

The background of the slide is a detailed architectural blueprint, showing various room layouts, dimensions, and annotations. The text is overlaid on this background.

# T-minus 31 Days to the New Payment Laws. Here's What You Should Know.

A look at Virginia's new payment landscape  
coming into effect January 1, 2023

# Big Picture Considerations

Relationships

Rules

Risk

# Pay-if-Paid Clauses Under Current VA Law

Under current Virginia law, Pay-if-Paid Clauses are enforceable.

- Risk shifting
- Conditions the GC's obligation to pay a Subcontractor on the GC's receipt of payment/funds from the Owner
  - "condition precedent" language,
  - "assumption of risk of non-payment,"
  - "risk of non-payment is on the subcontractor,"
  - parties' intent is to shift the risk of the owner's nonpayment or insolvency from the GC to the subcontractor/supplier.

# What is Pay-when-Paid?

- In Virginia, a Pay-when-Paid clause is not the same as a Pay-if-Paid clause.
- A Pay-when-Paid clause may delay payment from a GC to its subcontractor/supplier, but it still requires payment within a reasonable amount of time.
- Payment from the GC to the Subcontractor is not contingent upon the GC receiving the corresponding payment from the Owner.

# A Brief Legislative History

- 2020 Legislative session → Offset Clauses and Wage theft were the hot topics
- 2022 Legislative session → payment terms became the new hot topic
  - Public Procurement Act | Art. 4 | Prompt Payment
  - Title 11 – Contracts | Ch. 1 – General Provisions
- Department of General Services /Public Body Procurement Workgroup review
  - Report of findings and legislative recommendations are due to the General Assembly on or before December 1, 2022.

# Are we now living in a world of Pay-if-Paid or Pay-when-Paid?

Neither.

On January 1, 2023, Pay-if-Paid clauses will become unenforceable, with a few, very limited exceptions.

The new statutory language looks more like a Pay-when-Paid situation with fixed deadlines for owners to pay GCs, GCs to pay subcontractors, and so on.

# Big Picture Questions

- How does this law affect you?

It will affect Owners, General Contractors, Subcontractors, Suppliers, Design Professionals

- How does this affect the construction administration process?

Payment application submission, processing, and withholding; change orders; and claims and dispute resolution

- What steps should you take to prepare for January 1, 2023?

# New Payment Rules in Action

Owner → hires GC for Project

GC → hires Subcontractor to perform a certain scope

Subcontractor

→ hires surveyor to stake out work area

→ hires supplier to provide materials





§ 11-4.6(B)  
Private  
Projects  
Owner/GC

§ 11-4.6(C)  
Private  
Projects  
GC/Subs

VPPA  
§ 2.2-4354  
Public  
Projects



# New Prime and Subcontractor Payment Requirements for Public Projects

- Public Owner Prompt Pay to Prime Contractor (existing § 2.2–4350, -4352)
- Prime Contractor liable for amounts owed to Subcontractor, including a supplier, unless reducible ( new -4354)
  - If withholding, send written notice.
- Prime Contractor to flow these payment requirements down (existing -4354)

# Wage Theft Laws

- In 2020, the General Assembly passed multiple “Wage Theft” laws.
- One bill added Section 11-4.6 to the Code.
- Any construction contract entered into after July 1, 2020, includes a provision under which general contractor and the subcontractor at any tier are jointly and severally liable to pay any subcontractor's employees any wages due.
- A general contractor shall be deemed to be the employer of a subcontractor’s employees at any tier for purposes of § 40.1-29.
- If the wages due to the subcontractor's employees are not paid, the general contractor shall be subject to all civil and criminal penalties, under § 40.1-29

# Wage Theft Laws

- The provisions of 11-4.6 shall only apply if:
  - (i) it can be demonstrated that the general contractor knew or should have known that the subcontractor was not paying his employees all wages due,
  - (ii) the construction contract is related to a project other than a single family residential project, and
  - (iii) the value of the project, or an aggregate of projects under one construction contract, is greater than \$500,000.

# Wage Theft Laws

- “As evidence” a general contractor or subcontractor, regardless of tier, may offer a written certification, under oath, from the lower tier subcontractor:
  - (a) the subcontractor and each of his sub-subcontractors has paid all employees all wages due for the period during which the wages are claimed for the work performed on the project; and
  - (b) to the subcontractor's knowledge all sub-subcontractors below the subcontractor, regardless of tier, have similarly paid their employees all such wages.
- Any person who falsely signs such certification shall be personally liable to the general contractor or subcontractor for fraud and any damages the general contractor or subcontractor may incur.

# New Owner Payment Requirements for Private Projects

- Owner must pay General Contractor within 60 days of receipt of invoice (new 11-4.6(B))
  - If withholding, send written notice.
- Untimely payments accrue interest consistent with § 2.2-4355.
- New law does not apply to or prohibit the inclusion of any retainage provisions in a construction contract.

# New Prime Contractor Payment Requirements for Projects\*

- General Contractor must pay its subcontractor within earlier of 60 days of completion of work invoiced OR within 7 days of receipt of payment from Owner (new 11-4.6(C))
  - If withholding, send written notice.
- Pay-if-Paid language still enforceable in instances when the party obligated to pay is insolvent or a debtor in bankruptcy.
- Untimely payments accrue interest consistent with § 2.2-4355.
- New law does not apply to apply to or prohibit the inclusion of any retainage provisions in a construction contract.

\*Private, and possibly public projects.

# Deeper Dive Into the New Laws

- This is where things get messy....





## New Va. Code § 2.2-4354(1)

- **contractor** on a “construction contract” **liable** for the entire amount owed to any **subcontractor** with which it contracts.
- **not liable** for amounts otherwise reducible due to the **subcontractor's noncompliance** with the terms of the contract.
- If withholding all or a part of the “amount promised” to the subcontractor, **notify the subcontractor, in writing**,
  - **intention to withhold** all or a part of the subcontractor's payment
  - **reason for nonpayment.**
- Any condition precedent payment clause **shall be unenforceable.**
- Note the **lack of a timing requirement** (e.g. 60 days as in 11-4.6)

## Who Does This Apply To?

"Contractor" → the entity that has a direct contract with any "state agency" or any agency of local government.

"Subcontractor" → any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded **or to any subcontractor in the performance of the work provided for in such contract**.

"Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor."

# What Contracts Does This Apply To?

- VPPA 2.2-4354 starts out with “Any contract awarded by any state agency . . . :”
- New Sub-section (1) of 2.2-4354 specifically states “construction contracts”.
  - Ironically, this is an undefined term in the VPPA.

## New Va. Code § 11-4.6(B)

- In **any construction contract** between an **owner and a GC**
- **include a provision that requires the owner to pay the GC within 60 days of the receipt of the GC's invoice** following “satisfactory completion” of the work invoiced.
- Owner **not required to pay** amounts withheld due to **GC's noncompliance** with the contract.
- If withholding all or a part of the amount GC invoiced, **owner shall notify the GC, in writing** and with “reasonable specificity”, of
  - **intention to withhold** all or part of the payment
  - **reason for nonpayment.**

## Who Does Part (B) Apply To?

New Va. Code § 11-4.6(A) defines the "Owner" as “a person or entity, *other than a public body as defined in § 2.2-4301*, responsible for contracting with a general contractor for the procurement of a construction contract.”

Va. Code § 43-1 (Mechanic’s Lien Act) defines the "general contractor" as “contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner[.]”

Persons solely furnishing materials **excluded** from definition.

## What Contracts Does Part (B) Apply To?

**“In any construction contract between an owner and a general contractor . . .”**

Existing Va. Code § 11-4.6(A) defines a "Construction contract" as “a **contract between a general contractor and a subcontractor** relating to the construction, alteration, repair, or maintenance of a building, structure, or appurtenance thereto, including moving, demolition, and excavation connected therewith, or any provision contained in any contract relating to the construction of projects other than buildings.”

## In addition, Part (B) does . . .

- Imposes interest on the Owner for untimely payments in accordance with VPPA § 2.2-4355.
- Does not apply to an Owner's ability to require retainage.
  - “Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.”

## New Va. Code § 11-4.6(C)

- **Any contract** with at least **one general contractor and one subcontractor**
- shall be **deemed to include** a provision that GC is **liable** to the subcontractor for **“satisfactory performance”** of the subcontractor's duties under the contract.
- Such **contract shall require** the GC to **pay the subcontractor**
  - within the earlier of (i) **60 days of the satisfactory completion** of invoiced work or (ii) **seven days after GC’s receipt** of amounts paid by the owner for work performed by the subcontractor



## New Va. Code § 11-4.6(C)

- GC not be liable for amounts reducible due to Subcontractor's breach of contract
- **If withholding** all or a part of the amount Subcontractor invoiced, GC shall **notify the subcontractor, in writing**, of:
  - **intention to withhold** all or a part of the subcontractor's payment
  - **reason** for nonpayment,
  - “specifically identifying” the **contractual noncompliance**,
  - the **dollar amount** being withheld,
  - the **lower-tier subcontractor responsible** for the contractual noncompliance.

## Who Does Part (C) Apply To?

It certainly applies to general contractors and first tier subcontractors on private projects.

Because of the poor drafting, it could be interpreted to apply to general contractors and first tier subcontractors on public project.

Persons solely furnishing materials **excluded**.

## Does Part (C) apply to . . .

- Contractor relationships beyond the general contractors and first tier subcontractors?

Uncertain, but best practice is to assume it does.



## What Contracts Does Part (C) Apply To?

**“Any contract in which there is at least one general contractor and one subcontractor . . .”**

Here, in Part (C), we see the term “any contracts”, not “any construction contract” as in Part (B).

## In addition, Part (C) does . . .

- Eliminates condition precedent payment obligations, with one exception, when the upstream party is “insolvent or a debtor in bankruptcy as defined in § 50-73.79.”
- Imposes interest on the GC for untimely payments in accordance with VPPA § 2.2-4355.
- Does not apply an GC’s ability to require retainage.
  - “Nothing in this subsection shall be construed to apply to or prohibit the inclusion of any retainage provisions in a construction contract.”

# Are these New Laws Retroactive?

- No.
- Part 3 of the Act signed into law by Governor Youngkin states:
  - That the provisions of the first enactment of this act shall become effective on January 1, 2023 and shall apply to construction contracts executed on or after January 1, 2023.

# Where do we go from here?

- Consider now what contract revisions you need to make.
- Review the new laws and provide input/comment to your legislators before the 2023 legislative session.
- On and after Jan. 1, 2023, be aware of what is and is not valid under the new payment laws.
- Prepare now to comply with the new notice requirements.
- Document contract compliance and billing and completion information.
- Mechanic's Liens and Payment Bond claims are still options to protect right to payment.

# Questions?

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