

Prompt Payment Act – Arbitration Sole Remedy for Dispute Resolution

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Contractors and subcontractors on private improvement projects that read and understand the New York State’s Prompt Payment Act can utilize the Prompt Payment Act as a sword to expedite the resolution of disputes and obtain payments quickly without expending significant resources.

The Prompt Payment Act’s stated purpose is “to expedite payment of all monies owed to those who perform contracting services pursuant to [private] construction contracts.”

The provisions of the Prompt Payment Act can be used to supplement or can act as a default for certain provisions left out of a construction contract. While certain provision of the Prompt Payment Act can be superseded by written agreement, there are certain provisions that cannot be superseded. In fact, the Prompt Payment Act makes it clear that it is void and unenforceable to attempt to supersede the Act by contract in at least four situations.

In a recent Appellate Division case, the court was required to determine whether a contract’s clause that required litigation of disputes was allowable under the Prompt Payment Act. Here, a general contractor commenced a special proceeding seeking a permanent stay of the arbitration demanded by its subcontractor after a dispute arose and the general contractor withheld certain payments. Under the parties’ subcontract, litigation was established as the sole legal option for the resolution of disputes.

Under the Prompt Payment Act, if an owner or contractor is accused of violating any of the Prompt Payment Act’s provisions, an aggrieved contractor or subcontractor, as the case may be, may refer the matter to the American Arbitration Association for an expedited arbitration. The Prompt Payment Act also directs that “[a] provision, covenant, clause or understanding in, collateral to or affecting a construction contract stating that expedited arbitration as expressly provided for and in the manner established by [the Prompt Payment Act] is unavailable to one or both parties” is “void and unenforceable.” The general contractor attempted to argue that the subcontract’s dispute resolution provision superseded the Prompt Payment Act’s expedited arbitration requirement and that it was unaffected by the “except as otherwise provided” language in the Prompt Payment Act. The general contractor argued that the only exception to the Prompt Payment Act’s general policy of giving primacy to the terms of a construction contract is the accrual of interest on overdue payments. The court found this argument unavailing. The Court held that by establishing litigation as the sole legal option for the resolution of disputes, it denied both parties the opportunity to arbitrate any claims.

Commentary

The Prompt Payment Act has four distinct provisions that cannot be altered by a construction contract: (a) all contracts must be governed by the laws of New York and the resolution of disputes must occur in New York; (2) a party must be able to suspend performance if the other party fails to make prompt payment; (3) expedited arbitration must be available; and (4) the payment provisions in a contract must be in accordance with the Prompt Payment Act.

This decision poses an interesting question whether litigation of private construction disputes will ever be sanctioned in light of the Prompt Payment Act's requirement for expedited arbitration. While the Prompt Payment Act does allow for litigation, it appears that this holding may make arbitration the sole method for the resolution of all disputes.

In the practical sense, arbitrating disputes will, in all likelihood, resolve disputes quicker and disputes early in a project can be resolved contemporaneously and will not have to wait until project completion as traditionally occurs with litigation. However, contractors and subcontractors may not want to arbitrate disputes during a project because it may make the continued performance of the work contentious and adversarial. Conversely, contractors and subcontractors that desire to afford themselves of the benefits of the expedited arbitration process must be careful to follow the notice provisions of the Prompt Payment Act.

General contractors and subcontractors should be mindful of the existence of the Prompt Payment Act when drafting contracts and performing work on the project. Having an attorney review the construction contract prior to execution is important to make sure that the contractor or subcontractor is not unknowingly entering into an agreement that supplants the terms of the Prompt Payment Act that can be altered by contract. Additionally, if a dispute arises the contractor or subcontractor should contact an attorney to ensure that the required notices are timely sent and rights are preserved to pursue expedited arbitration.

Feel free to contact me to discuss the Prompt Payment Act.