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## PAY OR EXPLAIN - UNDERSTANDING THE MASSACHUSETTS PROMPT PAYMENT ACT

On November 8, 2010, a new prompt payment law went into effect in Massachusetts. The new law will revolutionize the application and change order process on large private construction projects. There are potentially catastrophic ramifications for contractors and owners who fail to understand or comply with this relatively new law.

The law applies to most private commercial (and larger residential projects) in which the prime contract with the project owner is \$3,000,000 or more. The new law does not apply to residential projects containing one to four dwelling units. The law applies to all subcontractors and lower-tier subcontractors who have subcontracts less than \$3,000,000, as long as the prime contract was \$3,000,000 or more.

The legislature has regulated the application for payment and change order process. This contractor must submit monthly applications for payment. The owner must approve or reject applications for payment within 15 days of submission. If the owner rejects the application, the owner must do so in writing, include a factual and contractual basis for rejection, and certify that it rejected the invoice in good faith. If the owner fails to make a timely objection, the invoice will be deemed approved. Thus, in subsequent litigation, the owner would be barred from asserting back charges that it had failed to include in a timely rejection letter.

The same is true on subcontractor and lower tier subcontractor invoices. Each tier has an additional seven days to approve or reject the invoice. Thus, a general contractor has 22 days to approve an Application, subcontractors have 29 days to approve or reject invoices from sub-subcontractors and so on. Again, if the general contractor or subcontractor does not object to the invoice within the statutory deadlines, the invoice will be deemed to be automatically approved as a matter of law.

As for change order work, owners have thirty (30) days under the new law to accept or reject change orders. The change order must be rejected with specific reasons and a certification. If the owner fails to act, the change order is deemed automatically approved. Each tier has an additional seven days to act. Thus, general contractors have 37 days to approve or reject subcontractor change orders. Subcontractors have 44 days to reject change orders submitted by sub-subcontractors, and so on.

The statute also regulates the time when payment must be made among the various parties. The time for payment can be less than, but may not exceed forty-five (45) days from approval of an application for payment according to the procedure noted above.

Finally, the legislature has generally declared "paywhen-paid clauses" to be void and unenforceable on projects covered by the Prompt Pay Act. A "paywhen-paid" clause is a contract clause stating that a contractor will only pay a subcontractor when the contractor receives payment from the owner. "Paywhen-paid" clauses are now only enforceable under very limited circumstances.

This is a simple overview of the prompt pay law. There are many nuances within the statute. Contractors and subcontractor should consult with their attorneys to ensure that they are processing and receiving payments in compliance with the new law.

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