

## ALERTS AND UPDATES

### Massachusetts Prompt-Pay Act Heads to Governor's Desk

August 5, 2010

The Massachusetts legislature has just passed an act that is likely to fundamentally affect payment terms on private construction projects. If signed into law by Mass. Gov. Deval Patrick (who has until August 10, 2010, to do so), it would become effective in 90 days and apply to all projects that entered into their prime contracts after the effective date. The "prompt-pay" law would govern all construction projects greater than \$3 million (except for one- to four-unit residential projects). It would establish a new section 29E in chapter 149 of the Massachusetts General Laws.

The primary elements of the new law would include:

- Timetable for action upon pay applications (requisitions)
- Timetable for payment
- Timetable for action on proposed change orders
- Timetable for seeking payment of change-order work
- Standards for disapproving pay applications and changes
- Severe restrictions on conditional payment ("pay-if-paid") clauses
- Statutory language to be included in contracts

**Pay Application Processing.** Periodic pay requests would need to be accepted at least every 30 days. Approval or rejection would need to occur within 15 days, with an additional seven days allowed for every tier below the prime. Payment would need to be made within 45 days of approval. A failure to act on a pay request would be deemed approval, unless it is rejected prior to the date for payment. Any rejection would need to be in writing, stating the "factual and contractual basis," and would need to be "certified as made in good faith."

**Change-Order Processing.** Approval or rejection would need to occur within 30 days of submission of the request or commencement of work, whichever is later. Failure to act would be deemed approval, unless rejected prior to the date for payment. Any rejection would need to follow the same standards noted above for action on a pay request—in writing, stating the factual and contractual basis, and certified as made in good faith. If deemed approved, the change-order amounts may be submitted for payment in the next-following pay request.

**Conditional Payment Clauses.** Pay-if-paid clauses would be "void and unenforceable," unless:

- Money has not been paid due to nonperformance by the person seeking payment, who has received written notice of the default and has failed to cure; *OR*
- The payor is insolvent or becomes insolvent within 90 days after the pay request is made, *AND* the party seeking to enforce conditional payment terms has (a) filed a notice of contract, and (b) is pursuing "all reasonable legal remedies" to recover payment "unless and until there is a reasonable likelihood such action will not result in obtaining payment."

**Other Requirements.** The limitation on the conditional payment clause would need to be stated in the clause. Contract terms requiring a party to continue performance when payment is overdue by at least 30 days would be "void and unenforceable"—again subject to disputes regarding quality of work or a notice of default. Contract terms purporting to waive or limit the effect of the new statute would be "void and unenforceable." If the person seeking payment believed that an upper-tier company was not diligently pursuing legal remedies, that person could utilize the expedited procedure in the lien statute<sup>1</sup> for a determination of the same, after making a written request for delineation of the legal remedies being pursued.

### **For Further Information**

If signed by Governor Patrick, section 29E would present many nuances to be considered. Duane Morris will be monitoring the Act and the governor's possible sign-off. Stay tuned for further information.

If you have any questions regarding this *Alert* or would like more information about Massachusetts' prompt-pay act, please contact [Stanley A. Martin](#), [Michael B. Donahue](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

### **Note**

1. Mass. Gen. Laws ch. 254, § 15A (2010).