

Missouri Prompt Payment Act modifications benefit contractors and design professionals.



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On June 20, 2014, Governor Jay Nixon signed into law modifications to Missouri's Public Prompt Pay Act (PPPA), (34.057, RSMo, et seq., the "PPPA") and Public Works Bonding Act (107.170, RSMo). These revisions took effect August 28, 2014, and generally

benefit contractors and certain design professionals because the modifications are intended to reduce delays in payments due from public owners. All parties involved in public works projects need to be familiar with the new requirements before entering public works contracts after August 28, 2014. Below is a brief summary of the new requirements.

The first revision to the PPPA clarifies those construction professionals that are covered by the act. Previously, owners were explicitly required to make prompt payment only to the contractor on public works projects. Other players involved in construction projects arguably were not protected under the old version of the law. Under the revised PPPA, it is clear that professional engineers, architects, landscape architects, and land surveyors must also be paid promptly in accordance with the PPPA.

The revised PPPA also reduces the maximum amount of retainage that an owner and contractor may withhold from a contractor or subcontractor, respectively. Under the prior version of the law, retainage could not exceed five percent of the value of the contract unless the owner and its architect or engineer determined that a higher rate (not to exceed 10 percent) was necessary to ensure performance of the contract. This language provided the proverbial exception that swallowed the rule. Because the old language gave broad discretion to owners and their design professionals in making

a determination that 5 percent retainage was insufficient, it is not surprising that owners overwhelmingly determined that a higher rate of retainage was required to ensure performance. Moreover, the owner's determination was rarely controverted because 10 percent retainage is permitted by the private prompt pay act (436.300, RSMo, et seq.), and is not uncommon in construction projects in Missouri and other states, with the result being that retainage was often set at 10 percent in public works contracts.

Addressing this issue, the current version of the PPPA explicitly limits retainage to five percent in all public works contracts except those under which the contractor is not obligated to obtain a bond under Section 107.170, RSMo, because the contract sum is not estimated to exceed \$50,000. Under those contracts, the owner may retain up to 10 percent. Thus, an apparent loophole has been closed,

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and owners and contractors have clear guidelines capping retainage under public works contracts.

A careful read of the revised PPPA, however, finds a curious omission. Although owners are permitted to retain up to 10 percent in contracts not estimated to exceed \$50,000, contractors were not provided the same latitude. Consequently, in limited circumstances owners may be allowed to retain 10 percent from the contractor, but the contractor may have to pay all except five percent retainage to its subcontractors. Contractors should speak

with their attorneys to determine how best to address this issue.

The revised PPPA also reduces the amount an owner may hold back to cover costs to complete punch list work. Previously, when retainage was released the owner could continue to hold back 200 percent of the value of the punch list work until it was complete. Today, the owner may withhold only 150 percent of the value until completion, bringing the public prompt pay act in line with the private prompt pay act.

Further attempting to speed payments into the hands of contractors and subcontractors, the revised PPPA requires owners that do not agree with the contractor's determination that the work is substantially complete to provide a written explanation of why within 14 calendar days. The contractor must then send the notice to any subcontractor or suppliers responsible. This process should hasten correction of inadequate work and prompt payment of final sums due. If the owner fails to timely deliver its explanation, then it must pay at least 98 percent of the retainage within 30 calendar days.

On a related note, the revised PPPA now provides that the contractor may withhold payment from subcontractors for inadequate work only if the owner provided an explanation as to why the work was deemed inadequate. Here, too, however, contractors are potentially put in an odd position. For instance, if the owner withholds payment due to inadequate work but fails to deliver an explanation, the contractor may be required to pay a subcontractor even though the owner may have the right to withhold funds from the contractor. To minimize this risk, contractors should be particularly diligent in working with the owner to obtain a detailed list of inadequate work.

Finally, in what may be viewed as minor relief to owners, the revised act provides that owners need not have contractors provide payment bonds on contracts not estimated to exceed \$50,000 (previously \$25,000). ■