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The Prompt Pay Statute in a nutshell, part 1 of 2

January 20, 2011 - Construction Design & Engineering

On August 10, 2010, Governor Patrick signed into law "An Act Promoting Fairness in Private Construction Contracts" ("the Act"). See Mass. Gen. L. c. 149, § 29E. The so-called "Prompt Payment Statute" sets time limitations for acceptance, refusal, and payment of periodic progress payments and change order requests. It also restricts the use of "pay if paid" clauses in construction contracts.

Does The Act Apply

To Your Project?

The Act does not apply to every construction contract in the Commonwealth. The following discusses the breadth of the statute:

The Date Of The Construction Contract:

The Act applies only to projects where the general contract was executed on or after November 8, 2010.

Private Construction Projects Only:

Importantly, the Act does not apply to public construction projects. Rather, the Act applies only to construction contracts for which a lien can be established (e.g. private projects).

Contract Price Limitations:

The Act applies only where the general contract has an original price of \$3,000,000 or more.

Residential Project Limitations:

Finally, the Act does not apply to any project that contains, or is designed to contain, between one and four dwelling units. Accordingly, the Act only applies to private residential projects with more than four residential units.

Reasonable Time

Periods For Payment

The Act requires construction contracts to include "reasonable time periods" to submit periodic progress payment requests, to accept or reject progress payment requests, and to pay approved (or partially approved) progress payments. The Act also provides parameters defining what is "reasonable."

Time Periods For Approving/Rejecting Pay Requests:

The Act states that payment applications must be approved or rejected (or partially approved or rejected) no later than fifteen days after they are submitted in writing. If a payment application is neither approved nor rejected in 15 days, it shall be deemed approved, unless the application thereafter is rejected before the date payment is due.

The Act allows each tier below the general contractor up to seven additional days more than the tier above it had to approve or reject payment requests. For example, if general contractor XYZ Co. has fifteen days to approve/reject a payment request from its subcontractor ABC Co., then ABC Co. is

allowed up to twenty two days (15 + 7) to approve/reject the pay requests it receives from its own sub-subcontractors.

Importantly, the Act requires a party rejecting (or partially rejecting) a payment application to provide a written explanation of the factual and contractual bases for the rejection and to certify that the rejection was made in good faith.

Time Period For Paying Approved Applications:

Parties must pay approved (or partially approved) applications no later than forty five days from the date of the approval/partial approval.

Time Period For Submitting Payment Requests:

A party seeking payment must submit a written application within thirty days of the end of the first calendar month that occurs at least fourteen days after it starts work.

For example, subcontractor ABC Co. commences work on December 10, 2010. ABC Co. has up to thirty days to submit a pay request, starting from the end of the first calendar month occurring at least fourteen days after it started work. The end of the first calendar month occurring at least fourteen days after ABC Co. started work is the end of December. Therefore, ABC Co. has thirty days from the last day of December to submit a progress payment application.

Reasonable Time Periods

For Change Orders

Like payment requests, the Act requires contracts to include reasonable time periods for approving and rejecting change order requests.

The Act requires that written change order requests be approved or rejected within 30 days after they are submitted, or the date the change order work commenced (whichever is later). The Act allows each tier below the prime contractor up to seven days more than the tier above it had to approve/reject change order requests.

Change order requests that neither are rejected nor approved within the time period for approval/rejection are deemed approved. Those change orders may be submitted with the next payment application unless the request is rejected before the date payment is due.

Also like pay applications, the Act requires a party rejecting (or partially rejecting) a change order request to provide a written explanation of the factual and contractual bases for the rejection and to certify that the rejection was made in good faith.

Part 2 will appear

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