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New Private Construction Reform Requires Prompt Payment in Massachusetts

[By Alexandria E. Baez](#)

Earlier this month, Massachusetts lawmakers approved the most significant legislation to the private construction industry in many years. The new law imposes prompt payment requirements on private construction projects, which, until now, were restricted to public works. The Prompt Pay Act, as it is known, will apply only to private construction contracts within the scope of a prime contract signed on or after November 8, 2010 which exceeds 3 million dollars. Regardless of the contract amount, the Prompt Pay Act will not apply to residential projects with fewer than five dwelling units.

Codified at M.G.L. c. 149, § 29E, the new law will impact the rights and duties of all parties in the construction chain by imposing strict time conditions on payment, processing requests for payment, and change order procedures. In addition, the statute, with few exceptions, invalidates "pay-when-paid" and "paid-if-paid" clauses. The law further limits contractual provisions requiring performance w payment has not been received within 30 days of becoming due, subject to disputes involving quality or quantity of work or notices of default. Clauses purporting to waive or limit any of the statute's provisions are void and unenforceable.

The Prompt Pay Act's key provisions are summarized as follows:

MANDATORY DEADLINES FOR PROGRESS PAYMENTS

Construction contracts affected by the new law are now required to include "reasonable time" provisions for payment application processing. In general, the frequency of request for payment may not exceed 30 days. A request for payment must be approved or rejected within 15 days, which approval or rejection must be passed down within an additional seven days for each tier. Issuance of payment must occur within 45 days of approval.

If a request for payment is neither approved nor denied within the specified time period, the law will treat the submission as "conditionally approved" unless subsequently rejected within the next billing interval and prior to when payment becomes due. Rejected requests for payment must also contain a written statement articulating the factual and contractual basis for the rejection.

ABBREVIATED APPROVAL PERIODS FOR CHANGE ORDER REQUESTS

Contract provisions governing requests for change orders will be subject to similar deadlines. Under the new law, change order requests must be approved or rejected within 30 days after

receipt, plus an additional 7 days for each tier below the party making the request. For example, a change order request submitted by a second-tier subcontractor will have to be approved or rejected within 37 days of receipt. Again, as with requests for payment, change order requests not rejected within the required time period will be presumed approved.

INVALIDATION OF PAY-WHEN-PAID PROVISIONS

The Prompt Pay Act virtually eliminates "pay-when-paid" and "pay-if-paid" provisions by declaring them to be void and unenforceable, with only two exceptions. The first exception exists w a contractor does not receive payment as a result of a failure or non-performance by the party seeking payment and that failure or non-performance is not corrected within a contractually-identified notice-and-cure period (14 days, if not otherwise specified in the agreement).

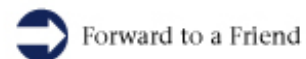
The second exception applies w the third party from whom payment is due is insolvent or becomes insolvent within 90 days following submission of the payment application. The availability of this "insolvency exception" is conditioned, however, upon a contractor filing and perfecting a notice of contract (and for lower tiers, the additional filing of a Notice of Identification) under Massachusetts' lien laws, and the pursuit of "all reasonable legal remedies" against whom payment is sought.

A party intending to take advantage of pay-when-paid or pay if paid conditions by way of either statutory exception is required to include language explicitly identifying the same within their contract documents. Such parties will also bear the burden of proof as to each element of the applicable statutory exception invoked in withholding payment.

Given the prospective application of the Prompt Pay Act, owners, developers, contractors and suppliers are well advised to review their Massachusetts construction contracts to ensure that provisions governing payment processing, change order approvals, and conditional payment restrictions comply with the new law's mandates. The construction attorneys of Robinson & Cole LLP have extensive experience advising construction industry clients on these issues.

For more information, please contact Construction Chair, [Dennis C. Cavanaugh](mailto:dcavanaugh@rc.com) at dcavanaugh@rc.com.

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