
THE NEW MASSACHUSETTS “PROMPT PAY” LAW

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PROJECTS AFFECTED

- Law goes into effect November 8, 2010
- Applies to private projects where prime contract signed after November 8, 2010 and has an original value of \$3 million or more
- Does not apply to residential projects of 1-4 units

CONTRACTS AFFECTED

- Applies to all contracts eligible for mechanic lien rights under G.L. c. 254
 - All prime contracts
 - All subcontracts (every tier)
 - Suppliers with contracts with prime contractor or any-tier subcontractor

PURPOSE OF THE LAW

- Empower payment mechanisms to work as designed
- Improve the flow of funds in private construction

PURPOSE OF THE LAW

- Four Components
 - Payment applications
 - Outside dates for submission, processing and payment
 - Change Orders
 - Outside dates for action on change orders
 - Pay if paid
 - Voids except in two narrow circumstances
 - Right to suspend
 - Restrictions on requirements to keep working when not paid approved amounts

PAYMENT APPLICATIONS

- Contracts and subcontracts must provide reasonable time periods within which periodic payment applications are:
 - Submitted
 - Approved/Rejected
 - Paid

PAYMENT APPLICATIONS

- Submission of periodic progress application
 - Reasonable time period cannot exceed 30 days
 - Except: first application may be delayed until the following month if at least 14 days have not elapsed since commencement
 - 30 day limit on billing intervals
 - Note: 31 day months
 - Progress payment based on actual progress
 - Milestones permitted so long as does not exceed 30 days between billings

PAYMENT APPLICATIONS

- Approval/Rejection of periodic payment applications
 - Reasonable time for owner to approve or reject prime contractor's application cannot exceed 15 days after submission
 - Deadline for each tier below owner is 7 days longer than the tier above
 - Prime contractor: 22 days
 - First tier subcontractor: 29 days

PAYMENT APPLICATIONS

- Rejection of periodic payment applications
 - Rejection may be in whole or in part
 - Any rejections, whether in whole or in part, must be:
 - in writing
 - explain factual and contractual basis for rejection
 - certified as made in good faith

PAYMENT APPLICATIONS

- Effect of neither approving or rejecting by deadline
 - Application “deemed” approved
 - “Deemed” approval may be reversed by actual rejection prior to time payment is due
 - But rejection must still meet statutory written, certification requirements
 - “Deemed” approval starts payment clock

PAYMENT APPLICATIONS

- Payment of periodic applications
 - Reasonable time period cannot exceed 45 days after approval
 - approval includes actual approval and “deemed” approval

PAYMENT APPLICATIONS

■ Dispute resolution

- ❑ Rejection of payment application subject to contractual dispute resolution procedures
- ❑ May commence dispute resolution 60 days after application is rejected
- ❑ Contracts requiring a party to delay dispute resolution until later than 60 days after rejection of a payment application is void and unenforceable

CHANGE ORDERS

- Contracts and subcontracts must provide reasonable time periods within which written change order requests are approved or rejected
 - Reasonable time period for owner to approve/reject prime contractor's change order request may not exceed 30 days after the later of commencing performance of the change order work or submitting the request
 - Deadline for each tier below owner is 7 days longer than the tier above
 - Prime contractor: 37 days
 - First tier subcontractor: 44 days

CHANGE ORDERS

- Rejection of written change order requests
 - Rejection may be in whole or in part
 - Any rejections, whether in whole or in part, must be:
 - in writing
 - explain factual and contractual basis for rejection
 - certified as made in good faith
- Procedural/notice requirements unaffected

CHANGE ORDERS

- Effect of neither approving or rejecting by deadline
 - Change order request “deemed” approved and may be included in next application for payment
 - “Deemed” approval may be reversed by actual rejection prior to time payment is due
 - But rejection must still meet statutory written, certification requirements

CHANGE ORDERS

■ Dispute resolution

- ❑ Rejection of written change order requests subject to contractual dispute resolution procedures
- ❑ May commence dispute resolution 60 days after change order request is rejected
- ❑ Contracts requiring a party to delay dispute resolution until later than 60 days after rejection of change order request is void and unenforceable

PAY-IF-PAID

- Contract provisions conditioning obligation to pay on receipt of payment from third party void and unenforceable except in two circumstances:
 - Non-performance
 - Insolvency

PAY-IF-PAID

- Non-performance Exception
 - Pay-if-paid enforceable if non-payment from third party is due to non-performance of the person seeking payment; and
 - Person seeking payment failed to cure the non-performance after receipt of written notice within the time required in contract to cure, or if contract has no cure period, within 14 days after receipt of written notice

PAY-IF-PAID

■ Insolvency Exception

- Pay-if-paid enforceable if third party is insolvent or becomes insolvent within 90 days after submission of pay application; and
- Party seeking to enforce pay-if-paid:
 - filed Notice of Contract before submission of first application for payment for on-site work
 - Notice of Identification filed by lower tier subcontractors
 - filed Statement of Account within time required by c. 254
 - filed suit to enforce lien within time required by c. 254
 - pursued all reasonable legal remedies to obtain payment from third party until there is a reasonable likelihood the action will not result in obtaining payment

PAY-IF-PAID

- May send a written request for disclosure of the legal remedies taken to pursue payment from third party
- May file a summary proceeding in court under c. 254, sec. 15A for a determination as to whether all reasonable legal remedies have been fulfilled:
 - If no response to written request within 10 days; or
 - Party seeking to enforce pay-if-paid unreasonably failed to pursue additional legal remedies after request

PAY-IF-PAID

- For non-performance and insolvency exceptions to apply they must be expressly stated in contract or subcontract
- “Insolvency” broadly defined
 - Defined under federal bankruptcy law
 - e.g., liabilities exceed assets; unable to pay debts as they become due...
 - Debtor in federal bankruptcy proceeding
 - Debtor in receivership proceeding
 - Making an assignment for benefit of creditors

RIGHT TO SUSPEND

- Contract provision requiring a person to continue working if payment of an approved amount is not received within 30 days of when it is due is void and unenforceable

- Two exceptions:
 - Non-payment due to dispute over quality or quantity of the work; or
 - Non-payment due to default after approval of the payment

- For exceptions to apply:
 - Person seeking payment must have received:
 - Prior written notice of dispute or default; and
 - Payment of all sums due less amounts attributable to dispute or default

NO WAIVER & ELECTRONIC NOTICE

- Any contract provision which purports to waive or limit the terms of the statute is void and unenforceable
- Notices required under statute may be served by electronic means

CONSIDERATIONS

- What should I look for in my general contracts or subcontracts?
- What should I change, if anything, in my general contracts, subcontracts or sub-subcontracts?
- What are valid grounds for rejection?
- How do I avoid rejection?

CONSIDERATIONS

- Should I file a lien to preserve my own pay-if-paid with my subcontractors or sub-subcontractors and suppliers?
- What if I miss a deadline and a payment application or change order request to me is “deemed” approved and should not be approved?
- What should I do to manage my obligations and risks under the new law?

SAMPLE RIDER PROVISIONS

- Review attached

CONCLUSION

- Intent of the statute is to move the process along as it was intended
- Prompt flow of funds and timely decisions benefits all
- Statute should make routine the practices of good owners, contractors and subcontractors

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- The foregoing is intended as a general guide relating to the Massachusetts Prompt Pay Law. It is not legal advice and should not be considered or relied upon as a substitution for consultation with an attorney. The legal and factual issues involved in any matter vary significantly from project to project, contract to contract, jurisdiction to jurisdiction and time to time. An attorney should be consulted with respect to the facts and law applicable to any specific construction law issue.