service provider.

## **Prime to Sub – Public**

### **Who's Covered**

*See* Rhode Island Owner to Prime - Public.

### **Entitlement to Payment**

*See* Rhode Island Owner to Prime - Public.

### **Payment Period**

Contractors shall pay subcontractors within 10 days of receipt of payment by the state. *R.I. Gen. Laws* § 42-11.1-3(b). However, *R.I. Gen. Laws* § 42-11.1-3 does not apply to a contract awarded by the department of transportation, unless the subcontractor provides a payment and performance bond in an amount equal to the value of the subcontract. *Id.* § 42-11.1-3(c).

Additionally, any charge for trucking or the furnishing of materials for the use of the contractor or subcontractor must be paid within 90 days after the obligation or charge is incurred, the trucking service performed, or the material delivered to the worksite. *Id.* § 37-13-5. If the public owner is notified of nonpayment, it may deduct and hold for 60 days money due to the contractor or subcontractor in the reasonable amount due. *Id.*

### ***Grounds to Withhold Payments***

A contractor may setoff a payment due to a subcontractor by the amount of any legally enforceable debt owed by the subcontractor to the contractor. *R.I. Gen. Laws* § 42-11.1-3(b). Additionally, the contractor may withhold any amounts allowed under the contract's terms or any amount owed by the subcontractor to the contractor under statute or enforceable lien. *Id.*

However, *R.I. Gen. Laws* § 42-11.1-3 does not apply to a contract awarded by the department of transportation, unless the subcontractor provides a payment and performance bond in an amount equal to the value of the subcontract. *Id.* § 42-11.1-3(c).

### ***Interest***

No applicable provision.

### ***Retainage***

No applicable provision.

### ***Attorney's Fees***

There does not appear to be a provision applicable to the payment of attorney's fees under the prompt pay statutes.

### ***Noteworthy***

## **Owner to Prime - Private**

Rhode Island does not appear to have a prompt payment act applicable to prime contractors on a private project.

## **Prime to Sub - Private**

Rhode Island does not appear to have a prompt payment act applicable to subcontractors on a private project.

# South Carolina

## Owner to Prime – Public

### *Who's Covered*

South Carolina's prompt pay statutes provide protection for contractors, subcontractors, and suppliers on a contract relating to the improvement of property or the performance of construction services for a private or public owner. However the statutes do not apply to residential homebuilders, real property improvements intended for residential purposes which consist of 16 or fewer units, and private persons or entities owning the improvements to real property when the improvements are not financed by a non-owner. *S.C. Code Ann. § 29-6-60.*

Notably, Article 3 of title 29, chapter 6 is referred to as the "Subcontractors' and Suppliers' Payment Protection Act." *Id.* § 29-6-210.

Under the statutes, the following relevant terms are defined:

"Contractor" means a person who contracts with an owner to improve real property or perform construction services for an owner.

"Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill, or landscape any real property, or to construct driveways and roadways, or to furnish materials, including trees and shrubbery, for any of these purposes, or to perform any labor upon these improvements, and also means and includes any design or other professional or skilled services furnished by architects, engineers, land surveyors, and landscape architects.

"Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and roadways on real property.

"Owner" means a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made, including any state, local, or municipal government agencies, instrumentalities, or entities.

"Real property" means the real estate that is improved, including lands, leaseholds, tenements, and hereditaments, and improvements placed on the real property.

"Subcontractor" means any person who has contracted to furnish labor or materials to, or has performed labor or supplied materials for, a contractor or another subcontractor in connection with a contract to improve real property.

*S.C. Code Ann. § 29-6-10.*

### ***Entitlement to Payment***

Performance by a contractor or subcontractor in accordance with the provisions of his contract entitles him to payment from the party with whom he contracts. *S.C. Code Ann.* § 29-6-20.

### ***Payment Period***

When a contractor or a subcontractor has performed in accordance with the provisions of his contract, the owner shall pay the contractor within 21 days of the owner's receipt of any pay request based upon work completed or service provided under the contract. *S.C. Code Ann.* § 29-6-30. However, the statutes also provide that "[n]othing in this chapter requires that payments due a contractor from an owner be paid any more frequently than as set forth in the construction documents." *Id.* § 29-6-40.

### ***Grounds to Withhold Payments***

The following grounds are specifically set forth in the statute: unsatisfactory job progress, defective construction not remedied, disputed work, third party claims filed or reasonable evidence that claim will be filed, failure of contractor or subcontractor to make timely payments for labor, equipment, and materials, damage to owner, contractor, or another subcontractor, reasonable evidence that contract or subcontract cannot be completed for the unpaid balance of the contract or subcontract sum, or a reasonable amount for retainage. *S.C. Code Ann.* § 29-6-40.

### ***Interest***

If a periodic or final payment to a contractor is delayed by more than 21 days, or by more than seven days in the case of a subcontractor, then interest will be assessed beginning on the due date at the rate of 1% per month. *S.C. Code Ann.* § 29-6-50. However, no interest is due unless the person being charged interest has been notified of the provisions of the statute at the time request for payment is made. *Id.*

Additionally, *on private construction projects only*, owners, contractors, and subcontractors may agree by contract to rates of interest and payment periods different from those stipulated in this section, and in this event, these contractual provisions shall control, provided the requirements of Section 29-6-30 and this section are specifically waived, by section number, in conspicuous bold-faced or underlined type. In case of a wilful breach of the contract provisions as to time of payment, the interest rate specified in this section shall apply. *Id.*

### ***Retainage***

In a contract or subcontract for construction which provides for progress payments in installments based upon an estimated percentage of completion, with a percentage of the contract's proceeds to be retained by the State or general contractor pending completion of the contract or subcontract, the retained amount of each progress payment or installment must be no more than three and one-half percent. *S.C. Code Ann.* § 11-35-3030(4)(a).

When a prime contractor's or subcontractor's work is completed, that portion of the retained funds which is allocable to the completed division of the contract must be released forthwith to the prime contractor, who, within ten days of its receipt, shall release to the subcontractor responsible for the completed work the full amount of retention previously withheld from him by the prime contractor. *Id.* § 11-35-3030(4)(b).

### ***Attorney's Fees***

Although the prompt payment statutes do not include a provision for attorney fees, under *S.C. Code Ann.* § 27-1-15, a contractor, laborer, design professional, or materials supplier that has expended labor, services, or materials under contract for the improvement of real property and has made due and just demand by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand. *Id.*

## **Prime to Sub – Public**

### ***Who's Covered***

See South Carolina Owner to Prime - Public.

### ***Entitlement to Payment***

See South Carolina Owner to Prime - Public.

Additionally, under *S.C. Code Ann.* § 29-6-230, performance by a construction subcontractor in accordance with the provisions of its contract entitles the subcontractor to payment from the party with whom it contracts. With regard to pay-if-paid or pay-when paid clauses, the statute specifically provides that payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. *Id.* Any agreement to the contrary is not enforceable. *Id.*

### ***Payment Period***

Under *S.C. Code Ann.* § 29-6-30, the contractor must pay his subcontractors and each subcontractor must pay his subcontractors, for the full amount received for that subcontractor's work and materials within seven days of receiving each periodic or final payment.

### ***Grounds to Withhold Payments***

See South Carolina Owner to Prime - Public.

### ***Interest***

See South Carolina Owner to Prime - Public.

### ***Retainage***

See South Carolina Owner to Prime - Public.

### ***Attorney's Fees***

See South Carolina Owner to Prime - Public.

### ***Noteworthy***

See South Carolina Owner to Prime - Public.

## **Owner to Prime – Private**

### ***Who's Covered***

See South Carolina Owner to Prime - Public.

### ***Entitlement to Payment***

See South Carolina Owner to Prime - Public.

### ***Payment Period***

See South Carolina Owner to Prime - Public.

### ***Grounds to Withhold Payments***

See South Carolina Owner to Prime - Public.

### ***Interest***

See South Carolina Owner to Prime - Public.

### ***Retainage***

See South Carolina Owner to Prime - Public.

### ***Attorney's Fees***

See South Carolina Owner to Prime - Public.

### ***Noteworthy***

## **Prime to Sub – Private**

### ***Who's Covered***

See South Carolina Prime to Sub - Public.

### ***Entitlement to Payment***

See South Carolina Prime to Sub - Public.

### ***Payment Period***

See South Carolina Prime to Sub - Public.

### ***Grounds to Withhold Payments***

See South Carolina Prime to Sub - Public.

### ***Interest***

See South Carolina Prime to Sub - Public.

### ***Retainage***

See South Carolina Prime to Sub - Public.

### ***Attorney's Fees***

See South Carolina Prime to Sub - Public.

*Noteworthy*

See South Carolina Prime to Sub - Public.

# South Dakota

## Owner to Prime – Public

### *Who's Covered*

The South Dakota Prompt Payment Act provides protection to contractors and first-tier subcontractors and suppliers who are involved in a contract with a state agency. Under the Act, the following relevant terms are defined, among others:

“Agency“ means each association, authority, board, branch, commission, committee, council, department, division, office, officer, system, task force, or other agent of the state government vested with the authority to exercise any portion of the state’s sovereignty and any county, municipality, public school district, and any officer, board, or commission empowered by law to enter into contracts for the construction of public improvements or for providing public services.

"Contract" means an invoice, purchase order, or vendor contract.

*S.D. Codified Laws § 5-26-1.*

### *Entitlement to Payment*

*S.D. Codified Laws § 5-26-2* provides that payment will be made for “complete” delivery of property or services. However, the statutes do not specify what is meant by “complete.” Thus, the parties’ contract and applicable common law will likely apply.

### *Payment Period*

Payments are due on the date required by contract or, if no date is specified, within 45 days after receipt and written acceptance of property or services as well as receipt of an invoice covering the delivered items or services. *S.D. Codified Laws § 5-26-2.*

### *Grounds to Withhold Payments*

The Prompt Pay Act is not applicable to situations where the amount due is disputed or compliance with the contract is disputed. *S.D. Codified Laws § 5-26-5.* In such a case, the agency must give written notice to the business of its disagreement with the property or services provided within 10 days of receipt of the property, services, or invoice. *Id.* This notice must state the reasons for and details about the dispute. *Id.*

### *Interest*

Proper invoices not paid within 45 days shall accrue interest beginning on the 30th day after receipt of property or service and receipt of the invoice. Interest shall accrue at 1.5% per month or at the rate specified by contract. *S.D. Codified Laws § 5-26-3.* Interest will compound every 60 days or at the end of a contractually specified compounding period. *Id.* No agency is required to pay interest, however, if less than \$5.00. *Id.* § 5-26-3.1.

### ***Retainage***

An amount necessary to complete the improvement shall be retained from the final payment until the contract is executed in full and the public improvement completed to the satisfaction and acceptance of the purchasing agency. *S.D. Codified Laws § 5-18B-11.*

When the contractor has furnished all required records and reports and a final inspection has been made, the amount retained must be released within 30 days after the contract work is completed, as evidenced either by the completion date established by the architect's or engineer's acceptance letter or by the use and occupancy of the public improvement. *Id.* Otherwise, interest will be charged as provided under *S.D. Codified Laws § 54-3-16*, category E. *Id.* Similar rules apply for retention from a progress payment. *Id.*

*See also S.D. Codified Laws § 5-18B-12* (providing for the substitution of securities in lieu of retainage).

### ***Attorney's Fees***

There is not a provision for attorney's fees within the South Dakota Prompt Payment Act.

## **Prime to Sub – Public**

### ***Who's Covered***

*See* South Dakota Owner to Prime - Public.

### ***Entitlement to Payment***

Payment is due to a contractor's subcontractor or supplier when the subcontractor or supplier has satisfied the terms of their contract or material delivery agreement. *S.D. Codified Laws § 5-26-6.*

### ***Payment Period***

Contractors shall pay its subcontractors and suppliers within 30 days of receiving payment from the agency. *S.D. Codified Laws § 5-26-6.*

### ***Grounds to Withhold Payments***

Grounds to withhold payments from a subcontractor or supplier are not specified in the prompt pay act. Thus, the parties' contract or applicable common law will likely govern this issue.

### ***Interest***

Late payments will accrue interest at the rate of 1.5% per month beginning on the 31st day unless otherwise provided by the parties' contract. *S.D. Codified Laws § 5-26-6.*

### ***Retainage***

No provision. Thus, any retention withheld would be subject to the terms of the parties' contract.

### ***Attorney's Fees***

There is not a provision for attorney's fees within the South Dakota Prompt Payment Act.

*Noteworthy*

**Owner to Prime – Private**

South Dakota does not appear to have a prompt payment act applicable to prime contractors on a private project.

**Prime to Sub – Private**

South Dakota does not appear to have a prompt payment act applicable to subcontractors on a private project.

# Tennessee

## Owner to Prime – Public

### *Who's Covered*

Tennessee's "Prompt Pay Act of 1985" provides for protection for those businesses who provide property or services pursuant to a contract with a state agency, which is defined as any entity of the state government, as well as those subcontractors or suppliers that have contracts with business. *Tenn. Code Ann.* §§ 12-4-702, 12-4-703, & 12-4-707.

However, it should be noted that certain sections of the Tennessee Prompt Pay Act of 1991, also apply to public contracts, even though the 1991 Act is generally thought of as the "private" prompt pay act. *Id.* § 66-34-701. These sections include: *Tenn. Code Ann.* §§ 66-34-205 (sums intended as payment are to be held in trust), 66-34-304 (sums intended as payment are to be held in trust), & 66-34-602 (notice of intent to seek relief under a prompt pay act).

### *Entitlement to Payment*

The Prompt Pay Act of 1985 does not specify when a contractor is entitled to submit an invoice to the state agency for payment. Thus, entitlement to payment will likely be governed by the parties' contract and applicable common law.

### *Payment Period*

If no payment date is specified in the contract, payment is due within 45 days after receipt of invoice. *Tenn. Code Ann.* § 12-4-703.

However, if there is a dispute over the amount due or compliance with the contract, payment does not need to be made within this 45 day period. *Id.* § 12-4-706.

### *Grounds to Withhold Payments*

The Prompt Pay Act of 1985 does not specify grounds on which payment may be withheld, other than provisions relating to retainage. Thus, entitlement to withhold payment will likely be governed by the parties' contract and applicable common law.

### *Interest*

Late payments are subject to interest at the rate of 1.5% per month beginning the day after payment is due. *Tenn. Code Ann.* § 12-4-704(a). If interest remains unpaid at the end of each 60-day period or at the end of a contractually specified period, that interest will be added to the debt's principle amount and accumulate interest. *Id.* § 12-4-704(b).

### *Retainage*

Under *Tenn. Code Ann.* § 66-34-103(a), both private and public construction contracts may allow for the withholding of retainage; however, the amount withheld may not exceed 5% of the contract amount. These amounts must be released for completed work under the terms of any contract to the prime contractor within 90 days of the work's completion or within 90 days after substantial completion of the project, whichever occurs first. *Id.* § 66-34-103(b). "Work completed" means

the completion of the scope of the work and all terms and conditions covered by the contract under which the retainage is being held. *Id.*

Additionally, the prime contractor must pay any retainages due to a subcontractor within 10 days of receiving a retention payment from the owner. *Id.* Similarly, subcontractors receiving a retention payment must forward retainages due to a sub-subcontractor or material supplier within 10 days. *Id.*

Under *Tenn. Code Ann.* § 12-4-108, securities may be substituted in place of retainage.

#### ***Attorney's Fees***

There is not a provision for attorney's fees within the Prompt Pay Act of 1985.

### **Prime to Sub – Public**

#### ***Who's Covered***

*See* Tennessee Owner to Prime - Public.

#### ***Entitlement to Payment***

*See* Tennessee Owner to Prime - Public.

#### ***Payment Period***

Upon receiving payment by an agency, a business shall pay its subcontractors and suppliers within 30 days of receiving payment. *Tenn. Code Ann.* § 12-4-707(a).

#### ***Grounds to Withhold Payments***

*See* Tennessee Owner to Prime - Public.

#### ***Interest***

Interest of 1.5% per month will accrue on payments not paid within 30 days after the contractor receives payment from the agency, unless otherwise provided by contract between the business and the agency or the business and the subcontractor or supplier. *Tenn. Code Ann.* § 12-4-707(b). Interest begins to accrue beginning on the 31st day. *Id.*

#### ***Retainage***

*See* Tennessee Owner to Prime - Public.

#### ***Attorney's Fees***

*See* Tennessee Owner to Prime - Public.

## Owner to Prime – Private

### *Who's Covered*

The Tennessee Prompt Pay Act of 1991 provides protection to contractors, subcontractors of all tiers and suppliers of all tiers. However, the 1991 Act does not apply to contracts for the construction of, or home improvement to, any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place for one (1), two (2), three (3) or four (4) single family units. *Tenn. Code Ann.* § 66-34-702. Additionally, the Act does not apply to any bank, savings bank, savings and loan association, industrial loan and thrift company, other regulated financial institution or insurance company. *Id.* § 66-34-703.

Under the Prompt Pay Act of 1991, the following terms are defined, including:

“Contract” means an agreement for improving real property, written or unwritten, express or implied, and includes extras as defined in this section.

“Furnish materials” means (i) To supply materials that are intended to be and are incorporated in the improvement; (ii) To supply materials that are intended to be and are delivered to the site of the improvement and become normal wastage in construction operations; (iii) To specially fabricate materials for incorporation in the improvement and, if not delivered to the site of the improvement, are not readily resalable by the lienor; (iv) To supply materials that are used for the construction and do not remain in the improvement, subject to diminution by the salvage value of such material; or (v) To supply tools, equipment, or machinery as permitted by § 66-11-102(g).

“Improvement” is broadly defined under the statutes to mean not only “any action or any activity in furtherance of constructing, erecting, altering, repairing, demolishing, removing, or furnishing materials or labor for any building, structure, appurtenance to the building or structure, fixture, bridge, driveway, private roadway, sidewalk, walkway . . . [and] the performance of architectural or engineering work,” but also to include such things as seeding, planting flowers, etc.

“Owner” includes the owner in fee of real property, or of a less estate in real property, a lessee for a term of years, a vendee in possession under a contract for the purchase of real property, and any person having any right, title or interest, legal or equitable, in real property, that may be sold under process.

“Prime contractor” means a person, including a land surveyor as defined in § 62-18-102, a person licensed to practice architecture or engineering under title 62, chapter 2, and any person other than a remote contractor who supervises or performs work or labor or who furnishes material, services, equipment, or machinery in furtherance of any improvement; provided, that the person is in direct privity of contract with an owner, or the owner's agent, of the improvement. A “prime contractor” also includes a person who takes over from a prime contractor the entire remaining work under such a contract.

*Id.* §§ 66-34-102 & 66-11-101.

### ***Entitlement to Payment***

A contractor is entitled to payment if he has performed in accordance with the provisions of a written contract with an owner. *Tenn. Code Ann.* §§ 66-34-201 & 66-34-202(a).

### ***Payment Period***

Payments shall be made in accordance with the schedule for payments established within the contract and within 30 days after application for payment is timely submitted by the contractor to the owner, in accordance with the schedule. *Tenn. Code Ann.* § 66-34-202(a). The failure of an architect, engineer or other agent employed by the owner to review and approve an application for payment shall not excuse the owner from making payment unless the architect has certified that a contractor has not completed performance. *Id.* § 66-34-202(b).

### ***Grounds to Withhold Payments***

An owner may withhold payment in accordance with the provisions of a written contract. *Tenn. Code Ann.* § 66-34-203.

### ***Interest***

Late payments will accrue interest at the rate specified in the contract or, if no interest rate is specified, at the rate specified in *Tenn. Code Ann.* § 47-14-121. *Tenn. Code Ann.* § 66-34-601. *Tenn. Code Ann.* § 47-14-121 sets an annual interest rate of 10%.

### ***Retainage***

See Tennessee Owner to Prime - Public.

See also *Tenn. Code Ann.* § 66-34-204 (identifying additional events when retainage must be released, less certain reasons for withholding); *Id.* § 66-34-203 (mirroring the 5% retainage limit set forth in § 66-34-103(a)).

### ***Attorney's Fees***

Attorney's fees may be awarded against the nonprevailing party on a claim under the prompt pay statutes if he or she has acted in bad faith. *Tenn. Code Ann.* § 66-34-602(b).

### ***Noteworthy***

Payments to architects and engineers is governed by *Tenn. Code Ann.* § 66-34-501.

Notification of non-payment and intent to seek relief under the prompt pay statutes must be given to the non-paying party under *Tenn. Code Ann.* § 66-34-602.

Except as specifically noted, §§66-34-205, 66-34-304, & 66-34-602 may not be waived by contract. *Tenn. Code Ann.* § 66-34-701.

## **Prime to Sub – Private**

### ***Who's Covered***

See Tennessee Owner to Prime - Private.

### ***Entitlement to Payment***

Performance by a subcontractor, materialman, or furnisher in accordance with the provisions of its contract with a contractor or another subcontractor shall entitle such person to payment. *Tenn. Code Ann.* §§ 66-34-301, 66-34-302(a), & 66-34-401.

### ***Payment Period***

Payments shall be made in accordance with the schedule for payments established within the contract and within 30 days after application for payment is timely submitted by the subcontractor, materialman, or furnisher to the contractor or subcontractor, in accordance with the schedule. *Tenn. Code Ann.* § 66-34-302 & 66-34-401. The subcontractor shall also be paid its pro rata share of any interest provided for in *Tenn. Code Ann.* § 66-34-601 that has been received by the contractor or subcontractor. *Id.* § 66-34-302(b).

It should be specifically noted that the statute makes payment to a subcontractor subject “to any condition precedent for payment clause in the contract.” *Id.* § 66-34-302(a). This appears to validate pay-if-paid and pay-when-paid clauses.

### ***Grounds to Withhold Payments***

In addition to withholding retainage, a contractor or subcontractor may withhold payment in accordance with the provisions of a written contract. *Tenn. Code Ann.* §§ 66-34-303 & 66-34-401.

### ***Interest***

See Tennessee Owner to Prime - Private.

### ***Retainage***

A reasonable amount not to exceed 5% of the contract’s amount may be withheld in retainage as specified in the written contract between the parties. *Tenn. Code Ann.* § 66-34-103(a).

### ***Attorney’s Fees***

See Tennessee Owner to Prime - Private.

### ***Noteworthy***

See Tennessee Owner to Prime - Private.

# Texas

## Owner to Prime – Public

### *Who's Covered*

The Texas public prompt pay statutes provide protection for those contracting with the governmental agencies (“vendors”), as well as first- and second-tier subcontractors and suppliers. Under the statutes, the following relevant terms are defined, among many others:

“Governmental Entity“ means a state agency or political subdivision of this state.

Political subdivision" means: (1) a county; (2) a municipality; (3) a public school district; or (4) a special-purpose district or authority.

“State Agency“ means a board, commission, department, office, or other agency in the executive branch of state government that is created by the constitution or a statute of Texas, the legislature or a legislative agency, or the judicial branch or State Bar of Texas.

"Subcontractor" means a person who contracts with a vendor to work or contribute toward completing work for a governmental entity. The term does not include a state agency. The term includes an officer or employee of a state agency when the officer or employee contracts with a vendor in a private capacity.

“Vendor“ means a person who supplies goods or services to a governmental entity. In the construction context, the vendor would be the general contractor.

*Tex. Gov't Code Ann. § 2251.001.*

### *Entitlement to Payment*

The statutes do not appear to specify when a contractor or subcontractor is entitled to submit an invoice or other request for payment; thus it seems likely that the parties' contract and the common law will govern entitlement to payment.

### *Payment Period*

Ordinarily, payment is due on the 30th day after the later of: (1) the date the governmental entity receives the goods under the contract; (2) the date when the performance of service under the contract is completed; or (3) the date the governmental entity receives an invoice for the goods or services. *Tex. Gov't Code Ann. § 2251.021(a)*. But if the contract was executed by a Political Subdivision whose governing body meets once a month or less, the payment is due on the 45th day after the later of these events. *Id. § 2251.021(b)*.

If a submitted invoice contains an error, the governmental entity must notify the vendor within 21 days of receiving the invoice. *Id. § 2251.042(a)*.

### *Grounds to Withhold Payments*

The ordinary payment period does not apply to a payment made by a governmental entity, vendor or subcontractor if: (1) there is a bona fide dispute between the Political Subdivision and the vendor, contractor, subcontractor, or supplier about the goods delivered or the services performed that

causes the payment to be late; (2) there is a bona fide dispute between a vendor and a subcontractor or between a subcontractor and its supplier about goods delivered or services performed that causes the payment to be late; (3) the terms of a federal contract, grant, regulation or statute prevent the governmental agency from making a timely payment with federal funds; or (4) the invoice is not mailed to the person to whom it is addressed in strict accordance with any instruction on the purchase order relating to the payment. *Tex. Gov't Code Ann.* § 2251.002(a).

### **Interest**

Interest begins to accrue on a late payment the day that that it becomes overdue. *Tex. Gov't Code Ann.* § 2251.025(a). The annual interest rate is calculated as of September 1st in the fiscal year in which payment became overdue. *Id.* § 2251.025(b). The rate is equal to the prime rate on the first weekday of the preceding July plus 1%. *Id.* Interest will stop accruing when payment is mailed or electronically submitted. *Id.* § 2251.025(c).

*See id.* §§ 2251.026 (payment of interest by state agency); 2251.027 (payment of interest by political subdivision); 2251.028 (payment of interest by vendor or subcontractor).

### **Retainage**

Texas does not appear to place limits on the amount of retainage that may be withheld. However, if the contract provides for retainage of 5% or greater, the governmental entity (*i.e.*, not a vendor) must keep the retainage in an interest bearing account to be disbursed upon completion of the contract. *Tex. Gov't Code Ann.* § 2252.032. This statute does not apply if the contract price is less than \$400,000 or if the contract is made with the Texas Department of Transportation. *Id.* § 2252.033. *See also Tex. Transp. Code Ann.* § 223.010 (relating to retainage under the transportation code). Other retainage agreements are contractually governed.

### **Attorney's Fees**

In a formal administrative or judicial action to collect an invoice payment or interest due under the prompt payment statutes, the opposing party, which may be the governmental entity or the vendor, shall pay the reasonable attorney fees of the prevailing party. *Tex. Gov't Code Ann.* § 2251.043.

### **Noteworthy**

Under *Tex. Gov't Code Ann.* § 2251.004, a person may not waive any right or remedy granted by the prompt payment statutes. Any purported waiver of any right or remedy granted by this chapter is void.

*Tex. Gov't Code Ann.* § 2251.051 gives a vendor the right to suspend performance under a contract with the governmental entity for nonpayment upon following specific notice requirements. Similarly, *Tex. Gov't Code Ann.* § 2251.052 allows subcontractors the right to suspend performance if not paid by the vendor.

Highway-related contracts are addressed specially in *Tex. Gov't Code Ann.* § 2251.053.

*Tex. Gov't Code Ann.* § 2251.054 details requirements for notices and written communications that must be issued under the prompt pay act.

The rights and remedies provided in the prompt pay act are not exclusive. *Tex. Gov't Code Ann.* § 2251.055.

## Prime to Sub – Public

### *Who's Covered*

See Texas Owner to Prime - Public.

### *Entitlement to Payment*

See Texas Owner to Prime - Public.

### *Payment Period*

The vendor is required to pay a subcontractor the appropriate share of any received payment within 10 days after the vendor received payment from the governmental entity. *Tex. Gov't Code Ann.* § 2251.022(a).

A subcontractor who receives payment from a vendor must pay anyone supplying goods or services for which the payment is made the appropriate share of the payment not later than 10 days after the date on which the subcontractor received payment. *Id.* § 2251.023.

With regard to lower-tier subcontractors, see Texas Prime to Sub - Private.

### *Grounds to Withhold Payments*

See Texas Owner to Prime - Public.

### *Interest*

See Texas Owner to Prime - Public.

### *Retainage*

See Texas Owner to Prime - Public.

### *Attorney's Fees*

The subcontractor is not included in the prompt payment act's language with regard to the collection of attorney fees. However, the *Tex. Civ. Prac. & Rem. Code* § 38.001 provides that a person may recover reasonable attorney's fees from an individual or corporation, if the person's claim is for rendered services, performed labor, or furnished material.

### *Noteworthy*

See Texas Owner to Prime - Public.

## Owner to Prime – Private

### *Who's Covered*

The Texas private prompt pay statutes, *Tex. Prop. Code Ann.* §§ 28.001 to 28.010, provide protection for prime contractors, subcontractors, suppliers, as well as lower-tiered subcontractors and suppliers.

Under the statutes, the following relevant terms are defined:

“Contractor” means a person who contracts with an owner to improve real property or perform construction services for an owner.

“Improve” means to:

- (A) build, construct, effect, erect, alter, repair, or demolish any improvement on, connected with, or beneath the surface of real property;
- (B) excavate, clear, grade, fill, or landscape real property;
- (C) construct a driveway or roadway;
- (D) furnish any material, including trees or shrubbery, for the purpose of taking any action described by Paragraphs (A)-(C) of this subdivision; or
- (E) perform any labor on or in connection with an improvement.

“Improvement” includes all or any part of:

- (A) a building, structure, erection, alteration, demolition, or excavation on, connected with, or beneath the surface of real property; and
- (B) the act of clearing, grading, filling, or landscaping real property, including constructing a driveway or roadway or furnishing trees or shrubbery.

“Owner” means a person or entity, other than a governmental entity, with an interest in real property that is improved, for whom an improvement is made, and who ordered the improvement to be made.

“Real property” includes lands, leaseholds, tenements, hereditaments, and improvements placed on the real property.

“Subcontractor” means a person who contracts to furnish labor or material to, or has performed labor or supplied materials for, a contractor or another subcontractor in connection with a contract to improve real property.

*Tex. Prop. Code Ann.* § 28.001.

### ***Entitlement to Payment***

The statutes do not appear to specify when a contractor or subcontractor is entitled to submit an invoice or other request for payment; thus it seems likely that the parties’ contract and the common law will govern entitlement to payment. *See, e.g., Tex. Prop. Code Ann.* § 28.002(a) (referring to amounts that are allowed to the contractor under the contract for properly performed work or suitably stored or specially fabricated materials).

### ***Payment Period***

Payment is timely when made no later than the 35th day after the date the Owner receives the request. *Tex. Prop. Code Ann.* § 28.002(a). However, in the case of a single family residence, the parties may contractually modify the payment period to allow for payment up to 60 days after receipt of the payment request. *Tex. Prop. Code Ann.* § 28.006.

### ***Grounds to Withhold Payments***

An Owner may withhold payment, or a portion of the request based upon a good faith dispute regarding the amount owed or the proper performance of work. *Tex. Prop. Code Ann.* § 28.003. If the contract for improvements concerns a detached single-family residence, duplex, triplex, or quadruplex, the owner, contractor, or subcontractor that is disputing its obligation to pay or the amount of payment may withhold up to 110% of the disputed amount. *Id.* § 28.003(a). For any other type of contract, the Owner may withhold 100% of the disputed amount. *Id.* § 28.003(b).

Amounts may also be withheld upon the lender's failure to disburse funds. If the lender is obligated to disburse funds but fails to do so, the Owner may pay the contractor by the fifth day after the Owner receives the loan proceeds. *Id.* § 28.008.

### **Interest**

Interest begins to accrue at a rate of 1.5% per month on the day after payment was due. *Tex. Prop. Code Ann.* § 28.004. Interest will stop accruing on the date that the payment is delivered, mailed (if delivery occurs within 3 days), or the date a judgment is entered on a claim brought under the prompt pay act, whichever is earliest. *Id.*

### **Retainage**

During the progress of work and for 30 days after the work is completed, the Owner must retain 10% of the contract price of the work or 10% of the value of the completed work, measured using the contract price or, if there is no contract price, using the reasonable value of the completed work. *Tex. Prop. Code Ann.* § 53.101.

### **Attorney's Fees**

In an action under the Act, the court may award costs and attorney's fees in an amount it determines to be equitable and just. *Tex. Prop. Code Ann.* § 28.005.

### **Noteworthy**

*Tex. Prop. Code Ann.* § 28.010 exempts any agreement for oil field services or mineral development.

No provision of the Act may be waived, other than in a written contract between an owner and contractor for improvements to or construction of a single-family residence, which may provide for payment to be made within 60 days after the owner receives a payment request. *Tex. Prop. Code Ann.* § 28.006.

*Tex. Prop. Code Ann.* § 28.009 gives a contractors or any subcontractor the right to suspend work upon non-payment if certain notices are given.

## **Prime to Sub – Private**

### **Who's Covered**

See Texas Owner to Prime - Private.

### **Entitlement to Payment**

See Texas Owner to Prime - Private.

### **Payment Period**

Payment is timely to a subcontractor when made no later than the seventh day after the contractor receives the Owner's payment. *Tex. Prop. Code Ann.* § 28.002(b). Similarly, a payment is timely from one subcontractor to another if made within seven days of when the higher-tiered subcontractor received payment. *Id.* § 28.002(c).

### ***Grounds to Withhold Payments***

The statutes do not appear to define grounds upon which a contractor or subcontractor may withhold grounds from a subcontractor. Thus, the parties' contract will likely govern when payment may be withheld.

### ***Interest***

See Texas Owner to Prime - Private.

### ***Retainage***

There does not appear to be a limitation upon the amount of retention that may be withheld from a subcontractor. Therefore, these amounts will be governed by the parties' contract.

### ***Attorney's Fees***

See Texas Owner to Prime - Private.

### ***Noteworthy***

See Texas Owner to Prime - Private.

## Utah

*NOTE: Utah appears to have three “sets” of payment statutes that are applicable to construction contracts. The first set of statutes is contained in Utah Code Ann. §§ 13-8-1 to 13-8-5 (relating to unenforceable agreements). These statutes apply to both private and public contracts entered into on or after July 1, 1999. Utah Code Ann. § 13-8-5(2). The second set of statutes is contained in Utah Code Ann. §§ 15-6-1 to 15-6-6 (“Utah Prompt Payment Act”) and addresses issues with public contracts. Finally, the third set is contained in Utah Code Ann. §§ 58-55-602 & 58-55-603. Section 58-55-602, however, refers back to the retainage and final payment provisions of Utah Code Ann. § 13-8-5.*

*This public section of the Survey will address the first two statutory sets, and the section on private contracts will address the third set of statutes.*

### Owner to Prime – Public

#### *Who’s Covered*

The Utah Prompt Payment Act provides protections for prime contractors and their subcontractors and suppliers to a contract with an agency of the State of Utah, with the exception of contracts involving the disbursement of federal funds by the State or its agencies. *Utah Code Ann. §§ 15-6-2, 15-6-5, & 15-6-6.*

#### *Entitlement to Payment*

The Prompt Pay Act does not define when a contractor or subcontractor is entitled to request payment; thus, entitlement will likely be determined by reference to the parties’ contract or the common law.

#### *Payment Period*

If no payment date is specified in the contract, payment is due within 60 days after receipt of the invoice covering the delivered items or services. *Utah Code Ann. § 15-6-2(1).*

However, if the agency has failed to pay the amount due on time because of a dispute between the agency and the business over the amount due or over compliance with the contract, then the provisions of Prompt Payment Act do not apply. *Id.* 15-6-4.

#### *Grounds to Withhold Payments*

If a contractor or subcontractor is in default or breach of the terms and conditions of the construction contract the owner or public agency may withhold from payment for as long as reasonably necessary an amount necessary to cure the breach or default of the contractor or subcontractor; or if a project or a portion of the project has been substantially completed, the owner or public agency may retain until completion up to twice the fair market value of the work of the original contractor or of any subcontractor that has not been completed: (1) in accordance with the construction contract documents, plans, and specifications; or (2) in the absence of plans and specifications, to generally accepted craft standards. The owner must describe in writing within 45 days of withholding what portion of the work was not properly completed. *Utah Code Ann. § 13-8-5(8).*

### **Interest**

Late payments are subject to interest of 2% above the rate paid by the Internal Revenue Service on refund claims. *Utah Code Ann.* § 15-6-3(1). Interest will be adjusted quarterly and applied on an annual basis beginning the day after payment is due. *Id.* Interest will compound at the end of each 60-day period, or at the end of such other period provided by contract. *Id.* § 15-6-3(2).

Any owner, public agency, original contractor, or subcontractor who knowingly and wrongfully withholds a retention shall be subject to a charge of 2% per month on the improperly withheld amount, in addition to any interest otherwise due. *Utah Code Ann.* § 13-8-5(10)(b).

### **Retainage**

Retention proceeds withheld and retained from any payment due under the terms of the construction project may not exceed 5% of the payment: (1) by the owner or public agency to the original contractor; (2) by the original contractor to any subcontractor; or (3) by a subcontractor. *Utah Code Ann.* § 13-8-5(3)(a). Further, the total retention proceeds withheld may not exceed 5% of the total construction price. *Id.* § 13-8-5(3)(b).

The percentage of the retention proceeds withheld and retained pursuant to a construction contract between the original contractor and a subcontractor or between subcontractors shall be the same retention percentage as between the owner and the original contractor if: (1) the retention percentage in the original construction contract between an owner and the original contractor is less than 5%; or (2) after the original construction contract is executed but before completion of the construction contract the retention percentage is reduced to less than 5%. *Id.* § 13-8-5(3)(c).

Exceptions to the general rule set out in *Utah Code Ann.* § 13-8-5(3) are established in subsection (8), as set out in the “Grounds to Withhold Payment,” *supra*.

Retention proceeds shall be placed in an interest bearing account. *Id.* § 13-8-5(4).

Retention proceeds shall be released pursuant to a billing statement from the contractor within 45 days from the later of: (1) the date that the owner or public agency receives the billing statement; (2) the date that a certificate of occupancy or final acceptance notice is issued to: (a) the original contractor, (b) the owner or architect, or (c) the public agency; (3) the date that a public agency or building inspector having authority to issue its own certificate of occupancy does not issue the certificate but permits partial or complete occupancy of a newly constructed or remodeled building; or (4) the date the contractor accepts the final pay quantities. *Id.* § 13-8-5(5). If only partial occupancy is permitted, retention must be released in proportion to the value of the part of the building that is occupied. *Id.* § 13-8-5(6).

Contractors or subcontractors who receive retention payments shall pay their subcontractors from whom retention has been withheld within 10 days from the day proceeds are received. *Id.* § 13-8-5(9).

### **Attorney's Fees**

In any action for the collection of retained proceeds withheld in violation of the statute, the successful party is entitled to attorney's fees and other allowable costs. *Utah Code Ann.* § 13-8-5(10)(a).

### ***Noteworthy***

*Utah Code Ann.* § 13-8-1(2) states that, with specified statutory exceptions, indemnification provisions in a construction contract between any combination of the following parties is against public policy, void, and unenforceable: (i) a construction manager; (ii) a general contractor; (iii) a subcontractor; (iv) a sub-subcontractor; and (v) a supplier.

*Utah Code Ann.* § 13-8-2, provides that contractual limitations on liability arising from the services of design professionals are prohibited.

Choice of venue provision in a State other than Utah is void, unenforceable, and against public policy if one of the parties to the construction contract is domiciled in Utah and the work to be done, or equipment and materials to be supplied, involves a Utah construction project. *Utah Code Ann.* § 13-8-3.

With regard to pay-if-paid or pay-when-paid clauses, *Utah Code Ann.* § 13-8-4 makes such a provision ineffective as a defense to a claim to enforce a mechanic's lien. However, the statute does not indicate that such clauses are unenforceable for all purposes.

Waiver of the retention provisions contained in *Utah Code Ann.* § 13-8-5 is not permitted. *Id.* § 13-8-5.

## **Prime to Sub – Public**

### ***Who's Covered***

See Utah Owner to Prime - Public.

### ***Entitlement to Payment***

See Utah Owner to Prime - Public.

### ***Payment Period***

Subcontractors and suppliers shall be paid within 30 days after the contractor receives payment from the state agency. *Utah Code Ann.* § 15-6-5.

### ***Grounds to Withhold Payments***

See Utah Owner to Prime - Public.

### ***Interest***

Payments to subcontractors and suppliers that are not made within 45 days after the contractor receives payment from the state will be subject to interest at the rate of 15.5% per year. *Utah Code Ann.* § 15-6-5. Interest will begin to accrue on the 31st day. *Id.*

### ***Retainage***

See Utah Owner to Prime - Public.

### ***Attorney's Fees***

See Utah Owner to Prime - Public.

### ***Noteworthy***

See Utah Owner to Prime - Public.

## **Owner to Prime – Private**

### ***Who's Covered***

The protection offered to a private prime contractor under *Utah Code Ann.* § 58-55-602 appears to be limited to the payment of retention and final payment as detailed in *Utah Code Ann.* § 13-8-5. See Utah Owner to Prime - Public.

### ***Entitlement to Payment***

See Utah Owner to Prime - Public.

### ***Payment Period***

There does not appear to be a provision for the payment of progress payments in the statute. Thus, the parties' contract would likely govern this issue.

With regard to final payment and/or retainage, see Utah Owner to Prime - Public.

### ***Grounds to Withhold Payments***

See Utah Owner to Prime - Public.

### ***Interest***

Any owner, public agency, original contractor, or subcontractor who knowingly and wrongfully withholds a retention shall be subject to a charge of 2% per month on the improperly withheld amount, in addition to any interest otherwise due. *Utah Code Ann.* § 13-8-5(10)(b).

### ***Retainage***

See Utah Owner to Prime - Public.

### ***Attorney's Fees***

See Utah Owner to Prime - Public.

### ***Noteworthy***

See Utah Owner to Prime - Public.

## **Prime to Sub – Private**

### ***Who's Covered***

*Utah Code Ann.* § 58-55-603 provides protection for suppliers and subcontractors of both a contractor and a subcontractor.

See also Utah Owner to Prime - Public.

### ***Entitlement to Payment***

*Utah Code Ann.* § 58-55-603 does not describe when a subcontractor is entitled to submit a payment to the contractor or another subcontractor. Thus, entitlement to payment would likely be governed by the parties' contract and common law.

***Payment Period***

Upon receipt of funds from an owner, a contractor, or another subcontractor for work performed and billed, the contractor or subcontractor shall pay their subcontractors and suppliers within 30 days unless otherwise agreed by contract. *Utah Code Ann.* § 58-55-603(1).

***Grounds to Withhold Payments***

See Utah Owner to Prime - Public.

***Interest***

Late payments are subject to interest at the rate of 1% per month beginning on the day after payment is due. *Utah Code Ann.* § 58-55-603(2).

***Retainage***

See Utah Owner to Prime - Public.

***Attorney's Fees***

The reasonable costs of collection and attorney's fees are allowed under *Utah Code Ann.* § 58-55-603(1).

***Noteworthy***

See Utah Owner to Prime - Public.

# Vermont

## Owner to Prime – Public

### *Who's Covered*

The Vermont prompt pay act, *Vt. Stat. Ann.* tit. 9, §§ 4001 to 4009, applies to public and private contracts involving work on real property within Vermont, and it provides protection for contractors and subcontractors of all tiers. However, these statutes do not apply to contracts for the purchase of materials by a natural person performing work on his own property.

Under the statute, the following terms are defined, among others:

"Billing period" means the period agreed to by the parties or, in the absence of an agreement, the calendar month within which work is performed.

"Contractor" means a person or entity which contracts with an owner to perform work, or provide materials or machinery necessary to perform work on real property.

"Construction contract" means any agreement, whether written or oral, to perform work on any real property located within the state of Vermont.

"Owner" means a person or entity having an interest in real property on which work is performed, if the person or entity has agreed to or requested such work. "Owner" also includes the state of Vermont and instrumentalities and subdivisions of the state of Vermont including municipalities and school districts having an interest in such real property.

"Subcontractor" means any person or entity which has contracted to perform work, or provide materials or machinery necessary to perform work for a contractor or another subcontractor in connection with a construction contract.

"Work" means to build, alter, repair or demolish any improvement on, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property or to construct driveways, private roadways, highways and bridges, drilled wells, septic, sewage systems, utilities, including trees and shrubbery, or to furnish materials, for any of such purposes, or to perform any labor upon real property. "Work" also includes any design or other professional or skilled services rendered by architects, engineers, land surveyors, landscape architects, and construction managers.

*Vt. Stat. Ann.* tit. 9, § 4001.

### *Entitlement to Payment*

The contractor shall be paid in strict accordance with the parties' contract. *Vt. Stat. Ann.* tit. 9, § 4002(a). If the contract is silent on the terms of payment, a contractor is entitled to invoice the owner for progress payments at the end of the billing period. *Id.* § 4002(b). A final invoice for full payment may be made upon completion of the agreed-upon work. *Id.*

### ***Payment Period***

Payment of interim and final invoices shall be due from the owner 20 days after the end of the billing period or 20 days after delivery of invoice, whichever is later. *Vt. Stat. Ann.* tit. 9, § 4002(c). If an invoice is incorrect or incomplete, the receiving party will contract the invoicing party in writing within 10 days; otherwise, any error is deemed to have been waived. *Id.* § 4004. If the invoice is corrected, the date on which the corrected invoice is delivered is deemed the end of the billing period. *Id.*

### ***Grounds to Withhold Payments***

The statute does not prevent an owner, contractor, or subcontractor from withholding payment in whole or in part in an amount equaling the value of any good faith claims against an invoicing contractor or subcontractor, including claims arising from unsatisfactory job progress, defective construction, disputed work or third party claims. *Vt. Stat. Ann.* tit. 9, § 4007(a).

### ***Interest***

Except as otherwise agreed, late progress or final payments will begin to accrue interest at 12% per year, the rate specified in *Vt. Stat. Ann.* tit. 12, § 2903(b), beginning on the 21st day. *Vt. Stat. Ann.* tit. 9, § 4002(d).

If an owner, contractor, or subcontractor is found through arbitration or litigation to have failed to comply with the terms of the prompt payment act, then—in addition to all other damages due—the arbitrator or the court will award as a penalty 1% per month of all sums that were wrongfully withheld. *Id.* § 4007(b). However, an amount will not be found to be wrongfully withheld to the extent that it bears a reasonable relationship to a good faith disputed amount. *Id.*

### ***Retainage***

Amounts retained during the performance of the contract and due to be released to the contractor upon final completion shall be paid within 30 days after final acceptance of the work. *Vt. Stat. Ann.* tit. 9, § 4005(a). If an owner is not withholding retainage, a contractor may withhold retainage from its subcontractor in accordance with their agreement and must release that retainage within 30 days of final acceptance of the work. *Id.* § 4005(b).

Regardless of any other agreement to the contrary, a contractor shall pay its subcontractors, and each subcontractor shall pay its subcontractors the full amount due within seven days after receipt of retainage. *Id.* § 4005(c). If retainage or acceptance is unreasonably withheld by an owner, contractor, or subcontractor, the owner, contractor, or subcontractor shall be subject to the interest penalty and attorneys' fees provisions identified in *Vt. Stat. Ann.* tit. 9, §§ 4002, 4003, and 4007. *Id.* § 4005(c), (d).

### ***Attorney's Fees***

Attorneys fees and expenses—in an amount to be determined by a court or arbitrator—shall be awarded to the substantially prevailing party in any proceeding to recover payment under the Act. *Vt. Stat. Ann.* tit. 9, 4007(c).

### ***Noteworthy***

If necessary to receive federal aid, the provision of this chapter may be varied by contract. *Vt. Stat. Ann.* tit. 9, § 4008.

## **Prime to Sub – Public**

### ***Who's Covered***

See Vermont Owner to Prime - Public.

### ***Entitlement to Payment***

Upon the subcontractor's performance in accordance with the contract's terms, the subcontractor shall be paid. *Id.* § 4003(a)

### ***Payment Period***

Contractors shall pay subcontractors, and subcontractors shall pay their subcontractors, within seven days after receipt of each progress or final payment or seven days after receipt of the subcontractor's invoice, whichever is later. *Vt. Stat. Ann.* tit. 9 § 4003(c).

If an invoice is incorrect or incomplete, the receiving party will contract the invoicing party in writing within 10 days; otherwise, any error is deemed to have been waived. *Id.* § 4004. If the invoice is corrected, the date on which the corrected invoice is delivered is deemed the end of the billing period. *Id.*

### ***Grounds to Withhold Payments***

See Vermont Owner to Prime - Public.

### ***Interest***

*Notwithstanding a contrary agreement*, late progress or final payments will begin to accrue interest at 12% per year, the rate specified in *Vt. Stat. Ann.* tit. 12, § 2903(b), beginning on the eighth day. *Vt. Stat. Ann.* tit. 9, § 4003(d)

### ***Retainage***

See Vermont Owner to Prime - Public.

### ***Attorney's Fees***

See Vermont Owner to Prime - Public.

### ***Noteworthy***

See Vermont Owner to Prime - Public.

## **Owner to Prime – Private**

### ***Who's Covered***

See Vermont Owner to Prime - Public.

### ***Entitlement to Payment***

See Vermont Owner to Prime - Public.

***Payment Period***

See Vermont Owner to Prime - Public.

***Grounds to Withhold Payments***

See Vermont Owner to Prime - Public.

***Interest***

See Vermont Owner to Prime - Public.

***Retainage***

See Vermont Owner to Prime - Public.

***Attorney's Fees***

See Vermont Owner to Prime - Public.

***Noteworthy***

See Vermont Owner to Prime - Public.

**Prime to Sub – Private**

***Who's Covered***

See Vermont Prime to Sub - Public.

***Entitlement to Payment***

See Vermont Prime to Sub - Public.

***Payment Period***

See Vermont Prime to Sub - Public.

***Grounds to Withhold Payments***

See Vermont Prime to Sub - Public.

***Interest***

See Vermont Prime to Sub - Public.

***Retainage***

See Vermont Prime to Sub - Public.

***Attorney's Fees***

See Vermont Prime to Sub - Public.

***Noteworthy***

See Vermont Prime to Sub - Public.

# Virginia

## Owner to Prime – Public

### *Who's Covered*

The Virginia prompt payment statutes provide protection to contractors that have a direct contract with a state agency or any agency of local government as well as subcontractors of all tiers. However, the statutes do not apply to the late payment provisions of any public utility tariff prescribed by the State Corporation Commission. *Va. Code Ann.* § 2.2-4348.

Under the statutes, the following relevant terms are defined:

“Contractor“ means the entity that has a direct contract with any “state agency“ or any agency of local government. *Id.* § 2.2-4347.

“Locality“ includes every agency of local government that acquires goods or services, or conducts any other type of contractual business with a nongovernmental, privately owned enterprise. *Id.* § 2.2-4352.

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, either

(a) 30 days after receipt of a proper invoice by the state agency or its agent or 45 days after receipt by the local government or its agent responsible under the contract for approval of such invoices for the amount of payment due, or

(b) 30 days after receipt of the goods or services by the state agency or 45 days after receipt by the local government,

whichever is later. *Id.* § 2.2-4347.

“State agency“ means any authority, board, department, instrumentality, institution, agency or other unit of state government. The term “state agency“ does not include any county, city or town or any local or regional governmental authority. *Id.* § 2.2-4347.

"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract. *Id.*

### *Entitlement to Payment*

Payment is owed by local governments and state agencies for goods that are “completely” delivered by the required payment date. *Va. Code Ann.* §§ 2.2-4350 & 2.2-4352. What constitutes “completely” will likely be determined by the parties’ contract and reference to common law.

### *Payment Period*

A state agency or local government shall promptly pay by the required payment date. *Va. Code Ann.* §§ 2.2-4350 & 2.2-4352. As defined above, if not established by contract, this date will be the later of (1) 30 days after the state agency’s receipt of a proper invoice (or 45 days in the case of a

local government) or (2) 30 days after receipt of the goods or services by the state agency (or 45 days in the case of a local government). *Id.* § 2.2-4347.

If there is a defect in the invoice, the state agency must notify the invoicer of the defect within 15 days if payment would be prevented by the payment date as a result of the defect. *Id.* § 2.2-4351. In a local government is the invoice receiver, such notice must only be sent within 20 days. *Id.* § 2.2-4352.

A mailed payment will be deemed paid as of the date of the postmark. *Id.* § 2.2-4353.

### ***Grounds to Withhold Payments***

Grounds to withhold payment are not specified in the statute, other than for an improper invoice, as described above, or for retainage. Thus, such grounds will likely be determined by reference to the parties' contract or the common law.

### ***Interest***

In the case of a late payment from a local government, finance charges not to exceed 1% per month that are assessed by the supplier of goods or services must be paid. *Va. Code Ann.* § 2.2-4352.

With regard to a state agency, interest will accrue on amounts remaining unpaid seven days after the payment date. *Id.* § 2.2-4355(A). However, the contract may provide for a different rate of interest or for interest payments in a different manner than that specified in the statute. *Id.* Additionally, interest will not accrue on amounts where the delay is the result of a dispute over the goods' or services' quantity, quality, or time of delivery. *Id.* § 2.2-4355(C).

Interest will be assessed at the base rate on corporate loans, as reported daily in the *Wall Street Journal*. *Id.* § 2.2-4355(B).

### ***Retainage***

In any public contract for construction providing for progress payments based on the percentage of completion, including subcontracts for a public project, no more than 5% may be retained to ensure faithful contract performance. *Va. Code Ann.* § 2.2-4333.

Interest will not accrue on retainage withheld under *Va. Code Ann.* § 2.2-4333. *Id.* § 2.2-4355(D).

### ***Attorney's Fees***

No provision for attorney's fees is made within the prompt pay statutes..

### ***Noteworthy***

## **Prime to Sub – Public**

### ***Who's Covered***

See Virginia Owner to Prime - Public.

### ***Entitlement to Payment***

A subcontractor is entitled to payment received from a state agency or local government for its proportionate share of work, absent a stated reason for non-payment. *Va. Code Ann.* § 2.2-

4354(1)(a) & an unnumbered paragraph requiring each subcontractor to include or otherwise be subject to a similar requirement.

***Payment Period***

A subcontractor must be paid within seven days after receipt of amounts paid to the contractor or subcontractor by the state agency or local government for work performed by the subcontractor under the contract. *Va. Code Ann. § 2.2-4354(1)*.

***Grounds to Withhold Payments***

*See Virginia Owner to Prime - Public.*

***Interest***

Unless otherwise provided in the subcontract, interest shall accrue at the rate of one percent (1%) per month. *Va. Code Ann. § 2.2-4352(3), (4)*.

***Retainage***

*See Virginia Owner to Prime - Public.*

***Attorney's Fees***

*See Virginia Owner to Prime - Public.*

***Noteworthy***

**Owner to Prime – Private**

Virginia does not appear to have a prompt payment act applicable to prime contractors on a private project.

**Prime to Sub – Private**

Virginia does not appear to have a prompt payment act applicable to subcontractors on a private project.

# Washington

## Owner to Prime – Public

### *Who's Covered*

The Washington prompt payment statutes provide protection for those contracting directly with state agencies, counties, cities, towns, school districts, board, commissions, and any other public body, as well as subcontractors of all tiers.

### *Entitlement to Payment*

The statutes do not appear to establish when a contractor or subcontractor is entitled to payment; therefore, the parties' contract and the common law will likely determine when entitlement to payment arises.

### *Payment Period*

For the purposes of assessing interest, payment is timely if mailed or made available on the date specified for the amount specified in the contract or, if no date is specified, within 30 days of receipt of a properly completed invoice or receipt of goods or services, whichever is later. *Wash. Rev. Code* § 39.76.011(1), (2)(a).

If payment is withheld for unsatisfactory performance or submission of an improper payment request, and the prime contractor remedies the defective work or request, the public body must pay the contractor within 30 calendar days after the prime contractor satisfactorily completes the remedial action.

### *Grounds to Withhold Payments*

In the event of a good faith dispute over all or a portion of the amount due, no more than 150% of the disputed amount may be withheld. *Wash. Rev. Code* § 39.04.250(2). Those not a party to the dispute are entitled to full and prompt payment. *Id.*

It appears that payment may also be withheld for unsatisfactory performance, or when a payment request does not comply with the requirements of the contract. *Id.* § 39.76.11(b). In such a situation, the public body must notify the prime contractor, in writing, within 8 working days after receipt of the payment request stating specifically why part or all of the payment is being withheld and what remedial actions must be taken by the prime contractor to receive the withheld amount. *Id.*

### *Interest*

Late payments are subject to interest at the rate of 1% per month, but at least \$1.00 per month, on amounts due on written contracts for public works, personal services, goods and services, equipment, and travel, whenever the state agency or unit of local government fails to make timely payment. *Wash. Rev. Code* § 39.76.011(1).

However, interest will not be assessed on certain types of transactions, as specified in *Wash. Rev. Code* § 39.76.020.

### ***Retainage***

Retainage shall not exceed 5% of the moneys earned by the contractor; however, the statute indicates that some amount of retainage shall be withheld. *Wash. Rev. Code* § 60.28.011(1). At any time, the contractor may request that retainage be reduced to 100% of the value of the work remaining on the project. *Id.* § 60.28.011(3). Any money or securities that are retained may be, at the contractor's request, placed into an interest bearing escrow account. *Id.* § 60.28.011(4). However, in lieu of cash retention, the contractor may substitute a bond. *Id.* § 60.28.011(6).

At the completion of all contract work other than landscaping, the contractor may request that retainage be released in full within 60 days. *Id.* § 60.28.011(3).

### ***Attorney's Fees***

In any action brought to collect interest due under the Act, the prevailing party is entitled to an award of reasonable attorney fees. *Wash. Rev. Code* § 39.76.040.

## **Prime to Sub – Public**

### ***Who's Covered***

See Washington Owner to Prime - Public.

### ***Entitlement to Payment***

See Washington Owner to Prime - Public.

### ***Payment Period***

Contractors and subcontractors shall pay subcontractors their proportionate share within 10 days after the receipt of payment. *Wash. Rev. Code*. § 39.04.250(1).

### ***Grounds to Withhold Payments***

See Washington Owner to Prime - Public.

Additionally, under *Wash. Rev. Code* § 39.76.011(2)(e), a prime contractor may withhold payments for unsatisfactory performance as allowed by the terms of the subcontract. If the prime contractor does withhold for such a reason, it must provide the subcontractor notice of the remedial actions that must be taken as soon as practicable after determining the cause for the withholding, but before the due date for the subcontractor payment. The prime contractor must also give the contracting officer of the public body a copy of the notice furnished to the subcontractor. Finally, the prime contractor must pay the subcontractor within eight working days after the subcontractor satisfactorily completes the remedial action identified in the notice. *Id.*

### ***Interest***

Amounts wrongfully withheld from a subcontractor after receipt of payment are subject to interest at the highest rate allowed under *Wash. Rev. Code* § 19.52.025. *Wash. Rev. Code* § 39.04.250. This monthly rate is reevaluated each month by the state treasurer. *Id.* § 19.52.025.

Payments withheld for unsatisfactory performance: Failure of a prime contractor to comply with the notice and payment provisions of *Wash. Rev. Code* § 39.76.011(2)(e) will result in an accrual of interest on such withheld payments at a rate of one percent per month, but at least one dollar per month. *Id.* §§ 39.76.011(2)(e)(ii) & 39.76.011(1).

### ***Retainage***

A contractor or subcontractor may also withhold payment of no more than 5% from the money earned by a subcontractor or sub-subcontractor or supplier. *Wash. Rev. Code* § 60.28.011(5). Interest must be paid on funds or securities withheld at the same rate as that received by a contractor or subcontractor from reserved funds. *Id.*

If a contractor has substituted a bond in lieu of retainage, he must accept like bonds from his subcontractors or suppliers. *Id.* § 60.28.011(6).

### ***Attorney's Fees***

If an action to collect amounts alleged to be wrongfully withheld from a subcontractor after receipt of payment, the prevailing party is entitled to the costs of suit and reasonable attorney fees. *Wash. Rev. Code* § 39.04.250(3).

### **Owner to Prime – Private**

Washington does not appear to have a prompt payment act applicable to prime contractors on a private project.

### **Prime to Sub – Private**

Washington does not appear to have a prompt payment act applicable to subcontractors on a private project.

# West Virginia

## Owner to Prime – Public

### *Who's Covered*

The West Virginia prompt pay statutes provided protection for those contracting directly with a state agency under “The Prompt Pay Act of 1990.” However, these provisions were repealed on March 13, 2010. A new, similar act, titled “The Prompt Pay Act of 2011” is being considered by the West Virginia legislature, but is not yet effective., *See* S. 462, 2011 Reg. Sess. (W. Va.).

Those contracting directly with a county or county agency (*W. Va. Code* § 7-5-7), or a municipality or municipality agency (*W. Va. Code* § 8-13-22d) to provide services or commodities are still protected.

*W. Va. Code* §§ 7-5-7 and 8-13-22d are referred to as the *Prompt Pay Act of 1995*.

### *Payment Period*

Payment is due within 60 days after a legitimate uncontested invoice is received. *W. Va. Code* §§ 7-5-7(b)(1), & 8-13-22d(b)(1).

An invoice is deemed received on the date that it is marked as received by the agency or three days after the postmark date, whichever is earlier. *Id.* §§, 7-5-7(b)(2), & 8-13-22d(b)(2). However, if the invoice is received prior to full delivery or performance and acceptance, the invoice is deemed to have been received on the date that delivery and acceptance or full performance and acceptance occurred. *Id.* §§ 7-5-7(b)(2).

Additionally, if a vendor under *W. Va. Code* §§ 7-5-7 or 8-13-22d can show that the invoice was received earlier, the date on which the invoice is deemed received may be earlier than provided above. *Id.* §§ 7-5-7(b)(2) & 8-13-22d(b)(2).

With regard to final payment for state contracts, these generally are due within 90 days after completion of the contract is certified by the approving authority to be complete, accepted by the authorized spending officer, occupied by the owner, or dedicated for public use by the owner. *Id.* § 14-3-1. However, in the case of a public construction contract relating to bridges or roads, payment is due within 150 day after final acceptance by the proper approving authority. *Id.*

### *Grounds to Withhold Payments*

There do not appear to be any provisions specifically stating under what grounds payments may be withheld. Thus, this issue will likely be governed by the parties’ contract.

### *Interest*

Late payments are subject to interest at the rate stated in *W. Va. Code* § 17A-10-11, beginning on the 61st day after a legitimate and uncontested invoice is received. *W. Va. Code* §§ 7-5-7(b)(1), 8-

13-22d(b)(1). If payment is not made as required under *W. Va. Code* §§ 7-5-7 or 8-13-22d due to unforeseen budgetary constraints, interest will not be owed. *Id.* §§ 7-5-7(b)(1) & 8-13-22d(b)(1).

In the case of *W. Va. Code* § 14-3-1, which addresses a final payment on a state contract, interest will generally begin to accrue on the 91st day after one of the events identified above in “Payment Period” unless the approving authority determines that the delay in completing the contract or accepting payment was the fault of the contractor. *Id.* § 14-3-1. In that case, the approving authority may accept, use, and/or occupy the project without payment of any interest on amount withheld past the 90 day limit. *Id.*

If the situation involves bridges or roads, interest will begin to accrue on the 151st day. *Id.* In such a situation, though, interest may be capped if a settlement offer had previously been made to but not accepted by the prime contractor as specified in the statute. *Id.*

### ***Retainage***

West Virginia does not appear to have a retainage provision applicable to public contracts. Thus, any retainage would likely be governed by the parties’ contract.

### ***Attorney’s Fees***

There is not a provision in the above-mentioned prompt pay statutes for the payment of attorney fees.

### ***Noteworthy***

## **Prime to Sub – Public**

West Virginia does not appear to have a prompt payment act applicable to subcontractors on a public project.

## **Owner to Prime – Private**

West Virginia does not appear to have a prompt payment act applicable to prime contractors on a private project.

## **Prime to Sub – Private**

West Virginia does not appear to have a prompt payment act applicable to subcontractors on a private project.

# Wisconsin

## Owner to Prime – Public

### *Who's Covered*

The Wisconsin public prompt pay statutes provide protections for contractors and subcontractors doing work for a state agency.

Under *Wi. Stat.* § 16.528, the following relevant terms are defined:

"Agency" means an office, department, independent agency, institution of higher education, association, society, or other body in state government created or authorized to be created by the constitution or any law, that is entitled to expend moneys appropriated by law, including the legislature and the courts, with certain exceptions specified in the statute. *Wis. Stat.* § 16.528(1)(a).

"Subcontractor" means a person whose relationship to the principal contractor is substantially the same as to a part of the work as the principal contractor's relationship is to the proprietor. *Id.* §§ 16.528(1)(b)

### *Entitlement to Payment*

The statutes do not specify when a contractor or subcontractor is entitled to payment; thus, it appears likely that entitlement will be determined by the parties' contract and common law.

### *Payment Period*

Payment must be made within 30 days after invoice or receipt and acceptance of services, whichever is later. *Wis. Stat.* § 16.528(2)(a).

### *Grounds to Withhold Payments*

The statutes do not specify when a contractor or subcontractor is entitled to withhold payment; thus, it appears likely that grounds to withhold payment will be determined by the parties' contract and common law.

### *Interest*

Interest will be owed on an unpaid balance beginning on the 31st day after receipt of a properly completed invoice or receipt and acceptance of the property or service, whichever is later. If the agency has received an improper invoice, but failed to notify the sender as required by *Wi. Stat.* § 16.53(2), then interest will be due from the 31st day after the receipt of an improper invoice or receipt and acceptance of the property or service, whichever is later. *Wi. Stat.* § 16.528(a). The interest will accrue at a rate of 12% per year and will compound monthly. *Id.*; see also *Id.* § 71.82.

However, interest will not be awarded on orders or contracts (1) under which the payment is made from federal moneys; (2) that is subject to late payment interest or another late payment charge required by another law; (3) between 2 or more agencies, except prison industries; (4) services which provides for the time of payment and the consequences of nontimely payment; (5) under which the amount due is subject to a good faith dispute if, before the date payment is not timely,

notice of the dispute is sent by 1st class mail, personally delivered or sent in accordance with the procedure specified in the order or contract. *Id.* § 16528(3).

### ***Retainage***

The Owner may not withhold more than 5% of the payments covering the first 50% of the project. *Wi. Stat.* § 16.855(19). No retainage may be held for the remaining 50% of the work, unless the architect or engineer certifies that the job is not proceeding satisfactorily. *Id.* If that is the case, however, owners may retain up to 10% of the total project payment if the work. *Id.*

Upon substantial completion any retained amount must be returned to the contractor. *Id.*

### ***Attorney's Fees***

Attorney's fees shall be awarded to the prevailing party in an action to recover interest. *Wi. Stat.* § 16.528(6).

### ***Noteworthy***

*Wi. Stat.* §§ 66.0135 et seq. relates to late payments from local government authorities.

## **Prime to Sub – Public**

### ***Who's Covered***

See Wisconsin Owner to Prime - Public.

### ***Entitlement to Payment***

See Wisconsin Owner to Prime - Public.

### ***Payment Period***

Principal contractors and subcontractors that engage subcontractors shall pay those subcontractors within seven days after the principal contractor or subcontractor is paid by the agency, contractor, or subcontractor, as the case may be. *Wi. Stat.* §§ 16.528(2m)(a) & 16.528(2m)(c).

### ***Grounds to Withhold Payments***

See Wisconsin Owner to Prime - Public.

### ***Interest***

If a subcontractor is not paid within the applicable seven day period, on the eighth day, interest will begin to accrue at the rate of 12% and will compound monthly. *Wi. Stat.* § 16.528(2m)(b).

### ***Retainage***

There does not appear to be a retainage provision applicable in *Wi. Stat.* § 16.528.

### ***Attorney's Fees***

See Wisconsin Owner to Prime - Public.

*Noteworthy*

**Owner to Prime – Private**

Wisconsin does not appear to have a prompt payment act applicable to prime contractors on a private project.

**Prime to Sub – Private**

Wisconsin does not appear to have a prompt payment act applicable to subcontractors on a private project.

# Wyoming

## Owner to Prime – Public

### *Who's Covered*

Wyoming law provides rules for payment of any contractor providing construction services to a public agency. For purposes of these rules, “agency“ means any department, agency or other instrumentality of the state or of a political subdivision of the state and “services“ means all services purchased, procured or contracted for by an agency, including construction services. Wyo. Stat. Ann. §16-6-601(a)(i) and (iii). Furthermore, a “contractor” means any person who is a party to a contract with a public entity to construct, erect, alter, install or repair any highway, public building, public work or public improvement, structure or system and “public entity” means the State of Wyoming or a county, city, town or any political subdivision thereof. Wyo. Stat. Ann. §16-6-701(a)(ii) and (iii). The rules do not apply to projects partially funded by the federal government or some other source that has requirements regarding retention of payments inconsistent with the statutes discussed in the act. Wyo. Stat. Ann. §16-6-706.

### *Entitlement to Payment*

A contractor is entitled to payment once it submits a correct notice of amount due to the public entity. Wyo. Stat. Ann. §16-6-602. With the exception of retainage discussed below, a public entity shall authorize partial payments of the amount due to the contractor under the contract as stipulated therein or as soon thereafter as practicable so long as the contractor is satisfactorily performing the contract. Wyo. Stat. Ann. § 16-6-702.

### *Payment Period*

Except as otherwise provided by contract, payment is due within 45 days after receipt of a correct notice of amount due unless a good faith dispute exists with respect to all or a portion of the amount due. Wyo. Stat. Ann. §16-6-602.

### *Grounds to Withhold Payments*

A public entity may withhold payments if a good faith dispute exists with respect to all or a portion of the amount due. Wyo. Stat. Ann. §16-6-602.

### *Interest*

Late payments are subject to interest at the rate of 1.5% per month until paid in full unless a good faith dispute exists as to the agency's obligation. Wyo. Stat. Ann. §16-6-602.

### *Retainage*

No more than 10% of the calculated value of any work completed shall be withheld until 50% of the work required by the contract has been performed. Wyo. Stat. Ann. § 16-6-702. After 50% of a project is complete, the public entity may pay remaining installments for completed work without withholding additional amounts if satisfactory progress is being made in the public entity's opinion. Wyo. Stat. Ann. § 16-6-702. No more than 10% may be retained on the remaining 50% of the work required. Wyo. Stat. Ann. § 16-6-702. On any contract of more than \$25,000, all retained funds shall be placed into an interest-bearing account. Wyo. Stat. Ann. § 16-6-704. The contractor is

entitled to all interest and income earned on such retained funds. Wyo. Stat. Ann. § 16-6-705. Once a project is 50% complete, a public entity may release the retainage if the contractor has made satisfactory progress on the project and provided satisfactory and substantial reasons for early payment and the surety who furnished bonds for the contract work approves in writing. Wyo. Stat. Ann. § 16-6-702.

#### ***Attorney's Fees***

There does not appear to be a provision for attorney's fees under the rules relating to prompt payment of contractor's in Wyoming.

#### ***Noteworthy***

If it becomes necessary for a public owner to take over completion of the contract, all retainage shall be first applied toward cost of completion of the contract and, if there is a positive balance remaining after completion, it shall be payable to the contractor or its creditors. Wyo. Stat. Ann. § 16-6-703.

#### **Prime to Sub – Public**

Wyoming does not appear to have a prompt payment act applicable to subcontractors on a public project.

#### **Owner to Prime – Private**

Wyoming does not appear to have a prompt payment act applicable to prime contractors on a private project.

#### **Prime to Sub – Private**

Wyoming does not appear to have a prompt payment act applicable to subcontractors on a private project.