



TOOTHLESS TIGER NO MORE... RECENT AMENDMENT ADDS BITE TO THE CONSTRUCTION CONTRACTS ACT (A/K/A THE NEW YORK PROMPT PAY ACT)

In September 2009, the New York Legislature amended the 2003 New York Construction Contracts Act (a/k/a The New York Prompt Pay Act, New York General Business Law Sections 756-758) (the “Act”) giving it teeth. While the law may now have teeth, it is still not clear exactly how the law will function and whether aspects of it are enforceable as a matter of law.

Although the wording in some cases may not be clear, at the very least we expect that Contractors and Owners will be exposed to arguments that the new law includes the following significant changes:

- ❖ Where before, Owners, Contractors, and Subcontractors could draft contract provisions to trump the timing of the payment and dispute resolution provisions of the Act, which acted merely as “default” provisions in the absence of contrary contractual provisions, the Act now imposes mandates that cannot be trumped.
- ❖ Before the amendment, a contract could establish the time in which an invoice had to be paid, regardless of the default time periods in the statute. Now, however, the Act mandates a 30-day time period in which Owners must make payments (within seven days if Owners receive money from lenders) and a seven-day time period from receipt of funds from the Owner for Contractors to make payment, regardless of what the parties may agree to in a contract. If the Owner or Contractor fail to make payment within the time required, the Owner or Contractor can be liable for interest on the amounts due at the rate of one percent per month (or a higher rate if specified by contract).
- ❖ If the Owner or Contractor fail to review and accept or reject invoices within the time allowed or fail to make payment within the time required, a Contractor or subcontractor may legally suspend its work. Pursuant to the Act, if the Contractor or Subcontractor properly suspends its work for non-payment, all time frames under the Act will be extended by the suspension period and the Contractor or Subcontractor will be entitled to some payment for remobilization (subject to negotiation between the parties).
- ❖ While the Act permits an Owner to with-

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hold payments from a Contractor to cover liquidated damages, the amendment now incongruously prohibits Contractors and Subcontractors from withholding monies from payments due to Subcontractors and Suppliers to cover liquidated damages, regardless of what the parties may have agreed to in their contract.

- ❖ The changes to the Act now make it applicable to a wider range of projects. While the Act still does not apply to public projects, it applies to most private construction projects where the aggregate cost of the project equals or exceeds \$150,000 (down from \$250,000) and to private residential projects where the aggregate size of the project is more than 4500 square feet.

Perhaps the most important and potentially controversial change to the Act is the requirement that the parties engage in expedited arbitration to resolve disputes that arise pursuant to the Act regardless of the requirements of the underlying contract. If one party feels that another has failed to comply with the provisions of the Act, it may send written notice of such complaint to the other party. If the parties are unable to resolve their dispute, the “aggrieved party,” after 15 days of making the other party aware of its complaint, may compel the other party to participate in an expedited arbitration administered under the Rules of the American Arbitration Association. Normally, arbitration of disputes can only be compelled if the parties agree by contract. The legality of the statutory deprivation of the parties’ rights to their day in court by the Act’s compulsory arbitration provision raises a serious legal question that will doubtless be raised for court determination in the future.

For now, Owners, Contractors, and Subcontractors of every tier must be aware that while they may think their contracts control these issues, the Act’s trump cards may truly control. We strongly urge that Contractors take a fresh look at their subcontracting practices, including their subcontract forms, since adaptations in light of this new law are likely required.

For more information about the Act or our firm, contact Richard Volack or any of our Partners in the New York Office of Peckar & Abramson, P.C.