

Recent Prompt Pay Act Case “Overruled Legislatively” as a Result of ABA’s Efforts
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On April 29, 2019, Governor Ducey signed SB1397 bill that included language “legislatively overruling” a recent Arizona Court of Appeals decision that had misconstrued the intent of Arizona’s prompt pay act (“PPA”). The troubling case—*S.K. Builders, Inc. v. Smith*—was decided on January 29, 2019. Because of the potential adverse effect of *S.K. Builders* on the prompt pay rights of contractors and subcontractors, the Arizona Builders Alliance acted quickly to convince the Arizona Legislature to amend the PPA. ABA’s lobbyist Mike Gardner was instrumental working with key legislators and the Governor’s office to get the change adopted in less than 90 days.

ABA’s rapid response was critical because *SK Builders* held the PPA did not apply to a contractor’s monthly pay application that included items not supplied within “the preceding thirty day billing cycle” even though the owner had failed to file a timely objection or to pay the contractor. The court strictly applied the language in the PPA that progress payments shall be made on a “billing or estimate of the work performed and material supplied during the preceding thirty day billing cycle.”

Since the court also held that contractors had the burden to prove that labor and materials included in a particular monthly progress pay application were furnished within the preceding 30 days to establish a PPA violation, owners would likely have raised this as a defense against every prompt pay claim.

In reaching its decision, the *SK Builders* court ignored the “realities” of the construction industry. The original intent of the “thirty-day billing cycle” language in the PPA was to establish monthly progress payment billings as the default for all construction projects in Arizona. Under the pay application process, there has never been a requirement, practice or understanding among parties on construction projects that a monthly pay application is limited to items furnished during the preceding 30 days.

Moreover, contractors often bill for work performed outside of the 30-day billing window. A simple example involves change order work. In January 2018, Owner directs Contractor to perform additional work pursuant to a construction change directive and that work will take more than 30 days to complete. Contractor is not entitled to bill for that work under its contract until a change order has been processed and signed. The change order is finalized in March 2018 and Contractor bills for the work. Under the *SK Builders* decision, the PPA would not have applied under these facts.

Another key aspect of the ABA-initiated amendment is that it included an intent clause stating that “[t]he purpose of the change . . . is to make the legislative’s original intent clear and to overrule legislatively the *S.K. Builders* decision.” This language should guarantee that the amendment has immediate (and retroactive) effect.

SB1397 also includes changes to the Registrar of Contractors statutes. ABA will post an article summarizing the ROC changes in the next several days.