

Publications

Massachusetts “Prompt Pay Law” Imposes New Obligations on Project Owners and Construction Lenders

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An Act Promoting Fairness in Private Construction Contracts (the “Prompt Pay Law,” codified at M.G.L. Section 29E, Chapter 149), which imposes new requirements on private construction projects, will apply to all construction projects that have an original contract price of \$3 million or more (other than projects containing between one and four dwelling units) entered into on or after November 8, 2010.

The Prompt Pay Law has significant consequences for owners and lenders of development projects.

1. Failure to respond promptly to payment requisitions and change orders will result in those requisitions and change orders being deemed approved.

Pay Application Processing—under the new law, periodic payment requests must be submitted at least every 30 days. Approval or rejection by the owner must occur within 15 days of submission, and payment must be made within 45 days of approval.

Change-Order Processing—approval or rejection must occur within 30 days of submission of the request or commencement of work, whichever is later. If approved, the change-order amounts may be submitted for payment in the next payment application.

If an owner fails to reject a payment or change order request within the specified time limits, the request is deemed approved. The “deemed approval” for a periodic payment request (but not a change order) may be reversed if the owner rejects the application prior to the date payment is due. Any rejection of a payment application or change order must be in writing, stating the factual and contractual basis for rejection, and must be certified as made in good faith. If a payment application or change order is rejected, the contractor may invoke the dispute resolution procedure identified in the contract. Contract provisions that require a party to delay commencement of the dispute resolution procedure until a date later than 60 days after the rejection are void and unenforceable under the Prompt Pay Law.

2. New contract provisions are required; old provisions may be void.

The Prompt Pay Law requires all applicable contracts to state the time periods (not to exceed the new statutory limits) for payment, processing requests for payment, and change order procedures. Owners should be sure that the time periods in their form construction contracts are revised to capture the requirements of the new law.

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Certain common contractual provisions are now severely limited in their application. "Pay-if-paid" provisions, i.e., contract provisions that condition payment to a party performing work upon the receipt of payment from a third party (e.g., the owner), are generally unenforceable except for certain limited exceptions. The party relying on a pay-if-paid provision, typically a general contractor who has not been paid by the owner and wants to delay payment to subcontractors, will generally be out of luck.

The Prompt Pay Law also voids provisions in construction contracts that require continued performance on a project for more than 30 days when a contractor or subcontractor has not been paid, again with only limited exceptions. Contract terms purporting to waive or limit the effect of the new law will be void and unenforceable.

Owners and lenders should review not only their form construction contracts but also construction loan provisions and contractor's consents to ensure compliance with the new law and to identify procedures to protect themselves from the consequences of a failure to respond to requisitions and change order requests in a lawful and timely manner. For example, owners and lenders will want to identify with particularity the supporting documentation required for a requisition or change order submission to be considered complete. Lenders should also ensure that any requisitions or change order submissions delivered to the owner will be simultaneously provided to the lender.

For questions about the information contained in this advisory, please contact your usual Goulston & Storrs attorney, any member of the [Construction](#) group or your usual Goulston & Storrs attorney.

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