

FARHANG & MEDCOFF

ATTORNEYS

LEGAL UPDATE

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The Arizona Prompt Pay Act allows a contractor or subcontractor to suspend or terminate performance on a private construction contract for non-payment. A.R.S. Section 32-1185. The law, as it applies to contractors, states:

- A. A contractor may suspend performance under a construction contract or terminate a construction contract for failure by the owner to make timely payment of the amount certified and approved pursuant to section 32-1182. A contractor shall provide written notice to the owner at least seven calendar days before the contractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the owner and contractor. A contractor shall not be deemed in breach of the construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a contractor to suspend performance or terminate a construction contract under this subsection.

Subcontractors have similar rights, and both GCs and subs need to provide written notice of intent to suspend or terminate.

The right to suspend or terminate is based on an owner's duty (or a GC's duty) to provide written notice within 14 days of receipt of any basis for disapproving the billing. The exact language states:

A billing or estimate for a progress payment shall be deemed certified and approved fourteen days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement stating in reasonable detail the owner's reasons for not certifying or approving all or a portion of the billing or estimate. A.R.S. Section 32-1182(D).

The question, then, is what constitutes “reasonable detail” for the reasons why the billing was not approved?

In one instance, a GC declined to approve a billing from a sub and provided no basis for the deductions in the billing other than to change the percentages being billed. The GC’s argument was that if the sub bills for 90% completion and the GC marks that down to 60%, that is sufficient detailed notice of disapproval. The sub’s argued that simply marking down the approved percentage of completion doesn’t provide enough information to determine why the work was rejected. Is it that the work is not past 60% completion; that a portion of the work was rejected because it doesn’t conform to project specifications; or another reason?

The Prompt Pay Act provides a list of reason why a billing can be rejected (Sect. 32-1182(D):

The owner may withhold from a progress payment a reasonable amount for retention. An owner may decline to certify and approve a billing or estimate or portion of a billing or estimate for any of the following reasons:

1. Unsatisfactory job progress.
2. Defective construction work or materials not remedied.
3. Disputed work or materials.
4. Failure to comply with other material provisions of the construction contract.
5. Third-party claims filed or reasonable evidence that a claim will be filed.
6. Failure of the contractor or a subcontractor to make timely payments for labor, equipment, and materials.
7. Damage to the owner.
8. Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum.

Reducing the percentages of approved completion probably does not satisfy the Prompt Pay Act requirement of stating with reasonable detail the reason for not approving the billing.

If an owner or GC disapproves all or a portion of the billing, they should explain the full basis for the disapproval, otherwise the GC or sub can exercise its right to suspend or terminate work.