



January 2024

Changes to New York’s Prompt Payment Act: Construction Contract Considerations for Developers and Owners

Go-To Guide:

- New York’s amended Prompt Payment Act applies to all construction contracts exceeding \$150,000 and renders void and unenforceable any contract provisions inconsistent with the Act.
- Under the amended Act, owners may not withhold retainage of more than 5% of the contract sum.
- Under the amended Act, contractors can submit to the owner their final invoice for payment of retainage upon substantial completion of the project.

New York’s Prompt Payment Act (“Act”) gives important rights to contractors and other parties who provide services or materials to private construction projects in their quest for prompt payment. The Act also places heavy burdens on project developers and owners, requiring them to take certain actions by strict deadlines at the risk of waiving their right to dispute amounts owed for construction work.

Amendments to the Act adopted Nov. 17, 2023, give contractors new rights and impose new burdens on project developers and owners. This GT Advisory explains the amendments and identifies actions New York developers and owners should consider to protect their interests.

The Prompt Payment Act Before the Amendments

The Act applies to all construction contracts exceeding \$150,000 and renders void and unenforceable any contract provisions inconsistent with the Act. N.Y. Gen. Bus. Law §§756, 757 (McKinney 2009).

The Act requires construction project owners to approve or disapprove all or a portion of a contractor's invoice within 12 business days of receipt of the invoice and all contractually required documentation. N.Y. Gen Bus. Law §756-a(2)(a)(i) (McKinney 2009).

Where an owner fails to disapprove the contractor's invoice by this strict deadline, the invoice is deemed approved and the owner must tender payment to the contractor "not later than thirty days after approval of the invoice." N.Y. Gen. Bus. Law §756-a(3)(a)(ii) (McKinney 2009).

Where the owner disapproves all or a portion of an invoice, it must at the same time issue a written statement "describing those items in the invoice that are not approved." N.Y. Gen. Bus. Law §756-a(2)(a)(i) (McKinney 2009).

The grounds for disapproving a contractor's invoice are limited. An owner may disapprove all or part of a contractor's invoice only for the following reasons: (1) unsatisfactory or disputed job progress, (2) defective construction work or material not remedied, (3) disputed work materials, (4) failure to comply with other material provisions of the construction contract, (5) failure of the contractor to make timely payments for labor, and (6) failure of the owner's architect to certify payment for any or all of the reasons set forth in this section so long as the reasons are included in the owner's written statement of disapproval. N.Y. Gen. Bus. Law §756-a(2)(a)(i).

An owner that fails to remit timely payments is required to pay the contractor interest beginning the next day at the rate of 1% per month, or 12% per year. N.Y. Gen. Bus. Law §756-b(1)(a) (McKinney 2009).

Where the owner fails to pay an approved invoice by the statutory deadline, the contractor may suspend contractually required performance so long as it provides the owner with 10 days' notice and an opportunity to cure. N.Y. Gen. Bus. Law §756-b(2)(a)(ii) (McKinney 2009).

The Act allows the owner to withhold a "reasonable amount" of the contract sum as retainage and requires release of the retainage to the contractor no later than 30 days after "the final approval of the work under a construction contract." N.Y. Gen. Bus. Law §756-c (McKinney 2009).

The Amendments

Amendments adopted Nov. 17, 2023, changed the Act in two important ways. First, owners may not withhold retainage of more than 5% of the contract sum, in contrast to the prior law which permitted the owner to retain a "reasonable amount" of the contract sum as retainage. N.Y. Gen. Bus. Law §756-c (McKinney 2009).

Second, contractors now may submit "a final invoice for payment in full upon reaching substantial completion, as such term is defined in the contract or as it is contemplated by the terms of the contract." N.Y. Gen. Bus. Law §756-a (McKinney 2009). The contractor's final invoice is where the contractor seeks full payment of all contract balances, including the release of retainage. Under the prior law, the contractor was entitled to submit a final bill and seek release of retainage only "upon the final approval of the work under a construction contract," N.Y. Gen Bus. Law §756-a(2)(a)(i) (McKinney 2009), which effectively means final completion of the construction contract.

Differences Between Substantial and Final Completion

The differences between substantial and final completion of a construction project are enormous.

Substantial completion is a critical milestone where a construction project is considered sufficiently functional so that the owner may occupy and utilize the project for its intended purpose, even though construction work remains incomplete and the contractor's contractual obligations remain unfulfilled.

Unfinished construction work at substantial completion typically includes the "punch list," which in theory is a list of minor items needing completion or correction. However, on larger projects the punch list may involve dozens, hundreds, or even thousands of incomplete or defective work items. And, frequently, items which at first seem minor in nature turn out to be only the tip of the iceberg, with a much more serious problem discovered later.

Unfulfilled contract obligations at substantial completion typically include the contractor providing a variety of "deliverables" – essential documents relating to the project which the contractor is obliged to provide to the owner, such as insurance certificates, written warranties and guarantees, final governmental approvals, as-built drawings, lien releases, affidavits, and others.

Substantial completion triggers important financial and legal obligations and events, such as:

- **Cutting Off Liquidated Damages.** Construction contracts frequently impose liquidated damages upon the contractor for late delivery of a project. Liquidated damages cease upon the contractor achieving substantial completion.
- **Owner Responsibility for the Site.** Upon substantial completion, responsibility for the property (e.g., utilities, security, site safety) shifts from the contractor to the owner.
- **Commencement of Limitations Periods.** Typically, the statute of limitations for claims arising from the construction project begins to run upon substantial completion.
- **Commencement of Warranty Periods.** Construction and equipment warranties typically begin to run upon substantial completion.
- **Insurance Coverage.** Builder's risk insurance, which covers accidents taking place during construction, typically ends upon substantial completion, with coverage of project risks shifting to the owner's property insurance policy.

Final completion marks the ultimate conclusion of a construction project. It signifies that all work, including both major and minor tasks, has been completed in accordance with the contract requirements and all contractual obligations have been fulfilled. At this stage, all punch list items, deficiencies, and outstanding obligations are deemed completed and corrected. The project is considered complete and the contractor's scope of work fulfilled.

Final completion typically triggers the owner's obligation to pay the contractor the entire contract balance, including all retainage.

Ambiguity in the Statute – When Must the Owner Release Retainage?

Although the Act's amendments allow a contractor to **submit** its final invoice seeking retainage upon achieving substantial completion, it is unclear whether the Act now requires **release** of retainage to the contractor upon substantial or final completion of the work. This is because the amendments did not

change the Act's provision stating that retainage must be released "no later than 30 days after the final approval of the work under a construction contract." N.Y. Gen. Bus. Law §756-c (McKinney 2009).

The Act thus contains contradictory language as to whether retainage must be released upon substantial or final completion of the work and the courts will need to clarify this ambiguity.

What Should Developers and Owners Do?

Require Extensive Backup for Contractor Invoices

The Act requires construction project owners to approve or disapprove all or a portion of a contractor's invoice within 12 business days of receipt of the invoice and all contractually required documentation. N.Y. Gen Bus. Law §756-a(2)(a)(i) (McKinney 2009).

The 12-day period to disapprove an invoice is woefully inadequate for the owner to identify and detail job site issues which might justify disapproving an invoice and withholding payment. The owner typically is not in a position to detect and identify – in real time as the work is progressing – job site problems, project delays, disputes, or issues with construction quality, which could justify disapproving an invoice. Rather, the contractor is in the best position to recognize actual or potential job site problems which are or could become a basis for the owner to disapprove an invoice.

Significantly, until "all contractually-required documentation" is provided, the owner has no obligation to pay a contractor's invoice. N.Y. Gen Bus. Law §756-a(2)(a)(i) (McKinney 2009).

To protect the owner, the construction contract should require extensive backup for the contractor's invoices, including not just vendor and subcontractor invoices and payroll records, but also monthly progress reports which identify actual and potential job site and supplier issues of which the contractor is aware, job site meeting minutes and other documents which enable the owner to identify significant project issues or problems. This approach would allow the owner to defer payment until the contractor provides complete and current project information and improves the owner's chances of early detection of construction issues which could justify disapproving an invoice.

Pay Interim Invoices With a Reservation of Rights

Delayed or withheld payment to the contractor may result in construction delays, work stoppage and disputes and, therefore, even where an owner has sufficient grounds to disapprove a contractor's invoice, it may not wish to do so to avoid delaying or disrupting construction progress.

Rather, where the owner believes it may have grounds to disapprove an invoice but does not wish to jeopardize construction progress or is not sure that withholding payment is justified, the owner should consider paying the interim invoice under a reservation of rights. In paying the invoice, the owner would state in writing that a potential issue or concern has been identified and is being investigated and that payment is made under a reservation of rights, with the owner preserving the right to disapprove a subsequent invoice based upon the identified concern if justified by the facts.

Change the Definition of Substantial Completion

The Act provides that the construction contract determines when substantial completion takes place, stating that contractors may submit a final invoice "upon reaching substantial completion, as such term is

defined in the contract or as it is contemplated by the terms of the contract.” N.Y. Gen. Bus. Law §756-a (McKinney 2009).

Construction contracts typically define substantial completion as “beneficial occupancy,” meaning that the construction project is sufficiently functional so that the owner may occupy and utilize the project for its intended purpose.

This definition may be changed in the construction contract to protect the owner’s interests. By way of example, provisions could be added which (a) limit the total estimated cost to complete the punch list to a minimal sum, (b) require the contractor to provide all or most project deliverables as a condition of achieving substantial completion rather than final completion, and (c) allow the owner a period of time to audit project costs before substantial completion is achieved.

Conclusion

The recent amendments to New York’s Prompt Payment Act give construction contractors and others powerful new rights and impose new obligations on project owners. Owners should protect their interests by modifying their construction contracts to address the changed law.

Author

This GT Advisory was prepared by:

- [Robert C. Epstein](#) | +1 973.360.7945 | epsteinr@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.↖ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Kingdom of Saudi Arabia.« Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Singapore.° Tallahassee. Tampa. Tel Aviv.^ Tokyo.² United Arab Emirates.< Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Advisory is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ↖Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. «Khalid Al-Thebity Law Firm in affiliation with Greenberg Traurig, P.A. is applying to register a joint venture in Saudi Arabia. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Consultant Office. °Greenberg Traurig’s Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ²Greenberg Traurig’s Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <Greenberg Traurig’s United Arab Emirates office is operated by Greenberg Traurig Limited. ~Greenberg Traurig’s Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2024 Greenberg Traurig, LLP. All rights reserved.*