



**MASSACHUSETTS
BUILDING CONGRESS**

Constructive Change? Massachusetts New Prompt Pay Law

be discussed by...

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APPLICABILITY

- Applies to all projects with an original value of \$3,000,000 or more.
- Does not apply to residential projects with fewer than 5 dwelling units.
- Applies to all projects with prime contracts signed on or after November 8, 2010.
- Requires certain new contract terms and prohibits parties from enforcing contract terms which waive or limit the new statute.



FIVE BASIC ISSUES ADDRESSED BY NEW LAW

- Timing for Periodic Payments
- Timing for Change Order Approval and Payment
- Pay-if-Paid Provisions
- Timing for Commencement of Dispute Resolution Procedures
- Suspension of Work Due to Nonpayment



HISTORY OF PROMPT PAY LEGISLATION

- In 2005, Massachusetts subcontractors, acting through the ASM, began working on a legislative initiative to address payment issues on private construction projects.
- In 2007, ASM filed legislation covering a broad range of construction payment issues, including progress payments, change orders, right to suspend and pay-if-paid.
- ASM attempted without success to negotiate an agreement with AGC on the bill. In 2010, ASM prepared and filed a revised bill.
- A version of that bill became law this past August.



PAYMENT APPLICATION REQUIREMENTS

Every contract must provide reasonable time periods within which payment applications must be:

- submitted (30 days after work is commenced);
- approved or rejected (15 days after submission, plus 7 additional days for each tier below the owner) – “deemed” approved if no action; and
- paid (45 days after approval).
- Pay applications “deemed” approved if not rejected by the date payment is due.



CHANGE ORDER PROCESSING

- Change Orders must be approved or rejected within 30 days after the later of commencement of the work on which the request is based or submission of the written request – “deemed” approved if no action;
- Time period may be extended by 7 days beyond the time period applicable to the party at the tier above the party seeking the change order.
- Change Orders are “deemed” approved if not rejected before date payment is due.



PAY-IF-PAID RESTRICTIONS

Subject to two exceptions described below, provisions which make payment to a contractor conditioned upon receipt of payment from a third-person who is not a party to the contract are void and unenforceable.

A pay-if-paid provision may still be enforced only if:

- (1) the reason for nonpayment by the third-party is due to the nonperformance, default and failure to cure of the party seeking payment; or
- (2) the third-party payor becomes insolvent within 90 days of the pay request and the party seeking to enforce the pay-if-paid has taken all steps to assert and perfect a mechanic's lien and pursues all reasonable legal remedies to obtain payment.

These pay-if-paid restrictions must be expressly set forth in the contract or they cannot be enforced.



DISPUTE RESOLUTION PROCEDURES

- Any party who disputes the denial of a payment requisition or a change order may commence dispute resolution proceedings 60 day following denial.
- Contract provisions which force a party to wait until work is complete to commence dispute procedures are void and unenforceable



RIGHT TO DISCONTINUE PERFORMANCE

A provision requiring a person to continue performance if payment is approved and due but not paid for more than 30 days shall be void except if:

- (1) dispute regarding quality or quantity of construction; and
- (2) default by an unpaid subcontractor after an earlier payment becomes due, provided that the party required to make payment provides written notice of default and pays any undisputed balance due.





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