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## **NEW YORK'S AMENDED PROMPT PAYMENT ACT**

### **NEW LEGISLATION SHOULD ACTUALLY FACILITATE TIMELY PAYMENT ON PRIVATE CONSTRUCTION PROJECTS**

There is a new weapon against late payments from owners and general contractors on private construction projects in New York. A recently enacted statute amends the Labor Law and General Business Law in relation to the payments on private construction projects. The purpose of the law was to “beef up” the existing, less than successful, Prompt Payment Act and to make available greater enforcement procedures for tradesman, materialmen, contractors and subcontractors.

New York previously enacted a Prompt Payment Act for construction work on private projects in New York in July 2002, however, that law was the target of much criticism for its lack of any meaningful enforcement mechanisms. Unlike the previous Act, the new Prompt Payment Act actually has “teeth” and may provide a more effective set of weapons against late payments. The following are a few of the more meaningful provisions of the new Prompt Payment Act.

#### **Minimum 30 Day Payment Rule**

The new Act establishes the maximum time period, 30 days, in which an owner may make payment on an interim or final invoice, which cannot be changed by the parties even if they mutually agree otherwise in their contract. Under the previous Act, payments were required to be made within 30 days, but parties were also free to contract as they desired on their payment provisions, which meant that the payment terms of the construction contract superseded the provisions of the Prompt Payment Act, thereby diminishing any effectiveness the old Act may have had.

#### **No L/Ds on Interim Payments**

The new Act also prohibits contractors and subcontractors from withholding “anticipated” liquidated damages from payments due a subcontractor, tradesman or materialman. Such withholding for liquidated damages was permitted under the previous Act in an amount established in the agreed upon schedule in the parties’ contract.

### **Binding Expedited Arbitration**

Finally, and perhaps most importantly, the new Prompt Payment Act provides that, where an owner and/or contractor fails to make payment on an invoice within the required time period, the contractor and/or subcontractor may resort to expedited, binding arbitration to resolve the late payment dispute. This is significant. By contrast, under the previous Act, the only remedy for contractors and subcontractors was to hope to eventually collect interest from the owner and/or suspend performance.

Now, in addition to collecting interest on late payments and in lieu of suspending performance, a contractor/subcontractor may first provide written notice of a complaint of late payment and attempt to resolve the matter giving rise to the complaint. If such resolution efforts are unsuccessful, the contractor/subcontractor may refer the matter after 15 days to the American Arbitration Association for expedited arbitration. Significantly, as indicated, the award of the arbitrator shall be final and binding on the parties.

### **G&C Commentary:**

The new Prompt Payment Act is certainly an improvement over the ineffective previous Act and may actually be an effective tool for subcontractors to ensure the timely payment of their invoices. In fact, it has the potential to dramatically change the “balance of power” along the construction payment food chain in the private sector. In particular, the provision allowing for expedited, binding arbitration could substantially limit the time it takes for disputes over payments to be resolved, during which time subcontractors typically go without payment.

However, it is important to remember that, even though you may now resort to arbitration for late and/or non-payment of invoices, you must still comply with all the notice and recordkeeping requirements set forth in your contract in order to preserve your rights to make claims and avoid any waiver of claims you may have against the contractor and/or owner. In addition, before resorting to arbitration, it is important that you do your homework and determine the alleged reason as to why you have not been paid. You also need to establish a paper trail evidencing your receivable which can be used to prove your case at the arbitration. You do not want to go into arbitration only to find out the contractor/owner has a legitimate, or even pretextual, reason for not making payment, one that may have been easily remedied or disproved prior to the arbitration.

### **Upcoming STA Breakfast Seminar-**

**Please join us on January 13<sup>th</sup> for a comprehensive discussion on :**

#### **GETTING PAID- The Amended NYS Prompt Payment Act and more..**

Wednesday January 13, 2010

8am, Crowne Plaza:

Goldberg & Connolly will be conducting this hour program which will review all the effective Subcontractor “Getting Paid” Strategies & Tactics.  
( registration form is on the next page).

*Christopher K. Smith, an associate with the firm, assisted with the preparation of the article.*