

***Cutting-Edge Issues in Prompt Pay***  
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The prompt pay provisions governing public work jobs vary depending on the identity of the public owner. The reason is that Arizona procurement law still has not been consolidated into one set of statutes, rules, and regulations governing all state and local public owners. Rather, Arizona procurement law is fractured into several sets of statutes, rules, and regulations. For example, the Arizona procurement code covers most state agencies, but there are several important exemptions. ADOT is covered separately by A.R.S. § 28-6923, universities by the University Procurement Code published by the Board of Regents (UPC), school districts by the School District Procurement Rules published by the State Board of Education, and counties, cities, and certain special districts by Title 34, A.R.S. Prompt pay also applies to private jobs under A.R.S. §~ 32-1129.01 through 32~1 129.05.

These various statutes, rules, and regulations are similar in many ways, but they also vary one from the other in certain material respects. Outlined below are the various rules and practices pertaining to (1) billing cycles, (2) time for payment by the owner to the general contractor, (3) the deadline for approval and certification of each progress estimate, (4) the deadline for payment by the general contractor to the subcontractor, (5) the deadline for payment from the subcontractor to its subcontractors or suppliers, (6) rates of retain age, and (7) the deadline for the owner to release remaining retainage and final payment.

**What is the Billing Cycle Set by Law or Rule?**

A.R.S. § 32-1129.01 requires private owners on jobs lasting more than 60 days to pay in a 30-day billing cycle. This law allows a private owner to make a different arrangement if it does so as agreed upon in the general contract and stamps the plans, including bid plans and construction plans, with the required notice of alternate billing cycle. The notice must be in clear and conspicuous type and must be

stamped on every page of the plan sheets.

The billing cycle is the preceding month on projects for ADOT (standard specification § 109.06), counties, cities, and special districts (A.R.S. § 34-221 [A][2]), and school districts (A.A.C. R7-2-1 115 [A]), and under University Procurement Code § 3-804(1-1)(I). The state procurement code provides that the time period covered by the progress payment shall be set by rule, but the rule (A.A.C. § R2-7-508) has been repealed and not replaced. Thus, for now the state procurement code is silent on the subject. Presumably state contracts let under the state procurement code provide for a monthly billing cycle.

**What is the Deadline for Payment by the Owner to the General Contractor for Each Progress Estimate?**

The deadline for most state agencies under the state procurement code (A.R.S. § 41-2577[A]), for universities under UPC § 3-804(H)(1), for ADOT under A.R.S. § 28-6924(A)(1), and for cities, counties, and local governments under Title 34 (A.R.S. § 34-221 [B][2]), is 14 days after the estimate is certified and approved. For school districts, the deadline is 30 days under School District Procurement Rule R7-2-1115(A).

For private owners the deadline is seven days under A.R.S. § 32-1129.01(A). Again, a private owner can vary this seven-day period, but it can do so only by a “clear and conspicuous” provision in the general contract spelling out the exact number of days for payment to be made. It also must stamp the plans, including bid plans and construction plans, with a required notice of extended payment provision. As with billing cycle, the notice must be in clear and conspicuous type and must be stamped on each page of the plan sheets.

## **Is There a Deadline by which the Owner Must Approve and Certify the Estimate?**

When prompt pay was first adopted in Arizona, nothing in the act required the owner to approve and certify the estimate expeditiously, and it was a common complaint that public owners sometimes sat on the contractor's pay applications. The Legislature, however, has amended both the state procurement code (A.R.S. § 41-2577[A]) and Title 34 (A.R.S. § 34-221 [B][2]) to require most state agencies and counties, cities, and local governments to approve and certify the estimate within seven days of submission. Failure to do so within the seven-day deadline now results in an automatic approval and certification of the estimate.

There is an exception that applies where, before the seven-day deadline elapses, the owner or owner's agent prepares and issues a written finding detailing those items in the work that are not approved or certified. These practices also apply to the universities, ADOT, and school districts, For private owners the deadline is 14 days under A.R.S. § 32-1129.01(D). The owner again can vary this time period by so providing in the general contract and by stamping the plans sheets.

## **How Soon Must the General Contractor Pay its Subcontractors or Suppliers?**

Under the state procurement code (A.R.S. § 41-2577[B]), University Procurement Code §3-804(H)(2), Title 34 (A.R.S. § 34-221[F]), and on ADOT jobs (A.R.S. § 2S-6924[A][2]), the general contractor is bound to pay the subcontractor no later than seven days after receipt of each progress payment from the owner. On private jobs, A.R.S. § 32-1129.02 sets a deadline of seven days also. There is no similar provision in the school district procurement rules, but there are two ways in which the seven-day deadline may apply to school district projects as well. The general provision found in the registrar statutes (A.R.S. § 32-1129.02[B]) may apply to the obligation from general contractor to subcontractor on school district projects. (Under A.R.S. § 32-1129.06 these registrar statutes specifically do not apply to the State of Arizona or its political subdivisions, but the law does not say that these statutes do not apply to relations between

general and subcontractor or subcontractor and sub-subcontractor operating on public projects.) In addition, School District Procurement Rule R7-2-115(A) conditions the general contractor's right to receive prompt pay from the school district upon the general contractor's adherence to the requirements of A.R.S. § 41-2577(B), one of which is payment from general to sub within seven days.

## **How Soon Must the Subcontractor Pay its Subcontractors or Suppliers?**

The rules are similar to those between general contractor and subcontractor: seven days after receipt of payment from the general contractor. This holds true under the state procurement code (A.R.S. §41-2576[B]), Title 34 (A.R.S. § 34-221 [F]), and University Procurement Code §3-804(H)(2), for ADOT (A.R.S. § 28-6924[A][2]), and for private work under the registrar statutes (A.R.S. § 32-1129.02). The School District Procurement Rules are silent on this issue, but for the same reason as above the registrar statutes (A.R.S. § 32-1129.02) may set a seven-day deadline

## **What are the Lawful Rates of Retainage?**

Under the state procurement code (A.R.S. § 41-2577[EJ]), University Procurement Code §3-804(G)(1), Title 34 (A.R.S. § 34-221fA][3]), and School District Procurement Rule R7-2-114(A), the owner is entitled to withhold 10% of each progress payment until 50% of the job is completed. At that point, the owner is required to release half the retainage and thereafter is allowed to withhold only 5% of each progress payment. For ADOT, standard specification 109.06 says 5% will be retained until final acceptance of the work, This specification also allows ADOT to release more of retainage if the withheld sum greatly exceeds the amount of work remaining to be accomplished and the bonding company consents. Thus I am told ADOT's practice is generally to release a portion of retainage after 50% completion and to reduce the retainage rate after 75% completion. On private jobs, A.R.S. § 32-1129.01(D) allows the owner to withhold a "reasonable" amount from each progress payment as retainage, but the law does not define what is reasonable under the circumstances. Presumably the standard 10% is reasonable.

## **When Must the Owner Release Retainage and Final Payment to the General Contractor? -**

Under the state procurement code (A.R.S. § 41-2577[E]), University Procurement Code §3-804(G)(1), Title 34 (A.R.S. § 34-221 {A}[3]), and School District Procurement Rule R7-2-I 114(A), the owner is required to release all withheld retainage no later than 60 days after final completion and acceptance. There is an exception, which allows the public owner to continue withholding retainage beyond the 60-day deadline if it can provide written justifications for doing so. While it is not spelled out in the statutes, rules, or regulations, the contractor should be able to go to court to shake loose the retainage if the owner is withholding payment unreasonably beyond the 60-day limit.

Under the state procurement code (A.R.S. § 41-2576[C]), University Procurement Code § 3-804(O), Title 34 (A.R.S. § 34-221 [A][5]), and School District Procurement Rule R7-2- 1114(D), final payment is due 60 days after completion and acceptance. For ADOT, A.R.S. § 28-6924(A)(1) says final payment must be made upon completion and acceptance. In contrast, ADOT standard specification § 109.09 says the engineer generally will not make final payment before 60 days after final acceptance of the work. On private jobs, A.R.S. § 32-112901(H) says the owner must make payment in full no later than seven days after the contractor completes and the owner approves and certifies the work.

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