

Does the Federal Prompt Pay Act Confer a Private Right of Action?

A Practical Guidance® Article by Kristi Morgan Aronica, Weitz Morgan PLLC



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This article addresses whether the Federal Prompt Pay Act confers a private right of action.

The overwhelming legal precedent on this question is that it does not. The requirements of the Federal Prompt Payment Act are implemented in FAR clauses 52.232-25 through 232-27. In short, these clauses set out government/prime contractor invoicing and payment terms and provide for an interest penalty for late payments. However, FAR 52.232-27, Prompt Payment for Construction Contracts, contains additional terms in order to account for the prime/sub relationships acutely prevalent in construction contracting.

Prime Contractors Must Include Certain Prompt Payment Provisions in Subcontracts

FAR 52.232-27 mandates that prime contractors include certain payment requirements in their subcontracts and that their subcontractors flow down the same. Specifically, the clause obligates the prime contractor to pay its subcontractors for satisfactory performance not later than seven days from receipt of payment from the government and provides for an interest penalty in the event payments are late. It also recognizes that it does not preclude the parties from negotiating payment terms in their subcontract

that allow withholding of payment so long any withholding is in accordance with the subcontract agreement. In the event of a payment withholding, procedures to notify the government outlined in the clause are then triggered.

Routinely, subcontractors who have not been paid on federal construction contracts attempt to include violation of the Federal Prompt Pay Act as a cause of action against the prime, claiming failure to pay within seven days of being paid is in contravention of FAR 52.232-27. They also routinely lose this issue, and the claim is summarily dismissed.

Courts recognize that while the Federal Prompt Pay Act confers rights and duties on federal contractors and subcontractors, it does not grant either an explicit or implied private cause of action in favor of unpaid subcontractors (or lower-tier subcontractors). Federal courts that have taken up this issue have consistently found that the Federal Prompt Payment Act does not provide a subcontractor with a private right of action against a prime contractor. Claims of violations of FAR 52.232-27 belong to the federal government; any non-conformity with the Federal Prompt Pay Act by the prime is for the federal government to pursue, not the subcontractor. A subcontractor's recourse is via the subcontract agreement through a breach of contract for nonpayment claim. Simply put, FAR 52.232-27 does not create an independent cause of action.

When pursuing litigation for non-payment, claimants want to include any and all avenues of redress in their complaint against a respondent. However, proper evaluation of the viability of each claim pleaded may lead to a decision to abandon the cause of action. As in the case of Federal Prompt Payment Act claims, a plaintiff will certainly be met with a motion to dismiss that is going to be almost impossible to overcome (perhaps unless there is a feasible flow-down or

incorporation by reference argument). Thus, a subcontractor will want to perform an analysis and evaluation of whether to expend resources on defending a Federal Prompt Payment Act cause of action in light of judicial interpretations of whether it creates a private right of action in a commercial dispute.

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Treatises

- Government Contracts: Law, Admin & Proc § 32.60, "Contractor's Damages", paragraph [7]

Statutes & Regulations

- 48 C.F.R. § 52.232-25
- 48 C.F.R. § 52.232-26
- 48 C.F.R. § 52.232-27

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An experienced attorney with comprehensive capabilities in commercial litigation and government contracts, Kristi has an extensive track record of excellence in work product and client satisfaction. A graduate of the University of Miami School of Law, she is licensed to practice in Texas and in various federal jurisdictions.

Kristi represents government contractors and subcontractors in federal procurements, including advising on applicable laws and solicitation terms, bid protests, contract negotiations, conducting post-award training and compliance, REAs and claims, litigating disputes, drafting/reviewing teaming agreements and subcontracts, and providing counsel or assistance with mergers and acquisitions, organizational conflicts of interests, GSA Schedules, small business programs, suspension and debarment proceedings, grants, and cooperative agreements.

Providing reliable legal representation founded on strength of conviction, strategic decision making, and substantive knowledge, Kristi is driven in her commitment to clients and their matters. As a result, she has also had successful outcomes in both state and federal courts as counsel for prime contractors and subcontractors in commercial disputes arising from federal procurement contracts. Experienced on both sides of the docket, she serves as plaintiff's or defendant's counsel and has a unique skill set of combined proficiency in federal public contract law and the civil procedure and substantive law of state and federal jurisdictions in Texas.

Kristi represents a diverse set of clients working on government contracts and has particularly strong knowledge in the unique aspects of entities operating in the government marketplace in the industries of construction, parts supply, and tech.

In addition to practicing law, Kristi has published on subcontract terms and conditions and in the fields of American literature and U.S./Mexican immigration and has been quoted by Bloomberg Law on federal procurement cases. She also spent numerous years in a leadership position on the board of directors of The Arc of the Capital Area, a Texas non-profit focused on enhancing the lives of those with intellectual and developmental disabilities.

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