

**NEW MASSACHUSETTS “PROMPT-PAY” LAW
GOVERNS PRIVATE CONSTRUCTION CONTRACTS**

September 2010 – Massachusetts recently inserted a new Section 29E into Chapter 149 of its general laws requiring construction payments to be paid promptly. The law will significantly affect payment provisions in private construction contracts. The prompt-pay law becomes effective on November 8, 2010 and will govern all prime construction contracts for private projects greater than \$3 Million (except 1-4 unit residential projects). Although primarily directed at general contractors and their subs, the law will have an impact on design professionals performing construction phase services. The primary elements of the new law are set forth below:

Pay Applications: The prompt pay law creates a timetable for periodic progress payments. Periodic pay requests must be accepted every 30 days, and the law provides a 15-day deadline for approval or rejection after the submission, with an additional seven days for every tier below the prime. Payment must then be made within 45 days of approval. If a payment application is not approved within the required time period, it is deemed approved unless it is rejected prior to the date for payment. The law requires that any rejection be made in writing, with an explanation of the “factual and contractual basis” for the rejection, and be “certified as made in good faith.”

Change Orders: The prompt pay law creates a 30-day time limit for approval or rejection of a request for an increase in the contract price. Similar to pay applications, if a change order request is neither approved nor rejected, it is deemed approved. If deemed approved, the change-order may be submitted for payment in the following pay request. Any rejection must be made in writing, with a “factual and contractual basis”, and be “certified as made in good faith.”

Other Provisions: The prompts pay law invalidates pay-if-paid clauses as void and unenforceable with two minor exceptions. It also provides that any contract provision requiring a party to continue performance when a payment is overdue by at least 30 days is “void and unenforceable” except for disputes regarding quality of work or notices of default.

Design Professionals: Design professionals will need to exercise increased diligence in their timely review and approve contractor invoices and proposed change orders, or provide a reasonable written explanation

for their rejection. If a design professional facilitates the general contractor's over payment to a subcontractor by failing to review and appropriately reject unwarranted items of work, it could generate a cause of action by the general contractor against the design professional. Similar scenarios can be envisioned where an Owner claims to have overpaid.

If you are involved in private construction contracts, we urge you to carefully review this new law that can be found at Chapter 293 of the Acts of 2010:

<http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter293>.

If you have any questions please feel free to contact Donovan Hatem LLP attorney Amanda Sirk at 617-406-4573 or asirk@donovanhatem.com.

#####