

## ABA LEGAL NOTES

Editor: Michael .I Ho/den Ho/den Walker PLC

This issue of *ABA Legal Notes* was prepared by the Phoenix law firm of Holden Walker PLC. *ABA Legal Notes* is a regular publication provided to members by the Alliance's Legal Advisory Council. Upcoming issues will be written and edited by other council members. The articles in this newsletter are not intended to provide complete legal analysis of each subject covered. For specific questions, contact your lawyer.

# Private Prompt Payment Audit: Does Your Subcontract Form Comply?

Arizona's private sector prompt payment law applies on all construction contracts signed after January 1, 2001. However, many contractors and subcontractors have not modified their standard subcontract forms to reflect the payment requirements.

The failure to make revisions has no real effect because the statutory provisions of the prompt payment law supercede or trump inconsistent contractual provisions (unless the owner has opted out in accordance with the statute). Nevertheless, to avoid confusion and to eliminate potential disputes or misunderstandings, it makes good business sense to modify your contract forms to comply with the new statute.

To assist you in reviewing your subcontracts for private sector prompt payment compliance, the following list includes suggested language to implement the mandatory payment terms under the private sector prompt payment law in your subcontracts:

- Contractor shall submit an application for payment to the Owner every 30 days.
- Subcontractor shall submit an application for payment to the Contractor not later than the [fill in] day of each month covering estimated percentage of Subcontract work that has been or will be completed through the end of the month. **Comment:** *Traditionally, subcontractors are required to submit pay applications five days before the general contractor makes its application for payment to the owner. However, since the general contractor now has an affirmative obligation under the prompt payment law to certify whether the subcontractor's billings is proper (rather than simply passing through the subcontractor's percentages), the general contractor may want additional time to complete its review.*
- Contractor shall pay Subcontractor within seven days of actual receipt by Contractor of the monthly payment from the Owner the full amount received for Subcontractor's Work
- Any retention withheld by Contractor shall not exceed the actual percentage retained by the Owner.
- Contractor shall make final payment to subcontractor no later than seven days after Contractor receives final payment for the Subcontractor's Work from the Owner.
- Subcontractor is entitled to interest on any past due amounts at a rate of 1.5% per month.
- In addition to any rights granted in the Subcontract, the Subcontractor shall have the right to suspend performance or terminate the Subcontract as provided for in A.R.S. §32-1129.04.
- In any action or arbitration brought to collect payments or interest pursuant to this Agreement, the successful party shall be awarded costs and reasonable attorneys' fees.

Subcontractors may want to add the following additional language to provide for notice if the general contractor fails to certify the subcontractor's pay applications:

- If Contractor, at the time of the monthly application for payment to the Owner, withholds from such application, or fails to certify, any portion of the estimated percentage of Subcontract Work set forth on the Subcontractor's application for payment, then Contractor shall give written notice of such action to the Subcontractor within 7 calendar days.
- If Owner fails to certify or approve any portion of the estimated percentage of Subcontract Work as set forth on the Contractor's Application for Payment, then Contractor shall give written notice of such action to the Subcontractor within 7 calendar days.

Contract forms between owners and general contractors also should be reviewed for private sector prompt payment compliance. If you are interested in our firm's standard prompt payment revisions to the AIA A101-1997: Standard Form of Agreement Between Owner and Contractor and AIA A201-1997: General Conditions of the Contract for Construction, call or email me (holden@holdenwalker.com) and I will forward them to you.

Mike Holden