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| TO: | Russell E. Gaenzle |
| FROM: | Meghan A. McGovern |
| RE: | New York Prompt Payment Act |

Payment provisions in a construction contract between an owner and a prime or general contractor or a contractor and subcontractors focus on when and even whether the owner and contractor are obligated to pay the contractor and subcontractors for work performed.

To enforce these contracts and protect the contractor, subcontractors and suppliers, and lower-tier subcontractors and suppliers, most states, including New York, have passed prompt pay acts[[1]](#footnote-1) requiring that payment be made within a specific time period (often a certain number of days after submission of a complete payment requisition).

The New York Prompt Payment Act covers construction contracts in *private* projects (privately owned or privately financed projects). However, New York also has prompt payment legislation in place for *public* projects, including rules for state and municipal contracts. This memorandum outlines the obligations under both the New York Prompt Payment Act relating to private projects and the state legislation pertaining to public projects.

1. ***The New York Prompt Payment Act (Private Projects)***

The New York Prompt Payment Act (General Business Law Art. 35E) governs payment procedures and remedies for most private non-residential construction contracts in excess of $150,000. In addition to timing of payments, New York’s Prompt Payment Act (“PPA”) also addresses interests and penalties for failure to comply with deadlines, payment application requirements, exceptions, and retainage requirements and limitations. The PPA does not apply to public construction projects.

* 1. **General Applicability and Payment Deadlines:**

The PPA applies to lessees and owners and only to construction contracts where the aggregate cost of the project equals or exceeds $150,000 and excludes most small, residential projects. (N.Y. Gen. Bus. Law § 756).

Owners must approve or disapprove of payment invoices within 12 business days after delivery, unless otherwise agreed by contract. The billing cycle is the calendar month. (N.Y. Gen. Bus. Law § 756-a). The required payment date must be made in accordance with the terms of the contract, but not later than 30 calendar days, excluding legal holidays, after approval of the invoice. (N.Y. Gen. Bus. Law § 756-a(3)(a)). When a subcontractor has performed in accordance with the provisions of its construction contract, the contractor must pay to the subcontractor, the full or proportionate amount of funds received from the owner for each subcontractor’s work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment. (N.Y. Gen. Bus. Law § 756-a(3)(b)(ii)).

Additionally, for all contracts entered on or after November 17, 2023, the contractor may submit an invoice for payment in full at *substantial completion* as defined in or as contemplated by the contract. (N.Y. Gen. Bus. Law § 756-a(2)(a)).

Interest on late payments accrues at a rate of 1% per month or fraction of a month on the unpaid balance, or at a higher rate if agreed to by contract. (N.Y. Gen. Bus. Law § 756-b).

* 1. **Retainage Permitted and Release of Retained Amounts; Statutory Grounds for Refusing (Withholding) Payment:**

By mutual agreement of the parties, an owner may retain no more than 5% of the contract sum as retainage. A contractor or subcontractor may also retain a reasonable amount no more than 5% for retainage, so long as the amount does not exceed the actual percentage retained by the owner. Retainage must be released and paid within 30 days after final approval of the work. (N.Y. Gen. Bus. Law § 756-c). If an owner fails to release retainage as required by law, or the contractor or subcontractor fails to release a proportionate amount of retainage to the relevant parties after receipt of retainage from the owner, the owner, contractor, or subcontractor, will be required to pay interest at the rate of 1% percent per month on the date retention was due. (*Id.*).

Owners may decline to approve an invoice and make payment for any of the following: unsatisfactory job progress; defective work or materials that is not remedied; disputed work; failure to comply with material provisions of the contract; contractor's failure to make timely payments for labor, including payroll taxes; reasonable evidence that the contract cannot be completed for the unpaid balance; or failure of the owner's architect to certify payment. Invoices cannot be unreasonably declined or declined in bad faith. (N.Y. Gen. Bus. Law § 756-a).

* 1. **Prohibited Clauses:**

The following provisions of construction contracts shall be void and unenforceable:

* + 1. Choice of law and venue provisions choosing a state other than New York. (N.Y. Gen. Bus. Law § 757(1)).
		2. A provision stating that a party to the contract cannot suspend performance under the contract if another party to the contract fails to make prompt payments under the contract. (N.Y. Gen. Bus. Law § 757(2)).
		3. A provision expressly providing for expedited arbitration. (N.Y. Gen. Bus. Law § 757(3)).
		4. A provision that strays from the obligations outlined in N.Y. Gen. Bus. Law §§ 756-a(3) or 756-b (the provisions outlining payment obligations and remedies). (N.Y. Gen. Bus. Law § 757(4)).

*See* N.Y. Gen. Bus. Law § 757.

1. ***New York Legislation Surrounding Prompt Payment in Public Projects***

The New York legislation governing the timing of payments to contractors or subcontractors on publicly owned or financed construction projects is housed in different statutes corresponding to the project’s public nexus. Rules regarding public projects with state agencies are found in the New York State Finance Law § 139-f. The law concerning public projects with municipal agencies (excluding the City of New York[[2]](#footnote-2)), is contained in New York General Municipal Law § 106-b(2). And the laws applying to public authorities and public construction projects are housed in the New York Public Authority Law § 2880.

* 1. **General Applicability and Payment Deadlines:**
		1. *State Contracts[[3]](#footnote-3):*

State agencies must promptly approve and pay requisitions for progress payments submitted by contractors according to the terms of their contracts, less an amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor and/or any amount of retainage allowed by statute (retainage discussed below). (N.Y. State Fin. Law § 139-f).

Unless a statutory exception applies, the required payment is due 30 calendar days (excluding legal holidays) after receipt of a requisition. However, for a small business the required payment date is 15 calendar days, excluding legal holidays, absent a showing by the contracting agency of circumstances beyond its control, provided that the small business submits its invoice electronically and identifies that it is seeking expedited payment as a small business. (N.Y. State Fin. Law § 179-f(6)).

The owner has 15 calendar days (or seven days for invoices received from small businesses) to advise the contractor of any defects or deficiencies in the requisition, which tolls the commencement of the 30-day period (N.Y. State Fin. Law § 179-f(3)).

Additionally, the contractor must pay any subcontractor within seven calendar days of when the contractor or higher-tiered subcontractor receives payment. (N.Y. State Fin. Law § 139-f(2)).

When all or major portions of the work are *substantially completed* under the contract terms, the contractor must submit a requisition for the contract balance. The owner must promptly approve and pay the remaining contract balance, less two times the value of any remaining items to be completed and/or an amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor. (N.Y. State Fin. Law § 139-f(1)).

If a state agency does not make a contract payment by the required payment date, it owes interest on the unpaid amount at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e). (N.Y. State Fin. Law §§ 179-f(1) and 179-g). However, interest is not applied if the payment is withheld as the result of a lien, attachment, or other legal process against the money due a contractor or the amount of interest is less than $10. (N.Y. State Fin. Law § 179-f(1)). Any interest paid must be distributed on a pro rata basis to each subcontractor in proportion to their share of the contract payment. (N.Y. State Fin. Law § 179-f(1)).

* + 1. *Municipal Contracts*

For contracts with municipal agencies (other than the City of New York), public owners must make payment within 30 days (excluding legal holidays) of receipt of a contractor's requisition, less an amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor and/or any amount of retainage allowed by statute. Where the owner is a municipal corporation that requires an elected official to approve progress payments, the payment period is increased to 45 days. (N.Y. Gen. Mun. Law § 106-b(1)(a)).

Additionally, the contractor must pay its subcontractors their proportionate share of the proceeds within seven calendar days of the receipt of any payment from the municipal agency. (N.Y. Gen. Mun. Law § 106-b(2)).

When all or major portions of the work are *substantially completed* under the terms of the contract, the contractor must submit a requisition for the contract balance. The owner must promptly approve and pay the remaining contract balance, less two times the value of any remaining items to be completed and/or an amount necessary to satisfy any claims, liens, or judgments not discharged by the contractor. (N.Y. Gen. Mun. Law § 106-b(1)(a)).

For municipal agencies, interest is paid at the rate in effect on the date the interest payment is made, computed at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e). (N.Y. Gen. Mun. Law § 106-b(1)(c)).

* + 1. *Public Authorities*

A proper invoice submitted by the contractor is required to initiate any payment, except where the contract provides that the contractor will be paid at predetermined intervals without having to submit an invoice for each such scheduled payment. N.Y. Pub. Auth. Law § 2880(10).

Each corporation (defined as “every public authority and public benefit corporation a majority of the governing board members of which are either appointed by the governor or serve as members by virtue of their service as an officer of a state department, division, agency, board or bureau, or combination thereof”) must promulgate rules and regulations detailing its prompt payment policy, which must include, but not be limited to:

* A description of the procedure to be followed by a contractor in requesting payment under a contract
* A schedule setting forth the time in which the corporation will make prompt payment under a contract
* A declaration that interest will be paid when prompt payment is not made and a statement of the rate at which such interest will accrue
* A list of the sources of funds available to the corporation to pay an interest penalty on each type or category of contract
* A list of facts and conditions which in the opinion of the corporation's governing body reasonably justify extension of the date by which contract payment must be made in order for the corporation not to become liable for interest payments in accordance with N.Y. Pub. Auth. Law § 2880(7).

N.Y. Pub. Auth. Law § 2880(2)-(3).

For contracts with public authorities, the corporation must make the payment within 30 calendar days (excluding legal holidays) of receipt of a proper invoice for the amount of the contract payment due (N.Y. Pub. Auth. Law § 2880(7)). The authority has 15 calendar days after receipt of an invoice to notify the contractor in writing of any objection to the invoice, which tolls the 30-day period (N.Y. Pub. Auth. Law § 2880(8)).

For public authorities, if the corporation fails to make a payment within the allotted period, interest is computed at the overpayment rate set by the commissioner of taxation and finance under N.Y. Tax Law § 1096(e). The corporation does not have to pay interest if the amount is less than $10. (N.Y. Pub. Auth. Law § 2880(7)(c), (d).)

* 1. **Retainage Permitted and Release of Retained Amounts**
		1. *State Agencies and Municipalities*

Under both the NY State Finance Law and the NY General Municipal Law, a public owner can retain up to 5% of each progress payment due to a contractor generally or up to 10% of each progress payment where the contractor is not required to provide a performance bond and a labor and material bond in the full amount of the contract. (N.Y. State Fin. Law § 139-f(1); N.Y. Gen. Mun. Law § 106-b(1)(a)).

Additionally, a contractor can retain up to 5% of each progress payment due to a subcontractor generally or up to 10% of each progress payment where, if requested by the contractor before entering into its subcontract, the subcontractor is unable or unwilling to provide a performance bond and a labor and material payment bond in the full amount of the subcontract. (N.Y. State Fin. Law § 139-f(2); N.Y. Gen. Mun. Law § 106-b(2)).

For contractors, upon *substantial completion*, the remaining contract balance must be promptly released, less two times the amount for remaining items and an amount to satisfy claims, liens, or judgements against the contractor, which must then be paid as resolved (N.Y. State Fin. Law § 139-f(1); N.Y. Gen. Mun. Law § 106-b(1)). For subcontractors, any remaining amounts due to the subcontractors from the remaining contract balance paid to the contractor will be paid, without retainage, within seven days after contractor receives payment (N.Y. State Fin. Law § 139-f(2); N.Y. Gen. Mun. Law § 106-b(2)). If the contractor has not requested payment of the remaining contract balance within 90 days of substantial completion, any contingent payment obligation in subcontracts are deemed invalid (N.Y. State Fin. Law § 139-f(2); N.Y. Gen. Mun. Law § 106-b(2)).

* + 1. *State Agencies*

Each state agency will have 15 calendar days after receipt of an invoice by the state agency at its designated payment office to notify the contractor of (a) defects in the delivered goods, property, or services, (b) defects in the invoice, or (c) suspected improprieties of any kind; and the existence of such defects or improprieties will prevent the commencement of the specified payment time period. Failure to timely notify the contractor results in obligation to make payment of the corrected invoice reduced by the number of days between the 15th day and the notification transmission day. Upon failure to provide reasonable grounds of a defect or impropriety, the required payment date is calculated from the date of receipt of an invoice. (N.Y. State Fin. Law §§ 179-f (3)).

Not later than forty-five business days after the date when the project has reached *substantial completion*, as such term is defined in the contract or as it is contemplated by the terms of the contract, the public owner shall submit to the contractor a written list describing all remaining items to be completed by the contractor. Not later than five business days after receiving a written list describing all remaining items to be completed by the contractor, the contractor shall submit to each subcontractor from whom the contractor is withholding retainage a written list of all remaining items required to be completed by the subcontractor. Such list may include items in addition to those items on the public owner’s list. (N.Y. State Fin. Law § 139-f (1) (1-a)).

* 1. ***Statutory Grounds for Refusing (Withholding) Payment and Prohibited and Required Clauses***
		1. *State Agency:*

As noted above, upon receipt of requisition, the public owner shall approve and promptly pay the remaining amount of the contract balance less two times the value of any remaining items to be completed and an amount necessary to satisfy any claims, liens or judgments against the contractor which have not been suitably discharged. (N.Y. State Fin. Law § 139-f (1)).

Prompt payment excused when:

* The state comptroller's audit determines reasonable cause to believe that payment may not properly be due, in whole or in part
* In accordance with specific statutory or contractual provisions, payment must be preceded by an inspection period audit
* Authorizing appropriation has not yet been enacted
* Federal government must examine invoice
* Compliant goods or property have not been delivered or services rendered
* The required payment date is modified

Any time taken to satisfy or rectify any of these conditions will extend the required payment date by an equal period of time, provided, however, that for small businesses, the required payment date is 15 calendar days, excluding legal holidays, after such conditions have been satisfied or rectified, and provided further that all reasonable and practicable efforts shall be taken to satisfy or rectify such conditions as soon as possible. (N.Y. State Fin. Law § 179-f (2)).

1. Although not applicable to state contracts or private construction contracts, the Federal Prompt Payment Act serves as a model for many state PPAs. See 31 U.S.C.S §§ 3901 through 3907; 5 C.F.R. §§ 1315.1 through 1315.20. [↑](#footnote-ref-1)
2. See Rules of New York City (RCNY), tit. 9, § 4-06(b) for the law pertaining to public contracts within NYC. [↑](#footnote-ref-2)
3. Note that there may be specific requirements for state highway projects. Additional information regarding state highway projects can be provided upon request. [↑](#footnote-ref-3)