

NEWS ALERT

CONSTRUCTION GROUP



Trial Court Strictly Construes Massachusetts Prompt Pay Law Against Owner

This first known decision interpreting the statute clarifies the consequences of an Owner's failure to properly reject applications for payment.

By Anthony R. Leone, Sara P. Bryant and Andrew G. Wailgum | January 6, 2021

A recent first-of-its-kind ruling from the Massachusetts Superior Court provides a critical lesson for project owners and contractors concerning the Massachusetts Prompt Payment Act (the "Prompt Pay Act"). In *Tocci v. IRIV Partners, LLC, et al.*, Suffolk Superior Court, 19CV000405 (November 19, 2020), the Court awarded over \$4 million to a contractor as a result of the project owner's failure to timely and properly reject the contractor's applications for payment in accordance with the Prompt Pay Act. In so doing, the Court held that the Prompt Pay Act supplements and trumps contractual agreements governing progress payments. Following the Court's ruling in *Tocci*, all parties subject to the Prompt Pay Act, including owners, contractors and subcontractors, must take a fresh look at their payment application and change order review procedures to confirm they are strictly complying with the Prompt Pay Act.

Generally, the Prompt Pay Act applies to private projects with prime contracts of \$3 million and above and requires, among other things, the project owner to approve or reject the contractor's applications for payment fifteen (15) days after submission, and make payment 45 days after approval. Mass. Gen. Laws c. 149, § 29E. Further, the Prompt Pay Act provides that any application which is "neither approved nor rejected within the [time provided by the Prompt Pay Act] shall be deemed to be approved unless it is rejected before the date payment is due." Mass. Gen. Laws c. 149, § 29E (c). Finally, the Prompt Pay Act requires that any rejection of an application (1) be in writing; (2) include the factual and contractual basis for the rejection; and (3) be certified in good faith. *Id.*

Here, the parties' contract set forth pay application procedures and requirements that differed from the Prompt Pay Act. In particular, the parties contractually agreed to a 14-day period for "disapproving or nullifying all or part of an application." The parties further agreed that the owner was required to "give written notice . . . at the time of disapproving or nullifying all or part of an application for payment, stating its specific reasons for such disapproval or nullification, and the remedial actions to be taken . . . in order to receive payment." The parties' contract further provided for payment 30 days after the contractor's submission for payment. Thus, the contract provided for a shorter approval or rejection deadline (by one day); a quicker payment deadline (by 15 days); and different requirements for the form and manner of a rejection.

Despite the terms set forth in the parties' contract, the Court in *Tocci* found the owner liable given its failure to reject seven payment applications in accordance with the Prompt Pay Act. In particular, the Court found the owner did not provide the requisite written explanation (including factual and contractual bases) for the rejection, or certify that the rejection was made in good faith. The owner's email communications in response to some of the applications, which did not cite contractual or factual bases for the rejection or certify that it was made in good faith, were insufficient because they failed to strictly adhere to the Prompt Pay Act requirements. For example, vague emails from the owner to the contractor requesting backup for the application for payment did not meet the requirements. Moreover, the owner was tardy in rejecting each of the applications for payment at issue. For the foregoing reasons, the Court held that the applications for payment that were not properly rejected were, in fact, deemed approved under the Prompt Pay Act.

The result is harsh—based on the owner's failure to strictly comply with the Prompt Pay Act and the automatic approval of the applications, the Court determined that the contractor was entitled to full payment (less retainage) totaling \$4,600,109.24. In so doing, the

Court emphasized the intention of the legislature in enacting the Prompt Pay Act to facilitate prompt progress payments.

The Court's decision provides a couple of critical takeaways for owners, contractors and subcontractors:

- (1) the Prompt Pay Act will trump any agreements that purport to waive or limit the Prompt Pay Act's procedures and requirements; and,
- (2) failure of a party to reject an application for payment in accordance with the Prompt Pay Act requirements results in a waiver of any objection the paying party may have had to the application for payment.

Given that the *Tocci* decision represents a rare analysis of the Prompt Pay Act, it remains to be seen if other decisions will follow suit. Further, the *Tocci* decision was issued by the Superior Court, and the owner has filed a Notice of Appeal. In the meantime, however, *Tocci* provides a guidepost for the construction industry to follow going forward.

If you have any questions about this bulletin, please contact us:

Sara P. Bryant at sbryant@murthalaw.com or 617.457.4048

Andrew G. Wailgum at awailgum@murthalaw.com or 617.457.4006

Anthony R. Leone at aleone@murthalaw.com or 617.457.4117

Andrew G. Wailgum, Chair

617.457.4006

awailgum@murthalaw.com

Terence J. Brunau

203.772.7785

tbrunau@murthalaw.com

Sara P. Bryant

617.457.4048

sbryant@murthalaw.com

Matthew A. Ciarleglio

203.772.7712

mciarleglio@murthalaw.com

Loring A. Cook, III

617.457.4014

lcook@murthalaw.com

Michael J. Donnelly

860.240.6058

mdonnelly@murthalaw.com

Anthony R. Leone

617.457.4117

aleone@murthalaw.com

James F. Radke

617.457.4130

jradke@murthalaw.com

With offices throughout Connecticut, Massachusetts and New York, Murtha Cullina LLP offers a full range of legal services to meet the local, regional and national needs of our clients. Our practice encompasses litigation, regulatory and transactional representation of businesses, governmental units, non-profit organizations and individuals.

