



CONSTRUCTION LAW E-UPDATE

THE NEW YORK PROMPT PAYMENT ACT: Designed To Get You Paid On Your Private Projects – Use It!

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APRIL 2013

New York's Prompt Payment Act ("PPA") requires that a contractor's pay requisition be reviewed and approved/disapproved by the owner within 12 days, and that payment of an approved pay requisition must be made by the owner to the contractor within 30 days of approval. The 30 day payment period is a maximum period; it cannot be lengthened by contract. Furthermore, the subcontractor's approved pay requisition must be paid within 7 days of the contractor's receipt of payment from the owner (provided all contractually required documentation and waivers have been submitted). If these statutory payment requirements are breached, the contractor and subcontractor have two very powerful remedies under the statute: 1) expedited, compulsory and binding arbitration, and 2) a protected ability to suspend work. Both of these tactics could be extremely effective in their application.

Expedited Arbitration

A contractor or subcontractor can enforce its rights under the PPA by commencing an expedited arbitration proceeding before the American Arbitration Association. To do so, the contractor or subcontractor need merely send a notice of complaint explaining the breach that is the subject of such notice. The parties are required to attempt to resolve such disputes. If no resolution is made, the contractor or subcontractor may commence an arbitration proceeding with the AAA under its "expedited arbitration rules" within no more than 15 days from the date that the contractor's or

subcontractor's notice of complaint was received by the owner and/or contractor. Under such "expedited arbitration rules," the owner's and/or contractor's answer must be filed within 7 days of the commencement of the proceeding. There is no discovery (i.e., no document production, depositions, etc.) and the hearing cannot exceed one day. Also, the hearing must be conducted within 45 days after the preliminary phone conference with the arbitrator and the arbitrator must make his/her award within 14 days from the hearing. These time frames are extraordinary.

Suspension of Work

In addition, if an owner and/or contractor fails to approve/disapprove a pay requisition within the 12 day period or make payment within the 30 day or 7 day period (as applicable), a contractor or subcontractor may utilize what is essentially a "safe harbor" provision to suspend its work until the owner or contractor cures its breach of the Act's requirements.

The contractor or subcontractor must provide the owner or contractor with a 10 day notice to cure before it is entitled to suspend work. If such cure notice is given and the cure not made, the work can be suspended and the work need not be recommenced until the payment or other breach of the PPA is completely remedied or such dispute resolved under the PPA's expedited arbitration provision. The PPA further specifically states that the contractor or subcontractor who suspends work cannot be held in breach of its contract and that it must

be allowed access to its machinery, equipment, tools, etc., at the site if it chooses to remove same from the site.

G&C Commentary:

It would not be an overstatement to assert that the provisions of this PPA can only be described as revolutionary. However, “you can bring a horse to water but you can’t make it drink it.” Statewide experience since the passage of this PPA advises us that the expedited arbitration procedure in the PPA is not, for the most part, being utilized. Nor are subcontractors or suppliers utilizing their right to suspend work for breaches of the PPA’s provisions. It is hard to imagine why this is so, but clearly a reluctance to breach business relationships with general contractors, owners and/or developers may in large part be responsible for this. One must wonder, however, how worthwhile such relationships are when payments are not forthcoming.

Nonetheless, it appears that merely sending a “Notice of Intent” to start an expedited arbitration, or to suspend work, often results in a prompt resolution of a payment dispute. The risk of expedited compulsory arbitration, or the ability of a subcontractor to stop work in a protected manner, often results in a prompt resolution of the payment dispute, thereby, obviating the need to actually pursue the arbitration or suspend work.

We are not suggesting that one should send notices of intent to invoke this statute on the 35th day after approval of a pay requisition. However, this PPA provides uniquely powerful tools to enforce your payment rights on private sector projects. Use them, or have only yourself to thank for not protecting your interests to the full extent available at law.

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