# Scribbles Squibs[1] # 78 (June 15, 2022)

# "PAYMENT HELP FOR PRIVATE WORK GENERAL CONTRACTORS UNDER THE MASSACHUSETTS PROMPT PAYMENT STATUTE, MGL C. 149, SECTION 29E"

*By Massachusetts Construction Attorney and Construction Mediator Jonathan Sauer*

## I. INTRODUCTION

On June 7, 2022 the Massachusetts Appeals Court came down with a decision relative to the Prompt Payment statute (hereinafter Statute), which applies only to private jobs where the general contract exceeds three million dollars. A copy of the Statute is attached to this ***Squib.*** The Court 'strictly construed' the Statute to mean that it applies and requires payment to the General Contractor from the Owner for failure to strictly comply with its requirements in terms of issuing rejections as to requisitions: (1) even if the Owner has claims against the General Contractor, which have not yet been heard and determined but are pending in court; (2) even if the Owner has expressed dissatisfaction with the work and the General Contractor's performance numerous times, including issuing various notices of default, but which are deemed to be insufficient because, among other things, the rejections did not comply with the strict requirements of the Statute, including that they were not 'certified'.

As a result of the foregoing, the Court affirmed a superior court judgment which issued a monetary award in favor of a General Contractor with regard to the General Contractor's prompt payment claim for unpaid monies as to seven requisitions at issue, even when there was litigation between the parties ongoing at that very time on a variety of other issues with monetary claims made in both directions, which were and are remaining to be litigated and which litigation would determine, ultimately, *who* owes *whom* and *how much* with regard to the performance of the underlying general contract.

The name of the case is Tocci Building Corporation v. Iriv Partners, LLC *et al.* (The Case)

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[1] A *squib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

I was asked by Massachusetts Lawyers Weekly, Massachusetts' only legal newspaper for lawyers, to comment on this case, which written comments will appear in a future issue. This ***Squib*** arose out of those comments and also because this is important information for private work general contractors to have who work on three million dollar plus contracts.

And, be sure to read carefully section (d) of this Statute, which is intended to create the same kind of even more questionable procedure for change orders as it has for requisitions. This is also discussed briefly in Section VII below.

## II. THE MASSACHUSETTS PROMPT PAYMENT STATUTE

The statute in question is Massachusetts General Laws (MGL) Chapter 149, Section 29E (Statute).

This is what that Statute provides:

First of all, this only applies to private work. Section (a) of this statute defines "Contract for construction" as a contract "for which a lien may be established under Sections 2 or 4 of chapter 254", which general contract is three million dollars or more. Chapter 254 is the mechanics' lien statute. By statute, one cannot lien public work. Therefore, a "Contract for construction" will not apply to public work but only to private work.

As the Statute is riddled with legalese, I will try to simplify it somewhat.

A subcontractor or general contractor will submit a requisition. The person receiving it shall approve or reject it, which must occur within 15 days after submission to the owner and up to 22 days with regard to a subcontractor's requisition to a general contractor. Payment shall be made within 45 days after approval.

The following is key language within this Statute:

> "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. A rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection **and shall be certified as made in good faith."** (Emphasis added).

And:

> "A rejection of an application for a periodic progress payment shall be subject to the applicable dispute resolution procedure. A provision in a contract which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection shall be void and unenforceable."

As those involved with the construction process know, any number of issues can arise among the parties during the course of a project. What seems to happen *most of the time* is that these issues get settled on some basis at the end of the job without anyone having to sue anyone else.

This provision says that on the 61st day after the rejection of a requisition, the general contractor (in claims involving payment to the general contractor) or the subcontractor (in claims involving payment to a subcontractor) can commence suit as to that rejection. Empirical evidence suggests that most of these suits are simply unnecessary. They increase everyone's legal costs (and blood pressure). And, as a practical matter, they seriously damage the tone of the environment in which settlements of different issues can be negotiated due to the adversarial relationships early, and mostly unnecessary, litigations create.

## III. WHAT CONSTITUTES A 'CERTIFICATION'?

Note that there is no requirement, at all, that the requisition itself has to be 'certified'. Certification applies only to the requisition's rejection. The statute does not define what a 'certification' is. If the requisition does not have to be certified in any manner, doesn't that mean that there is a presumption that the requisition itself is valid? Because, why else is there a distinction in the way these two documents are handled if they are to be considered as co-equal?

If the response has to be 'certified', why shouldn't the requisition itself have to be certified? To me, a 'certification' means/should mean a sworn statement signed under the pains and penalties of perjury in front of a notary public. Otherwise, an unsworn-to and not notarized requisition itself might lead to mischief, some of which possibilities are discussed below.[1]

In a sense, this prompt payment procedure is analogous to a demand for direct payment under MGL C. 30, S. 39F, which can be made by a subcontractor performing public work, seeking payment of its claim from the general contractor's monies being held by the public owner.

Under that procedure, the subcontractor is looking for the owner to pay it for its work when, for whatever reason, the general contractor has not paid it. The subcontractor serves a demand for direct payment as to what it believes it is owed on both the general contractor and the public owner. The general contractor has ten days to respond to the demand for direct payment. If it doesn't respond in a timely manner - or, respond sufficiently to meet the requirements of this statute - then the demand for direct payment has to be paid to the subcontractor by the public owner out of the next available monies due the general contractor.

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[1] I think the whole purpose of this statute is to help subcontractors and general contractors to try and blow fastballs past their contracting parties with regard to requisitions and change orders. Since subcontractors can then convert homeruns they achieve under this statute with regard to requisitions and change orders into payment bond claims, then they can collect or try to collect attorneys' fees pursuant to MGL C. 149, S. 29, which provides for them, which awards are obtained from general contractors and their sureties. So, while Tocci is a general contractor in this Case, methinks that the moving parties who got this statute enacted were most likely subcontractors.

Under this procedure, there are three requirements for the demand and the very same three requirements for the general contractor's response to the demand. One of these requirements is that the demand and the response to the demand ***both*** have to be sworn to in front of a notary public.

Why would the Legislature have that critical difference between MGL, C. 30, S. 39F and this Statute when both procedures are designed to be quick and non-judicial methods of obtaining payment?

In looking at the legal authorities, I have not found a definition by the Massachusetts appellate courts of the word 'certify' that could be used within the context of this Statute, which, itself, does not define this word while, nonetheless, requiring certification.

In defining this word, various appellate courts have referenced dictionaries to define 'certify,' rather than provide a definition of the word themselves.

In Yankee Atomic Elec. Co. v. Secretary of Com., 402 Mass. 750, 757, 525 N.E.2d 369 (1988), the Supreme Judicial Court of Massachusetts defined the word 'certify' thusly:

> "A standard 1913 dictionary definition of "certify" is as follows: "1. To give certain information of; to make certain, as a fact; to attest authoritatively; to verify.... 2. To testify to in writing; to make a declaration concerning, in writing, under hand, or hand and seal.... 3. To give certain information to; assure; make certain." Webster's New International Dictionary of the English Language (G. & C. Merriam Co. 1913)."

In a more recent case, Trust v. Scott, 85 Mass.App.Ct. 1108 (2014), the following is how the Appeals Court defined the word 'certify':

> " "Certify" is defined in Black's Law Dictionary as "[t]o authenticate or verify in writing" or "to attest as being true or as meeting certain criteria." Black's Law Dictionary 258 (9th Ed.2009). See Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 402 Mass. 750, 757, 525 N.E.2d 369 (1988). Although certify could be interpreted to mean a formal declaration, it also could be interpreted to mean a writing that verifies a fact."

The on-line Merriam Webster dictionary defines 'certify': "to attest authoritatively: such as : confirm; to present in formal communication; to attest as being true or as represented or as meeting a standard."

That the Statute specifically provides that the rejection must be 'certified' would seem to suggest that this should be more than the making of a simple statement. But, without a definition of 'certified', why wouldn't a simple rejection of a requisition with one sentence suffice, particularly if the owner tacked on at the end of its response that the statement was 'certified' as being in good faith?

Without a definition of 'certify', who can say whether any sentence or phrasing of words is sufficient to 'certify' *anything*? While is appears acceptable for beauty to be determined in the eye of the beholder, whatever some legal concept means should be capable of only *one*

interpretation, particularly where one party will collect money from another party without going through the judicial process.

The Statute does not say whether or not the 'certification' - whatever that word *means* - has to be notarized and/or sworn to under the pains and penalties of perjury. But, the requisition itself does not need to be certified. If the Commonwealth is going to allow for what amounts to a pretrial seizure of property, particularly where there is significant litigation between the parties which could result in the plaintiff's not being entitled to *any* recovery *at all*, then the requisition should at least be 'certified' in like measure.

Fundamental fairness should require that the requisition itself be certified. Because, if it is sworn to, whoever makes that certification might think twice before simply throwing some words on a piece of paper and then running them up a flag pole to see if anyone will salute them. Because, if it is a sworn statement, there very well could be *consequences* for someone simply submitting an unlikely requisition based more in fantasy than in fact.

When Pinocchio told a lie, the only consequence for him was that his nose would grow. If someone tells a lie when it is presented as a sworn statement, that person could end up as a residential guest of the Commonwealth for a considerable period of time, in a place where the rooms are small, the food simply horrible and one's roommates much, much worse.

Any 'certification' should be notarized. Otherwise, when one's feet are put to the fire, the 'signatory' might simply claim that this isn't his/her signature on the piece of paper, something that is a lot harder to do when the statement is made in front of a public official - a notary public.

## IV. THE LEGAL MEANING OF THE WORD 'SHALL'

Some Massachusetts law on the meaning of the word 'shall'.

It is commonly understood that in matters of statutory construction the use of the word "shall" references something which is *mandatory* as opposed to something which is *precatory* (expressing merely a wish), which is frequently evidenced by the use of the word "may".

For instance, in the case of Assessors of Springfield v. New England Telephone & Telegraph Co., 330 Mass. 198, 201 (1953) the Supreme Judicial Court was called upon to interpret a statutory provision. As to the word 'shall' in the statute under consideration, the SJC said the following:

> "Although undoubtedly in some contexts the word shall can be construed as equivalent to may, its ususal and correct signification is mandatory. *McCarty v. Boyden,* 275 Mass. 91,93. *Opinion of the Justices,*300 Mass. 591,593. *Elmer v. Commissioner of Insurance,* 304 Mass. 194, 196. *Brennan v. Election Commissioners of Boston,* 310 Mass. 784, 786. *Jenny v. Assessors of Mattapoisett,*322 Mass. 76, 78. In this instance the context tends to reinforce its mandatory character."

In another case, The Massachusetts Society of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601, 603 (1953), the SJC, in interpreting another statute, said that: "It will be noted that "shall," a word of command, is used in the statute."

## V. THE DECISION

Procedurally, issues concerning what Tocci's rights to be paid under the Statute were determined by a Superior Court Judge under a motion for summary judgment (a kind of a trial by affidavit). The allowance of a summary judgment motion in a construction case is rare, unusual. Tocci was successful and a judgment entered in its favor.

The trial court even entered a separate and final judgment in Tocci's favor on this prompt payment claim, which is even more unusual than allowing the motion for summary judgment, particularly where there were a whole host of issues remaining to be litigated, including a number of claims by the Defendant against the Plaintiff on a variety or theories, which could result in a monetary judgment in the Owner's favor against the General Contractor. With an affirmed separate and final judgment, that means that Tocci is entitled to be paid *now*.

The Appeals Court affirmed the Superior Court's actions.

The Appeals Court said that this was the first time ever the Appeals Court had heard a case interpreting this statute.

Here's what happened as to this Case.

There was a general contract between the parties for the construction of a project at 645 Summer Street in Boston. Tocci submitted a number of different requisitions to Iriv, seven of which became involved in this dispute. The Owner made negative comments about Tocci's performance on multiple occasions, some which were made within the timeframes for issuing a rejection of a submitted requisition and some of them that weren't. Some of the requisitions were not commented upon at all by Iriv. But, as to none of the requisitions, were the Owner's statements made specifically as justification for the rejection of any specific requisition. Rather, the statements made by the Owner, some of which were in some detail, did not specifically indicate that it was rejecting any requisition for these reasons. Some of the statements said that it was for this reason or that reason that the Owner was not going to pay Tocci. The Owner provided Tocci with several notices of default. But, as reported in the decision, it did not appear that any specific statement or group of statements was made by Iriv within the context of a rejection of any particular requisition.

At least as to two of the requisitions, the Court found that the Owner communications "at least arguably . . .include(s) an explanation of the factual and contractual basis for the rejection." But, the Court found that as to *none* of the seven requisitions did the Owner include any certification that the rejections were made in good faith.

After completion of the project, Tocci sued Iriv and Iriv countersued under a number of different legal theories.

The Court said that Iriv failed to issue a rejection effective under the Statute prior to the date payment was due as to all seven requisitions, some of which did result in partial payments.

The Court said that the certification procedure provides "a clear indication to the contractor that an application has been rejected," including in its decision comments about the enormous amount of communications there can be between a contractor and an owner on a complicated construction project.

The Court said:

"If an owner does not wish to make a periodic payment pending resolution of a dispute because it believes it will not in the end owe the money, it must file a prompt rejection in compliance with the statute. Because the defendants here did not do that, they must pay what is due, even though their claims against the contractor have not yet been resolved." (**ED**: *Huh??*)

## VI. HOW THIS DECISION MIGHT EVENTUALLY AFFECT PUBLIC WORK

First, to be clear, this decision has no direct application to public work. But, it's a decision that represents a 'strict construction' of a statute having to do with payment. Among other things, that means the statute will be enforced just as written (and without any interpolation of outside factors, such as common sense). Within public construction, most statutes involved with payment of contractors reflect the 'public policy' of the Commonwealth that contractors should be paid for their work. 'Public policy' reflects a philosophy, which is a great deal more substantial and at a much higher level of importance than the result achieved in any run of the mill civil case.

My sense would be that 'public policy' concerns would apply even more to public work than they would to private work. And, since the Statute allows for payments that might be seen as premature, the only justification for this has to be that there is a public policy that general contractors working on private projects get paid.[2]

My experience is that public owners often do not comply with the mandates of various payment statutes which direct a public owner to take a certain action.

For example, MGL C. 30, s. 39G and K specifically require a public owner to *automatically* include in its payments to the general contractor on its periodic requisitions interest if those payments are late. And, the general contractor is not statutorily required to do anything to get that interest. My experience over a period of 46 years as a construction lawyer is that public owners simply do not do this.

The demand for direct payment statute, MGL C. 30, s.39F, referenced above, requires a public owner to perform certain acts. If the demand and response are in proper form and served properly and promptly, to the extent that some portion of the demand is contested, the public

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[2] Although methinks this statute was promulgated more for the benefit of subcontractors and at the behest of subcontractors. That Tocci is a general contractor might be simply a coincidence. Or, protective coloring.

owner is specifically mandated to to set up a joint, interest-bearing account at a bank in the names of the subcontractor and general contractor as to that amount. By my experience, if I have ever seen a public owner do this, this could not have been done more than once or twice.

And, if the demand for direct payment is not contested by the general contractor *or* the general contractor's response is late or in improper form, the public owner is mandated to pay the subcontractor pursuant to that demand out of the general contractor's next available monies. I have seen owners do this but I have seen them *not* do this a substantially greater number of times. I would say that their usual practice is to *not* directly make payments to subcontractors. I have more often seen more responsible public owners attempt to force the general contractor to make the payment itself.[3]

Under the public bidding laws for public buildings and public works, there are any number of bid errors committed by public owners in the bid process that mandate rebidding. Although the current hearing officer for bid protests is excellent and well-experienced, it is my sense that the AG's office does not order projects rebid to the extent that they did a couple of decades ago.

I think that the very clear rationale of The Case will ultimately find its way to public construction with public owners being under much greater pressure to take the actions that various statutes require of them, the above only being examples.

## VII. AN EVEN *WORSE* PART OF THE STATUTE

Although not involved with the issues associated with this case, the second part of this statute is even scarier than the first. This is contained in section (d) of the statute. This section essentially uses similar time periods for submittal, approval, automatic approval, rejection and certification as are used for requisitions for a party to a contract seeking in "increase in the contract price." Since one would only get an increase in contract price through the performance of an item of claimed extra work, this is beyond aggressive, ignoring as it does, other aspects of processing change orders, particularly at the general contractor level. Change orders are almost exclusively (supposed to be) negotiated and bi-lateral. They shouldn't come into being through the use of a 'gotcha' statute, which, frankly, is what this statute appears to be the more I read it and think about it.

And, what if a subcontractor gets a change order through this procedure? And, what if this should have been the subject of a pass-through change order to the owner? I can see owners refusing to negotiate change orders at the general contractor level as to subcontractor change orders that have already been established under this procedure because they may not have been properly/promptly presented by the general contractor to the owner in accordance with the appropriate provisions of the general contract, which this procedure completely ignores.

Or, the owner might reject the subcontractor's requested change completely, not recognizing this as a legitimate change order. Or, the subcontractor submitted the change order proposal late. Or the subcontractor submitted the change order with incorrect/insufficient back-

[3] By statute, public owners are required to make reasonable efforts to see that subcontractors get paid.

up. And, what if the owner is right? Had appropriate change order procedures been followed, the owner's denial of the subcontractor's requested change order proposal would most likely mean that that subcontractor could not recover on this from the general contractor. But, if this kind of 'gotcha' procedure is used and the general contractor does not make an absolutely perfect rejection, the subcontractor might, by default, get its change order. Why should the general contractor have to pay a subcontractor on a pass-through type claim that the owner correctly rejects? Does this seem fair?

In my view, this is a matter that should be brought to the attention of organizations such as Associated General Contractors because this provision/procedure is wrong, wronger and wrongest and is simply not good for construction. This provision looks like it was intended to benefit subcontractors at the expense of general contractors.

## VIII. CONCLUSION

In my mind, this decision and the Statute it interprets are flawed for the following reasons:

1. The requisitions do not have to be 'certified'. Only the rejections have to be 'certified'. There is no legal rationale that would explain this difference.

2. The Statute provides no definition of what the word 'certified' means. Two Massachusetts appellate cases referenced above simply give dictionary definitions and provide no definitions of their own.

3. What happens if the Owner wins the case and it is the General Contractor that owes money to the Owner and not the other way around? What if the General Contractor can't pay *that* judgment? What if after this judgment is paid the General Contractor files bankruptcy? How is that fair to the Owner?

4. How does this *not* become the 'law of the case' for the Judge hearing the case, whether formally or informally, intentionally or not intentionally? (The 'law of the case' is something that has already been established within that case and is not/cannot be the subject of further litigation.) This decision could unconsciously influence the trial judge's consideration of the underlying dispute, to the prejudice of the Owner.

5. The Statute's allowing for the initiation of suit on a rejected requisition after sixty days goes against how disputes are practically resolved in construction. Most of such suits, with the passage of time, would prove to be unnecessary. They increase each party's legal costs (and blood pressure). And, the adversarial relationships litigations create make it more difficult to resolve subsequent disputes that otherwise might have been resolved in a calmer, toned down environment.

Litigation and, even more, construction litigation can be confusing enough. How can there be any kind of 'final judgment' on any issue before a number of other claims have to be litigated to a conclusion before there is a *real* final judgment?

Usually, it takes about five years for a construction case to reach the trial stage in the superior court. That was what the time period was pre-COVID. Undoubtedly, it will take longer for current cases to get to trial because the court system was inactive/less than fully functional through the Pandemic. Also, the fact that the parties have had to brief their positions for the Appeals Court and then have had to wait for a decision has very likely delayed the further progress of this case.

This case was filed on February 6, 2019. Under pre-Pandemic practice, a trial would occur on or about February of 2024, which is a year and eight months from now. A lot of things can happen in a year and eight months to the financial status of any party to a litigation. This becomes all the more so given the present continuation of the Pandemic and the worst economic inflation in forty years.

Let's assume a hypothetical, something not based on actual facts. And, because these are made-up facts, let's substitute for the name 'Tocci' 'General Contractor' and let's substitute for the name 'Iriv' 'Owner'.

Let's assume that a General Contractor was able to get an Owner to pay a judgment entered at some point after this decision has entered. But, when the matter came to trial, the Owner prevailed on many of its claims against the General Contractor, which ended up with the Owner obtaining a judgment against the General Contractor for money damages and not the other way around. Put another way, the actual trial might determine that the General Contractor was not entitled to be paid *anything* under the contract due to its various breaches of contract. And, that the General Contractor ends up owing the Owner damages the Owner has incurred as the result of the General Contractor's breaches of contract. Then, the General Contractor files bankruptcy for a Chapter 7 liquidation, claiming that this to be a 'no asset' case.

We end up with the result that the General Contractor collected money from the Owner that it was not entitled to *at all*. And, the Owner cannot collect from the General Contractor monies owed it by the General Contractor due to the fact that the General Contractor filed bankruptcy as a liquidation. Under those assumed facts, in the vernacular, the General Contractor scored.

Had all of the claims been litigated and the Owner prevailed, it wouldn't have had to pay the General Contractor *anything* because it would be the General Contractor that owed the Owner monies.

Doesn't that potential result seem screwy? Why a rush to judgment on *one* claim when the trial of *other* claims might have invalidated the judgment given the General Contractor under the Statute in *this* case?

I think a fairer result would have been for the trial court to have granted Tocci partial summary judgment just on this claim but only as to the issue of liability and not for a sum certain. And, also, in my view, the trial court shouldn't have entered a separate and final judgment because with this decision, Tocci can give the execution (the formal paper issued after the judgment issued by the Court for use by the sheriff) to a sheriff and try to collect on its claim.

Of course, Iriv bears some of the responsibility for this bad result. Had it simply followed the various requirements of the Statute which, in the grand scheme of things, are not overly complicated, Tocci would not have achieved this result. Both the trial court and the Appeals Court found that Iriv had issued insufficient rejections of requisitions that did not follow the Statute.

For all of these reasons, I think that this decision is a premature and inequitable result, particularly where the facts of the case have yet to be fully developed through sworn testimony and no actual decision has issued yet as to *who* owes *whom* under this general contract dispute.

Neither life nor the law, one of life's most imperfect creations, is always fair. Sometimes, it seems, each is *often* unfair. Representing a number of general contractors, as I do, I'd have to say that this statute, and as interpreted by this Court, very much favors the interests of general contractors over owners. From that standpoint, I can be professionally pleased that they are/will be getting some assistance with regard to payments.

At the same time, and to the same extent, this Statute could favor the interests of subcontractors over those of general contractors.

One thing is certain. However a contractor is involved with any kind of 'prompt payment' issue on a private project of three million dollars or more, it behooves its interests to thoroughly understand what actions need to be taken to protect its rights under this Statute, whether offensively or defensively.

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*(Jonathan Sauer is a Massachusetts construction attorney with 46 years experience, still working full-time, who says he has no intention of ever retiring. As he says: "I'm single. The kids are grown and out. And, why would I ever retire when sometimes this job can be fun? Besides, I don't play golf or have a boat!" He says that he always has room in his practice for quality material supplier, subcontractor and general contractor clients.)*

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# "Knowledge is Money In Your Pocket! (It ***Really*** is!)"

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and discussion purposes only. Questions of your legal rights and obligations under your contracts and under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on only construction and surety law issues for forty-six years, sees as part of its mission the provision of information and education to the material suppliers, subcontractors, general contractors, owners and sureties it daily serves, which will hopefully assist them in the more successful practice of their business. Articles and forms are available on a wide number of construction and surety subjects can be found at www.sauerconstructionlaw.com. We periodically send out ***'Squibs'*** - short articles, such as this one - on various construction and surety law subjects. If you are not currently on the emailing list but would like to be, please send us an email and we'll put you on it. All prior ***Squibs*** can be found on our website.

**Part I** ADMINISTRATION OF THE GOVERNMENT

**Title XXI** LABOR AND INDUSTRIES

**Chapter 149** LABOR AND INDUSTRIES

**Section 29E** CONSTRUCTION CONTRACTS; REASONABLE TIME PERIODS FOR PERIODIC PROGRESS PAYMENTS AND INCREASES IN CONTRACT PRICE; PAYMENT CONDITIONED UPON RECEIPT OF PAYMENT FROM THIRD PARTY; REQUIREMENT TO CONTINUE PERFORMANCE OF CONSTRUCTION WITHOUT PAYMENT

Section 29E. (a) As used in this section the following words shall have the following meanings, unless the context clearly requires otherwise:

"Contract for construction", a contract for which a lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of $3,000,000 or more; provided, however, this shall not include projects containing or designed to contain at least 1 but not more than 4 dwelling units.

"Insolvent", insolvent as defined under federal bankruptcy law or being a debtor in a proceeding commenced under federal bankruptcy law or under the corresponding law of another country, or being a debtor in a receivership proceeding or having made an assignment for the benefit

of creditors.

(b) A communication required in this section to be in writing may be submitted in electronic form and by electronic means.

(c) Every contract for construction shall provide reasonable time periods within which: (i) a person seeking payment under the contract shall submit written applications for periodic progress payments; (ii) the person receiving the application shall approve or reject the application, whether in whole or in part; and (iii) the person approving the application shall pay the amount approved. The time periods for each application for a periodic progress payment shall not exceed: (i) for submission, 30 days, beginning with the end of the first calendar month occurring at least 14 days after the person seeking payment has commenced performance; (ii) for approval or rejection, 15 days after submission; provided, however, that the time period, as applicable to approval or rejection by the person at each tier of contract below the owner of the project, may be extended by 7 days more than the time period applicable to the person at the tier of contract above the person; and (iii) for payment, 45 days after approval, unless the payment is subject to the condition of receipt of payment by a third person but only to the extent enforceable under subsection (e). 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. A rejection of an application for a periodic progress payment, whether in whole or in part, shall be made in writing and shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith. A rejection of an application for a periodic progress payment

shall be subject to the applicable dispute resolution procedure. A provision in the contract which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection shall be void and unenforceable.

(d) Every contract for construction shall provide a reasonable time period within which a written request submitted by a person seeking an increase in the contract price shall be approved or rejected, whether in whole or in part. The time period shall not exceed 30 days after the later of commencement of the performance of the work on which the request is based or submission of the written request; provided, however, that the time period, as applicable to approval or rejection by the person at each tier of contract below the owner of the project, may be extended by 7 days more than the time period applicable to the person at the tier of contract above the person. A request which is neither approved nor rejected within such time period shall be deemed to be approved and may be submitted for payment within the next application for a periodic progress payment, unless it is rejected before the date payment is due. A rejection of a request, whether in whole or in part, shall be made in writing, shall include an explanation of the factual and contractual basis for the rejection and shall be certified as made in good faith. A rejection of a request shall be subject to the applicable dispute resolution procedure. A provision in the contract which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection shall be void and unenforceable.

(e) A provision in a contract for construction which makes payment to a person performing the construction conditioned upon receipt of

payment from a third person that is not a party to the contract shall be void and unenforceable, except:

(1) to the extent of amounts not received from the third person because the person performing the construction failed to perform under its contract and failed to cure the non-performance within the time required by the contract after receipt of written notice as provided in the contract or, in the case of contract lacking a cure and notice provision, failed to cure the non-performance within 14 days after receipt of written notice of the failure to perform; or

(2) to the extent of amounts not received from the third person because the third person is insolvent or becomes insolvent within 90 days after the date of submission of the requisition for which payment is sought; provided, however, that the person seeking to enforce the payment condition (i) filed a notice of contract under chapter 254 and in the case of a person having no direct contractual relationship with the original contractor, also sent a notice of identification within the time required under said chapter 254, prior to the person's submission of the first application for payment after commencement of performance at the project site and did not dissolve the lien created by the filing of such notice of contract; and (ii) within the time periods allowed by said chapter 254 files a statement of amount due and commenced or commences a civil action to enforce the lien; and (iii) pursues all reasonable legal remedies to obtain payment from the person with whom the person had a direct contract unless and until there is a reasonable likelihood the action shall not result in obtaining payment.

The foregoing exceptions shall be expressly stated in any conditional payment provision and the person seeking to enforce the payment

condition shall have the burden of proof as to each element. Nothing in this section or in a conditional payment provision shall be valid as a defense to enforcement of a lien claimed under said chapter 254 by the person furnishing the construction nor shall it excuse compliance with said chapter 254. A party aggrieved by the failure of the party seeking to enforce the payment condition to pursue all reasonable legal remedies to obtain payment may avail itself of the procedure set forth in section 15A of said chapter 254, for a summary determination of whether all reasonable legal remedies have been fulfilled with respect to the particular lien claim at issue; provided, however, that the aggrieved party has first made a request in writing that the party seeking to assert the payment provision identify the legal remedies the aggrieved party has pursued and either: (i) has not received a response in writing within 10 days after making the request; or (ii) having received a response, has requested the party to pursue specific additional legal remedies and the party has failed unreasonably to take such actions.

(f) A provision in a contract for construction, including without limitation a payment condition enforceable under subsection (e), purporting to require a person to continue performance of the construction if payment of an approved amount is due under the terms of the contract but is not received, and more than 30 days have elapsed since the date payment was due, shall be void and unenforceable, except for: (i) a dispute regarding the quality or quantity of the construction so furnished; or (ii) a default by the person under the contract for construction after approval of the payment; provided, however, that the person has received (i) a prior written notice of such

dispute or default certified as made in good faith; and (ii) all sums due less any amounts attributable to the dispute or default.

(g) A provision in a contract for construction which purports to waive or limit any provisions of this section shall be void and unenforceable.