

Scribbles Squibs<sup>1</sup> # 74 (July 15, 2019)

# **“WHEN ARE CONTRACTORS ENTITLED TO PAYMENT ON MASSACHUSETTS PUBLIC CONSTRUCTION PROJECTS AND WHAT INTEREST IS DUE THEM FOR LATE PAYMENT”**

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## **I. INTRODUCTION.**

Subcontractors and general contractors, are you familiar with what the rules are in terms of the timing of payments to subcontractors and when subcontractors and general contractors are entitled to their payments for Massachusetts public projects?

Delving into the particulars of these subjects, including explaining the differences between timing clauses and pay-when-paid clauses, is the subject matter of this Squib. In addition, we will discuss how statutes for the timing of payments to subcontractors and general contractors provide for the payment of mandatory interest for late payments. In fact, these statutes *require* the public agency to pay interest without the contractor’s even having to ask for it!

Interest is highly statutory (defined by statute). There is a small amount of applicable case law, which largely deals with resolving conflicts among different interest statutes, some of which is discussed below.

There are a lot of different deadlines for a number of different things. Some of them are conditional on things either happening or not happening.

Inasmuch as we know that you want to get paid, let’s get going . . . .

## **II. SUBCONTRACTORS, MONTHLY REQUISITIONS.**

Under Massachusetts law, a subcontractor is entitled to be paid for its requisitions pursuant to the Massachusetts General Laws (which are Massachusetts statutes referenced hereafter as MGL) C. 30, s. 39F ‘forthwith’ upon receipt of monies from the owner. I have not been able to find a Massachusetts definition for ‘forthwith’. This statute applies both to public works and public buildings projects. This is that portion of that statute:

“(1)(a) **Forthwith** after the general contractor receives payment on account of a periodic estimate, the general contractor **shall<sup>2</sup>** pay to each subcontractor the amount paid for the labor performed and the materials furnished by that subcontractor, less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.” (Emphasis added)

Merriam-Webster defines ‘forthwith’ as being “immediately”. Black’s Law Dictionary (Tenth Edition), a legal authority often referenced by the courts, defines ‘forthwith’ as: “1. Immediately; without delay. 2. Directly; promptly within a reasonable time under the circumstances with all convenient dispatch.”

I have generally considered this time period in the real world to be seven days (at most) or less.

### **III. SUBCONTRACTORS, RETENTION.**

Again, this is defined in the following statute, which is quite lengthy. I have tried to reduce it down to give its basic idea. Should claims arise concerning this matter, the entire statute should be consulted.

MGL C. 30, s. 39F states when a subcontractor is entitled to retention. This is due:

“. . . (1)(b) **Not later than the sixty-fifth day after each subcontractor substantially completes his work in accordance with the plans and specifications, the entire balance due under the subcontract less amounts retained by the awarding authority as the estimated cost of completing the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding authority shall pay that amount to the general contractor. The general contractor shall forthwith pay to the subcontractor the full amount received from the awarding authority less any amount specified in any court proceedings barring such payment and also less any amount claimed due from the subcontractor by the general contractor.**

(c) Each payment made by the awarding authority to the general contractor pursuant to subparagraphs (a) and (b) of this paragraph for the labor performed and the materials furnished by a subcontractor **shall** be made to the general contractor for the account of that subcontractor; **and the awarding authority shall take reasonable steps to compel the general contractor to make each such payment to each such subcontractor. . .**” (Emphasis added)

Note that last sentence! This statutory provision places some onus on the awarding authority to try to insure that the subcontractor gets paid. In many situations, reminding the awarding authority of this might be a good idea.

#### **IV. THE MEANING OF THE WORD ‘SHALL’.**

The next two sections of this Squib discuss issues as to when a public owner has to make payments of interest to the contractor with regard to late payments having to do with ‘public buildings’ (MGL C. 30, s. 39K) and with regard to ‘public works’ (MGL C. 30, s. 39G). Both of these sections make frequent use of the word ‘shall’. As a matter of statutory construction, ‘shall’ is considered to be a mandatory word.

The significance of the use of the word ‘shall’ in these sections means that the public owner itself *on its own initiative* is supposed to add the interest on to late payments *without the contractor’s even having to ask for it!*

In my 43 years as a lawyer, it has not come to my attention that an owner has every *voluntarily* paid interest to a contractor even *once*. (To be fair, I usually only see the problem situations and not situations which were resolved between the parties.)

The ‘shall’ language should help convince public owners that they owe interest, even if the net effect of the threat for pursuing a claim for the same is simply to just get a payment, which, ordinarily, is probably what a contractor will settle for, that being his goal.

At the same time, because of the ‘shall’ language, if it is necessary to seek payment for interest in court, this should make a collection somewhat easier, assuming that any conditions/pre-conditions can be proved as having been met.

I had a general contractor client some years ago who wanted me to sue the City of Boston on an ‘interest only’ claim, claiming that the City owed it about twelve thousand dollars interest for late payments on a certain project. Well before reaching the pretrial conference stage, and as a result of a court-ordered ‘conciliation’, the City of Boston ended up paying the twelve thousand dollars fairly early in the case. More on this later.

It is well-established that “(a) statutes should be interpreted so as to give meaning to all the words in context; none of the words should be regarded as superfluous.” Roblin Hope Industries, Inc. v. J.A. Sullivan Corp. 6 Mass. App. Ct. 481, 486 (1974). The general rule in the Commonwealth is that failure to adhere to statutory bidding requirements makes void a contract entered into without such compliance. Phipps Products Corp. v. M.B.T.A. 387 Mass. 687,691 (1982).

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 a wish or intention, but not a requirement), usually 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 usual 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 Mattapoissett*,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. INTEREST DUE SUBCONTRACTORS AND GENERAL CONTRACTORS FOR LATE PAYMENTS ON PUBLIC BUILDING PROJECTS.**

This statute is quite lengthy and I have tried to reduce it as much as possible to convey the general idea of it. Should an interest situation arise as to a Massachusetts public building project, the entire statute should be reviewed at that time.

MGL C. 30, s. 39K describes what interest a contractor is entitled to receive for late payment:

### **§ 39K. Public building construction contracts; payments**

“Every contract for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building by the commonwealth, or by any county, city, town, district, board, commission or other public body, when the amount is more than five thousand dollars in the case of the commonwealth and more than two thousand dollars in the case of any county, city, town, district, board, commission or other public body, shall contain the following paragraph:-- **Within fifteen days (30 days in the case of the Commonwealth, including local housing authorities) after receipt from the contractor, at the place designated by the awarding authority if such a place is so designated, of a periodic estimate requesting payment of the amount due for the preceding month, the awarding authority **will**<sup>3</sup> make a periodic payment to the contractor for the work performed during the preceding month and for the materials not incorporated in the work but delivered and suitably stored at the site (or at some location agreed upon in writing) to which the contractor has title or to**

which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority. . . . After the receipt of a periodic estimate requesting final payment and **within sixty-five days** after (a) the contractor fully completes the work or substantially completes the work so that the value of the work remaining to be done is, in the estimate of the awarding authority, less than one per cent of the original contract price, or (b) the contractor substantially completes the work and the awarding authority takes possession for occupancy, whichever occurs first, **the awarding authority shall pay the contractor the entire balance due on the contract less (1) a retention** based on its estimate of the fair value of its claims against the contractor and of the cost of completing the incomplete and unsatisfactory items of work and less (2) a retention for direct payments to subcontractors based on demands for same in accordance with the provisions of [section thirty-nine F](#), or based on the record of payments by the contractor to the subcontractors under this contract if such record of payment indicates that the contractor has not paid subcontractors as provided in [section thirty-nine F](#). **If the awarding authority fails to make payment as herein provided, there shall be added to each such payment daily interest at the rate of three percentage points above the rediscount rate then charged by the Federal Reserve Bank of Boston commencing on the first day after said payment is due and continuing until the payment is delivered or mailed to the contractor; provided, that no interest shall be due, in any event, on the amount due on a periodic estimate for final payment until fifteen days (twenty-four days in the case of the Commonwealth) after receipt of such a periodic estimate from the contractor, at the place designated by the awarding authority if such a place is so designated. The contractor agrees to pay to each subcontractor a portion of any such interest paid in accordance with the amount due each subcontractor. . . .**

The person making payment for the awarding authority **shall<sup>4</sup>** add the daily interest provided for herein to each payment for each day beyond the due date based on the date of receipt marked on the estimate.” (Emphasis added)

## **VI. INTEREST DUE SUBCONTRACTORS AND GENERAL CONTRACTORS ON PUBLIC WORKS PROJECTS (NON-BUILDINGS, SUCH AS WATER AND SEWER AND PAVING PROJECTS).**

This statute is quite lengthy and, much as I did with the previous statute, I have tried to reduce it down as much as possible to convey the general *idea* of it. Should an interest situation arise as to a Massachusetts public works project, the entire statute should be reviewed at that time.

MGL C. 30, s. 39G describes what interest a contractor is entitled to receive for late payment:

**§ 39G. Completion of public works; semi-final and final estimates; payments; extra work; disputed items**

**“ . . . . Within sixty-five days after the effective date of a declaration of a substantial completion, the awarding authority shall prepare and forthwith send to the contractor for acceptance a substantial completion estimate** for the quantity and price of the work done and all but one per cent retainage, if held by the awarding authority, on that work, including the quantity, price and all but one per cent retainage, if held by the awarding authority, for the undisputed part of each work item and extra work item in dispute but excluding the disputed part thereof, less the estimated cost of completing all incomplete and unsatisfactory work items and less the total periodic payments made to date for the work. . .

**If the awarding authority fails to prepare and send to the contractor any substantial completion estimate required by this section on or before the date herein above set forth, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such substantial completion estimate at the rate of three percentage points above the rediscount rate then charged by the Federal Reserve Bank of Boston from such date to the date on which the awarding authority sends that substantial completion estimate to the contractor for acceptance or to the date of payment therefor, whichever occurs first. The awarding authority shall include the amount of such interest in the substantial completion estimate. . . .**

**Within thirty days after receipt by the awarding authority of a notice from the contractor stating that all of the work required by the contract has been completed, the awarding authority shall prepare and forthwith send to the contractor for acceptance a final estimate for the quantity and price of the work done and all retainage, if held by the awarding authority, on that work less all payments made to date, unless the awarding authority's inspection shows that work items required by the contract remain incomplete or unsatisfactory, or that documentation required by the contract has not been completed. If the awarding authority fails to prepare and send to the contractor the final estimate within thirty days after receipt of notice of completion, the awarding authority shall pay to the contractor interest on the amount which would have been due to the contractor pursuant to such final estimate at the rate hereinabove provided from the thirtieth day after such completion until the date on which the awarding authority sends the final estimate to the contractor for acceptance or the date of payment therefor, whichever occurs first, provided that the awarding authority's inspection shows that no work items required by the contract remain**

incomplete or unsatisfactory. Interest shall not be paid hereunder on amounts for which interest is required to be paid in connection with the substantial completion estimate as hereinabove provided. **The awarding authority shall include the amount of the interest required to be paid hereunder in the final estimate.**

**The awarding authority shall pay the amount due pursuant to any substantial completion or final estimate within thirty-five days after receipt of written acceptance for such estimate from the contractor and shall pay interest on the amount due pursuant to such estimate at the rate hereinabove provided from that thirty-fifth day to the date of payment. Within 15 days, 30 days in the case of the Commonwealth, after receipt from the contractor, at the place designated by the awarding authority, if such place is so designated, of a periodic estimate requesting payment of the amount due for the preceding periodic estimate**

period, the awarding authority **shall** make a periodic payment to the contractor for the work performed during the preceding periodic estimate period and for the materials not incorporated in the work but delivered and suitably stored at the site, or at some location agreed upon in writing, to which the contractor has title or to which a subcontractor has title and has authorized the contractor to transfer title to the awarding authority, upon certification by the contractor that he is the lawful owner and that the materials are free from all encumbrances. **The awarding authority shall include with each such payment interest on the amount due pursuant to such periodic estimate at the rate herein above provided from the due date. . . .**” (Emphasis added)

## **VII. MASSACHUSETTS’ GENERAL STATUTE FOR THE PAYMENT OF INTEREST ON CONTRACT ACTIONS.**

There is a general interest statute in Massachusetts, which applies to what contract interest subcontractors and general contractors are entitled to with regard to their legal actions. MGL C. 231, s. 6C provides:

### **§ 6C. Interest added to damages in contract actions**

“In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or **at the rate of twelve per cent per annum from the date of the breach or demand.** If the date of the breach or demand is not established, interest shall be added by the clerk of the court, at such contractual rate, or **at the rate of twelve per cent per annum from the date of the commencement of the action,** provided, however, that in all actions based on contractual obligations, upon a verdict, finding or order for judgment against the commonwealth for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at

the contract rate, if established, or at a rate calculated pursuant to the provisions of [section six](#) I from the date of the breach or demand. If the date of the breach or demand is not established, such interest shall be added by the clerk of the court from the date of the commencement of the action.” (Emphasis added)

## **VIII. HOW CONFLICTS ARE RESOLVED AS TO INTEREST RATES BETWEEN THE GENERAL PUBLIC CONSTRUCTION PROVISIONS PROVIDING FOR INTEREST AND THE GENERAL CONTRACT RATE OF INTEREST AS IS ALSO PROVIDED FOR BY STATUTE.**

When there is a conflict between the public construction rates of interest (MGL C. 30, s. 39G and K) and the general contract rate of interest (MGL C. 231, 6C), the latter statute prevails. Here are some judicial decisions saying so:

Interest under G.L. c. 231, § 6C applies even for claims by a subcontractor against a general contractor on a public construction project. *J.C. Higgins Company, Inc. v. Bond Bros., Inc.*, 58 Mass.App.Ct. 537, 791 N.E.2d 367 (2003) (§ 6C controls even though statute, G.L. c. 30, § 39K, provides different penalty rate for such contracts; plaintiff cannot apply § 39K rate even in settlement of disputed amount). See also, *D. Federico Co. v. New Bedford Redev. Auth'y*, 9 Mass.App.Ct. 141, 399 N.E.2d 1103 (1980) (disputed amounts under a public works contract accrue interest under G.L. c. 231, § 6C, rather than under penalty rate under G.L. c. 30, § 39G, the latter generally controlling such contracts).

This is an important idea to understand, as a public owner will always try to reduce the interest factor to be that of either MGL C. 30, s. 39K or MGL C. 30, s. 39G as a measure of its maximum exposure, this assuming it realizes (and acknowledges) that it has an obligation to pay such interest in the first place.

Subcontractors/general contractors should always press for interest under MGL C. 231, s. 6C, as the rate of interest under that statute will be *much* greater than that of the two public construction-specific statutes discussed above. Perhaps, it is only awardable if there is a pending legal action. If it becomes relevant, that issue might be looked into. Depending on how much money is at issue, a legal action to collect interest can be initiated. (An example of a successful such action is discussed below.)

## **IX. THE DIFFERENCE BETWEEN A TIMING CLAUSE AND A PAY-WHEN-PAID CLAUSE AND HOW THESE AFFECT THE OBLIGATIONS OF GENERAL CONTRACTORS TO PAY SUBCONTRACTORS.**

Generally speaking, the fact that a general contractor has not been paid by the owner (unless the reason for non-payment is attributable to the subcontractor in question) is no defense



to a subcontractor's right to be paid from the general contractor in accordance with the payment provisions as contained within the subcontract. It is only when there is an enforceable pay-when-paid clause that a general contractor is excused – for a time - for non-payment to a subcontractor.

The difference between a 'timing clause' and a 'pay-when-paid' clause is that under the former, the subcontractor is assuming *no* risk of the owner's non-payment while under the latter the subcontractor is assuming at least *some* risk as to the owner's non-payment, which could/can delay payment to that subcontractor.

But, even a pay-when-paid clause has its limitations. Ultimately, if the reason for non-payment is not attributable to the subcontractor in question, then lack of payment by the owner to the general contractor is not a defense for the general contractor. I know of no case which defines the length of time between when lack of payment is a defense to when it is *not* a defense any longer. This is an area of the law that needs more work!<sup>5</sup>

A pay-when-paid clause will necessarily require a subcontractor's agreement to assume some of the risk for owner non-payment.<sup>6</sup>

I will give an example of a timing clause and then an example of a pay-when-paid clause. As you will see, up to a point, both clauses are identical.

#### **A. A timing clause (lack of payment is no defense):**

Here's an example of a 'timing clause':

"General contractor will pay subcontractor within ten days of receipt of payment from the owner."

This is a 'timing clause'. The idea underlying a 'timing clause' is that the general contractor should be afforded an opportunity to try to get paid. The fact that it does not get paid, however, is irrelevant to its obligations to make payments to the subcontractor pursuant to the payment provisions of any applicable subcontract.

#### **B. A pay-when-paid clause:**

This can start out looking just like a timing clause:

"General contractor will pay subcontractor within ten days of receipt of payment from the owner, **prior payment by the owner to the general contractor being a condition precedent to the general contractor's obligation to make payment to the subcontractor.**"

Note that until we reach the language in bold, this part of the pay-when-paid clause is identical to a timing clause. What makes it a pay-when-paid clause is the subcontractor in the language in bold is assuming some of the risk of the owner's non-payment. And, this

'assumption' is evidenced simply by the subcontractor's execution of the subcontract containing such a provision.

**C. A pay-when-paid clause in a subcontract is not a defense to a general contractor's surety on a public payment bond claim even when that clause is a defense to the general contractor.**

When a claim is made against a general contractor and the general contractor's surety on a public payment bond, notwithstanding the fact that a pay-when-paid clause is a defense to the general contractor, this is no defense to the general contractor's surety pursuant to case law. Coastline Fire Protection Co., Inc. v. Peabody Construction Co., Inc., 2004 WL 1791425. This goes against the usual law that a surety is entitled to all of the factual and legal defenses of its principal, in addition to its own personal defenses (e.g. lack of timely notice, statute of limitations).

In drafting subcontracts, subcontractors will try to have payment determined by a timing clause while general contractors will try to have payment determined by a pay-when-paid clause. And, so proceeds the eternal dance!

## **X. INTEREST DUE UNDER CLAIMS AGAINST THE COMMONWEALTH.**

M.G.L.A. 231 § 6I provides:

### **§ 6I. Interest rate; schedule**

“Interest required to be paid by the commonwealth pursuant to this section shall be calculated at a Weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding date of the judgment; provided, however, that **such interest shall not exceed the rate of ten percent per annum.** The secretary of administration and finance shall maintain a schedule of the rate described above for the distribution to all clerks of courts.” (Emphasis added)

## **XI. THE MECHANICS OF AN INTEREST ONLY LAWSUIT.**

As I mentioned above, a general contractor I represented had a project with the City of Boston. It was either a painting contract or a maintenance contract which required a lot of painting.

My client told me that for an entire Boston department, all payments had to go through just *one* person, an older lady fairly close to retirement. And, when this person was sick, overworked, overwhelmed or just on vacation, payments simply didn't get processed when they were supposed to.

My client sent me a spreadsheet showing the specifics of when each requisition had been submitted and then when it was paid by the City of Boston. Most of the payments were late and, of the payments that *were* late, the majority of them were *really late*. Interest due on these overdue sums, computed using the references above, was \$12,000.

My guy wanted to sue! I was dubious because, for the court system, it was a fairly small amount. And, of course, because we were dealing with the City of Boston! Enough said?

First tactical decision? Never sue the City of Boston in any court located within the City of Boston! As I recall, suit was filed in Stoughton District Court.

At that time, there were court ordered ‘conciliations’ with a ‘lawyer for the day’. (A conciliation is similar to a settlement conference, although significantly less in scope than that of a mediation.) Both parties were ordered to attend with settlement authority.

The City of Boston lawyer showed up. The conciliator asked the City of Boston Attorney what his authority was and he said that he didn’t have any. Wrong answer! The conciliator read him the riot act and insisted he call his people then and there and obtain some.

Shortly thereafter, the matter was settled for \$12,000!

This was a very good result and a very quick result. Because the issue is so clearly defined, the discovery that would be necessary to prosecute such a case should be fairly minimal, assuming that there is no serious issue as to whether or not the contractor was entitled to payment when it claimed to be and both sides agreed on the arithmetic. It should be kept in mind, however, that in any suit of this nature, a plaintiff’s attorneys’ fees will not be recoverable against the public owner due to the ‘American Rule’ of attorneys’ fees, which Massachusetts follows, and which is discussed elsewhere on our website.

## **XII. CONCLUSION.**

I can almost promise you that whatever Massachusetts public agency you are/will be dealing with, from the very smallest to the very largest, they will not fully understand the timing of their payment obligations to you.

In particular, it may be important to remind them that pursuant to both MGL C. 30, s. 39K (buildings) and MGL C. 30, s. 39G (public works) payment of interest for late payments is both statutory and *mandatory*. And, that according to these statutes, public agencies are under an obligation to pay interest for late payments without the contractor’s even having to ask for it!

And, never lose sight of the fact that 12% interest is possible and that in any conflict between that interest statute and the two statutes referenced in the paragraphs above, by various court decisions, the contractor is entitled to the higher rate of interest.

Hopefully, with a better understanding of your interest rights, you’ll be asking for interest more frequently in applicable situations. If nothing else, since public employees want to keep as

low a profile as is possible from their supervisors as to their possible negative acts, your asking for interest for late payments will, at least, (hopefully) stimulate the late payment!

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

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<sup>1</sup> 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.”

<sup>2</sup> The word ‘shall’ has special statutory significance, which will be discussed below.

<sup>3</sup> The word ‘will’ in this context is the functional equivalent of the word ‘shall’.

<sup>4</sup> When sending a copy of the statute to the awarding authority, don’t be shy in pointing out how many times the word ‘shall’ appears!

<sup>5</sup> As do so many other areas of the law!!

<sup>6</sup> From a judicial standpoint, just the fact that the subcontractor signed the contract in question is all the evidence a court will need to establish the subcontractor’s ‘agreement’.