



New Law Limits the Legality of Pay When Paid Clauses

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A new law recently passed by the Massachusetts legislature and signed by the Governor will help ensure that payment decisions relative to private construction contracts are made promptly. This type of "Prompt Payment Bill" has already been passed in a number of states, including New York and Connecticut. The new Massachusetts law, G.L. c. 149, § 29E, applies to contracts with an original contract price of \$3,000,000 or more, but does not apply to projects with fewer than five dwelling units.

The law provides for reasonable times for the approval or rejection of regular periodic payment requests. A periodic request for payment shall be made within 30 days, beginning with the end of the first calendar month occurring at least 14 days after the person seeking payment has begun performance. Thereafter, the request must be approved or rejected within 15 days. Actual payment must be made within 45 days after approval. An application for payment which is neither approved nor rejected within the time period shall be deemed approved, unless it is rejected before the date payment is due. In such a case, the rejection must be made in writing, shall include an explanation for the rejection, and shall be certified as made in good faith.

The law provides similar provisions for the approval of change orders. As a result, change orders should be moved more quickly in the normal payment cycle as described above. All requests for change order must be approved or rejected within 30 days. Any request which is neither approved nor rejected within such time shall be deemed to be approved, unless it is rejected before the date payment is due. A rejection of a change order request, whether in whole or in part, shall be made in writing, shall provide a reason for the rejection, and shall be certified as made in good faith.

Perhaps most importantly, the new law severely limits the enforceability of so-called "pay when paid" contract provisions. In the past, "pay when paid" provisions could be used by general contractors to govern their payments to subcontractors; subcontractors, though, believe these provisions can be used as an excuse for non-payment when the subcontractor has fully performed his work, and in situations where there may be other reasons why the general contractor had not been paid by the owner.

Under the new law, any provision which makes payment to a person performing construction conditioned upon receipt of payment from a third person that is not a party to the contract shall be void and unenforceable, except (a) to the extent of amounts not received because the person performing construction failed to perform and failed to cure the non-performance, or (b) to the extent that the amounts not received from the third person is because the third person is insolvent. In order for the second exception to become applicable, the party seeking to enforce the provision must have filed a mechanic's lien and complied with certain other provisions of the mechanic's lien law. Both exceptions must be expressly stated in the conditional payment provision of the contract, and the person seeking to enforce the provision shall bear the burden of proof as to each element.

Finally, the new law prohibits contract provisions which require a person to continue performance of construction if payment of an approved amount is more than 30 days past due. The exceptions to this rule is 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.

The new law should help speed the flow of payments in the construction industry, as well as severely limit the use of "pay when paid" provisions to avoid payments to subcontractors. The new law applies to contracts entered into after November 8, 2010.

It is very important that parties incorporate its provisions into their construction contracts executed after that date.

The Gould Construction Institute will be holding a seminar on the new "prompt pay law" on September 21st from 8 - 10 am at the GCI headquarters. To sign up, please call (781) 270-9990.