



New Amendments to Virginia's "Prompt Payment" Law Take Effect July 1, 2023

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06.29.2023

In 2022, the General Assembly enacted significant changes to Virginia Code §§**2.2-4347**, **2.2-4354** and **11-4.6** that mandated prompt payment by owners, contractors and subcontractors on public and private construction projects and invalidated "pay if paid" clauses (the Prompt Payment law). That Prompt Payment law became effective as of January 1, 2023. For a detailed description of those requirements, please see this link to our prior **alert**. The new Prompt Payment law also required the Department of General Services to convene a Workgroup to study the impact of the new Prompt Payment law. The Workgroup released a report in November 2022 recommending a number of changes and clarifying edits to the Prompt Payment law.

In 2023, the General Assembly acted on the Workgroup's recommendations, passing **SB 1313 (Bell)** and **HB 2500 (Wiley)**, and Governor Youngkin signed the new legislation into law, making some significant changes to the existing Prompt Payment law. Those changes take effect July 1, 2023 and the highlights of those changes are described below.

New Amendments & Requirements for Contracting on Private Projects

The 2023 amendments to the Prompt Payment law impact private construction projects by revising Virginia Code § **11-4.6** in significant ways:

- The new definition of "Construction contract" broadened^[1] the scope and reach of the Prompt Payment law. "Construction contract" is no longer limited to contracts between general contractors and subcontractors. Now, it also applies to subcontracts, sub-subcontracts, etc. Note that the definition still excludes contracts awarded solely for "professional services" (e.g., architects and engineers) as defined in Va. Code § 2.2-4301.
- The definitions of "contractor" and "general contractor" were changed to match the definitions in Va. Code § **54.1-1100**.^[2] The old definitions only applied to parties contracting directly with a property owner. The new definition, however, is broader and would include downstream contractors.
- The definition of "subcontractor" was also expanded in two significant ways:

1. it is no longer limited to parties in direct contract with the contractor/general contractor. Under the new definition, it includes anyone who has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in performance of the work provided for in such contract. In other words, it means subcontractors at any tier (sub-subcontractors, etc.)
2. It now includes material suppliers who were previously excluded under the prior version of the statute. This means that materials suppliers now get the benefits and protections of the Prompt Payment law (but not the obligations since they're excluded from the definition of contractor?). Upstream contractors must be sure to incorporate the Prompt Payment terms and requirements in their purchase orders and contracts for materials.
 - If an owner intends to withhold any payment for contractual noncompliance, the owner must send written notice to the contractor within 45 days from receipt of an invoice or pay application. That notice must specifically identify the contractual noncompliance and the dollar amount being withheld.
 - The deadline for contractors to pay lower tier subcontractors and suppliers within 60 days starts to run from receipt of an invoice or pay application, not from performance of the work.
 - If a contractor intends to withhold any payment from a lower tier subcontractor or supplier for contractual noncompliance, contractor must send written notice to the contractor within 50 days from receipt of a pay application. That notice must specifically identify the contractual noncompliance and the dollar amount being withheld.
 - The new amendments clarify that subcontractors are required to follow the same Prompt Payment requirements with respect to payment of their subcontractors and suppliers, with two notable exceptions:
 1. Persons *solely* furnishing materials do not have to pay their suppliers within 60 days or comply with the obligations of the Prompt Payment law (but, again, they do get the benefits of the Prompt Payment law and must be paid within 60 days, etc.).
 2. Also excluded from these Prompt Payment requirements are contracts between subcontractors and lower-tier subcontractors for (i) single-family residential projects or (ii) subcontracts in which the value of the work is \$500,000 or less.

If a subcontract doesn't fall into one of the above exceptions, that subcontract needs to comply with the Prompt Payment law discussed in our prior **alert**.

New Amendments & Requirements for Contracting on Public Projects

The 2023 amendments to the Prompt Payment law impact public construction projects by revising Virginia Code § **2.2-4347** and § **2.2-4354** in several significant ways:

- Contractors (defined as the entity in direct contract with the state agency) are required to pay subcontractors and suppliers within 60 days from receive of an invoice, even if the contractor has not received payment from the state agency. However, the 2023 amendments create two

exceptions to this 60-day payment deadline:

1. Neither the 60-day payment deadline nor the prohibition on pay if paid clauses apply to retainage. If permitted by the express language in the subcontract, a contractor can withhold retainage until certain conditions precedent are met.
2. Neither the 60-day payment deadline nor the prohibition on pay if paid clauses apply to professional services where the state agency has contracted directly with an architectural and engineering firm.
 - If the contractor wants to withhold all or part of a subcontractor's payment due to subcontractor's noncompliance with the subcontract, the contractor must notify the subcontractor within 50 days of the receipt of the subcontractor's invoice. The notification must specifically identify the contractual noncompliance, the dollar amount being withheld, and the lower-tier subcontractor that is responsible for the contractual noncompliance.[4]
 - Finally, the legislation added a definition for "construction contract." See definition in fn 1.

Conclusion

You may need to adjust payment procedures and to update your contract and subcontract forms to reflect these new changes. For more information, if you have questions or if you need help with your contract forms, please contact Alex Burnett, Chris McDonald, or a member of the Williams Mullen Construction Team.

[1] New definition: "Construction contract" is defined as "a contract relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance to such building or structure, including moving, demolition, and excavation connected with such building or structure, or any provision contained in any contract relating to the construction of projects other than buildings."

[2] Note that there is no definition for "general contractor" in 54.1-1100 which creates a minor ambiguity in the amendment; presumably, however, the General Assembly intended for those terms to be interchangeable in the new statute.

[3] The prompt payment deadline is the earlier of 1) 7 days after payment from the owner or 2) 60 days from receipt of an invoice or pay application.

[4] The notice requirement itself is not new, but the 50 day deadline to provide the notice is a new change taking effect July 1.

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