



**KANSAS BAR
ASSOCIATION**

CHAPTER 8 PROMPT PAYMENT ACTS

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§8.1 I. PURPOSE OF ACT

The right to payment is a central aspect to all contracts in the area of construction. Of major concern to contractors entering into contracts with public and private entities is, more specifically, the timeliness of such payment. The concern for timely payment stems from the demands placed on every contractor and subcontractor, especially since payments received are often essential to provide the necessary funds to continue work pursuant to the contract. The consequences and ramifications associated with late payment, or nonpayment can drastically impair the contractor's ability to meet demands or to even operate.

To lessen the burden of late payment from agencies, the United States Congress enacted the Federal Prompt Payment Act (FPPA), 31 U.S.C. § 3901, *et seq.* The 1982 enactment of the FPPA decreases the risk of late payment on public projects. The FPPA requires federal agencies to pay for construction work on a timely basis, to pay interest penalties for late payments, and to take discounts only when payments are made by the discount date. The FPPA underwent substantial modification in 1988 as provisions were added to regulate the manner in which prime contractors paid subcontractors and vendors.

§8.2 II. CONTRACTS TO WHICH ACT APPLIES

§8.2.1 A. Government Agencies Subject to Act

The FPPA applies to all contracts involving an “agency acquiring property or service from a business concern.” 31 U.S.C. § 3902(a). The term “agency” is broadly defined as any authority of the Government of the United States except for the following: Congress; United States courts; United States possessions or territories; government of the District of Columbia; courts martial and military courts; and military authority in war time or in occupied territory. 5 U.S.C. § 551(1).

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§8.2.2 B. Vendors Subject to Act

As the FPPA applies to property or services obtained “from a business concern,” the term “business concern” is defined to include any person carrying on a trade or business or a nonprofit entity operating as a contractor. 31 U.S.C. § 3901(2).

§8.2.3 C. Contracts for Property or Services

The FPPA applies to contracts encompassing “property or service,” including construction contracts.

§8.3 III. GOVERNMENT’S OBLIGATIONS UNDER ACT

§8.3.1 A. When Payment Is Due

Under the FPPA, payment is due upon the date identified in the contract. 31 U.S.C. § 3903(a)(1)(A). If the contract fails to specify the date, payment is due 30 days after the agency receives a proper invoice. 31 U.S.C. § 3903(a)(1)(B). The date in which payment is due is altered in the case of prime contractors when a proper progress payment request has been approved by an agency. Payment must be remitted by the agency within 14 days after receipt of a proper payment request, or the period may be extended if provided for in the contract and the agency requires more time to inspect the adequacy of the work. 31 U.S.C. § 3903(a)(6)(A). Earlier payment may be requested by a contractor by offering the agency a discount provision. Upon agency acceptance, payment is due by the date prescribed in the discount provision. 31 U.S.C. § 3904.

Unless a discount provision is provided, an agency is limited to tendering payment no more than seven days prior to the date in which payment is due or as close to the due date as possible. 5 C.F.R. § 1315.4(j) (2003). An agency is permitted to pay early if one of the following is present: when a single invoice is less than \$2,500; payment is requested by a small business; when payment is related to emergencies, disasters and military deployments; or for interim payments under cost-reimbursement service contracts. 5 C.F.R. § 1315.5 (2003).

§8.3.1.1 1. Proper Invoice

The FPPA provides that if a contract fails to specify a payment date, the payment is due 30 days after the agency receives a “proper invoice.” 31 U.S.C. § 3903(a)(1)(B). A proper invoice is defined by the FPPA as an invoice containing the “substantiating documentation” required by the director of the Office of Management and Budget (OMB). 31 U.S.C. § 3903(a)(3). The substantiating documentation required by the OMB director includes the following:

1. Identity of contractor and invoice date;
2. Contract number or other authorization that provides for the delivery of property or services;
3. Description of the property and services actually delivered or rendered, including price and quantity;

4. Shipping and payment terms;
5. Other substantiating documentation as may be required by the contract; and
6. Name, title, telephone number, and complete mailing address of the responsible contract representative to whom payment is to be sent.

In 1999, the Office of Management and Budget issued final revisions to its rules on the implementation of the Prompt Payment Act and added the following requirements for substantiating documentation:

7. Taxpayer Identifying Number; and
8. Information necessary to facilitate an Electronic Funds Transfer (EFT) payment, including the contractor's bank account number and the contractor financial institution's routing number.

Although not required, contractors are encouraged to also include the name, title, phone number, and mailing address of the person to be notified in the event the invoice is found defective. F.A.R. 32.905(b)(1)(i-x).

§8.3.1.2 2. When Invoice Deemed Received

Barring any financial or contractual disputes or complications, the time period for which an agency has to make a payment begins once the agency "receives" a proper invoice. The FPPA clarifies any ambiguity by providing that an agency is deemed to have received an invoice on the later of the following events:

1. The date of actual receipt by the designated agency place or representative;
2. On the seventh day after delivery of property or completion of services (unless such property or services is accepted before the seventh day); or
3. The date specified in the contract, if determined to be necessary by the contracting officer to afford inspection and testing of property or evaluation of services.

31 U.S.C. § 3901(a)(4)(A)(i) and (ii). *See also* 5 C.F.R. § 1315.4(b) (2003).

Constructive "receipt" of requests for progress payments is not clarified under the FPPA. The legislative history however, suggests that upon "actual" receipt, the fourteen day time period for progress payment begins. Michael J. Renner, *Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment*, 21 PUB. CONT. L.J. 177, 212 n.151 (1992).

§8.3.1.3 3. When Payment Deemed Made

The FPPA prescribes that payment is deemed to be made "on the date a check for payment is dated or an electronic fund transfer is made." 31 U.S.C. § 3901(a)(5). Although contrary to customary business practice, the intent of prescribing that payment is deemed made on the date noted on the check is to allow an agency to determine whether an interest payment is owed before issuing payment. S. Rep.

No. 302, 97th Cong., 1st Sess. 11 (1982). The FPPA definition of when payment is deemed made suggests a problematic scenario: the agency's timely check may be lost in the mail. Such a scenario would particularly impact the contractor, since once payment is deemed made, the time period is initiated for payment to be tendered to any subcontractors. Furthermore, the agency is not liable for interest under the FPPA where the date on the check is timely, but delivery is thwarted by subsequent events. *See Four Square Constr. Co.*, Comp. Gen. B-215703, 84-2 CPD ¶ 480.

To avoid problems with lost payments, the OMB encourages all agencies and contractors to engage in electronic fund transfers. The necessary information to complete electronic fund transfers is outlined in detail in the Federal Acquisition Regulations, 48 C.F.R. § 52.232-38 (1993).

§8.3.1.4 4. Substantiation (OMB Requirements)

The date in which payment is due is altered in the case of prime contractors when a proper progress payment request has been approved by an agency. To be deemed "proper," a request for progress payment first requires substantiation of the requested amounts. 31 U.S.C. § 3903(b)(1)(A). Although not addressed under the FPPA, the OMB guidelines for substantiation provide direction. Following the guidelines is recommended since failure to substantiate by even one detail may result in an improper request. *See Appeal of Consolidated Constr., Inc.*, GSBCA No. 8871, 88-2 BCA ¶ 20,811 (1988) (finding that failure to submit subcontractor payrolls resulted in an "improper" invoice).

Under the OMB guidelines, the contractor can substantiate progress payment requests with the following:

1. Specific amounts requested and itemized line items of relevant work;
2. Identification of work performed by subcontractor(s);
3. Identification of the total amount of each subcontract;
4. Identification of amounts tendered to each subcontractor; and
5. Any additional information or documentation specified by the contracting officer prior to the payment request.

5 C.F.R. § 1315.14(b) (2003).

§8.3.1.5 5. Prime Contractor Certifications

The second requirement for a progress payment request to be deemed "proper" is a certification by the prime contractor. 31 U.S.C. § 3903(b)(1)(B). The prime contractor is required to certify to the best of his or her "knowledge and belief" that:

1. Requested amounts are only for the performance as defined under the contract;
2. All debts to subcontractors and suppliers have been or will be satisfied from prior payments or the proceeds of the payment requested; and

3. No amounts included are intended to be withheld from subcontractors or suppliers.

31 U.S.C. § 3903(b)(1)(B)(i)-(iii).

§8.3.1.6 6. Contract Modifications

A contract modification to incorporate the value of any changed work may result in an improper invoice or progress payment request if the modification is not pre-approved by the agency through execution. *Appeal of Hunter Constr. Co.*, ASBCA No. 32,193 89-3 BCA ¶ 21,970 (1989). In *Hunter*, the Armed Services Board of Contract Appeals found that an invoice submitted to the agency, before execution of a contract modification, which increased the contract price was not a “proper invoice.” *Id.* at 89-3 BCA 21,970. See also *Appeal of Bruce Anderson Co., Inc.*, ASBCA No. 34,489, 88-1 BCA ¶ 20,355 (1987); *Appeal of Ricway, Inc.*, ASBCA No. 30,204, 86-3 BCA ¶ 19,234 (1986). Where a contract modification is present, an invoice or progress payment request is only deemed proper if it is submitted after the execution of the modification.

§8.3.1.7 7. Notice from Government when Invoice Improper

The FPPA requires an agency to review an invoice when “practicable” after receipt. 31 U.S.C. § 3903(a)(7)(A). If the agency determines that the invoice is not proper, it must return the invoice within seven days after receipt and specify the reason. 31 U.S.C. § 3903(a)(7)(B). Should the agency fail to return the invoice within the seven day time period, the time period for payment after receipt of a corrected and proper invoice is reduced by the number of days the agency exceeded the seven day review period in returning the invoice. 31 U.S.C. § 3903(a)(7)(C). More clearly stated, untimely notification results in a day-for-day reduction in the amount of time allotted for agency payment. The purpose of this provision is to eliminate any possibility that the agency could avoid an interest penalty simply due to a deficient invoice. S. Rep. No. 302, 97th Cong., 1st Sess. 9-10 (1982).

The FPPA procedure for review of a progress payment request is identical to the review of invoices. However, if the agency exceeds the seven day review period, the excessive days are not later counted against the agency. 31 U.S.C. § 3903(b)(2).

§8.3.1.8 8. Existence of Dispute

The existence of a dispute must be taken into consideration when determining a payment due date. The FPPA provides that the time period for payment is tolled if the agency and the business concern are in “dispute . . . over the amount of payment or compliance with the contract.” 31 U.S.C. § 3907(c). Disputed contract payment amounts are subject to Contract Disputes Act interest, 41 U.S.C. §611, not Prompt Payment Act Interest.” *George Sollitt Constr. Co. v. U.S.*, 64 Fed. Cl. 229, 248 (Fed. Cl. 2005). Although the term “dispute” is not defined in the FPPA, it was the congressional intent that agencies should not suffer interest penalties while contractors benefit for failing to meet contractual obligations. Michael J. Renner, *Prompt Pay-*

ment Act: An Interest(ing) Remedy for Government Late Payment, 21 PUB. CONT. L.J. 177, 215 (1992).

§8.3.2 B. Interest Penalty Calculation

If an agency acquires property or services and receives a proper invoice or progress payment request, yet fails to render timely payment, the FPPA requires the agency to “pay an interest penalty to the [business] concern on the amount of the payment due.” 31 U.S.C. § 3902(a). Absent a material breach, a contractor’s sole redress for late payment is through the interest penalty. When an agency remits a late payment, it must also tender the interest penalty accompanied by a notice itemizing the amount tendered along with the rate and period for which the penalty was computed.

§8.3.2.1 1. Rate

The interest penalty is computed at the daily rate and the interest is compounded every thirty days. The interest rate is determined by the secretary of the treasury for claims under the Contract Disputes Act of 1978. The rate is published around January 1 and July 1 in the *Federal Register*. The applicable interest rate may also be obtained through the Department of Treasury’s Financial Management Service (FMS) Prompt Payment help line at 1-800-266-9667 or www.fms.treas.gov.

§8.3.2.2 2. Period

The FPPA provides a limited period for the application of the penalty. The interest penalty begins to accrue the day after the required due date and continues to accrue until:

1. Payment is satisfied;
2. A claim for interest is filed under the Contract Disputes Act of 1978; or
3. One year passes.

31 U.S.C. § 3907(b)(1)(A) and (B).

§8.3.3 C. Demand for Payment of Penalty

If the agency submits payment and fails to include the appropriate interest penalty, an additional penalty may be employed against the agency upon demand from the contractor.

§8.3.3.1 1. Timing

Provided the agency does not pay the appropriate interest penalty within ten days after offering the late payment, the contractor must make a formal demand in writing. The demand for interest must be made within forty days from the time the late payment was tendered. The demand should include both a copy of the invoice involved and a certification by the contractor that the principal amount has been received and the date of such receipt.

§8.3.3.2 2. Right to Additional Penalty

The contractor is entitled to an additional interest penalty or “double interest” if:

1. The contractor is already owed the standard interest penalty;
2. The agency pays all or part of the principal but includes no interest;
3. The agency does not correct its failure to pay within 10 days of paying the principal; and
4. The contractor makes a written demand for the interest not later than 40 days after the incomplete payment.

31 U.S.C. § 3902(c)(3)(D).

The additional penalty is equal to 100 percent of the amount of the original late payment interest, but no less than \$25 and not exceeding \$5,000. 5 C.F.R. § 1315.11 (2003). If the agency refuses to pay the interest penalty, the contractor may file a claim “under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605).” 31 U.S.C. § 3907(a).

§8.3.4 D. OMB Prompt Payment Implementing Regulations

In order to implement the Prompt Payment Act, the Office of Management and Budget (OMB) issued regulations under Circular A-125 in 1982. Responding to Prompt Payment Act amendments, Circular A-125 was subsequently revised in 1989 and the regulations were codified in the Code of Federal Regulations. See 5 C.F.R. § 1315 (2003). OMB’s issuance of codified regulations effectively superseded and rescinded Circular A-125.

Copies of 5 C.F.R. § 1315 along with background information and answers to common questions can be accessed through the Prompt Pay website of the Financial Management Service at <http://www.fms.treas.gov/prompt/index.html> or from the Executive Office of the President’s Publications Office, Room 2200 New Executive Office Building, 725 17th Street NW, Washington, D.C. 20503, phone (202) 395-7332, and via fax-on-demand at (202) 395-9068. For questions regarding Prompt Payment policy, reporting requirements and previous and current Prompt Payment interest rates, a toll-free number has been provided, 1-800-266-9667.

§8.3.5 E. Contractor’s and Subcontractor’s Obligations Under Act

Contractors and subcontractors are subject to particular requirements and obligations under the FPPA once the agency has satisfied its payment responsibilities.

§8.3.5.1 1. Payment Provisions in Subcontracts

The FPPA requires that every subcontract include payment provisions which are substantially similar to provisions in the prime contract. A payment clause must be included in each subcontract which requires the subcontractor to be paid by the prime contractor “for satisfactory performance under its subcontract within seven days out of such amounts as are paid to the prime contractor by the agency. . . .” 31 U.S.C. § 3905(b)(1). Since the date entered on the check or the date of the electronic fund

transfer is the “date” the agency is deemed to have paid the contractor, the contractor’s 7 day time period to pay its subcontractors begins on that “date,” not when payment is received.

The FPPA also requires that every subcontract include an interest penalty clause obligating the prime contractor to pay interest on late payments. 31 U.S.C. § 3905(c). The interest penalty is calculated in the same manner as discussed above for agency late payments. However, unlike agencies, prime contractors are not required to pay a “double interest” penalty on late interest payments to subcontractors. Furthermore, no requirement exists obligating the contractor to forward the subcontractor any interest penalty received from the agency so long as the subcontractor receives timely payment.

A “flow-down” clause must also be included in each subcontract designating that each subcontractor shall include a “payment” clause and “interest penalty” clause in any subcontracts the subcontractor enters. 31 U.S.C. § 3905(c). In fact, payment obligations and interest obligations must appear in all sub-subcontracts entered with lower tier subcontractors and suppliers.

§8.3.5.2 2. Payment Obligations to Subcontractors

The FPPA requires that every subcontract include payment provisions which are substantially similar to provisions in the prime contract. The obligation of payment includes the prime contractor’s right to withhold payment without incurring an interest liability. The circumstances giving rise to the prime contractor’s right to withhold payment must be specifically reserved in the subcontract.

§8.3.5.2.1 a. Timing of Payment

As previously mentioned, a payment clause must be included in each subcontract which requires the subcontractor to be paid by the prime contractor “for satisfactory performance under its subcontract within 7 days out of such amounts as are paid to the prime contractor by the agency. . . .” 31 U.S.C. § 3905(b)(1). The prime contractor’s seven day time period to pay subcontractors, as discussed above, begins on the “date” the agency pays the contractor, not when payment is received. Such “date” is the date entered on the check or the date of the electronic fund transfer.

§8.3.5.2.2 b. Retention

One circumstance giving rise to the prime contractor’s right to withhold payment is retention, assuming it is agreed upon in the contract. A certain percentage may be retained by the prime contractor from each progress payment. The FPPA prescribes only that the retention amount must be “appropriate” to the subcontractor’s ability to provide performance and payment bonds. The contractor’s ability to retain from subcontractors is however limited, as the contractor may not request agency payment of any retained amount until the contractor has certified to the agency that the subcontractor is entitled to such retainage. In essence, the retainage funds are actually held by the agency, rather than the contractor.

§8.3.5.2.3 c. Receipt of Miller Act Notification

Another circumstance giving rise to the right to withhold payment is the prime contractor's timely receipt of notice under the Miller Act, which is incorporated into the code at 40 U.S.C.S. §§ 3131," that a lower tier subcontractor or supplier has not received payment from the subcontractor. Once again, withholding payment upon notice under the Miller Act must be stipulated in the contract. After receipt of the Miller Act notice, specific duties are placed on the prime contractor. The prime contractor must forward a notice of the withholding to the subcontractor and the agency:

1. Identifying the amount withheld;
2. Identifying the reason for withholding; and
3. Specifying the remedial actions to be taken by the subcontractor in order to receive the withheld sum.

31 U.S.C. § 3905(f) and (g).

§8.3.5.3 3. Subcontractor's Rights Upon Non-Payment

In the event the prime contractor fails to make payment, the subcontractor may pursue all remedies available, including "contractual, administrative, or judicial remedies." 31 U.S.C. § 3905(j). This unlimited jurisdiction for the subcontractor is directly opposite to the jurisdictional limitations imposed on prime contractors when seeking interest penalty collection. Whereas the prime contractor is limited to an initial claim under the Contract Disputes Act of 1978, and appeal to the agency Board of Contract Appeals or the United States Court of Federal Claims, the subcontractor may seek relief in state or federal courts, administrative proceedings, arbitration or other alternative dispute methods, as noted in the contract.

§8.3.5.4 4. Contractor's Obligations to Government Upon Discovery of Performance Deficiency

The FPPA specifies that the prime contractor is to notify the agency of any performance which "fails to conform to the specifications, terms, and condition of its contract." 31 U.S.C. § 3905(a)(1).

§8.3.5.4.1 a. Prior to Payment from Government

The FPPA specifically indicates that the agency is only to be notified of a performance deficiency "after making a certified payment request . . ." 31 U.S.C. § 3905(a). No requirements are prescribed under the FPPA regarding the prime contractors obligations prior to payment from the agency, although it would be in the best interest of the prime contractor to correct any performance deficiency before requesting payment.

§8.3.5.4.2 b. After Receipt of Payment from Government

If the work which fails to conform to the contract has already been the subject of a certified payment request, specific guidelines apply. The prime contractor must notify

the agency, in writing, of the performance deficiency. The prime contractor's notice to the agency of such performance deficiency effectively professes that a portion of the earlier pay request was "unearned." As such, the prime contractor is required to pay the agency an interest penalty on the "unearned amount." 31 U.S.C. § 3905(a)(1) and (2). The interest penalty begins to accrue from the eighth day after the contractor received the "unearned amount" at a rate equal to the current ninety-one day treasury bill. After performance obligations have been satisfied, the contractor must notify the agency, at which time the interest penalty ceases to accrue. The interest penalty should be deducted from the agency's next payment to the contractor. 5 C.F.R. § 1315.14 (2003).

§8.3.5.5 5. Contractor's Obligations to Subcontractor Upon Discovery of Performance Deficiency

As previously mentioned, the prime contractor is to notify the agency of any deficient performance and pay an interest penalty for any "unearned amount." The interest penalty applies to the prime contractor notwithstanding deficient performance by the subcontractor. In order to protect the prime contractor, it is recommended that a similar notification provision be implemented in all subcontracts. Another provision may be necessary requiring the subcontractor to reimburse the prime contractor for any interest penalty paid due to the defective performance of the subcontractor.

In addition to retention and notification under the Miller Act, discussed above, another circumstance giving rise to the prime contractor's right to withhold payment from the subcontractor is defective performance. Once again, the prime contractor does not incur liability for withholding and the circumstances giving rise to the prime contractor's right to withhold must be present in the subcontract. Upon discovering defective work, the prime contractor may withhold an appropriate amount from the next progress payment until the defective performance is corrected.

§8.3.5.5.1 a. Notice Requirements

Should the prime contractor elect to withhold payment, the prime contractor must notify the subcontractor and indicate the nature of the withholding. 31 U.S.C. § 3905(e). Notice must be given prior to when payment would have been due. The prime contractor must also notify the agency of the defective work and the withholding, possibly resulting in an interest penalty for any "unearned" amounts, as above.

§8.3.5.5.2 b. Procedure after Correction

After the subcontractor has remedied the defective work, the prime contractor must remit payment within seven days after the correction. 31 U.S.C. § 3905(e). Should the prime contractor fail to remit payment within seven days after the correction, the prime contractor will incur a late payment interest penalty.

§8.3.6 F. Contract Disputes Act of 1978

As previously noted, when an agency refuses to pay an interest penalty, a contractor may file a claim "under section 6 of the Contract Disputes Act of 1978 (41 U.S.C.

§ 605).” 31 U.S.C. § 3907(a). The Contract Disputes Act of 1978 requires all claims to first be administered to the contracting officer as written demands for payment. Should the claim exceed \$100,000, it must be certified by a person authorized to bind the contractor. The certification must provide:

1. That the claim is made in good faith;
2. That the supporting data is accurate and complete to the knowledge of the authorized person;
3. That the amount requested accurately reflects the contract adjustment for which the contractor believes the agency is liable; and
4. That the certifier is duly authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 605(c)(1).

Under the Contract Disputes Act of 1978, the contractor forfeits entitlement to the interest if the contracting officer denies the claim. To avoid this undesirable result, the contractor must appeal to the agency board of contract appeals within ninety days after the contracting officer’s denial is received or to the United States Court of Federal Claims within twelve months after the contracting officer’s denial is received. 41 U.S.C. § 609. Decisions from either the agency board or the Court of Federal Claims may be appealed within 120 days of the decision to the United States Court of Appeals for the Federal Circuit.

§8.4 IV. THE KANSAS PROMPT PAYMENT ACT

§8.4.1 A. Purpose of Act

In 1984, the Kansas Legislature enacted a Prompt Payment Act mandating prompt payment for public contracts for goods or services. The Kansas Prompt Payment Act (KPPA), K.S.A. 75-6401, *et seq.*, was implemented with the same purpose and many similar provisions as the federal Prompt Payment Act. Due to the definiteness of the KPPA, only one decision from Kansas courts has even made reference to the KPPA. *See D-1 Constructors, Ltd. v. Unified School Dist. No. 229*, 14 Kan. App. 2d 245, 788 P.2d 289 (1990). Therefore, the following will highlight key statutory provisions regarding applicability and interest payments under the KPPA.

§8.4.2 B. Contracts to Which Act Applies

§8.4.2.1 1. Government Agencies

The KPPA applies to all contracts involving any “government agency purchasing or contracting for goods or services from a vendor.” K.S.A. 75-6403(a). The term “government agency” is broadly defined to encompass the state, any state agency, department, division or authority, as well as any state library, community college or unified school district. K.S.A. 75-6402(a) and (b).

§8.4.2.2 2. Vendors

As the KPPA applies to those goods or services obtained “from a vendor,” the term “vendor” has been defined to include any for-profit or not-for-profit person, corporation, association or other business concern which provides goods or services. K.S.A. 75-6402(c).

§8.4.2.3 3. Goods or Services

The KPPA applies to purchases or contracts involving “goods or services.” K.S.A. 75-6403(a). The term “goods” includes any goods, supplies, materials, equipment or other personal property, but does not include real property. K.S.A. 75-6402(d). The term “services” is designated as any contractual service, which includes such services as architectural, engineering, medical, financial, consulting and construction. However, “services” does not include those services provided by officers or employees of a government agency. K.S.A. 75-6402(e).

§8.4.2.4 4. Absence of Written Agreement on Payment Terms

Contractual payment provisions may be bargained for in writing between the vendor and the governmental agency. Should the provisions for payment be absent from the written agreement, the KPPA prescribes the appropriate payment provisions. Under the KPPA, payment of the full amount is due on or before the thirtieth calendar day after the date the government agency received the goods or services, or the date the governmental agency received the bill, whichever is later. K.S.A. 75-6403(b).

§8.4.3 C. Prerequisites to Receipt of Interest Penalty

§8.4.3.1 1. Complete Delivery and Final Acceptance

One event which initiates the thirty day time restraint for payment is when the agency receives the contractual goods or services. As the time restraint for complete payment may be dependant upon the date the governmental agency received the goods or services, it is important to distinguish what constitutes “receipt.” The KPPA notes that actual “receipt” occurs when the goods or services are “completely delivered and finally accepted by the government agency.” K.S.A. 75-6403(b). The KPPA therefore, reassures that the time restraint placed on the government agency will not begin until performance has been provided in full and the agency has deemed the performance acceptable.

§8.4.3.2 2. Delivery of Bill by Vendor

Another event which initiates the thirty day time restraint for payment is the delivery of the bill by the vendor. The date the agency receives the bill is the date on which the thirty day time restraint for payment begins. K.S.A. 75-6403(b).

§8.4.4 D. Calculation of Interest Penalty

If a government agency that received goods or services fails to render timely payment within the thirty day time restraint, the agency will be subject to an interest

payment penalty. K.S.A. 75-6403(b). A payment, according to the KPPA, is considered to have been made as of the date noted on the warrant or check. K.S.A. 75-6403(b). Should the date noted on the warrant or check succeed the thirty day time limit, the amount due will be subject to an interest penalty at a rate of 1.5 percent per month. K.S.A. 75-6403(d).

§8.4.5 E. Procedure for Obtaining Interest Penalty

The KPPA specifically warrants that no interest payment is obtainable unless the vendor composes a written request for payment. K.S.A. 75-6403(b). The KPPA defines the necessary prerequisites for the timing and the contents of the request for payment.

§8.4.5.1 1. Time for Submission of Request for Payment

The request for payment is to be sent to the chief executive officer of the government agency after the thirty day time limit has expired. No interest penalty is obtainable if the vendor fails to request payment within four months after the thirty day time limit has expired. K.S.A. 75-6403(f).

§8.4.5.2 2. Form of Request

The FPPA mandates that the request for payment indicate the following:

1. The government agency obligated to make the payment;
2. The date of receipt of the goods or services by the government agency;
3. The date the vendor sent the government agency the bill for such goods or services; and
4. In case of a state agency, such other information as may be prescribed by rules and regulations adopted under K.S.A. 75-6407.

K.S.A. 75-6403(c).

§8.4.6 F. Dispute Resolution in Collecting Interest Penalty

In the event a conflict arises after the vendor has made a payment request, the KPPA prescribes the proper procedure to be followed by the government agency. The agency is required to inform the vendor in writing of the following:

1. The grounds for refusal; and
2. The vendor's right to file a claim against the state with the joint committee on special claims.

K.S.A. 75-6403(e).

§8.5 V. THE KANSAS FAIRNESS IN PRIVATE CONSTRUCTION CONTRACT ACT

§8.5.1 A. Purpose of Act

On April 18, 2005, Governor Kathleen Sebelius signed into law the Kansas Fairness in Private Construction Contract Act (SB 33) (the “Act”). It became effective on July 1, 2005, and is codified at K.S.A. 16-1801 through K.S.A. 16-1807. The Act was enacted to level the playing field between parties in non-residential private construction contracts.

§8.5.2 B. Contracts to Which Act Applies

§8.5.2.1 1. Private Construction Contracts

The Act only applies to private construction contracts entered into after July 1, 2005 (the effective date of the Act). K.S.A. 16-1803. It does not apply to single family residential projects, small multi-family residential projects or public works projects. K.S.A. 16-1807. The Act defines construction as “furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building, structure, road, bridge, water line, sewer line, oil line, gas line, appurtenance or other improvement to real property, including any moving, demolition or excavation.” K.S.A. 16-1802(a).

It applies to contracts entered into between contractors and subcontractors; contractors and owners; and subcontractors and subcontractors. K.S.A. 16-1802(b). The Act defines a contractor as “a person performing construction and having a contract with an owner of the real property or with a trustee, agent or spouse of an owner.” K.S.A. 16-1802(c). A subcontractor is “any person performing construction covered by a contract between an owner and a contractor but not having a contract with the owner.” K.S.A. 16-1802(g). The Act applies to all tiers of subcontractors.

§8.5.3 C. Payment Between Owner and Contractor

§8.5.3.1 1. Time Limit

The Act provides that all private construction contracts must contain a provision which requires an owner to pay a contractor “within 30 days after the owner receives a timely, properly completed, undisputed request for payment.” K.S.A. 16-1803(d). This 30 day time limit does not apply to retainage. *Id.*

§8.5.3.2 2. Remedy

If the owner fails to remit payment within 30 days of the contractor's proper request, the contractor is entitled to collect a penalty of 18% per annum on the undisputed amount. K.S.A. 16-1803(e). The 18% penalty is computed from the 31st day after the owner received the contractor's payment request. *Id.*

§8.5.4 D. Payment Between Contractor and Subcontractors

§8.5.4.1 1. Time Limit

A general contractor is obligated to remit payment to a subcontractor within seven days after it receives payment from the owner provided that the subcontractor submitted a “timely, properly completed and undisputed request for payment to the contractor.” K.S.A. 16-1803(f). This section applies to all levels of subcontractors. K.S.A. 16-1803(h).

§8.5.4.2 2. Remedy

If the contractor does not remit payment on an undisputed amount within the seven day time limit, the contractor must pay a late penalty of 18% per annum on the amount. K.S.A. 16-1803(g). The time period for the penalty computation begins on the eighth day after the contractor received payment. *Id.*

§8.5.5 E. Retainage

A party may not withhold any more than 10% retainage from an undisputed payment without cause. K.S.A. 16-1804(a). If the party fails to pay retainage, the party must pay 18% interest on the amount due accumulating from the first day after payment was due. *Id.* This provision applies to any payments between an owner, contractor or subcontractor.

§8.5.6 F. Suspension of Performance

If a party fails to remit payment on undisputed amounts and retainage within seven business days after the payment date set forth in the contract or the Act, the party entitled to payment must provide the party from whom payment is due with an additional seven business days written notice. K.S.A. 16-1805. If payment is still not received, the party who is entitled to payment may suspend work until it is paid. *Id.* The party is also entitled to collect interest on the amount due before resuming work. *Id.* Once work is resumed, the contract time for each contract affected is extended and the sum increased by “the suspending party’s reasonable costs of demobilization, delay and remobilization.” *Id.* These provisions apply to payments due from an owner, a general contractor and all tiers of subcontractors. *Id.*

§8.5.7 G. Unenforceable Contract Provisions

The Act sets forth three provisions which will be unenforceable in private construction contracts entered into after July 1, 2005. First, private construction contracts cannot contain a provision that waives or releases the right to resolve a dispute through litigation. K.S.A. 16-1803(b)(1). However, a contract may require binding or non-binding arbitration. *Id.*

Second, a private construction contract cannot waive lien rights, except as to the amount of payment received. K.S.A. 16-1803(b)(2).

Third, the Act affects subrogation rights. It states a contract cannot contain a “waiver or release of subrogation for losses paid by liability or workers’ compensation insurance, except claims paid by a consolidated or wrap-up insurance program, owners/contractors protective liability insurance, or project management protective liability insurance.” K.S.A. 16-1803(b)(3).

§8.5.8 H. “Pay If Paid” Provisions

In addition, the Act states that “pay if paid” provisions in private construction contracts cannot be used as a defense to either enforce a mechanic’s lien or payment bond. K.S.A. 16-1803(c). A “pay if paid” provision provides that payment from one party is contingent upon receiving payment from another party.

§8.5.9 I. Enforcement of Act

§8.5.9.1 1. Costs and Attorney Fees

In any action to enforce the Act, including arbitration, costs and reasonable attorney fees shall be awarded to the prevailing party. K.S.A. 16-1806.

§8.5.9.2 2. Venue and Arbitration Hearing

K.S.A. 16-1806 provides that venue or an arbitration hearing shall be in the county in which the real property is located.