



ASA Publishes White Paper on Progress Payments

Receiving timely payment for work properly performed is vital to any subcontractor. Avoiding or preventing late payments is essential. Education is the key. An educated subcontractor negotiates better contracts. ASA's new [White Paper on Progress Payments](#) advises subcontractors to keep in mind that:

- You are not only a subcontractor but also a creditor. You are a creditor because your work is performed on the promise of a future payment by a customer.
- You, as a responsible creditor, must hold up your end of the bargain according to the payment rules to which you agreed in the contract document.
- You must have and use collections tools.

The white paper also provides tips that a prudent subcontractor can use to protect itself from the potentially devastating effects of late progress payments, including starting with the bidding process, establishing unambiguous terms, submitting proper invoices, and implementing an effective collections program. The white paper is free for ASA members and is located in the "Contracts & Project Management" section of the [Member Resources](#) area of the ASA Web site.

FAQ on 'Small Business Payment for Performance Act'

On May 23, Rep. Brian Fitzpatrick (R-Pa.), joined by Rep. Steve Knight (R-Calif.) and Rep. Stephanie Murphy (D-Fla.), introduced H.R. 2594, the "Small Business Payment for Performance Act," a bill to reform the federal government's change order procedures. This article answers the most frequent questions posed to ASA Chief Advocacy Officer E. Colette Nelson about this bill.

What does H.R. 2594 do?

H.R. 2594 is intended to keep cash flowing to prime contractors and subcontractors when the federal government unilaterally directs change order work to begin before the parties have agreed on the scope, price and time of a change. Specifically, the bill would require that when a federal agency issues a unilateral change order, the contracting officer provisionally authorize the payment of 50 percent of the additional funds requested by the contractor to cover the government's directive.

Would the parties be bound by the REA when the government makes partial payments?

A federal agency's interim partial payment would not prejudice the rights of either party in definitizing the contractor's request for an equitable adjustment during subsequent negotiation or failing to reach mutual agreement, any further resolution pursuant to the disputes clause in the Federal Acquisition Regulation.

This bill would get payment into the hands of the government's prime contractor. What about subcontractors and suppliers?

The federal Prompt Payment Act requires the federal government to pay its prime construction contractors within 14 days of receipt of a proper invoice, the prime contractor to pay its subcontractors within seven days of receipt of payment by the prime contractor, a subcontractor to pay its own subcontractors and suppliers seven days later, and so on. These provisions would remain in effect if this bill is enacted.

Congress seems to have its hands full with high profile issues. Is it even going to consider this bill?

While it's true that much of Congress' bandwidth has been filled with the debate on health care, tax reform and Trump Administration's missteps, many committees are focused on the narrow issues under their jurisdiction. The House Small Business Committee already has held a hearing on the need for change order reform and is expected to further consider legislation this month. All three of the sponsors of H.R. 2494 serve on the House Armed Services Committee and may offer the bill as an amendment to the annual National Defense Authorization Act, one of the must-pass bills for 2017.

What can I do to help?

Ask your U.S. Representative to co-sponsor H.R. 2594. The easiest way to do this is through ASA's [Legislative Action Center](#).

Dateline: The States

With fewer than 20 state legislatures in session, governors continue to sign bills that impact the operations of construction subcontractors and suppliers. The following are just some of the recently-enacted laws that impact ASA members:

Colorado: Gov. John Hickenlooper (D) signed [HB1279](#), which requires that, before the executive board of a condominium association brings suit against a developer or builder on behalf of unit owners based on a defect in construction work not ordered by the association itself, the board must:

- Notify all unit owners and the developer or builder against whom the lawsuit is being considered.
- Call a meeting at which the executive board and the developer or builder will have an opportunity to present relevant facts and arguments and the developer or builder may, but is not required to, make an offer to remedy the defect.
- Obtain the approval of a majority of the unit owners after giving them detailed disclosures about the lawsuit and its potential costs and benefits.

The meeting of unit owners commences a 90-day voting period during which the association will accept votes for or against proceeding with the lawsuit. Statutes of limitation are tolled during this period. The association is required to keep copies of its mailing list and maintain records of the votes received. The voting period may end in less than 90 days if sufficient votes are received to approve the lawsuit before 90 days have elapsed.

Maryland: Gov. Larry Hogan (R) signed [HB467](#), which requires each contractor or subcontractor awarded a contract for at least \$500,000 for a capital construction project that receives at least \$1 million in the state’s capital budget to, under specified circumstances, (1) be affiliated with a registered apprenticeship program and use apprentices in each covered craft that is used; (2) make payments to the State Apprenticeship Training Fund; or (3) make specified payments directly to a registered apprenticeship program. Contractors and subcontractors are not subject to the new law’s requirements if: (1) there are no registered apprenticeship programs for the craft or trade employed by the contractor or subcontractor; or (2) the project is required to pay prevailing wages under state law. Payments to SATF may not exceed 25 cents per hour for each of the contractor’s or subcontractor’s employees working on the project. If a contractor or subcontractor makes payments directly to an apprenticeship program that are less than those required by the new law, the contractor must pay the difference to the fund. All payments to the fund must be made on a monthly basis. A contractor or subcontractor that fails to meet the law’s requirements is subject to fines and penalties.

Missouri: Gov. Eric Greitens (R) signed [SB182](#), which removes the existing 50 percent funding threshold and further prohibits the state, any agency or political subdivision from requiring, or prohibiting, bidders from entering into agreements with labor organizations when entering into contracts for the construction, repair, remodeling or demolition of a facility. Discrimination against such bidders is also prohibited. In addition, under the new law, the state, any agency, political subdivision or instrumentality of the state, cannot encourage or give preferential treatment to bidders who enter or refuse to enter into agreements with a labor organization. Any entity which violates the provisions of the new law is liable to the person affected for equitable damages as well as reasonable attorney fees. Furthermore, such entities shall not be eligible for state funding, including tax credits for two years.

Montana: Gov. Steve Bullock (D) signed [SB196](#), which defines traffic violations in construction and work zones. The new law establishes an offense for a person who drives recklessly and establishes fines and punishments.

Oklahoma: Gov. Mary Fallin (R) signed [HB1534](#), which authorizes local governments to form a Local Partnership Committee that would be charged with reviewing proposals for public improvement projects and public services to determine if a public-private partnership would be the best method for delivering the project. The new law provides that the conditions for the P3 would be set forth in the P3 agreement and generally outlines what terms would be included. For example, the new law specifies that the agreement could include requirements for performance and payment bonds for all construction activities. Letters of credit, surety bonds or other security could be required under the agreement for the development or operation of the qualifying project, in the forms and amounts that are satisfactory to the responsible governmental entity.

Texas: Gov. Greg Abbott signed [SB22](#), which creates a work-based education program called Pathways in Technology Early College High School (P-TECH) program. The new law establishes a grant program to help districts and charter schools implement the P-TECH program. The new P-TECH program would enable a participating student to combine high school and postsecondary courses. Students in the P-TECH program would be allowed six years to receive a high school diploma and an associate degree, a two-year postsecondary certificate or industry certification. They also would be required to complete work-based training through an internship, apprenticeship or other job-training program.

In other activities:

In response to President Donald Trump’s decision to withdraw from the Paris Climate Agreement, a coalition of three states—California, New York and Washington—announced the formation of the United States Climate Alliance. The new Alliance will convene states that want to uphold the Agreement and take aggressive action on climate change.

OSHA Announces Inaugural ‘Safe + Sound Week’

The U.S. Occupational Safety and Health Administration has designated June 12-18, 2017, as “Safe + Sound Week,” a new nationwide effort that calls on organizations of all sizes in a wide range of industries to raise awareness of the value and importance of workplace safety and health programs. Joining OSHA to sponsor the effort are the National Safety Council, American Industrial Hygiene Association, American Society of Safety Engineers and the National Institute for

Occupational Safety and Health. “Our nation has made great strides in raising awareness about the importance of workplace safety, yet more than 4 million workers suffer serious job-related injuries or illnesses annually. We can do better,” said Secretary of Labor Alexander Acosta. Participating in Safe + Sound Week can help organizations get their safety and health program started or energize an existing one. While approaches vary, effective programs have three core elements:

- Management leadership that commits to establishing, maintaining and continually improving the program. Managers must also provide needed resources to support the program.
- Workers who help identify solutions for improvements. A workforce engaged in safety and health programs result in higher productivity, increased job satisfaction and strong worker retention, which combine to increase revenues and lower turnover and recruitment costs.
- A systematic “find and fix” approach that calls upon employers and workers alike to examine their workplaces—proactively and routinely—to identify and address hazards before an injury or illness occurs.

Information on how to participate in Safe + Sound Week, ideas for events and resources, and details of planned events around the country are available on a special [OSHA Web site](#).

Help ASA Fund Precedent-Setting Briefs

Have you ever wondered what *you* can do to improve the business environment for construction subcontractors? One answer is to support ASA’s work to protect payment and other subcontractor rights in federal and state courts. ASA’s Subcontractors Legal Defense Fund has been financing “friend of the court” briefs for 20 years. The SLDF allows ASA to intervene in court cases where it can have a meaningful impact on cases involving subcontractor rights, such as the enforceability of pay-if-paid clauses, mechanic’s lien and payment bond rights, bid shopping, no damage for delay, the applicability of the duty to defend, insurance coverage for construction defects, and more. Right now, ASA attorneys are preparing a “friend of the court” brief in a case seeking to overturn a decision of a Texas trial court which refused to use the exclusive remedy provision of workers compensation as a bar to a negligence claim against the contractor participants under a wrap-up insurance policy. In addition, ASA is waiting for a decision in a Kentucky case concerning contingent payment and unjust enrichment. ASA also used funding from the SLDF to fund its share of legal fees in an industry lawsuit taking on OSHA’s rule on crystalline silica. With the help of ASA members, ASA can marshal the financial resources needed to invest in precedent-setting litigation to establish subcontractor rights. You can make your contribution through the [ASA online store](#). For more information, visit the ASA SLDF Web site at www.sldf.net.

Do You Have to Complete Work Without Payment?

How long can a subcontractor be forced to continue working without payment? The subcontractor has a different problem than a prime contractor, for whom the ability to suspend work for nonpayment is rarely in question. The owner must produce the funds to pay its obligations to the contractor as they become due. A prime contractor might be convinced to continue work without a payment if payment seems reasonably certain, but contract terms that actually require a contractor to continue work in the face of owner-financing problems are not all that common. Subcontractors, on the other hand, routinely accept more payment risk. For starters, common payment terms put off the due date for the subcontractor’s payment until after the upper-tier contractor has received its payment. Even subcontract forms that don’t use “contingent payment” or “pay-if-paid” terms ordinarily will contain “pay-when-paid” terms that base the due date for payment on the date that the upper-tier payment is received. Pay-when-paid terms are usually interpreted by courts to require a payment after a “reasonable” time, if the upper-tier payment is never received, unlike pay-if-paid terms. Since a subcontractor’s due date for payment is normally uncertain, it is unclear when, if ever, the upper-tier contractor’s failure to make a payment will be a breach of the contract. So a subcontractor’s decision to suspend work is always more difficult than a prime contractor’s decision to stop work. If the subcontract is pay-when-paid, it may take the passing of another payment cycle to be certain that payment is even overdue. If the subcontract contains a pay-if-paid clause, the payment is arguably never overdue. Pay-if-paid subcontracts can even be drafted to exploit the “gray areas,” making the subcontractor’s situation more precarious. Contingent payment terms change the potential impact of dispute resolution terms, like terms requiring the subcontractor to continue work or allowing the subcontractor to suspend work. Subcontractors must consider how the payment terms and dispute resolution terms will work together when they are asked to consider pay-if-paid language so that they can insist on terms that will increase their chances of survival in the event that project funding slows or stops.

Contract Changes and Claims: Waiver of Lien Rights or Other Adjustments

In all 50 states subcontractors are afforded lien rights to help assure recovery of payment for their work. Thus, an owner receiving the benefit of a subcontractor’s work or a supplier’s materials must bear the responsibility of ensuring that the labor and material have been paid for. Mechanics liens provide some security for payment. Lien rights are in addition to a subcontractor’s contractual rights to receive payment from the prime contractor for labor and materials. Consequently, any subcontract that requires a subcontractor to waive lien rights before beginning performance is requesting the

subcontractor to relinquish rights granted under state law, thus increasing unreasonably the risk to the subcontractor. ASA's [Contract Changes and Claims](#) is a series of articles providing tips for the management of changes and changed conditions and how to realize full adjustment to the contract price or contract time.

ASA Invites Subcontractors to Apply for Certificate of Excellence in Ethics

ASA, upon the recommendation of the ASA Task Force on Ethics in the Construction Industry, has renamed its Excellence in Ethics Awards Program to better reflect that the program is not an awards competition, but rather a certification program that determines whether a subcontracting firm has met certain qualifications demonstrating its commitment to professionalism and sound business practices. The ASA Certificate of Excellence in Ethics recognizes subcontractors that demonstrate the highest standards of internal and external integrity. Applicants still must meet a number of critical milestones before the Dec. 15, 2017, deadline, particularly those who have not yet developed a documented ethics program. ASA provides a timeline to help applicants keep on track. Each applicant is also required to respond to questions concerning the firm's corporate ethics policies and procedures, its construction practices, and its general business practices. Each applicant must submit detailed documentation, including sealed letters of recommendation from a customer, a competitor, and a supplier. Applicants can learn more about the judging criteria and submission requirements in the program brochure, download an application, and access a resource guide to help them prepare and submit an application. This guide contains model documents, such as sample recommendation letter requests and model policies on topics ranging from competition and conflicts of interest to internal procedures and whistle blowing. Apply for the ASA Certificate of Excellence in Ethics by **Dec. 15, 2017**. Certificate recipients will be announced during an awards ceremony held in conjunction with SUBExcel 2018, which will take place Feb. 28-March 3, 2018, in Tempe, Ariz. Be sure to save the dates on your calendar! Information about this certificate is located under "[Education & Events](#)" on the ASA Web site.

Beware of 'Killer Contract Clauses' That Are Out to Get You! Register for ASA's June 13 Webinar

You are negotiating a new construction subcontract. There are always some clauses you question. Some look innocent. Others you believe are non-negotiable. Others are just horrible—killer contract clauses—and they are out to get you! "Seldom is a general contractor's contract form a fair and balanced contract. Why would it be?" says Russell O'Rourke, Esq., Meyers, Roman, Friedberg & Lewis, who will present the June 13 ASA webinar, "Killer Contract Clauses." "It was written by his or her lawyer to protect the contractor, not you. It has every bad clause in it the lawyer could think of to protect the contractor, but with the purpose of being negotiable." In this webinar, O'Rourke will examine some of the worst clauses you're bound to encounter, what they mean to you, and how to negotiate them away so you have a reasonable contract. O'Rourke's discussion of contract clauses will cover pay-if-paid; retainage; change orders; no liens; dispute resolution with venue and choice of law; indemnification; flow-down; expanding scope of work; no damages for delay; waiver of claims by accepting final payment; non-compete agreements (even with your existing customers); personal liability for corporate default; and uncompensated schedule/sequencing changes. This live, 90-minute webinar will begin at 12:00 p.m. Eastern time/9:00 a.m. Pacific time. Registration is \$99 for members and \$179 for nonmembers. [Register online.](#)

June 27 ASA Webinar Focuses on Developing Your Future Chapter Board Leadership Team

Boards of Directors set forth the direction of an association, including setting major goals for the organization and developing strategies for achieving those goals. Board members approve operational plans based on those goals and provide critical oversight of the organization's financial health, exposure to risks, measurement of progress, and evaluation of programs and services. "When considering the responsibilities of a board, it becomes critically important to identify and recruit the right leaders to serve and represent your chapter," said Walter Bazan Jr., Bazan Painting Co. Bazan will present the complimentary June 27 ASA webinar, "Developing Your Future Board Leadership Team." Designed for ASA chapter leaders, but open to everyone, this webinar will examine the qualities and characteristics to look for in a future leader, the kinds of people who make good board members, and strategies and techniques that can help you confidently ask those individuals to get involved. This live, 90-minute webinar will begin at 12:00 p.m. Eastern time/9:00 a.m. Pacific time. Registration is free for members and nonmembers. [Register online.](#)

Complimentary FASA Video-on-Demand Examines OSHA Transgender Bathroom Requirements

The Occupational Safety and Health Administration now requires all employers under its jurisdiction to accommodate employees based on which gender that employee identifies with. In the new, complimentary video-on-demand, "OSHA Transgender Bathroom Requirements," available from the Foundation of ASA, presenter Jamie Hasty, SESCO Management Consultants, reviews the OSHA requirements and explains what employers should be doing to be in compliance with all applicable policies and practices. Play this on-demand video with a free media player like [Windows Media Player](#), and use it for group training by projecting it onto a screen or wall in a conference room. "OSHA Transgender Bathroom Requirements" (Item #8099) is free for ASA members and nonmembers. [Order online.](#)

Find your Productivity—Field to Office—with Gold ASA Sponsor Project DocControl

Project DocControl has been an ASAdvantage participant and ASA Gold sponsor for more than a decade, providing your ASA peers a document management system that has consistently been a part of each day. How are you communicating and sharing with your field? Take advantage of an opportunity to simplify your company's documentation and have your office and field personal on the same centralized database for all projects. Project DocControl has been providing the project document management solution helping all specialty contractors increase productivity, reduce risk, and improve accountability for more than 20 years. Project DocControl was created by and for all specialty contractors. How are you sharing current electronic communication on all of your projects between the office and the field? Can you locate any email on any project from any date? Do you have a few minutes to review a product that can help you control and manage all of your documentation in one centralized database in real time? Save time and eliminate islands of information in folders on everyone's desktop or different software packages. Project DocControl enables you to identify critical issues quickly so you can manage projects—not paperwork. Please contact Project DocControl at www.projectdoccontrol.com to schedule a one-on-one presentation to learn how Project DocControl will help you.

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