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# New Law Helps Contractors Get Paid

**By Eric C. Rubenstein and Patricia M. Schaubeck**

Recently enacted state legislation imposes strict requirements for payments to contractors, which directly affects owners, lenders, contractors and subcontractors. The Construction Contracts Act also prescribes various default provisions governing the relationship among owners, contractors and subcontractors.

**Scope of Act**
Governor Pataki signed the Act into law on July 18, 2002 adding new Article 35-E to the General Business Law, which takes effect on January 14, 2003. The Act applies to construction contracts unless the contract is part of a construction project for which permits have been issued and work begun on the project prior to January 14, 2003. Construction contracts subject to the Act can be written or oral, and include contracts:

- for the construction, alteration, maintenance or demolition of buildings, improvements or structures; and
- where the aggregate cost of all construction contracts for the project (including the costs of labor, services, materials and equipment) equals or exceeds $250,000.00.

The Act does not apply to:

- contracts with the state, any public department or municipal corporation for the construction, alteration, maintenance or demolition of a public works project;
- any contract for the purpose of construction, alteration, maintenance or demolition of individual one, two or three family residential dwellings;
- projects involving certain size residential developments; or
- any construction contract relating to the reconstruction or excavation of any building or land in and around the World Trade Center necessitated by the September 11th terrorist attacks.

**Payment Procedures**

Absent agreement to the contrary, the Act sets forth default provisions establishing the length of the billing cycle, the time within which invoices must be approved or disapproved and the time within which invoices must be paid.

A billing cycle is the calendar month within which the work is performed. An owner is required to reasonably approve, in good faith, all or a portion of an invoice accompanied by all contractually required documentation within twelve (12) business days of receipt. An owner may decline to approve an invoice for, among other things, unsatisfactory progress, defective construction work or material, failure of contractor to make timely payments for labor or failure to comply with material provisions of the construction contract.

Payment of an invoice is due from the owner not later than 30 days after approval of the invoice. If, however, the owner received a construction loan for the project and the owner timely requests a loan disbursement from the lender and the lender is legally obligated to disburse proceeds to the owner, but has failed to do so, payment of the invoice is due from the owner 7 days after receipt by the owner of the loan proceeds necessary to make the payment.

By mutual agreement of the parties, an owner may withhold a reasonable retainage. Retainage is required to be released to the contractor no later than 30 days after final approval of the work. In addition, an owner may withhold a sum sufficient to pay costs and expenses. Generally, payments by contractors to subcontractors mirror the payment provisions for owners to contractors.

**Remedies**

If any payment or a release of retainage to the contractor is delayed beyond the time frames established under the Act, the owner must pay the contractor interest of 1% percent per month on the unpaid balance or unreleased retainage. If an owner fails to approve or disapprove an invoice within the time frames provided for in the Act, or pay a contractor the undisputed invoice amount within the prescribed time frames, the contractor may suspend contractually required performance. Generally, subcontractors have the same remedies as contractors.

**Modification by Agreement**
The Act prohibits parties to modify the minimum rates of interest on amounts due a contractor or subcontractor and provisions allowing for the suspension of performance due to failure to timely approve or disapprove an invoice or to pay undisputed invoices when due. Otherwise, the parties to a construction contract are free to negotiate the terms of their agreement. If the parties have an agreement that does not address the provisions covered by the Act, the legislation will control. Accordingly, the parties should consider the following:

- Billing cycle. Whether a calendar month is an appropriate billing cycle for the project.
- Approval/payment of invoices. The time frames for approval (12 business days) and payment (30 days after approval) of invoices under the Act may not be sufficient, especially if lender approval is also required.
- Disapproval of invoices. It may be prudent to define the circumstances set forth in the Act that allow an owner to disapprove an invoice. For example, unsatisfactory job progress might be defined to mean failure to meet target percentage completion goals by certain dates. Further, the parties should consider additional factors that might allow for disapproval of invoices (e.g., failure of the contractor to comply with its subcontractor agreements).
- Retainage. In addition to final approval of the work, it may be appropriate to set forth additional conditions under which retainage will be released by the owner (e.g., sworn statements from subcontractors that they have been paid in full and receipt of all necessary permits and authorizations for the operation of the project).

These suggestions are not exhaustive. A careful review of any construction contract should be undertaken to make sure that the owner and lender are not bound by the Act, which may not be appropriate for the particular project and may not reflect the agreement of the parties.

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