



The ASA Report: The Policy Environment in the States

2007 Executive Summary

This annual report examines the public policy environment on the state level as it relates to construction subcontractors. ASA defines that environment as the combined result of laws and judicial decisions relating to assurance of prompt payment of subcontractors when they have properly performed their work, risk allocation, the integrity of the bidding process, and other policies. The specific policies judged by ASA are spelled out in the "Background" section.

This report is commonly referred to as the "ASA report card" as it assigns scores and grades in seven policy areas and uses these to calculate an overall score, grade and rank for each state. The 2007 report shows that awareness of the harmful effects of retainage is growing, and legislators are acting on that awareness. New Mexico has all but prohibited retainage, reaching a true milestone that earned it a score of 100 percent in the category of "retainage limitation policies." This achievement and the enactment of retainage reform in three other states (Kentucky, North Carolina and Tennessee), earning them significant score increases, would not have been possible without the groundwork laid by ASA and the Foundation of ASA (FASA), such as FASA's 2004 report, *Retainage Practice in the Construction Industry*.

The ASA Report also reveals that prompt payment continues to be an area in which subcontractors are making policy advances. Four states enacted prompt pay laws: Kansas, Kentucky, New Mexico, and Illinois. Kansas' law propelled it into the number one position in this category. The law extended a previously existing law for private work to public owners, contractors and subcontractors, with harsh penalties for late payment.

The kind of fortune that materialized for retainage and prompt payment policies in some states was not universal enough, however, to generally transform the harsh policy environment in which subcontractors conduct business. In 2007 (as in previous reports), the District of Columbia and every state but New Mexico earned a failing grade, or overall score of 60 percent or less. Even so, among the mass of failing states, not all were "equal." The policy environment in a state with a score of 58 percent (e.g., South Carolina) vs. one scoring 14 percent (e.g., Wyoming) would differ in the extreme.

There were some other important policy victories for subcontractors that could signal the beginning of future trends. Colorado's new anti-indemnity law, which moved its score from 0 to 94 percent in the anti-indemnity category, prevents the contractual transfer of risk in construction contracts and closes the additional insured loophole. Georgia legislatively addressed a judicially created loophole allowing broad-form indemnity, earning the state a 41-percent jump in this category. New Mexico and Texas, which previously scored 0 in the anti-'pay-if-paid' category, enacted laws to address the inequities of contingent payment. New Mexico's score in this category now stands at 90 percent, and Texas' at 75 percent.

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" with the objective of creating a better business environment in the construction industry. ■