

Real Estate Title Insurance & Construction Law

Enforcing N.J.'s Prompt Payment Act

Contractors deserve timely
compensation for their work, even
from towns and counties

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New Jersey's Prompt Payment Act, N.J.S.A.2A:30A-1, et seq. (PPA), obligates a real estate owner who engages a contractor to make improvements to real property to: (1) pay promptly payments due to the contractor; (2) alternatively, object in writing to such payment; or (3) risk being subject to the PPA's remedies of interest at 1 percent above prime on the unpaid amount and shifting of the con-

tractor's legal fees should it prevail in subsequent litigation.

There are few cases reported under the PPA. The only Appellate Division case construing the PPA is unpublished. In that case, *Shore Mechanical Contractors v. W. G. Osborne Construction*, 2008 WL 4107895 (App. Div. Sept. 8, 2008), the court held that the fee-shifting provision was *mandatory*, i.e., not discretionary, when the contractor prevailed. Recently, a decision in the Superior Court of New Jersey upheld the PPA remedies against the County of Warren in a case brought by one of its contractors on a county project. *Aire Enterprises v. County of Warren*, WNL-151-09.

Almost five years after Warren County's architect certified the final amount due to a contractor who had

completed renovation of a county building, the Honorable Amy O'Connor, Justice of the Superior Court, Warren County, awarded the contractor in the *Aire Enterprises* case the unpaid balance of the architect-certified final amount due, plus interest, costs and attorney fees under the authority of the PPA. Judge O'Connor rejected the County's position that the contractor's alleged defective installation of approximately 20 of 400 carpet tiles justified withholding the final contract balance. The trial court denied the County relief on all points other than to award it \$150 for the relative handful of carpet tiles of which it complained.

As adopted effective in September 2006, the PPA requires that real estate owners make full payment to contractors for work performed on their property within 30 days of the contractor's submission of a final billing. The PPA allows the owner to dispute some or all of the final billing by written notice to the contractor within 20 days of the owner's receipt of the final billing. However, the PPA obligates the owner to pay whatever portion of the final billing amount is not so disputed. If a contract with a governmental owner specifically allows the payment to be made to the contractor at the next payment time in the governmental agency's billing

Webb and Goski served as co-counsel to the contractor plaintiff in the Aire Enterprises case. Webb offers general-counsel and business-strategy services as the owner of JGW, INCounsel in Budd Lake. Goski is a solo practitioner in Florham Park, focusing on all aspects of civil dispute resolution, and offering mediation, arbitration and civil commercial trial experience.

cycle, the 30-day payment requirement can be modified by contract between the contractor and the government owner. In the *Aire Enterprises* case, the trial court found that there was no evidence in the contract between the parties specifying the time of payment to be defined by Warren County's billing cycle.

The defendant in *Aire Enterprises* moved for reconsideration of the trial court's interpretation of the PPA. The defendant argued that the PPA allows a property owner to withhold any amount of payment from a contractor whose work is not in fact entirely complete and defect-free, irrespective of whether the property owner notifies the contractor within 20 days of the billing date of "the amount withheld and the reason for withholding payment." N.J.S.A. 2A:30A-2a. In its April 23 decision denying Warren County's motion for reconsideration, the court interpreted the PPA to mean as follows:

The statute imposes a twenty day deadline when an owner has to advise a contractor that it is not going to pay a bill or a part of a bill, and to give the reasons why. If the owner does not meet the deadline, then the statute deems the bill to have been approved by the owner and, impliedly, the work performed by the contractor as well. Under the statute an owner does not have to pay the bill if it does not approve it, but the owner must give the contractor reasons within twenty days of getting the bill. Otherwise, the bill must be honored.

The court further observed, "The defendant did not forfeit any remedies it had if thereafter it discovered that there was a problem ... but it had to pay the full bill"

Additionally, the court pointed out that even if the defendant's interpretation of the PPA were correct, in the *Aire Enterprises* case the County violated the PPA by withholding a portion of the final billing (\$9,095.85 paid six months late) for which the County had no reason to

withhold payment. The court stated, "the defendant withheld over \$21,345.85. The amount in controversy was \$12,250. The defendant did not justify why it withheld as much as it did. The defendant is responsible for withholding \$9,095.85 under the Prompt Payment Act even if the defendant's interpretation [of the] statute is correct."

Shortly after the effective date of the PPA, the Finance Department of the State of New Jersey issued a policy statement to all municipal (county and town) governments providing guidelines on implementation of the payment provisions required by the PPA. Local Finance Notice 2006-2. According to responses to Open Public Records Act (OPRA) requests to the 21 counties in New Jersey between February 2010 and March 2011, approximately half of the counties in New Jersey ignored those guidelines, including Warren County, which, based upon the *Aire Enterprises* decision, disregarded the PPA at its peril. As late as March 2011, Warren County had adopted no policy on the PPA, despite the fact that, in the *Aire Enterprises* litigation, the contractor had persistently since the March 2009 commencement of litigation sought statutory relief under the PPA, specifically, legal fees and statutory interest on the contract balance due.

Between February 2010 and February 2011, plaintiff's counsel in *Aire Enterprises* sent each county in New Jersey the following OPRA request:

If the County has adopted any policy or procedure related to compliance with the New Jersey Prompt Payment Act, N.J.S.A. 2A-30A-1 et seq., provide a copy of any such policy or procedure that is in writing, briefly set forth the substance of any such policy or procedure that is in existence but not reduced to writing, and state the first date when such policy or procedure was adopted by the County.

According to the OPRA responses, approximately half of the counties in New Jersey had a written policy about,

or reported compliance with, the PPA. Counties' PPA responses took different forms.

The counties of Bergen, Cumberland, Essex and Mercer had adopted standard construction contract provisions assuring contractors of the county's compliance with the PPA.

Bergen County's contract provisions exemplify this approach to PPA compliance. Bergen County's contract form provides that payments "shall be deemed approved and certified 20 days after the County's receipt of same unless the County provides, before the end of the 20-day period, a written statement of the amount withheld and the reason for withholding payment." The Bergen County contract further provides: "In the event that a payment is approved or deemed approved but is not paid in a timely manner ... the County shall be liable for the amount of money owed under the contract plus interest in accordance with N.J.S.A. 2A:30A."

Burlington, Monmouth and Ocean Counties simply responded that they comply with the PPA, and Atlantic County replied that they comply with the PPA and with Local Finance Notice 2006-2.

The Counties of Middlesex, Somerset and Sussex reported the formal adoption of policies concerning compliance with the PPA. Middlesex County's policy carries forward a policy adopted in 2002 to include a "payment clause" in the specifications for all contracts. The payment clause includes the following:

The contractor shall submit a request for payment before the 10th day of each month ... If within 20 days of the receipt of the request for payment either the County Engineer, designated County Representative or the consulting engineer whichever is appropriate, questions any item or items contained in the request for payment, the engineer shall notify the contractor as to the items in question and the amount withheld from the pending payment. All requests for payment which are not in

dispute shall be paid within 30 days after receipt by the County.

The Counties of Middlesex, Somerset and Sussex, as well as a majority of the other counties that reported compliance with the PPA, reported paying contrac-

tor billings in the county's billing cycle after the billing had been certified and approved as specified in the PPA.

What was surprising was that almost half the counties responded to the OPRA request that they had no PPA policy at all. The counties of Camden, Cape May, Gloucester, Hudson, Hunterdon, Morris,

Passaic, Salem, Union and Warren all responded to the OPRA request that they had no policy on compliance with the PPA. A county, or any other property owner, that fails to comply with the PPA in making timely payments to contractors does so at its peril, as the *Aire Enterprises* case demonstrates. ■