

OHIO HOUSE BILL 380: ADDING OWNER ACCOUNTABILITY TO OHIO'S PROMPT PAYMENT ACT

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As many Ohio commercial builders already know, Ohio's Prompt Payment Act is a powerful tool for subcontractors, sub-subcontractors, and material suppliers seeking "prompt payment" from prime contractors and upper-tiered subcontractors. The trouble with the Prompt Payment Act, however, is that it only applies to contractors and subcontractors. The Act says nothing about when project owners must pay their bills. And if project owners are not making timely payment to their prime contractors, then the Prompt Payment Act benefits no one. A current Ohio House Bill, however, may change things.

Under the current Prompt Payment Act, a prime contractor must pay its subcontractors within ten days of receipt of payment from the project owner. This "ten day" requirement trickles down the chain of contracts, requiring subcontractors to pay their sub-subcontractors, materials suppliers, etc. within ten days of the date that they receive payment. If prime contractors or upper-tiered subcontractors fail to make payment within the "ten day" window, subcontractors and suppliers may seek 18% interest on balances due. If the prime contractor or higher-tiered subcontractor does not make payment within thirty days after receipt of payment, subcontractors and suppliers may file suit and seek reimbursement for associated attorneys' fees. Again, however, none of this matters if the owner's payment is delinquent.

Ohio House Bill 380 proposes an amendment to the Prompt Payment Act. Specifically, HB380 would amend the Prompt

Payment Act to require project owners to pay prime contractors within thirty-five days after receipt of a proper payment application. Failure to make payment within thirty-five days would subject the owner to the same 18% interest and attorneys' fees burden imposed on builders under the current version of the Act.

In proposing these revisions, the Ohio legislature cited a study prepared by Rabbet, a construction financial software developer. According to Rabbet, there is a \$40 billion impact on the industry for carrying forward fees and costs associated with slow payments from project owners. This same study found that an overwhelming majority of subcontractors must turn to other sources of financing for wages and materials while they wait for payment. Only 39% of subcontractors reported the ability to rely on their balance sheet, followed by 36% having to use a line of credit, 22% using credit cards, 15% using personal savings and 6% using retirement savings.

Currently, twenty nine other states have statutes similar to the proposed revisions sought by Ohio House Bill 380. In fact, there is even a similar statute in place for public work in Ohio. Specifically, under Ohio Revised Code §153.14, a public owner that fails to make payment within thirty days of receipt of a proper invoice is subject to paying interest at the statutory rate. In short, Ohio's private commercial construction owners have benefited from relaxed payment enforcement laws for longer than many of their public and out-of-state counterparts. If the current House Bill passes, this will change.

To date, the Construction Employers Association, the Mechanical Contractors Association of Ohio, and the American General Contractors of Ohio have formally endorsed the bill. In advocating for the bill, AGC's Andrea Ashley correctly observed, "Commercial construction is a high-risk, high-volume, and low-margin industry – especially on the vertical building side. Cash flow is extremely important. Money is necessary to compensate workers, pay subcontractors and suppliers, procure material and equipment, fund new projects, and finance other company functions. It can impact a construction company's ability to obtain appropriate bonding and insurance, as well as a company's ability to be considered for future construction projects."

Based on these concerns, the AGC is supporting enhanced owner accountability that is "notably missing" from the current version of the Prompt Payment Act.

If the AGC's words are taken to heart by the Ohio General Assembly, Ohio will follow the precedent set by 29 other states and make owner payment within thirty five days statutorily mandatory and subject to interest and reimbursement of attorneys' fees. We will continue to follow the progress of the House Bill and keep ACI's members updated on its status.

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