

Pay It Forward

Questions Abound Surrounding Prompt Payment Act, And Definitive Answers May Only Come With Court Rulings

Margery Newman of Ogletree Deakins Nash Smoak & Stewart began her presentation by stating that the answer to many of the questions flying around the room would be “we don’t know.”

It’s a phrase that’s bound to be thrown around plenty until experience and court decisions give contractors a better handle on the Contractor Prompt Payment Act, which the Governor signed into law last year.

Newman and Randy Ruff of Ogletree Deakins were among presenters at a seminar on the Act conducted by the Chicago Building Congress. Panelists outlined the ins-and-outs of the Act, which dictates – among other things – that a contractor must pay a subcontractor within 15 days of receiving payment from the owner or General Contractor.

When the bill first came about last year, Builders Association members polled were uncertain of the impact the Act would have. The general consensus was that good contractors paid their subcontractors well ahead of time, and that the Act would be tough to enforce.

Uncertainty is likely to remain until court cases in Illinois create precedent, as the Act is written in a vague enough manner to have even experts on the topic guessing about what’s going to happen.

“I don’t like the Act, the reasons go beyond what’s actually in it,” Ruff said. “It’s not very well drafted and it’s likely to be ineffective because there are ways around it.”

“Despite all of the confusion, I don’t see it as having a huge impact.”

Be that as it may, Ruff was quick to point out simple things for a contractor to keep in mind regarding the Act. Contractors shouldn’t set subcontractor money received on one contract against a debt on another contract. The entire payment process should be expedited in general, but if a GC discovers any reason to withhold money from a subcontractor, that GC should either not draw that money from the owner or return the disputed money to the owner until the conflict is resolved.

“Contractors should always be hesitant to hold on to money for more than three days,” Ruff said. “It can be very risky, and it becomes an even more of a difficult proposition with the Prompt

Contractor Prompt Payment Act

Payment Act.

“The main thing is, when you receive money from the owner, you’ve got to either pay it down or send it back. You can’t just hang on to it.”

Under the Contractor Prompt Payment Act, the owner is obligated to approve or reject pay applications within 25 days of receipts and pay the approved amount less than 15 days after approval. General Contractors and subcontractors likewise are obligated to pay down all amounts received from the owner or GC within 15 days. Penalties for late payment include 10 percent simple interest, and the right of unpaid subcontractors to suspend work with seven days written notice.

“In my eyes, that threat to stop work helps to bring things into balance,” said Robert Lessman of SmithAmundsen, LLC. “On one hand, you could say ‘why would a guy continue to work for free?’ On the other hand, there aren’t going to be many subcontractors who decide to stop work. A lot depends on the relationship between the contractor and the subcontractor.”

Also presenting at the seminar was Paul Peterson, Vice President and Assistant General Counsel for the Chicago Title Insurance Company, who gave the angle of the insurance and title companies on the Prompt Payment Act. He stressed that regardless of work stoppages, non-payment or the reason for non-payment, contractors and subcontractors are still responsible for the coverage.

“As insurers, we don’t care about (the Act),” Peterson said. “We don’t care about it and we don’t want to hear about it. We’re bound by the terms of the escrow agreement, which doesn’t include anything about (the Act).”

There’s also some unsettling news for contractors wishing to simply write the Act out of contracts. Again, it comes down to interpretation by the courts, but law experts aren’t sure the contractor can write the Act out.

“That seems to be a question that’s gotten a good deal of conversation,” Lessman said. “It’s still a fair question, and there’s nothing specifically in the statute that says it can’t be waived, but the general feeling from a number of good construction lawyers is that companies will not be able to do that.”

Contractors and subcontractors will have to develop a wait-and-see attitude to see what impact, if any, the Contractor Prompt Payment Act has the construction industry in the area, although much more should be known when precedent is established.

“There’s a lot of confusion about this, and the source of that confusion is that this document just isn’t put together very well,” Ruff said.

“Can the Act be waived? What constitutes payment approval? There are a number of things we just don’t know yet.”

“Contractors should always be hesitant to hold on to money for more than three days. It can be very risky, and it becomes even more of a difficult proposition with the Prompt Payment Act.”

-Randy Ruff

Ogletree Deakins Nash Smoak & Stewart, P.C.