



American Subcontractors Association, Inc.

NEWS RELEASE

**1004 Duke Street • Alexandria, VA 22314-3588 • <http://www.asaonline.com>
Telephone: 703.684.3450 • Fax: 703.836.3482 • e-mail: ASAoffice@asa-hq.com**

FOR IMMEDIATE RELEASE

March 1, 2007

Contact: David Mendes
(703) 684-3450, Ext. 1335
dmendes@asa-hq.com

ASA Report Shows Modest Policy Gains for Construction Subcontractors in 2006

But Public Policies in 49 States and the District of Columbia Generally Fail Subcontractors

ALEXANDRIA, Va. — Where subcontractor-friendly public policy is concerned, the state of New Mexico is definitely the place to be for specialty trade contractors. Published by the American Subcontractors Association (ASA), “The ASA Report: The Policy Environment in the States” awarded New Mexico the highest ranking (69 out of 100) for its overall public policies impacting construction subcontractors.

ASA’s annual report, now in its third year, scores each state in individual policy areas such as prompt payment and anti-“bid shopping” policies, and uses the scores to assign an overall score and grade to each state. New Mexico dominated ASA’s state ranking for a third year in a row even without any scoring changes in the policy areas ASA evaluates for the report.

“New Mexico is known as the ‘Land of Enchantment,’ and for subcontractors, the slogan does ring more true for New Mexico than for any other state,” said 2006-07 ASA President Stephen Rohrbach, CPC, president of F. A. Rohrbach Inc., Allentown, Pa. “Every state has a long way to go to achieve a supportive policy environment for subcontractors, but New Mexico remains the leader. Some states showed modest policy gains for subcontractors in 2006, but no state came close to dethroning New Mexico from its place as the front-runner.”

In 2006, Oklahoma showed the greatest overall improvement as its state ranking increased 15 spots from 34th to 19th. A sweeping indemnity reform bill (S.B. 324) signed into law by Gov. Brad Henry (D) on Nov. 1, 2006, caused the increase. The law prohibits hold-harmless terms and “additional insured” requirements in construction contracts from indemnifying parties against liability for personal injury or damage which arises out of their own negligence or fault.

“Oklahoma made a remarkable advance with its new anti-indemnity law, a victory that the leaders of ASA of Oklahoma worked hard to achieve,” said Rohrbach. “Subcontractors in some other states, such as New Jersey, celebrated important advances in specific areas such as prompt payment. The overall picture presented by the report, however, is of states whose policies consistently and dramatically fail to protect subcontractors. ASA urges subcontractors to build upward to a better policy environment from their victories in 2006 and, where there were no victories, to re-ignite their advocacy efforts. ASA can help.”

(MORE)

ASA calculated that, aside from New Mexico, every other state and the District of Columbia had a failing grade, or overall score of 60 points or less out of 100.

ASA is contacting media, legislators and other public officials across the country to share the results of "The ASA Report: The Policy Environment in the States." ASA's campaign will warn subcontractors of deficits in their state laws, provide advocacy information to help change laws, and educate subcontractors about the need to remain vigilant when negotiating contracts in a harsh public policy environment.

ASA calculated the overall grade for each state (and the District of Columbia) by scoring seven key state public policy areas, and then combining the points for a final score and a final grade for each state. ASA scored: (1) Prompt payment protections; (2) Treatment of pay-if-paid clauses; (3) Mechanic's lien protections; (4) Payment bond protections; (5) Retainage limitations; (6) Anti-indemnity protections, including limits on "additional insured" endorsements; and (7) Anti-"bid shopping" measures. The scoring in each policy area took into account both laws and judicial decisions.

In addition to Oklahoma, "The ASA Report: The Policy Environment in the States" found policy changes in six states in 2006 affecting scores in the report: Hawaii, Illinois, New Jersey, Pennsylvania, Tennessee and Utah. They are:

—Enactment of H.B. 3036 in Hawaii. This law, which will take effect on July 1, 2007, increased the state's prompt pay score by requiring a prime contractor to pay a subcontractor within 10 days after receipt of funds for the subcontractor's final payment request on state or local public projects, provided that there are no *bona fide* disputes regarding the subcontractor's performance. The law establishes new, alternative forms of security that a subcontractor may provide to compel state and local public procurement officers to timely disburse retainage to the prime contractor as part of the subcontractor's final payment request. The law includes a monthly interest penalty of 1.5 percent for late payments to the prime contractor or the subcontractor.

—Enactment of H.B. 5260 in Illinois. This law, which will take effect on July 1, 2007, increased the state's prompt pay score by setting a 30-day limit for state officials to dispute construction-related invoices, and by requiring payment without delay of undisputed portions of construction-related invoices. Furthermore, when the state fails to pay on time and incurs interest penalties, prime contractors must pass the interest payments on to subcontractors on a *pro rata* basis.

—Enactment of S.B. 1726 in New Jersey. The law significantly raised New Jersey's ranking in the prompt pay category by expanding prompt pay requirements to include private owners and by allowing suspension of work for nonpayment. The law requires construction owners to pay their contractors within 30 days of billing for "work performed in accordance with the provisions of a contract and certified by the owner or the owner's authorized approving agent." If an owner does not make payment within the 30-day time frame, the law holds the owner liable for the remaining balance plus interest at a rate equal to the prime rate plus 1 percent. The law applies the new prompt payment requirements to public owners, which previously had 60 days to pay prime contractors and had to pay interest penalties for late payments, but at a much lower rate. New Jersey law requires a prime contractor to pay its subcontractors within 10 days of receipt of payment from an owner. The new law allows prime contractors, subcontractors and sub-subcontractors to suspend work for nonpayment after seven calendar days' notice after payment is due.

(MORE)

—Enactment of H.B. 1637 in Pennsylvania. This law raised the state’s score for mechanic’s lien policy by taking away the ability of a prime contractor on a non-residential project to waive a subcontractor’s rights to exercise a lien claim against property to ensure payment, unless the waiver is “given in consideration for payment for the work, services, materials or equipment provided and only to the extent that such payment is actually received, or unless the Contractor has posted a bond guaranteeing payment for labor and materials provided by subcontractors.” The law also extended mechanic’s lien rights to sub-subcontractors.

—Enactment of H.B. 3068 in Tennessee. This law amended the Prompt Pay Act of 1991 to provide a deadline by which contractors, subcontractors, materialmen and furnishers must be paid for non-residential work. In contracts between a contractor and subcontractor, payment for work performed must be made within 30 days after the subcontractor timely submits its correct application for payment, and late payments are penalized with accrued interest. The old law required payment to contractors and subcontractors “within the time provided in the contract” and did not provide an interest penalty for late payments to subcontractors.

—Enactment of S.B. 161 in Utah. This law amended Utah’s mechanic’s lien laws to standardize conditional lien waiver language and to ensure that a conditional waiver of lien rights is effective only if a subcontractor receives the payment made in exchange for it. In addition, the law ensures that a waiver of lien rights for a progress payment does not apply “to any retention withheld; any items, modifications, or changes pending approval; disputed items and claims; or items furnished or invoiced after the Payment Period.” It also ensures that a waiver of lien rights for final payment does not apply “to payment of Disputed Claims, if any.”

“The ASA Report: The Policy Environment in the States” notes other policy developments in 2006 that are of interest to subcontractors but that did not affect scores in the report, including:

—Enactment of H.B. 1177 in Georgia. This law added a requirement that state Department of Transportation construction contracts exceeding \$300 million be secured with guarantees that are “not less than \$300 million of performance and payment bonds and shall equal not less than 100 percent of the contractors’ obligation under the construction portion of the contract.” The law provides that certain types of alternative securities may be provided for contract sums above \$300 million with “a written determination supported by specific findings that single bonds in such amount are not reasonably available.”

—A New York Court of Appeals decision regarding enforcement of pay-if-paid clauses between out-of-state contractors. In a Nov. 20, 2006, decision in *Welsbach Electric v. MasTec North America*, the New York Court of Appeals fashioned a limited exception to the policy of not enforcing pay-if-paid clauses in construction contracts. The court asserted that New York lien law “seeks to protect New York subcontractors from the oppressive use of bargaining power” but permitted enforcement of pay-if-paid terms in a contract between two out-of-state contractors whose contract for electrical work on a project in New York contained a choice-of-law provision specifying Florida law, and a pay-if-paid provision, which Florida law allows. In July 2006, ASA filed a friend-of-the-court brief arguing that contractors cannot circumvent the state’s policy by using venue provisions that apply out-of-state laws. The court concluded, however, that the out-of-state contractors are “sophisticated commercial entities that knowingly and voluntarily entered into the subcontract,” and that “the checkered history of pay-if-paid clauses” provided insufficient grounds upon which to void the parties’ choice of law. The decision is likely to have limited application, however, because choice-of-

(MORE)

law provisions in New York contracts on private improvements of \$250,000 or more that designate out-of-state laws as controlling are void under a prompt pay law that took effect on Jan. 14, 2003.

—An Ohio appellate court decision regarding mechanic's lien rights for equipment installations. On Oct. 6, 2006, an Ohio appellate court reversed a lower court decision in *Mid-Ohio Mechanical v. Eisenmann Corporation* that would have stripped Ohio subcontractors of mechanic's lien rights for most types of equipment installations. The lower court decision was based on an interpretation of Ohio's mechanic's lien law that would have invalidated a \$750,000 lien securing payment on machinery a subcontractor installed by lowering it through a hole in the roof, bolting it to a special foundation then attaching it to power lines physically connected to the utility lines serving the building. In a May 22 friend-of-the-court brief, ASA argued that the lower court decision denying the lien "ignores the plain language of the Ohio Mechanic's Lien statutes, contradicts recent Ohio precedent and destabilizes the foundation of the construction industry. The appellate court agreed, ruling that the subcontractor's work and materials are "as a matter of law, improvements to a building, fixture, appurtenance or other structure" and subject to lien.

—A Pennsylvania Superior Court's decision on Sept. 12, 2006, rejecting a trial court's argument that the Pennsylvania Contractor and Subcontractor Payment Act created a "pay-if-paid" clause in every construction contract. The non-precedential Superior Court decision in *Eschbach Bros. v. Contracting Systems, Inc.* concluded that "the parties never argued during trial that the provisions of the Contractor and Subcontractor Payment Act at issue were incorporated into the parties' written contract, contrary to the parties' contract, or negated the condition precedent established in the contract. Therefore, we find any argument with regard thereto to be waived." In a February 2006 friend-of-court brief, ASA argued that that the trial court had ignored the state law and inferred a payment clause not intended by the parties or created by the contract language.

"The ASA Report: The Policy Environment in the States," is available on the ASA Web site, www.asaonline.com.

Founded in 1966, ASA amplifies the voice of, and leads, trade contractors to improve the business environment for the construction industry and to serve as a steward for the community. ASA's vision is to be the united voice dedicated to improving the business environment in the construction industry. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, a safe and healthy work environment, and integrity and membership diversity.

###