

LEGAL ALERT

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PROMPTLY PAY THE SUBCONTRACTOR OR PAY THE CONSEQUENCES

BY JUSTIN M. CRONISER
HAHN LOESER & PARKS LLP

Under Ohio’s Prompt Pay Act, a general contractor could end up paying more for the subcontractor’s attorneys’ fees than the general contractor owed to the subcontractor. That was the ruling by the Ohio appellate court in *Atlas Piers NEO v. Summit Construction Co., Inc.*, 2021-Ohio-2024 (9th Dist.). In *Atlas Piers*, the general contractor hired a subcontractor to provide “services that help stabilize buildings constructed in poor soil conditions.” *Id.* at ¶ 2. In particular, the subcontractor installed helical screws and piers in a series of buildings to be built for the Akron Metropolitan Housing Authority. *Id.*

A dispute later arose regarding the piers and the subcontractor’s work on the piers. The subcontractor sought a change order for work that the general contractor instructed the subcontractor to perform. But the general contractor refused to issue a change order because “it believed one was not necessary.” *Id.* at ¶ 9. When the subcontractor refused to act without a change order, the general contractor terminated the subcontract.

The subcontractor then filed a lawsuit against the contractor, seeking “money for lost time, extra work performed, lost profits, and” retainage that had not been paid by the contractor. *Id.* at ¶ 10. The subcontractor also sought damages and attorneys’ fees under Ohio’s Prompt Pay Act because the general contractor “failed to timely pay” the subcontractor in violation of Ohio Rev. Code § 4113.61. *Id.* at ¶ 11. Following a bench trial, the trial court found that the contractor owed the subcontractor approximately \$20,000, plus 18% interest, as well as attorneys’ fees. *Id.* at ¶12.

Next, the court held a hearing to determine the amount of attorneys’ fees that should be awarded to the subcontractor. The court rejected the contractor’s arguments that the subcontractor “failed to satisfy the factors in the” Prompt Pay Act and that the subcontractor should only recover fees relating to the Prompt Pay Act claim. All told, the court awarded the subcontractor \$64,974.88 in attorneys’ fees—more than three times the amount owed to the subcontractor.

On appeal, the contractor raised several arguments in an attempt to throw out the attorneys’ fees award. But the appellate court rejected each of those arguments. In particular, the court disagreed with the contractor’s argument that the attorneys’ fees award was “disproportionate and

unreasonable in light of the sum recovered by” the subcontractor. *Id.* at ¶ 34. The appellate court explained that “[n]othing in the statute . . . indicate[s] that it is per se unreasonable for an award of attorney fees to substantially exceed the funds recovered by the prevailing party. While it is true that [the subcontractor] did not recover a large proportion of the money it sought, it was nonetheless successful in its litigation.” *Id.*

THE MORAL OF THE STORY

Attorneys’ fees could make a Prompt Pay Act claim much more costly for a contractor. Those fees could greatly exceed the actual amount owed to the subcontractor. Plus, courts could assess those fees even when the subcontractor does not recover the total amount that it claims that it is owed. Therefore, contractors should pay particular attention to Prompt Pay Act claims made by their subcontractors and consider the potential award of attorneys’ fees in evaluating those claims.

AUTHOR



JUSTIN M. CRONISER, PARTNER

jcroniser@hahnlaw.com

216.274.2331

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