

Payment Act Comparison

NJ/DE/PA/MD/NY

Many Remedies Exist for Non-Payment or Untimely Payment:

- Mechanics' Liens
- Payment Bond Claims
- Trust Fund Claims
- Prompt Payment Act Claims
- Litigation/Arbitration/Mediation to Enforce Contractual Payment Breaches

What are Prompt Payment Act Claims?

Essentially: Claims created by statute that impose unfavorable consequences on those who fail to timely pay for materials and labor provided by others.

Today's Focus is on Five States:

New Jersey:

- Prompt Payment Law, N.J.S.A. 2A:30A-1, et seq.

Delaware:

- Construction Prompt Payment Act, 6 Del. C. 3501, et seq.
- Public Works Prompt Payment Act, 29 Del. C. 6501, et seq.

Pennsylvania:

- Contractor & Subcontractor Payment Act, 73 P.S. 501, et seq.
- Commonwealth Procurement Code, 62 Pa.C.S.A. 3901, et seq.

Today's Focus is on Five States:

Maryland:

- Prompt Payment Act, Md. Code, Real Property 9-301, et seq.
- General Procurement Law, Md. Code, State Fin. & Proc. 15-226

New York:

- Prompt Pay Act, N.Y. Gen. Bus. Law 756, et seq.

Today's Game Plan:

Examine these statutes together,
answering the following questions:

- To what contracts does the Act apply?
- Who can make a claim under the Act?
- To what payments does the Act apply?

Today's Game Plan:

- What is untimely payment to a subcontractor?
- What is a proper basis to withhold payment?
- What is the consequence of untimely payment?

QUESTION 1: To What Contracts Does the New Jersey Prompt Payment Law Apply?

ANSWER: Applies to all contracts public and private entered on or after September 1, 2006 to improve real property within the State of New Jersey.

“Improvement” broadly defined.

QUESTION 1: To What Contracts Does the Delaware Construction Prompt Payment Act (Private) Apply?

ANSWER: Applies to all construction contracts with the exception of:

- public works contracts;
- contracts for the erection of 6 or fewer residential units which are under construction simultaneously, or for the alteration or repair of any single residential unit; and
- contracts for the purchase of materials by a person performing work on that person's own property.

QUESTION 1: To What Contracts Does the Delaware Public Works Prompt Payment Act Apply?

ANSWER: Applies to public works contracts as defined by 29 Del. C. 6902.

- “Public Works Contract” means a contract for the construction, reconstruction, demolition, alteration and repair work and maintenance work paid for, in whole or in part, with public funds.
- “Public funds” means funds of the State, of any agency within the State, of any public school district, of or from the United States government.

QUESTION 1: To What Contracts Does the Pennsylvania CASPA (Private) Apply?

ANSWER: Applies to contracts entered on or after April 1994 to improve real property in the Commonwealth of Pennsylvania.

- “Improvements” include all or any part of a building, and the construction, alteration, demolition, excavation, clearing, grading or filling of real property.

QUESTION 1: To What Contracts Does the Pennsylvania Commonwealth Procurement Code (Public) Apply?

ANSWER: Applies to contracts exceeding \$50,000 entered after 1998 to design, build, alter, repair, improve or demolish any public structure or building or to make other public improvement to any public real property in the Commonwealth of Pennsylvania.

- **Exclusion.** Does not apply to Department of Transportation contracts.

QUESTION 1: To What Contracts Does the Maryland Prompt Pay Act (Private) Apply?

ANSWER: Applies to contracts entered on or after July 1989 for the improvement of any building, installation of wells to supply water, installation of any swimming pools, landscaping, grading, and paving, and the installation of waterlines, sanitary sewers, or storm drains.

- **Exclusion.** Does not apply to construction of single family residences, home improvement contracts, or contracts entered into with the State, a county, a municipal corporation, a board of education or any other public authority.

QUESTION 1: To What Contracts Does the MD General Procurement Law (Public) Apply?

ANSWER: Applies to public contracts for construction entered into after October 1999.

“Construction” includes the process of building, altering, improving, or demolishing any improvement to real property.

Exclusion. Does not apply to maintenance or routine operation of an existing improvement to real property.

QUESTION 1: To What Contracts Does the New York Prompt Pay Act (Private) Apply?

ANSWER: Applies to all contracts exceeding \$150,000 entered into after January 2003 to construct, reconstruct, alter, maintain, demolish, or otherwise excavate, develop or improve real property within the State of New York.

- **Exclusion.** Does not apply to any contracts made and awarded by the State, a public department, a public benefit corporation, a municipal corporation, or that involves certain defined residential developments.

QUESTION 2: Who can make a claim under the New Jersey Prompt Payment Law?

ANSWER: Anyone who falls under the definition of a “Prime Contractor,” “Subcontractor,” or “Subsubcontractor.

Examples: General Contractors, trade contractors, architects, engineers, surveyors, suppliers; practically everyone down to two tiers below the Prime Contractor.

QUESTION 2: Who can make a claim under the Delaware Prompt Payment Law (Private)?

ANSWER: Contactors, architects, engineers, real estate brokers or agents, subcontractors and suppliers.

QUESTION 2: Who can make a claim under the Delaware Public Works Prompt Payment Act?

ANSWER:

Contractors (meaning any person, partnership, firm, corporation, nonprofit agency or other business association who has a contract with an Agency); and

Subcontractors and Suppliers (not defined, but context confirms at least 1st and 2nd Tier).

QUESTION 2: Who can make a claim under the Pennsylvania CASPA (Private)?

ANSWER: Anyone who falls under the definition of a “Contractor” or “Subcontractor.”

Examples: Prime Contractors, trade contractors, architects, engineers, surveyors, attorneys, suppliers; practically everyone down to the second tier below the Prime Contractor.

QUESTION 2: Who can make a claim under the Commonwealth Procurement Code (Public)?

ANSWER: Design professionals, contractors, and subcontractors.

Examples: Prime Contractors, trade contractors, architects, engineers, surveyors, suppliers; practically everyone down to the second tier below the Prime Contractor.

QUESTION 2: Who can make a claim under the Maryland Prompt Payment Act (Private)?

ANSWER:

Contactors (meaning any person who has a contract with an owner); and

Subcontractors and Suppliers (meaning any person who has a contract with anyone except the owner; context confirms at least 2nd Tier).

QUESTION 2: Who can make a claim under the MD General Procurement Law (Public)?

ANSWER: Subcontractors working under a State procurement contract.

Note: “Subcontractor” is broadly defined by regulation and includes a subcontractor at any tier.

QUESTION 2: Who can make a claim under the New York Prompt Pay Act (Private)?

ANSWER:

Contractors (any person or entity, including a construction manager, which enters into a construction contract with an owner); and

Subcontractors (any person or entity, which enters into construction contract with a contractor or another subcontractor).

Note: Does not apply below sub-subcontractors.

QUESTION 3: To What Payments Does the New Jersey Prompt Payment Law Apply?

ANSWER: Applies to all “billings.”

Examples: periodic payments, final payment, written approved change orders and request for release of retainage.

QUESTION 3: To What Payments Does the Delaware Construction Prompt Payment Act (Private) Apply?

ANSWER: All payments (1) identified in a contract, and (2) for all undisputed amounts owed.

Examples: Progress payments, final payment, approved change orders and retainage.

QUESTION 3: To What Payments Does the Delaware Public Works Prompt Payment Act Apply?

ANSWER: Expressly applies to:

- Progress payments,
- Final payment, and
- Retainage.

QUESTION 3: To What Payments Does the Pennsylvania CASPA (Private) Apply?

ANSWER: To all payments identified in a construction contract.

Note: CASPA requires payment in strict accordance with the terms of the contract.

Examples: Progress payments, final payment, approved change orders and retainage.

QUESTION 3: To What Payments Does the PA Commonwealth Procurement Code (Public) Apply?

ANSWER: To all payments identified in a construction contract.

Note: The Code requires payment in strict accordance with the terms of the contract.

Examples: Progress payments, final payment, approved change orders and retainage.

QUESTION 3: To What Payments Does the Maryland Prompt Payment Act (Private) Apply?

Answer: All “undisputed amounts” owed under the terms of the contract.

Defined: any amount owed on a contract for which there is no good faith dispute, including any retainage withheld.

QUESTION 3: To What Payments Does the Maryland General Procurement Code (Public) Apply?

Answer: All “undisputed amounts” owed under the terms of the contract.

Defined: an amount owed by a prime contractor to a subcontractor or a subcontractor to another subcontractor, at any tier, for which there is no good faith dispute, including any retainage withheld.

QUESTION 3: To What Payments Does the New York Prompt Pay Act (Private) Apply?

Answer: Expressly includes all interim payments at the end of a billing cycle, a final invoice for payment in full, and retainage.

QUESTION 4: What is untimely payment to a subcontractor under the NJ Prompt Payment Law?

ANSWER: Unless otherwise agreed in writing, payments not tendered within 10 calendar days of prime contractor's (or subcontractor's) receipt of payment for the work performed.

Note: In the case of ongoing work on the same project for which partial payments are made, payment is due only if the work is being performed to the prime contractor or subcontractor's satisfaction.

QUESTION 4: What is untimely payment to a sub-contractor under the Delaware Construction Prompt Payment Act (Private)?

ANSWER: A contractor is required by statute to include in its contract a payment clause obligating it to pay the subcontractor and each supplier for satisfactory performance under the subcontract within 30 days out of such amounts as are paid to the contractor.

Note: If that clause exists, the contractor has 30 days to pay. If no timing clause exists, the contractor must pay within 15 days of its receipt of payment.

QUESTION 4: What is untimely payment to a sub-contractor under the Delaware Public Works Prompt Payment Act?

ANSWER:

- With respect to Periodic and Final payments, Contractors and Subcontractors must pay within 21 days of receipt of each progress payment and final payment.
- With respect to Retainage, the Act is silent. Arguably, release of retainage is a final payment, which must be paid within 21 days of receipt.

QUESTION 4: What is untimely payment to a sub-contractor under the Pennsylvania CASPA (Private)?

ANSWER: With Respect to Interim and Final Invoices:

- Contractors shall pay subcontractors, and subcontractors shall pay their subcontractors, within 14 days after (sub)contractor's receipt of each progress or final payment or 14 days after receipt of the subcontractor's invoice, whichever is later.

QUESTION 4: the Pennsylvania CASPA (continued)

- A (sub)contractor is required to disclose to a sub-contractor, before a subcontract is executed, the due date for receipt of payments from the Owner. If this isn't done, the (sub)contractor is obligated to pay as if the Owner had made payment to the Contractor 20 days after the end of a billing period or 20 days after delivery of Contractor's invoice, whichever is later.
- With Respect to Retainage, (sub)contractors must release retainage to their respective subcontractors 14 days after receipt of payment therefor.

QUESTION 4: What is untimely payment to a sub-contractor under the Pennsylvania Commonwealth Procurement Code (Public)?

ANSWER: With Respect to Progress payment, any payments not tendered within 14 days after contractor's/ subcontractor's receipt of a progress payment.

Note: A (sub)contractor is required to disclose to a subcontractor, before a subcontract is executed, the due date for receipt of progress payments from the Government Agency. If this isn't done, the Contractor or Subcontractor is obligated to pay as if the Government Agency had made payment to the Contractor within 45 days of the Government Agencies' receipt of an application for payment.

QUESTION 4: Procurement Code (continued)

ANSWER: With Respect to Retainage:

In the absence of sufficient reason, within 20 days of the receipt of payment by the contractor, the contractor shall pay all subcontractors with which it has contracted their earned share of the payment the contractor received.

QUESTION 4: What is untimely payment to a sub-contractor under the Maryland Prompt Payment Act (Private)?

ANSWER: If no provision in the contract address the time of payment, Contractors and Subcontractors must pay any and all undisputed amounts within 7 days after receipt of payment.

QUESTION 4: What is untimely payment to a subcontractor under the Maryland General Procurement Law (Public)?

ANSWER: (Sub)contractor is required to pay its subcontractor any undisputed amounts within 10 days of receipt of the progress or final payment from the governmental unit.

QUESTION 4: What is untimely payment to a subcontractor under the New York Prompt Pay Act (Private)?

ANSWER: (Sub)contractor is required to pay its subcontractor the full or proportionate amount of funds received from the Owner within 7 days after receipt of good funds for each interim or final payment, provided all contractually required documentation and waivers are received.

Note: The terms and conditions of the construction contract shall supersede the provisions of the Act.

QUESTION 5: What is a proper basis to withhold payment under the New Jersey Prompt Payment Law?

ANSWER: Not defined. No case law.

QUESTION 5: What is a proper basis to withhold payment under the Delaware Construction Prompt Payment Act (Private)?

ANSWER: Unless the contract identifies a different procedure, to dispute/withhold payment, a party must:

- notify the other party in writing within 7 days of the receipt of the disputed invoice; and
- must specifically identify the disputed items.

Note: If no such written notice is provided, the invoice is deemed to be accepted as submitted.

QUESTION 5: What is a proper basis to withhold payment under the Delaware Public Works Prompt Payment Act?

ANSWER: A Contractor or Subcontractor may withhold payment if it notifies the Subcontractor in writing, within the 21-day period of time for making payment, of the reason or reasons for withholding.

Note: Withholdings must be (1) based on “reasonable grounds” and (2) must bear a “reasonable relation to the value of any disputed amount or claim held in good faith” by the Agency, Contractor or Subcontractor.

QUESTION 5: What is a proper basis to withhold payment under the Pennsylvania CASPA (Private)?

ANSWER: An Owner, Contractor and Subcontractor may withhold the value of “deficiency items” according to the terms of the construction contract, but only if they:

- 1) notify the party whose payment is withheld of the deficiency item within 7 days of the date the invoice is received; and
- 2) pay the value of satisfactorily completed work.

QUESTION 5: What is a proper basis to withhold payment under the Pennsylvania Commonwealth Procurement Code (Public)?

ANSWER: A Contractor or Subcontractor may withhold the value of deficiency items but only if they:

- 1) notify the Subcontractor and the Government Agency of the reason within 15 days of the receipt of the notice of the deficiency item from the Government Agency; and
- 2) pay the value of satisfactorily completed work.

QUESTION 5: What is a proper basis to withhold payment under the Maryland Prompt Payment Act (Private)?

ANSWER: If the amount is “disputed” in good-faith.

Note: Unclear what exactly qualifies as “disputed” since there is no case law on point analyzing this term.

QUESTION 5: What is a proper basis to withhold payment under the Maryland General Procurement Law (Public)?

ANSWER: If the amount is “disputed” in good-faith.

Note: Unclear what exactly qualifies as “disputed” since there is no case law on point analyzing this term.

QUESTION 5: What is a proper basis to withhold payment under the NY Prompt Pay Act (Private)?

ANSWER: (Sub)contractor may withhold payment to its subcontractor for:

- (1) Unsatisfactory or disputed job progress;
- (2) Defective construction work or material;
- (3) Disputed work;
- (4) Failure to comply with other material provisions of the construction contract; or
- (5) Failure of the subcontractor to make timely payments for labor, equipment and materials, or reasonable evidence that the subcontract cannot be completed for the unpaid sum.

QUESTION 6: What is the consequence for untimely payment under the New Jersey Prompt Payment Law?

ANSWER: A delinquent party shall be liable for:

- The payment amount(s) owed under contract;
- interest at prime rate (presently 3.25%) plus 1% for the duration of late payment; and
- where civil action is brought to collect payments under the act, reasonable costs and attorney fees to the prevailing party.

QUESTION 6: New Jersey (continued)

- A prime contractor, subcontractor or sub-subcontractor may, after providing 7 days' written notice to the delinquent paying party, may suspend performance of a construction contract, without penalty for breach of contract, until the payment is made.*

QUESTION 6: What is the consequence for untimely payment under the Delaware Construction Prompt Payment Act (Private)?

ANSWER: Failure to timely pay may result in the following damages:

- Interest at the legal rate (5% over the Federal Reserve discount rate, presently .75%), compounded monthly;
- Amount wrongfully withheld;
- Attorneys' Fees & Costs, including expenses for any expert witnesses

QUESTION 6: What is the consequence for untimely payment under the Pennsylvania CASPA (Private)?

ANSWER:

- **Interest.** Except as otherwise agreed, (sub)contractors must pay their subcontractors 1% per month.
- **Penalty.** If a court determines that a (sub)contractor failed to comply with the Act, the court shall award a penalty equal to 1% per month for the amount wrongfully withheld.*
- **Fees & Expenses.** Notwithstanding any agreement to the contrary, the substantially prevailing party in any litigation to recover any payment under this Act shall be awarded a reasonable attorney fee in an amount to be determined by the court, with expenses.

QUESTION 6: What is the consequence for untimely payment under the Pennsylvania Commonwealth Procurement Code (Public)?

ANSWER:

- **Interest.** (Sub)contractors must pay their subcontractors interest at the Federal Short Term Interest Rate (2.5 % annual) beginning 15 days after the payment was due.
- **Penalty.** If a court determines that a (sub)contractor failed to comply with the Act, the court shall award a penalty equal to 1% per month for the amount withheld in bad faith;
- **Fees & Expenses.** Notwithstanding any agreement to the contrary, the prevailing party in any litigation to recover any payment under this Act may be awarded a reasonable attorney fee in an amount to be determined by the court, with expenses, if the withholder acted in bad faith.

QUESTION 6: What is the consequence for untimely payment under the Maryland Prompt Payment Act (Private)?

ANSWER:

- **Equitable Relief.** Includes the enjoining of further violations;
- **Interest & Costs.** Prevailing party in any litigation under the Act is entitled to interest from the date the amount owed was due and any reasonable costs incurred therewith; and
- **Fees.** If a court determines that the (sub)contractor acted in bad faith by failing to pay any undisputed amounts owed its subcontractor, the court may award to the prevailing party reasonable attorneys' fees.

QUESTION 6: What is the consequence for untimely payment under the Maryland General Procurement Law (Public)?

ANSWER:

1. If a subcontractor does not receive timely payment, it must give notice to the governmental unit, which, within 2 business days, will determine whether the amount is undisputed; if so, unit will order (sub)contractor to pay the subcontract the undisputed amount within 3 business days.
2. If a government unit determines that (sub)contractor is delinquent in payment of the undisputed amount, the unit may order further progress payments to (sub)contractor be withheld until the subcontractor is paid.
3. If payment is not made within 7 days from when the unit determines that the (sub)contractor is delinquent, the unit will hold a second meeting to determine additional remedies, including:

QUESTION 6: Maryland (continued)

- i. Order that further payments to the (sub)contractor not be processed until payment to the subcontractor is verified;
- ii. Order that all or some of the work under the contract be suspended without affecting the contractually required completion date;
- iii. If the delinquent party is a subcontractor, order it to pay the undisputed amount, together with any penalty assessed against subcontractor, not to exceed \$100 per day, from the date that payment was required; or
- iv. If the delinquent party is a subcontractor, order it to place the payment owed the other subcontractor for the undisputed amount and any penalty therewith in an interest bearing escrow account.

QUESTION 6: What is the consequence for untimely payment under the New York Prompt Pay Act (Private)?

ANSWER:

Interest. If any interim payments or final payment to a subcontractor is delayed beyond the due date established by the Act, the (sub)contractor shall pay its subcontractor interest, beginning on the next day, at the rate of 1% per month or fraction of a month on the unpaid balance, or at a higher rate consistent with the construction contract.

QUESTION 6: New York (continued)

Suspension. A subcontractor may suspend contractually required performance as follows, provided written notice is given to the owner and the contractor at least 10 days before the intended suspension date:

- a) If Owner fails to make timely payments for undisputed invoices for Subcontractor's work and Contractor fails to pay Subcontractor;
- b) If Owner pays the Contractor for Subcontractor's work but Contractor fails to make timely payment to Subcontractor; or
- c) If Owner fails to timely approve or disapprove a portion of Contractor's invoice for work performed by Subcontractor.

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