

## **ALERTS AND UPDATES**

### **Amendments to New York Prompt Payment Act Broaden Enforcement**

March 5, 2010

On September 8, 2009, New York Gov. David Paterson signed into law amendments to the state's Prompt Payment Act (the "Act") intended to create broader enforcement mechanisms for the benefit of contractors, subcontractors, suppliers and laborers. New York's General Business Law was revised to ensure that contractors, subcontractors and suppliers are timely paid for completed work on private construction projects, and the state's Labor Law was revised to allow complaints to the New York State Commissioner of Labor of nonpayment of wages arising from violations of the Act. The following are the more noteworthy changes.

#### **The Policy of the Act Is Recited**

The purpose of the Act, to ensure that payments required by private construction contracts are made in a timely manner, is now spelled out in the statute by the addition of the following language:

It is the policy and purpose of this article to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts.<sup>1</sup>

#### **The Reach of the Act Is Expanded**

The reach of the Act was broadened to include smaller construction contracts and smaller projects. The definition of a construction contract was changed to include any contract whose aggregate price equals or exceeds \$150,000. Previously, to invoke the protections of the statute, the price of the contract had to be \$250,000 or greater. Thus, the statute, as amended, lowers the cost threshold price of applicable construction contracts from \$250,000 to \$150,000.<sup>2</sup> The new amendments also broaden the definition of a construction contract by: (1) lowering the aggregate size threshold for residential construction projects from 9,000 square feet to 4,500 square feet or less; (2) lowering the number of applicable residential public housing units from 150 to 75 units; and (3) lowering the number of applicable residential tract developments from 150 one- or two-family dwellings to 100 such dwellings.<sup>3</sup>

## Timely Payment Rules Are Not Optional

The Act, as amended, no longer permits parties to contractually opt-out of the statute's payment requirements.<sup>4</sup> The party to whom an invoice is submitted has 12 days to approve or disapprove all or a portion of the invoice by a written statement describing the items not approved.<sup>5</sup> The statute lists the reasons for which an owner may not approve an invoice or portion of one,<sup>6</sup> and for which a contractor or subcontractor may not approve an invoice or portion of one.<sup>7</sup> The amendments do not preclude parties from contractually changing the time frame for reviewing an invoice or modifying the reasons for endorsing or rejecting an invoice. However, once approved, an invoice must be paid within the statutory time frames. An owner must tender payment of an invoice, including final payment, within 30 days of an invoice's approval.<sup>8</sup> A contractor or subcontractor must tender payment to its subcontractor of the proportionate amount paid by the owner for the subcontractor's work within 7 days of having received payment for the work.<sup>9</sup> The parties cannot change by contract the 30-day and 7-day payment periods.<sup>10</sup>

If the owner, contractor or subcontractor fails to timely pay an invoice within the time frame set forth in the statute, interest accrues beginning the day after payment is due.<sup>11</sup> The new amendments to the Act also prohibit parties from contractually opting-out of the obligation to pay interest.<sup>12</sup>

It is important to note that the General Business Law's new section 757 subdivision 4, which identifies provisions of contracts which are void and unenforceable, reads:

A provision, covenant, clause or understanding in collateral to or affecting a construction contract establishing payment provisions which differ from those established in *subdivision three of section seven hundred fifty-six-a and section seven hundred fifty-six-b* as applicable.<sup>13</sup>

An initial reading may raise the question of whether the limiting reference to "subdivision 3" is applicable to section 756-b. However, a better reading of the statute may be that it intends to include all of section 756-b.

## Liquidated Damages Are No Longer Deductible

A contractor or subcontractor can no longer withhold monies from payments due a subcontractor or supplier to cover liquidated damages.<sup>14</sup> A contract clause that provides otherwise is void and unenforceable.<sup>15</sup> Prior to being amended, the statute provided that a contractor or subcontractor could withhold from an interim payment to a subcontractor or supplier an

amount sufficient to cover liquidated damages set forth in the parties' agreement. The owner's right to withhold from an interim payment an amount sufficient to cover liquidated damages set forth in the parties' agreement is unaffected.<sup>16</sup>

### **Arbitration of Payment Disputes May Be Required by the Aggrieved Party**

The amendments allow a contractor, subcontractor or supplier to use arbitration as a permissive remedy for nonpayment. Where an owner, contractor or subcontractor does not make a timely payment, the aggrieved contractor, subcontractor or supplier can resort to binding arbitration to resolve the payment dispute. The nonpaying party can be required to participate in binding arbitration under the auspices of the American Arbitration Association.<sup>17</sup> First, the aggrieved party must provide written notice of nonpayment and attempt to resolve the matter. If a resolution is not reached by the parties within 15 days, the contractor, subcontractor or supplier has the option of mandating expedited and binding arbitration.<sup>18</sup> The parties may not contract to opt out of the arbitration requirement.<sup>19</sup>

In short, arbitration is no longer a mutually agreed-upon means to resolve private construction disputes. An owner, contractor or subcontractor can now be required to enter into binding arbitration, even if its construction contract does not contain an arbitration provision.

### **Labor Law Provisions**

The amendments also revise section 196-a of the Labor Law to allow employees and labor unions to file complaints with the Commissioner of Labor regarding failure to pay wages arising from alleged violations of the Act.

### **Effective Date of Amendments**

The amendments became effective on September 8, 2009, and apply to private construction contracts entered into after the effective date, excluding contracts for projects for which permits had been issued and work had begun prior to the effective date.

### **Conclusion**

The Act as amended maintains its stated purpose of expediting payment to those who perform contracting services pursuant to construction contracts. However, the new amendments also furnish aggrieved parties with the mechanisms that had not existed in the statute to ensure timely payment for completed work.

## For Further Information

If you have any questions regarding this *Alert* or would like more information, please contact [Jose A. Aquino](#), [Richard P. Dyer](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

## Notes

1. N.Y. Gen. Bus. Law § 756-a (Consol. 2010).
2. § 756(1).
3. *Id.*
4. § 757(4).
5. § 756-a(2)(a)(i) & (ii).
6. § 756-a(2)(a)(i)(1)-(6).
7. § 756-a(2)(a)(ii)(1)-(5).
8. § 756-a(3)(a)(ii).
9. *Id.*
10. § 757(4).
11. § 756-b(1)(a) & (b).
12. § 757(4).
13. *Id.* (emphasis added).
14. § 756-a(3)(b)(iii).
15. § 757(4).
16. § 756-a(3)(a)(iv).
17. § 756-b(3).
18. *Id.*
19. § 757(3).