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

February 17, 2011 - Construction Design & Engineering

Restrictions On

"Pay If Paid" Clauses

Notably, the Act severely prohibits the use of "pay if paid" clauses, making them void and unenforceable with limited exceptions. Further, for the exceptions to apply, the parties must include them in the contract. A party invoking a pay if paid clause to justify non-payment has the burden of proving that one of the exceptions applies.

Exception for Failure to Perform and Cure:

Pay if paid clauses can be enforced when non-payment occurs because the party seeking payment both failed to perform under the contract and failed to timely cure the non-performance after receiving written notice. For contracts lacking specific cure and notice provisions, the pay if paid clause can be enforced if the party seeking payment fails to perform and does not cure within fourteen days of receiving written notice of the defect.

Exception for Insolvency:

There is another exception to the general rule against pay when paid clauses involving situations where the upstream payor becomes insolvent.

For the insolvency exception to apply, the party asserting the pay if paid provision must have taken the following steps to protect its payment rights against the now insolvent upstream payor: (a) timely recorded a notice of contract before the first payment requisition; (b) timely perfected the mechanic's lien; and (c) pursued all reasonable legal remedies to obtain payment from the party with whom it had a direct contract, unless and until there is a reasonable likelihood that it will not recover payment.

Requiring Work To

Continue After Non-Payment Of Approved Amount

The Act voids contract provisions requiring a party to continue working for more than thirty days after non-payment of an approved amount except for:

Mass. Gen. L. c. 149, Â§ 29E(1)(f).

Limits On Delaying Use

Of Contract Dispute

Resolution Provisions

The Act voids contract provisions requiring a party to delay the use of contract dispute resolution procedures for more than sixty days following the rejection of a pay requisition or change order request.

What To Do If The

Act Applies To Your Project

If the Act applies to your project, make sure that you are prepared to meet the deadlines for

submitting, approving, or rejecting pay applications and change order requests. If you reject any pay application or change order request, make sure you do so in a timely, certified writing that provides the factual and contractual bases for the rejection.

You also need to redouble your due diligence efforts. Is the party with whom you are contracting capable of making payments to you? Also, be aware as a general contractor that a lender's refusal to disburse funds cannot relieve the owner of its payment obligations to you. Finally, make sure to update form contracts to include the exceptions to the Act's limits on pay when paid clauses.

The text of the Act can be found at <http://www.mass.gov/legis/laws/seslaw10/sl100293.htm>.

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