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## DUELING APPELLATE DEPARTMENTS: DIFFERING INTERPRETATIONS OF NEW YORK'S PROMPT PAYMENT ACT

New York's Prompt Payment Act (PPA) (General Business Law Section 756, et. Seq.) was enacted in 2003, and has remained in its current, amended version since 2009. Yet there have been surprisingly few cases addressing its application and enforcement. It was not until 2014 that the courts issued decisions interpreting the PPA's procedure for the review and disapproval of invoices delivered for payment on private construction projects – despite the fact that this language has been in the PPA since its inception. Unfortunately for those looking for practical advice, two of New York's appellate courts, the First Dept. and Second Dept., have arrived at differing interpretations.

General Business Law Section 756-a(2)(a)(i) governs the procedures for a private owner's approval or disapproval of an invoice. It states that if an owner wishes to disapprove all or a portion of an invoice, the owner must do so within 12 business days from the date the invoice is delivered by preparing and issuing a written statement describing those items disapproved.

Subparagraph (ii) of Section 756-a (2)(a) governs a contractor's or subcontractor's review of an invoice on a private project. A "contractor" includes a construction manager, general contractor, or others who enter into a construction contract with a private owner. Subparagraphs (i) and (ii) both require review and approval or disapproval, within 12 days of the invoice's delivery, but subparagraph (ii) does not contain language requiring a contractor to issue a written statement in order to effectuate its disapproval.

Several recent cases addressed the question of whether the failure to timely object to an invoice in accordance with this section of the PPA constitutes a waiver of the right to contest or renders the invoice an account stated.

### First Department:

In *W & W Glass, LLC v. 1113 York Ave Realty Co, LLC*, the First Dept. decided that because the contractor sent monthly requisitions for payment, and the owner failed to timely object, the contractor had established an account stated and was entitled to interest at the rate of 1% per month on all overdue invoices pursuant to the PPA. In *Precast Restoration Servs., LLC v Global Precast, Inc.*, a lower court case following *W & W Glass, LLC*, a subcontractor was hired to perform work for a contractor on two separate projects.

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Citing the decision in *W & W Glass, LLC*, the *Precast* court held that “[w]here there is no record of any objection to a contractor’s demand for payment and invoices, and payment was not timely made, summary judgment is appropriate and the contractor is entitled to interest under the PPA.” The court further explained that “[t]he PPA requires that any objections to the invoices be made within twelve business days of their receipt. See GBL §756-a. However, it is undisputed that Global failed to make any objections to the invoices and thus, it has now waived those objections pursuant to the PPA.” Key to these decisions was the failure of the recipient to indicate any objection, written or otherwise, within the 12 days following invoice delivery.

### Second Department:

In *Donninger Constr. Inc. v C.W. Brown, Inc.*, a subcontractor argued that a general contractor was barred from asserting any defense to its non-payment claims because the contractor failed to issue written disapproval on invoices delivered by the subcontractor. Referencing the PPA’s review requirements, the Second Department held that the contractor’s failure to timely disapprove an invoice did not bar it from asserting any defenses to the subcontractor’s claims. In setting forth its rationale, the Court stated that the PPA “provides for the imposition of interest on the unpaid balance of a submitted invoice, for the suspension of performance, and for arbitration. However, nothing in General Business Law §756-b provides that a contractor’s failure to timely disapprove or make payment on an invoice prevents the contractor from contesting, acts as a waiver of a contractor’s ability to contest, or constitutes an admission that the contractor owes the invoiced sum.”

Courts sitting in the First Dept., which includes New York and Bronx counties, may take a strict literal approach and deem an invoice admitted if not promptly rejected. Courts in the Second Dept., which includes Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Orange, Dutchess, Rockland, and Putnam counties, may interpret and apply the PPA differently and allow a contractor or owner to contest the underlying debt. The implication of a contractor’s or owner’s failure to timely review and reject invoices may remain in a state of limbo until the Court of Appeals issues a definitive decision.

The PPA allows contracting parties to create contractual language detailing their own procedure for the review, approval, and disapproval of invoices. Care must be taken to avoid running afoul of PPA requirements such as the time for payment of approved invoices, or the right to suspend for non-payment. Internal procedures for prompt review of and objection to invoices will help you establish a course of dealing and prevent misunderstandings.

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