

MASSACHUSETTS PROMPT PAYMENT ACT [BY ERIC EVERETT]

GENERAL OVERVIEW

In November 2010, Massachusetts enacted the most significant legislation to the private construction industry since the 1996 revisions to the Mechanic's Lien Act.

An Act Promoting Fairness in Private Construction Contracts (the "Prompt Pay Act," codified at M.G.L. Section 29E, Chapter 149), imposes new requirements on private construction projects, and will apply to all construction projects that have an original contract price of \$3 million or more (other than projects containing between one and four dwelling units) entered into on or after November 8, 2010.

Massachusetts already requires prompt payment of contractors and subcontractors on public projects. The Act now places prompt payment requirements on private projects. It substantially shifts the risk of an owner's failure to pay from subcontractors to prime contractors. The Act will require revision of form contracts as well as modifications in standard payment practices.

Specifically, the Act imposes certain deadlines and procedures on applications for progress payments, approval/rejection of payment applications, and payment itself. It also imposes similar procedures and deadlines for change orders. Perhaps most significantly, the Act largely invalidates so called "pay-if-paid" clauses. Finally, the Act mandates that construction contracts can no longer require a contractor or subcontractor to continue performing if an approved payment has been outstanding for more than 30 days, unless there is an uncured default or a dispute over construction quality or quantity.

Progress Payments

The Act requires that payment applications be processed in a reasonable time. The following periods may not be exceeded:

1. An application for payment must be submitted on a cycle of no more than 30 days¹;
2. The application must be approved or rejected within 15 days of application, or will otherwise be deemed approved²;
3. The period for approval may be extended by up to 7 days beyond the approval deadline for a higher-tier approval; and,
4. Payment must be made within 45 days of approval.

Any rejection of a payment request must include a written statement setting forth both the contractual and factual basis for the rejection, as well as a certification that the rejection was made in "good faith".

Change Orders

Change orders are similarly regulated by the Act. Under the new law, payment or rejection of the change order request must take place within 30 days of the later of commencement of the performance of the work on which the request is based, or submission of the written request. Like approval of progress payments, the period for approval of change order requests may be extended by up to 7 days beyond the approval deadline for a higher-tier approval. A rejection of a change order request must also include an explanation describing both the contractual and factual basis for the rejection, as well as a certification that the rejection was made in "good faith".³

¹ Beginning with the end of the first calendar month occurring at least 14 days after the person seeking payment has begun performance.

² If no rejection within that time period, then the application will be deemed approved, unless rejected before the date payment is due.

³ Any rejection of a pay application shall be subject to the dispute resolution procedures as provided in the construction contract. Any contract provision that requires a party to delay the dispute resolution procedures for more than 60 days after rejection of the pay application is void.

Pay-if-Paid Clauses

Pay-if-paid clauses are void and unenforceable, unless the following exceptions apply, AND those exceptions are expressly stated in the construction contract:

- (a) payment is withheld due to the non-performance of the person seeking payment, with the condition that the person seeking payment must have received written notice of non-performance and an opportunity to cure as described in the statute; OR
- (b) the payor is insolvent or becomes insolvent within 90 days after the application for payment was made, AND the party seeking to enforce the pay-if-paid clause (i) has filed a notice of contract prior to that person's submission of its first requisition and (ii) is pursuing "all reasonable legal remedies" to recover payment.

Prohibition on Requiring Continued Performance When Payment is Past Due

Generally, the Act prohibits any provision in a construction contract which would require a person seeking payment to continue performance of construction, if an approved payment is more than 30 days past due. This prohibition does not apply if (a) there is a dispute regarding the quality or quantity of the construction so furnished, or (b) there is a default by the person under contract after approval of the payment.

Practical Considerations

- Only contracts subject to the Massachusetts Mechanics Lien Act are subject to the Prompt Pay Act; therefore, contracts for professional design services are excluded from the requirements addressed here.
- The parties may not override the provisions of the Act by contract, and any purported waiver or limitation "shall be void and unenforceable."
- Lenders are not subject to the Act, which may lead to difficulties for Owners and Contractors, if lender review of payment applications is delayed.
- Clients engaged in construction projects must be particularly careful and timely in responding to email requests as they may constitute requests for payment or change orders under the statute.
- "Pay-when-paid" provisions continue to be enforceable on private projects with an original contract price of less than \$3 million, and other projects that are not subject to the Act.

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