

Superior Court Strictly Interprets the Massachusetts Prompt Payment Act

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The Massachusetts Prompt Payment Act, [M.G.L. c. 149, § 29E](#) (the “PPA”), governs certain private construction projects in the Commonwealth, including periodic applications for payment. Before, there were very few cases interpreting the PPA, and therefore very “little direction available as to the practical consequences of missing a deadline or otherwise violating the Prompt Payment Act.” [See Kris Olson, Judge Strictly Construes Prompt Payment Act, Massachusetts Lawyers Weekly, December 10, 2020.](#)

On November 19, 2020, the Massachusetts Superior Court for Suffolk County (Ricciuti, J.), entered a [Memorandum of Decision and Order on Plaintiff’s Motion for Partial Summary Judgment](#), strictly interpreting the Massachusetts PPA. Specifically, Judge Ricciuti held that certain provisions of the Massachusetts PPA are “mandatory,” and that applications for payment are “deemed approved” absent strict adherence to the PPA. Although the decision is non-precedential and currently pending appeal, it provides some clarity into the potential consequences for failure to strictly comply with the terms of the statute.

I. HISTORY OF THE PPA

Historically, the Massachusetts PPA was enacted in 2010 to “standardize payment provisions and requirements on private construction projects and to establish timelines for the submission and approval of requisitions and change order requests.” Hugh J. Gorman, III, Private and Public Construction Contract Performance Issues, CLL MA-CLE 3-1 (2020).

The statute covers private construction projects for prime contractors, subcontractors, and suppliers, who are entitled to file a mechanic’s lien on projects where the prime contract has an original value of three million dollars (\$3,000,000) or more. [See G.L. C. 149, § 29E \(a\).](#) The PPA does not cover projects containing or designed to contain four or fewer dwelling units. [Id.](#)

After the PPA’s enactment, the risk of nonpayment from the owner largely shifted from subcontractors to general contractors. [See Massachusetts Prompt Payment Act Introduction](#), at n. 1. Specifically, whereas prior to the enactment of the PPA, owners, contractors, and subcontractors could more readily negotiate the terms of their agreements, including provisions regarding payment, the PPA expressly states that, “[a] provision in a contract for construction which purports to waive or limit any provisions of this section shall be void and unenforceable.” G.L. C. 149, § 29E (g).

Among other things, the PPA sets forth strict “mandatory time periods for the submission, review and payment of periodic payment requisitions, with written statements of reasons for any rejection or reduction of requisition.” [Massachusetts Prompt Payment Act- Introduction](#), 57 Mass. Prac., Mass. Construction Law, § 7:27 (2020). Specifically, the PPA includes deadlines by which: (1) a person seeking payment under the contract shall submit

written applications for periodic progress payments; (2) the person receiving the application shall approve or reject the application (in whole or in part); and (3) the person approving the application shall pay the amount approved. G.L. C. 149, § 29E (c). An application for a periodic progress payment which is neither approved nor rejected within the time period shall be deemed to be approved unless it is rejected before the date payment is due. G.L. C. 149, § 29E (d).

In addition, under the PPA, pay-if-paid contractual clauses are generally unenforceable subject to two narrow exceptions, neither of which applies unless expressly set forth in the contract or subcontract. See 57 Joel Lewin, et al., Construction Law (2020). The first paid-if-paid exception applies where non-payment from the third party is due to failure in performance by the party seeking payment. See id. The party seeking to enforce pay-if-paid must have provided written notice of the failure, and the party seeking payment must have failed to cure within the contractual cure period, or if there is none, within 14 days after receipt of written notice. See id. The second paid-if-paid exception applies where the third party fails to pay because it is insolvent or becomes insolvent within 90 days after submission of the application for payment. See Id. However, even in the case of an owner's or contractor's insolvency, the right to withhold payment is not absolute, and the person seeking to enforce the pay-if-paid clause can only do so if it: (a) files preliminary mechanic's lien documents before submitting its first payment requisition; and (b) pursues the lien claim and all other reasonable legal remedies against the insolvent upstream party. See G.L. C. 149, §§29E (e)(1), 29E (e)(2). The party seeking payment may question the legal remedies taken, and if not satisfied, may file a proceeding in court for a quick judicial determination.

The PPA also includes provisions for the submission, review, approval, and payment of change orders, governs forced continuation of work, and dispute resolution. See M.G.L. c. 149, § 29(a)-(f).

II. STRICT INTERPRETATION OF THE PPA

Very few judicial decisions have interpreted the PPA since its enactment more than a decade ago. Recently, however, the Massachusetts Superior Court for Suffolk County (Ricciuti, J.), entered a [Memorandum of Decision and Order on Plaintiff's Motion for Partial Summary Judgment](#) ("Ricciuti's Order") in the case of [Tocci Building Corp. v. IRIV Partners, LLC](#), strictly interpreting the Massachusetts PPA. Of significance, Judge Ricciuti held that the provisions of the Massachusetts PPA are "mandatory," and that applications for payment are "deemed approved" absent strict adherence to the PPA. Ricciuti's Order, at 2, 3. The decision is non-precedential and currently pending appeal.

The decision followed Tocci's motion for Partial Summary Judgment, arguing IRIV Partners, LLC did not pay and/or properly reject seven applications for payment in violation of the PPA. See id. at 5. IRIV alleged that it did, in fact, respond to the applications for payment and any deviations from the language of the statute were merely technical and harmless errors. See id. at 12.

Ultimately, the Court disagreed with the defendant and found that IRIV failed to reject the applications for payment "in the time or manner prescribed by the Act." Id. at 11. The Court made clear that emails and letters (even when drafted by counsel) served within the allowable time period and articulating that no further payment would be made were **insufficient** to satisfy the express terms of the statute. See id. at 6-9, 12.

Rather, the Court held that any rejection to a specific periodic payment application "must comply with the three requirements under the Act: it must (1) be in writing; (2) include an explanation of the factual and contractual basis for the rejection; and (3) be certified to have been made in good faith." Id. at 4. Moreover, the rejection must be done, pursuant to the three requirements, before payment for the application comes due. Otherwise, the applications for payment "must be treated as approved." Id. at 13.

Of further consequence, the Court found that because the Defendant “was free to raise any factual or contractual basis for rejecting” the applications for payment in the applicable time period, whatever objections the Defendant “may have had under the Contract **were waived.**” Id. at 12 (emphasis added).

The Court not only allowed the partial motion for summary judgment, but also allowed a final and separate judgment on the contract claims pursuant to Mass. R. C. P. of 54(b). See id. at 14-15. The Court acknowledged that this is done on “very limited circumstances,” but found that “[w]hile the remaining claims will have to be separately adjudicated, the payment requisitions covered under the Act are legally distinct from them and can and should be resolved separately and promptly to comport with the Legislature’s will” in enacting the PPA. Id. at 13, 15. The Court awarded the full amount of each application for payment (minus retainage) plus interest. Id. at 15.

III. PRACTICAL CONSIDERATIONS

Although the Tocci decision is non-precedential and is pending appeal, property owners, contractors, subcontractors, and their counsel should familiarize themselves with the PPA and its interpretation in Tocci. Furthermore, owners and contractors subject to the PPA should engage counsel to:

- Ensure a timely response to each and every periodic application for payment and identify it as such;
- Ensure a rejection to a periodic application for payment is timely and in writing, explains all factual and contractual reasons for the rejection, and is certified to have been made in good faith;
- Create a form rejection for applications for payments, to be certified in good faith, and listing the reasons for non-payment that complies with the PPA’s requirements, and which may be tailored to each specific payment application. Having this routine in place will aid clients in avoiding the costly result faced by Tocci;
- Review and update standard contracts to ensure compliance with the PPA and other, related statutes;
- This review should remove or revise any waiver of prompt payment, unenforceable “pay when paid” provisions, and any other terms that may violate the PPA;
- In the event of litigation, be prepared for motions for partial summary judgment, as filed in the Tocci case, and other dispositive motions pertaining to applications for periodic payment which were not rejected in strict accordance with the PPA. Untimely and improper rejections to periodic applications for payment risk being deemed approved without much room for challenge and any objection to the quality of the construction performed and any other contractual bases for objecting to the payment will likely be waived.

Our office will continue to monitor developments in the interpretation and implementation of the Massachusetts PPA and will advise accordingly.