



CONSTRUCTION LAW E-UPDATE

NEW YORK'S AMENDED PROMPT PAYMENT ACT REVISITED:

Summary of Highlights

By Henry L. Goldberg

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We have been requested to again summarize the important aspects of this new statute.

As we noted in our original article entitled "New York's Amended Prompt Payment Act," recent changes to New York's existing Prompt Pay Act for private projects have greatly enhanced the effectiveness of the Law. The changes may have finally put "prompt" into the Act and provided much needed enforcement "teeth" in the form of binding arbitration.

Binding and Expedited Arbitration

This is the most significant and meaningful aspect of this reform legislation.

Under the old act, subcontractors acquired important remedies, namely to suspend performance and to collect interest from the general contractor and/or owner. However, under the revised Act, a subcontractor can now give notice to the general contractor and/or owner that they have violated the Act, and then seek to resolve the matter described in the notice.

Significantly, if the parties are unsuccessful in resolving the dispute themselves, the subcontractor may, after 15 days notice, refer the dispute to the American Arbitration Association for binding and expedited arbitration. The Act declares that the award of the arbitrator shall be final and

binding, and may only be vacated or modified for very limited grounds. This is a major change.

Minimum 30 Day Payment Rule

The new Act also requires an owner to make payment on an interim or final invoice within 30 days of receipt of the same. This differs from the prior version of the Prompt Payment Act, which required payment within 30 days, unless the parties agreed otherwise. This "opt-out" provision of the old act allowed for lengthening of the payment period under the prime contract. Now, there is no "opt-out" for owners; they must follow the 30-day rule without exception.

The act also provides that subcontractors must be paid within 7 days of the general contractor receiving good funds from the owner. While this provision is non-negotiable, a general contractor may take the position that its payment obligations to the subcontractor only kick in once they receive payment from the owner. As such, the 7 day period may be delayed in starting to run. However, a close reading of the Act reveals that the 30-day rule applicable to payments from owners to general contractors is enforceable not only by the general contractor, but by subcontractors as well.

Thus, regardless of whether the general contractor, itself, objects to a late payment, all the remedies available under the Act (i.e., suspension of work and binding arbitration) are



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still viable options for subcontractors who are not being paid timely because the owner is not paying the general contractor.

No LDs on Interim Payments

The new Prompt Payment Act also prohibits contractors and subcontractors from withholding "anticipated" liquidated damages from interim payments due a subcontractor, tradesman or materialman. Under the old act, "anticipated" liquidated damages were permitted in an amount agreed upon in the parties' contract.

G&C Commentary

The new, private sector, Prompt Payment Act represents a vast improvement over the old Act. Used effectively, the new Act can be a tool for subcontractors. In particular, the binding, expedited arbitration provisions of the new law should limit the period of time that a subcontractor goes without payment. Remember, this applies whether the general contractor fails to pay within 7 days after receiving payment from the owner, or, significantly, where the owner fails to pay the general contractor within thirty days after receiving an invoice that included work you performed on the project. This latter feature is another dramatic change.

Despite the utility of the expedited arbitration process, it is important for subcontractors not to lose sight of the immediate

goal, payment. It is essential for the subcontractor to fully organize their records and have all necessary supporting documentation prepared for its claim.

Finally, subcontractors should use the arbitration procedures as broadly as possible. It should cover not only disputes concerning when a payment is made, but also what is paid. Under the statute, an amount that should have been paid, but was unjustifiably not paid, is considered late. Expedited arbitration should, therefore, include a decision on whether the general contractor paid the proper amount, as this issue is inextricably intertwined with the issue of timeliness of the payment.

In conclusion, the new Prompt Payment Act presents a great opportunity for subcontractors on private construction projects to ensure they are timely paid for the work and materials that they provide. A valuable tool now exists; it's up to you and/or your counsel to use it.