



## **Owners, GC's and subcontractors: Pending legislation affecting the construction industry**

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There are currently two pending pieces of legislation working their way through the New York State Assembly and Senate which directly impact the construction industry. One bill seeks to expand the prompt payment provisions set forth in the General Business Law concerning private improvement contracts, and the other seeks to amend the State Finance Law by clarifying the date when the statute of limitations begins to run against a payment bond in connection with public improvement projects.

Article 35-E of the General Business Law was enacted in 2002 and went into effect in January 2003 to protect contractors and subcontractors from unjust delays in payment. These "prompt payment" provisions concern only private improvement contracts, as opposed to contracts to perform construction work on public improvements. As the statute stands today, the prompt payment requirements are applicable only to commercial projects and residential projects having more than 150 units. The statute also does not pertain to one, two or three family residential dwellings. These provisions were intended to be default provisions in the event the contract between the parties did not include terms which concern the timing of approvals of invoices and payment. The contract may contain terms which vary from the statutory requirements.

The current bill would amend Article 35-E by: (1) lessening the criteria for applicability; (2) mandating that disputes be resolved through binding arbitration; and (3) prohibiting parties to construction contracts from voluntarily agreeing to contrary provisions. In addition, the bill seeks to amend the Labor Law to grant the Labor Commissioner jurisdiction over construction contracts under General Business Law Article 35-E. This bill would essentially prohibit parties to freely contract for the terms of billing and payment, and to choose the court system to resolve disputes. Moreover, under this bill, the parties would not be able to agree on different terms and any contract which contravened the statutory provisions would be void. The proposed bill would lower the criteria for the application of its provisions to residential home construction from a 150 unit project to a 100 unit project, and mandates that any disputes between the parties if unresolved after 30 days would be referred to the American Arbitration Association for an expedited arbitration. Any contractual provision denying arbitration would be void.

This bill would benefit contractors and subcontractors, and would be detrimental to owners. For example, since owners generally generate the contract with the general contractor, they usually include terms which are conditions precedent to payment for extra work claims and delays. While courts generally uphold these contractual provisions barring claims where the general contractor or subcontractor failed to give the prerequisite notice, arbitrators tend to look at claims in a more equitable fashion.

A second bill working its way through the legislature affects section 137 of the State Finance Law.

Section 137 of the State Finance Law concerns public works projects and sets forth the requirements of a subcontractor to bring a claim against a payment bond issued by a surety company on behalf of a general (or prime) contractor. Currently, a claimant on a payment bond has one year to bring an action from the last day the claimant's final payment was due. Several court decisions have held that the one year begins to run when the claimant submitted its invoice for final payment. However, there are also other court decisions which hold that the one year limitations period begins to run when final payment became due pursuant to the terms of the contract. Due to the conflicting authority concerning the commencement of the limitations period to bring an action against a payment bond, lawmakers have proposed a bill which provides that that the one year limitations period would begin to run when the project is completed and accepted by the owner.

Such a change in the statute would greatly expand the time to bring an action against the payment bond because each subcontractor's right to bring an action would not be based on its own completion date with respect to its work, but rather the completion date for the entire project. I would expect vociferous opposition from general contractor and surety company associations since they would be negatively affected by the amendment.

The foregoing bills, if passed, will greatly affect the construction industry with respect to private and public improvements. All owners, general contractors and subcontractors should follow these bills to see if they are passed and if so, which provisions are put into law. If the bills are passed, they will affect construction contracts and claims concerning work performed and monies due.

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