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To: ABA Advisory Board – Legal Update

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1. **SHEA CONNELLY V ROC COURT OF APPEALS DECISION**

The Arizona Court of Appeals issued a decision in Shea Connelly Dev. v. Arizona Registrar of Contractors which has implications for general contractors, subcontractors and suppliers on enforcement of payment issues under the Prompt Pay Act (A.R.S. Section 32-1181 et seq.) While the decision is unpublished (meaning it can’t be cited as precedent) it is still instructive on how the ROC and courts apply the Prompt Pay Act.

In the Shea Connelly case the GC and sub entered into two separate contracts on two separate projects. The subcontracts on both projects provided that a default by the sub on one project would be deemed a default on all subcontracts.

Sub received partial payment on Project 1 (although no work was done) and performed work on Project 2 and billed for that work. GC determined that the work on Project 2 was deficient and terminated sub on both projects. GC did not provide a written notice to sub under the Prompt Pay Act (PPA) disputing in detail the reasons for non-payment on Project 2.

Sub filed a complaint for non-payment with the ROC and as defenses to the claim the GC alleged the rights of accord and satisfaction and offset, claiming the partial payment on Project 1 could be applied to the amounts owing on Project 2.

The ROC rejected these arguments and found that GC’s failure to provide written notice detailing the reason for non-payment on Project 2 was a violation of payment rights under the PPA. Accordingly the ROC suspended GC’s license for non-payment.

The Court of Appeals upheld the ROC’s ruling, finding that 1) accord and satisfaction does not apply because it alters a sub’s statutory right to receive prompt payment; and 2) offset did not apply because the ROC is not a forum for litigating contract rights and obligations. The PPA establishes a statutory framework for ensuring timely payments; allowing a GC to bring a counterclaim or other right outside the PPA would “inflate a simple prompt payment proceeding before an ALJ to full civil litigation better suited to the superior court.”

TAKEAWAYS:

1. If you are a GC disputing a sub’s billing or a sub disputing a sub-sub’s or suppliers’ billing you must provide detailed written notice within 14 days of receipt of the billing, otherwise it is deemed certified and approved under the PPA.
2. If a GC has a claim for offset or some other contractual remedy to assert against an ROC claim for non-payment, the GC should probably bring an action in superior court asserting the claims and then move to stay the ROC action pending outcome in superior court.
3. **AAA FEES**

Many construction contracts include a provision that the parties must use the American Arbitration Association for any mediation or binding arbitration. While AAA has some benefits (a good pool of prospective construction mediators and arbitrators) the problem with AAA is that you have to pay an administrative fee as well as pay the mediator or arbitrator for his/her time. This can result in fees that are much higher than what you might pay in standard cases.

For instance, a claim between $150,000 to $300,000 requires an initial filing fee of $2,650 and final fee of $2,000 to AAA. If a counterclaim is filed the other party also has to pay a filing fee. AAA charges to set up conferences with the mediator/arbitrator, generate letters confirming the conference and the discussion, and the parties also have to pay the mediator/arbitrator. On a recent case involving a claim of $100,000 the parties received a statement from AAA for over $11,000 for the AAA and arbitrator’s fees/costs.

I recommend to my clients that they don’t use AAA in their contracts and instead agree to mediate privately and/or to submit disputes to binding arbitration under the Arizona Revised Uniform Arbitration Act, A.R.S. Section 12-3001 et seq. The parties can choose their own arbitrator and avoid paying AAA to administer the case.