

MUZI & ASSOCIATES

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SUBCONTRACTOR'S RIGHT TO PROMPT PAYMENT PENALTIES FOR NONPAYMENT

The California legislature has enacted prompt payment statutes whereby claimants may seek to collect penalties if payments of undisputed amounts are not made within a specified period. These prompt payment statutes are aimed at deterring the practice of withholding money in excess of the amount in dispute as a means of exacting economic leverage against a claimant.

On both private works and state and local public works, within 10 days after receiving each progress payment, the prime contractor and subcontractors must pay their subcontractors the amounts included in the progress payments attributable to their work. Fail-

ure to do so will subject the contractor or subcontractor to a penalty of 2 percent per month in addition to interest, attorney fees, costs and disciplinary action by the CSLB, Business & Professions Code §7108.5; Public Contract Code §10262.



The time period and penalties vary, based on a broad variety of factors including the type of public entity involved, type of payment, type of claimant (prime

contractor or subcontractor) and the date the contract was entered into. For more information on prompt payment statutes, contact Andrew C. Muzi, Esq. at Muzi & Associates.

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If you have any questions regarding this newsletter or any public or private works construction issues, contact Andrew C. Muzi, Esq. at Muzi & Associates (949) 553-9277.

LET'S BE "REASONABLE": WHAT TO DO WHEN THERE IS NO SCHEDULE

In the absence of a work schedule, a subcontractor is permitted under law to finish his work within a reasonable time. California Civil Code §1657 provides that "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." In determining what period constitutes reasonable time, courts consider the facts and circumstances sur-

rounding the project. There are many factors which may be considered in determining the reasonable time for any given project. For scheduling and delay questions, contact Andrew C. Muzi, Esq. at Muzi & Associates.



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CSLB FACTS

The CSLB operates under the California Department of Consumer Affairs and licenses California's 310,000 contractors. The CSLB conducts over 20,000 investigations against contractors annually and in the fiscal year 2006 to 2007 helped consumers recover \$45 million in restitution damages.

CSLB CITES UNLICENSED CONTRACTORS IN STING OPERATION

The CSLB's Statewide Investigative Fraud Team (SWIFT) recently conducted a sting operation in Central California where they posed as homeowners and invited unlicensed contractor suspects to bid on projects that included fencing, painting, tree trimming and landscaping. On the day of the sting, fourteen people were cited for contracting without a license, two were cited for illegal advertising and one licensed contractor was cited for trying to work with an expired license.

Unlicensed operators are part of a multi-billion dollar underground economy that takes jobs away from legitimate contractors and tax dollars

from schools, roads and law enforcement. Additionally, such unlawful activity is dangerous for homeowners as these illegal operators rarely have workers' compensation insurance and the homeowners have little recourse against them in event of damage or injury. If you know a homeowner that is trying to cut corners and hire an unlicensed contractor for cheap labor, advise them of the potentially severe consequences and the risks involved to their project and pocket book.



CHANGE ORDER ON A PUBLIC JOB MAY PERMIT THE REPLACEMENT OF A LISTED SUBCONTRACTOR

California's Subletting and Subcontracting Fair Practices Act codified in Public Contract Code Section 4100 et seq. requires a general contractor, upon bid acceptance, to use the subcontractors listed in the bid. However, subdivision (c) of section 4107 provides an exception in the case of change orders causing changes or deletions from the original contract. The California Court of Appeals recently held in Affholder, Inc. v. Mitchell Engineering, Inc. 153 Cal. App. 4th 510, that if the change order involved a significant change, the exception permits the prime contractor to subcontract out the work without obligation to the original subcontractor; however, if the change was not significant the contractor could not subcontract out the work without violating the statute. For questions related to public works projects and compliance under the California Public Contract Code, contact Andrew C. Muzi, Esq. at Muzi & Associates.



Season's Greetings from Muzi & Associates

IN THE NEGOTIATION PROCESS, WHOSE CONTRACT TERMS & CONDITIONS ULTIMATELY APPLY

During negotiations, when bids, proposals, correspondence and invoices are exchanged between the parties, in the absence of a signed agreement by both parties, it is sometimes difficult to know which terms and conditions apply. While these legal questions tend to be fact sensitive, in the case of a subcontractor supplying and installing "goods" or products on a job, i.e. casework, HVAC units, or windows, the Uniform Commercial Code offers some guidance as to the answer.



In the instance where a subcontractor provides a bid (which contains certain terms and conditions) to supply and install a product on a job, and the contractor confirms the bid in a writing, i.e. letter, invoice, e-mail, or work order, within a reasonable time - that written confirmation acts as an "acceptance" of the subcontractor's bid, which contains its terms and conditions.

The Uniform Commercial Code Section 2-207(1) specifically states: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms."

Determining whose terms and conditions apply is often pivotal to a dispute since they dictate the parameters governing the dispute and the recovery available, i.e. binding arbitration clauses, attorney's fees to the prevailing party, limited damages, notice requirements, etc. It is always preferable to have an agreed to written contract signed by both parties, but in its absence, the application of law to facts will determine whose terms and conditions apply. For more information on contract formation and enforcement, contact Andrew C. Muzi, Esq. at Muzi & Associates.

MUZI & ASSOCIATES CELEBRATES ITS 10 YEAR ANNIVERSARY

January 2008 marks our ten year anniversary at the law firm of Muzi & Associates. Over the past ten years we have celebrated many legal victories on behalf of our clients in state and federal courts inside and outside the State of California. It has been our pleasure serving our clients' legal needs and we look forward to continuing to provide the quality of legal services our clients have come to identify with Muzi & Associates in the years to come.



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