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The Prompt Payment Act—Texas Property Code Chapter 28

Texas has **mandatory** deadlines for paying Contractors, Subcontractors, and Suppliers who provide labor, material and/or equipment to a residential Project. Pursuant to Texas Property Code, Chapter 28, referred to as the “**Prompt Payment Act**”, a Property Owner must pay its Contractor within **no later** than 35 days from receipt of a written payment request (this deadline is extended if the Homeowners obtained a loan for the improvements or construction of the residence). In turn, the Contractor is required to pay its Subcontractors and Suppliers that portion of the payment attributable to their labor/material/equipment within no later than 7 days from receipt of the payment. Those Subcontractors and Suppliers are then required to pay their downstream Subcontractor and Suppliers within no later than 7 days as well.

Notwithstanding the above, there is a way in which the Payor can use the Prompt Payment Act as a shield. Specifically, if the Payor can identify a legitimate reason, referred to as a “**Good Faith Dispute**”, as to why some or all the amount claimed owed should not be paid, then the Payor may withhold 110% of that amount from the overall payment until the dispute is resolved, but no more. For example, if a Builder/Contractor submits a payment request in the amount of \$75,000.00, but the Homeowners have a good faith reason for withholding \$15,000.00 of that amount as a result of a dispute, then the Homeowner may legally withhold \$15,000.00 and release the remaining undisputed \$60,000.00. A good faith dispute can be for any legitimate reason, including accounting errors, disputed charges, defective work, incomplete work, or a right provided for by Contract, *e.g.*, statutory or contractual retainage, or an administrative condition precedent to payment like the execution/exchange of a Conditional Lien Waiver & Release. Homeowners can use the Prompt Payment Act to withhold funds from a progress or final payment until the dispute is resolved.

To invoke the Good Faith Exception, the Homeowners must serve the Builder/Contractor with written notice expressly identifying the *specific reasons* for withholding payment. If a reason specified includes nonconforming or defective work, then the Contractor is entitled to a **reasonable opportunity** to cure the defects or to offer a sum of money in which to compensate the Homeowners for the items that cannot be promptly cured. Presumably, failure to satisfy this notice requirement and/or to allow the Contractor an opportunity to cure, would defeat a Homeowner's assertion of the Good Faith Dispute exception as a defense to nonpayment. Further, if a trier-of-fact (through an arbitration or civil lawsuit) later finds that the Homeowners did not have a “good faith” right to withhold payment, then the Homeowners may be required to pay accrued interest on the unpaid amount at 1.5% a month and reimburse the Builder/Contractor's attorneys' fees.