

## High-Profile: CONSTRUCTION LAW

by *Blase Reardon and Kurt Dettman*

Officially known as “An Act Promoting Fairness in Private Construction Contracts,” the recently passed Massachusetts Prompt Pay Law was introduced in the February blog of *High Profile Monthly*. In that article, attorneys Mel Nash and Ross Wecker properly called attention to the key word in this statute — “prompt,” as in the timing of construction administrative practices, rather than “pay,” as many might think. Building upon their theme, we propose to define what “prompt pay” really means for the construction practices of construction project stakeholders, including lenders, owners/developers, architects/engineers (A/E), construction managers (CM), contractors, trade contractors, and sureties.

### What Steps Do Project Stakeholders Need to Take to Follow the Prompt Pay Law?

Approaching the project stakeholder list in reverse order, here are some of the ways we define “prompt”:

- The intent of the Prompt Pay Law is to address contractor and subcontractor cash flow issues. To the extent that the Prompt Pay Law is followed, defaults due to cash flow problems should be less of an issue for sureties. Thus, sureties have an interest in ensuring that the subcontractors they underwrite follow the Prompt Pay Law. Sureties should insist upon establishing the bonding capacity of subcontractors prior to the award of a bondable project rather than permitting firms to await an award and then cause excessive pressure for sureties to issue a bond “ASAP.” For a subcontractor to accept an award and then struggle to obtain suitable bonding initiates a bad working relationship with the prime contractor at the beginning of the project.

- Contractors and subcontractors must submit complete and accurate requisitions for payment. In turn, A/E's, CMs, and owners must within 15 days review and approve or reject, with reasons, the pay requisition. A dispute about the pay requisition must be referred to a dispute resolution process that must commence within 60 days after a rejection. From a practical standpoint, the project participants may determine that a “pencil requisition” process should be employed so that the statutory pay requisition timelines can be met by all parties.

- Subcontractors are usually the most knowledgeable about deficiencies or contradictions in the design documents. When they request a contract change they must write a complete, concise, and understandable explanation of the change request and the pricing should be realistic!

- Upon receiving a change order request, the owner organization must act upon



*Blase Reardon*



*Kurt Dettman*

it promptly. This may include submitting it to multiple parties within the owner organization so that a response and/or decision can be made within the 30-day time frame set out in the Prompt Pay Law. Also note that the failure to timely reject a request for a change order is deemed to be acceptance.

- As a conduit to all members of the design team, including engineers and consultants, the A/E or CM needs to analyze the change order request and get a prompt response from the appropriate owner team member. Then the A/E or CM must respond to the initiator of the change order request with a complete explanation of the basis for its response. The single words “Accepted” or “Rejected” will no longer suffice — instead, a clear explanation must be given for the basis of the decision.

- If the work in question must proceed while awaiting a final decision on a change order request, the prime contractor must issue written instructions to the subcontractor. Henceforth, the subcontractor must proceed on a time and materials (T&M) basis. Here, too, the subcontractor’s T&M documents should be daily, accurate, and complete for the work done, and all members of the project team should be involved in ensuring that contemporaneous, accurate, and complete records are kept.

- As noted earlier, all disputes or claims regarding rejected pay requisitions or denials of change order requests must be dealt with through a “dispute resolution procedure.” The dispute resolution process must begin within 60 days after rejection of a pay requisition or denial of a change order request. Gone are the days of waiting until the project is finished to resolve all outstanding claims.

- Upon resolution of a dispute during the job, if a change in price to the owner/developer is appropriate, the contractor, A/E or CM must notify the owner immediately, according to the terms of the contract between the owner and the prime contractor.

- More than likely as required by loan covenants, an owner/developer must notify a lender immediately of any changes to the project costs and resolve how these changes will be financed. Here’s where real transpar-

ency comes into play, as the lender will need to be kept aware of project cost increases as they occur.

### How Will the Prompt Pay Law Change the Way Projects Are Managed?

First, projects will simply need to be better managed. There will need to be in place project management plans and processes that comply with the time frames of the Prompt Pay Law. Trade contractors and prime contractors will need to submit better documented pay applications and requests for change orders. A/E's and CMs will have to promptly review pay applications and requests for change orders and make a reasoned, documented, and certified decisions on whether to accept or reject.

Second, projects will have to implement issue- and dispute-resolution processes. At the level of pay applications and requests for change orders, there will need to be a step resolution process to review and respond to submissions. For disputed items, there will need to be a dispute resolution process, which could include a project facilitator, a standing neutral, a standing mediator, or standing arbitrator. These processes should be set up at the beginning of the project and be available in “real time” as disputes arise and need to be resolved. Global settlements at the end of the job are no longer permitted, unless all parties agree.

Third, in order to make the process work for all parties (each of whom has different but interdependent responsibilities), there will need to be greater awareness and commitment to working together. If approached with the right attitude, at a project management level, the system can lead to better collaboration and teamwork on how the project is managed. At a minimum, the parties will need to ensure that the requisite processes are in place, are understood by all parties, and are monitored for compliance. This can be accomplished by written guidelines and forms, electronic tracking systems, and training/education (for example, review at the pre-con meeting)

### Conclusion-

From our vantage point as specialists in construction dispute avoidance and resolution over the past 10 years, these examples highlight the true meaning of the Prompt Pay Act. It requires a sea change in the construction management process. When it becomes commonplace, it will result in better project delivery at all stages of the project — planning, design, construction, commissioning, and close-out.

*Blase Reardon and Kurt Dettman provide dispute prevention and dispute resolution services on all types of construction projects.*