

The Massachusetts Prompt-Pay Act: Sweeping Changes for Construction Providers and Users Alike

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**“IF YOU LIKE LAWS AND SAUSAGES, YOU SHOULD
NEVER WATCH EITHER ONE BEING MADE.”**

Otto Von Bismark (1815 – 1989)

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BACKGROUND

- **THE GENESIS OF ACT CENTERS ON WHETHER GENERAL CONTRACTORS SHOULD BEAR THE RISK OF THEIR OWNERS' FAILURE TO PAY.**
- **THE FOCAL POINT: “CONDITIONAL PAYMENT” PROVISIONS.**
 - **ALSO, KNOWN AS “PAY IF PAID” PROVISIONS.**
- **THESE PROVISION LINKS GENERAL CONTRACTOR'S PAYMENT OBLIGATIONS TO RECEIPT OF PAYMENT FROM OWNER.**



- **FOR OVER 40 YEARS, MASSACHUSETTS COURTS HAVE UPHELD “PAY IF PAID” PROVISIONS. *AJ WOLFE COMPANY V. BALTIMORE CONTRACTORS, INC.*, 345 MASS. 361 (1969).**
- **PROVISIONS ALSO USED DEFENSIVELY BY SURETIES.**
- **SIMILAR DEFENSES ALSO RAISED IN CONNECTION WITH CLAIMS UNDER THE MASSACHUSETTS MECHANIC’S LIEN LAW.**
- **THE COMMON LAWS IN MANY OTHER STATES WERE SIMILAR TO MASSACHUSETTS LAW.**
- **FOR DECADES, BATTLE LINES HAVE BEEN DRAWN OVER DIFFERING POSITIONS.**



THE GENERAL CONTRACTORS' POSITION

- **BECAUSE OF COMPRESSED MARK-UPS, IT IS UNREASONABLE FOR GENERAL CONTRACTORS TO ASSUME THE FULL RISK OF NON- PAYMENT.**
- **CONDITIONAL PAYMENT PROVISIONS ARE TYPICALLY NEGOTIATED, AND, TODAY, SUBCONTRACTORS HAVE MORE LEVERAGE TODAY TO NEGOTIATE PAYMENT REQUIREMENTS.**
- **IT IS FAIRER AND MORE EQUITABLE TO ALLOCATE RISK RATHER THAN LAYING 100% AT THE GENERAL CONTRACTOR'S FEET.**



THE SUBCONTRACTORS' POSITION

- **THEY SHOULD NOT BE REQUIRED TO FORFEIT PAYMENT WHERE NON-PAYMENT IS NOT BASED ON THEIR NONPERFORMANCE.**
- **SUBCONTRACTORS ARE GENERALLY UNABLE TO OBTAIN ANY PAYMENT GUARANTEES DIRECTLY FROM OWNER.**
- **GENERAL CONTRACTORS ARE IN THE BEST POSITION TO DETERMINE THEIR OWNERS' ABILITY TO PAY AND TO SECURE PROTECTION FOR NON-PAYMENT.**



- **SUBCONTRACTORS AND GENERAL CONTRACTORS RARELY HAVE EQUAL BARGAINING POWER.**
- **GENERAL CONTRACTORS OFTEN FUNCTION MORE AS BROKERS; SUBCONTRACTOR OFTEN PERFORM UPWARDS OF 90% OF THE WORK.**
 - **THUS, THE RISK OF AN OWNER INSOLVENCY IS DISPROPORTIONATELY BORNE BY THE SUBCONTRACTOR.**
- **THE APPLICATION OF THE “CONDITIONAL PAYMENT” CLAUSE WOULD LIKELY INVALIDATE A SUBCONTRACTOR’S LIEN OR PAYMENT BOND RIGHTS.**



THE EMERGENCE OF LEGISLATIVE INITIATIVES

- **IN THE EARLY 1990'S, A NUMBER OF STATES ENACTED LAWS RENDERING CONDITIONAL PAYMENT PROVISIONS UNENFORCEABLE OR UNAVAILABLE AS A LIEN OR BOND CLAIM DEFENSE.**
- **AS OF THE ENACTMENT DATE OF THE MASSACHUSETTS ACT, OVER 30 STATES HAVE ENACTED SOME FORM OF PROMPT PAYMENT LEGISLATION.**
- **ENACTMENT OF THE MASSACHUSETTS ACT WAS THE CULMINATION OF A DECADE LONG LOBBYING EFFORT BY ASM.**



- **THIS PAST SPRING, IN A CLEVER BIT OF LEGISLATIVE MANEUVERING, ASM JOINED WITH 12 TRADE UNIONS AND RE-CAST THE LEGISLATION AS A “JOBS BILL.”**
- **THE ASM’S PRINCIPLE OPPONENT, AGC, CLAIMED THAT THE LEGISLATION WAS “POORLY CRAFTED, DISJOINTED, AND RIDDLED WITH HARMFUL AND UNINTENDED CONSEQUENCES.”**
 - **AGC HAD A VALID POINT**



- **IN THE FINAL TWO WEEKS OF THE 2010 LEGISLATIVE SESSION (WHEN IT BECAME CLEAR A BILL WOULD BE ENACTED), AGC NEGOTIATED SOME CHANGES WITH ASM.**
- **THE COMPROMISE BILL STILL LACKS CLARITY AND RAISES MANY QUESTIONS.**
- **AND, SIMILAR TO SAUSAGE, THE ACT CONTAINS INGREDIENTS WHICH YOU MAY NOT WANT TO, BUT SHOULD, KNOW ABOUT PRIOR TO CONSUMPTION.**



KEY FEATURES OF THE ACT

EFFECTIVE DATE

- **CHAPTER 293 OF THE ACTS OF 2010 (“AN ACT PROMOTING FAIRNESS IN PRIVATE CONSTRUCTION CONTRACTS”) CREATES A NEW SECTION 29E IN G.L. CHAPTER 149.**
 - **BECOMES EFFECTIVE ON NOVEMBER 8, 2010.**
- **THE ACT DOES NOT APPLY RETROACTIVELY.**
- **ONLY APPLIES TO CONSTRUCTION CONTRACTS ENTERED INTO ON OR AFTER THE EFFECTIVE DATE.**



CONTRACTS AND PROJECTS WHICH ARE SUBJECT TO THE ACT

- **ACT APPLIES TO PROJECTS:**
 - **“FOR WHICH A LIEN *MAY* BE ESTABLISHED UNDER SECTIONS 2 OR 4 OF CHAPTER 254”;** AND,
 - **FOR PROJECTS IN EXCESS OF FOUR DWELLING UNITS HAVING A CONTRACT PRICE OF \$3 MILLION OR MORE.**

COMMENTS:

- **M.G.L. CH. 254, § 2 APPLIES TO GENERAL CONTRACTORS;**



COMMENTS (CONT'D.):

- **M.G.L. CH. 254, § 4 APPLIES TO FIRST AND SECOND TIER SUBCONTRACTORS. THUS, ACT'S REACH GOES NO LOWER THAN SUB-SUBCONTRACTOR TIER.**

- **THE ACT DOES NOT APPLY TO CONTRACTS WITH OWNERS FOR PERSONAL LABOR.**



COMMENTS (CONT'D.):

- **USE OF THE VERB “MAY” IN § 29E(a) COULD LEAD TO DIFFERENT INTERPRETATIONS. E.G., IF AN ELIGIBLE MECHANIC’S LIEN CLAIMANT FAILS TO PERFECT LIEN, IS HE STILL ENTITLED TO ACT’S PROTECTION?**
- **ALSO, DOES THE ACT APPLY WHERE, E.G., AN OWNER OF A \$10 MILLION PROJECT AWARDS FIVE SEPARATE PRIME CONTRACTS OF \$2 MILLION EACH?**
- **DOES THE ACT APPLY, E.G., TO A DEVELOPER OF FIVE SEPARATE FIVE UNIT CONDOMINIUM PROJECTS TO BE BUILT SIMULTANEOUSLY, EACH OF WHICH HAS A CONTRACT OF LESS THAN \$3 MILLION?**



PERIODIC PAYMENT APPLICATIONS

- **UNDER § 29E(c), CONTRACTS MUST PROVIDE “REASONABLE TIME PERIODS” WITHIN WHICH THE CONTRACTOR MUST SUBMIT PERIODIC PAYMENT APPLICATIONS.**
- **TIME PERIOD MUST NOT EXCEED 30 DAYS BEGINNING WITH END OF FIRST CALENDAR MONTH OCCURRING AT LEAST 14 DAYS AFTER CONTRACTOR COMMENCED PERFORMANCE.**

COMMENTS:

- **IF, E.G., CONTRACTOR BEGINS PERFORMANCE ON JANUARY 14TH, THE CONTRACT CAN REQUIRE THAT THE PAYMENT APPLICATION BE SUBMITTED ON MARCH 2ND (I.E., 30 DAYS AFTER JANUARY 31ST).**



COMMENTS (CONT'D.):

- **§ 29E(c) MANDATES THAT THE CONTRACT IMPOSE A “REASONABLE TIME” NOT TO EXCEED THE AFOREMENTIONED TIME LIMITS.**
- **THERE WILL LIKELY BE CASES WHERE A CONTRACTOR WILL ARGUE THAT 44 DAYS IS UNREASONABLE.**
- **APPLIES TO “PERIODIC PROGRESS PAYMENTS”, BUT APPARENTLY NOT TO FINAL PAYMENTS.**



APPROVAL OR REJECTION OF PAYMENT APPLICATIONS

- **CONTRACTS MUST ALSO PROVIDE A “REASONABLE TIME” FOR APPROVAL OR REJECTION OF A PAYMENT APPLICATION.**
- **TIME MUST NOT EXCEED:**
 - **15 DAYS AFTER *SUBMISSION* TO OWNER;**
 - **22 DAYS FOR A GENERAL CONTRACTOR’S APPROVAL/REJECTION OF A SUBCONTRACTOR’S APPLICATION; AND,**
 - **29 DAYS FOR SUBCONTRACTOR’S APPROVAL/REJECTION OF SUB-SUBCONTRACTOR’S APPLICATION.**



COMMENTS :

- **DOES “SUBMISSION” MEAN SUBMISSION TO THE ARCHITECT (AS IN MOST AIA CONTRACTS) OR TO THE OWNER, AFTER ARCHITECT’S REVIEW AND APPROVAL OR REJECTION?**
- **E.G., AIA A201 – 2007 § 9.4.1 PROVIDES THE ARCHITECT WITH 7 DAYS TO ISSUE A CERTIFICATE FOR PAYMENT OR NOTIFY THE CONTRACTOR AND OWNER IN WRITING OF REASONS FOR WITHHOLDING CERTIFICATION.**
- **THUS, IF “SUBMISSION” MEANS SUBMISSION TO THE ARCHITECT, THEN THE OWNER MAY ONLY HAVE A MAXIMUM OF 8 DAYS TO APPROVE OR REJECT THE APPLICATION.**



COMMENTS (CONT'D.):

- **WHAT IF THE OWNER'S LENDER MUST ALSO APPROVE PAYMENT APPLICATIONS?**
- **AS WITH PERIODIC PAYMENT APPLICATION PROCEDURES, CONTRACTORS AND SUBCONTRACTORS MAY ARGUE THAT THE MAXIMUM TIME PERIODS ARE UNREASONABLY LONG.**



- **PAYMENT APPLICATIONS NOT APPROVED OR REJECTED WITHIN THE MAXIMUM ALLOWABLE TIME PERIOD SHALL BE “DEEMED” APPROVED.**
- **REJECTIONS MUST BE IN WRITING AND INCLUDE “AN EXPLANATION OF THE FACTUAL AND CONTRACTUAL BASIS FOR THE REJECTION AND SHALL BE CERTIFIED AS MADE IN GOOD FAITH.”**
- **REJECTION OF AN APPLICATION SHALL BE “SUBJECT TO THE APPLICABLE (CONTRACT) DISPUTE RESOLUTION PROCEDURES.**
- **CONTRACT PROVISIONS REQUIRING A PARTY TO DELAY COMMENCEMENT OF DISPUTE RESOLUTION PROCEDURES MORE THAN 60 DAYS AFTER REJECTION “SHALL BE VOID AND UNENFORCEABLE.”**



- **THERE IS AN EXCEPTION FOR PAYMENTS SUBJECT TO “CONDITION OF RECEIPT OF PAYMENT BY A THIRD PERSON” UNDER § 29E(e) WHICH WILL BE DISCUSSED LATER ON.**

COMMENTS:

- **THE ‘DEEMED’ APPROVED PROVISIONS APPEAR TO BE APPLICABLE ONLY TO PERIODIC PROGRESS PAYMENTS AND NOT TO FINAL PAYMENTS.**
- **THUS, THERE IS NO TIME LIMIT FOR APPROVAL OR REJECTION OF FINAL PAYMENT APPLICATIONS.**
- **THERE IS ALSO NO LANGUAGE DIFFERENTIATING BETWEEN PARTIAL OR COMPLETE APPROVAL OR REJECTION OF APPLICATION.**



COMMENTS (CONT'D.):

- **UNDER COMMON LAW PRINCIPLES, THE REJECTING PARTY MIGHT BE *PRECLUDED* FROM ASSERTING ANY NEW BASES FOR REJECTION AFTER THE INITIAL REJECTION NOTICE HAS BEEN PROVIDED.**

- **WHAT CONSTITUTES A “GOOD FAITH” CERTIFICATION OF REJECTION WILL LIKELY ENGENDER DISPUTES.**



- **A “DEEMED” APPROVAL” STARTS THE TIME PERIOD FOR PAYMENT.**
- **A “DEEMED” APPROVAL CAN BE REVERSED BY REJECTION MADE BEFORE PAYMENT DUE DATE.**

COMMENTS:

- **LACK OF “GOOD FAITH” CLAIMS MIGHT INCREASE IF A “DEEMED” APPROVAL IS REJECTED JUST BEFORE PAYMENT WOULD OTHERWISE BE DUE.**
- **NONETHELESS, CONTRACTORS/SUBCONTRACTORS/ OWNERS MAY WISH TO WAIT UNTIL SHORTLY BEFORE THE PAYMENT IS DUE TO REJECT THE APPLICATION IN ORDER TO DEVELOP ADDITIONAL BASES.**



COMMENTS (CONT'D.):

- **REJECTIONS ARE SUBJECT TO “THE APPLICABLE DISPUTES RESOLUTION” PROCEDURES IN THE CONTRACT.**
- **THUS, IT’S IMPORTANT FOR OWNERS, SUBCONTRACTORS AND CONTRACTORS TO SPECIFY DISPUTE RESOLUTION PROCEDURES FOR REJECTED PAYMENT APPLICATIONS.**



TIME FOR PAYMENT

- **CONTRACTS MUST PROVIDE A “REASONABLE TIME” IN WHICH PAYMENT APPLICATIONS MUST BE PAID, NOT TO EXCEED 45 DAYS.**

COMMENT:

- **CONTRACTORS AT MAY CONTEND THAT 45 DAYS IS AN UNREASONABLY LONG PERIOD OF TIME.**



CONTRACT PRICE INCREASES

- **UNDER § 29E(d), CONTRACTS MUST PROVIDE A “REASONABLE TIME” PERIOD FOR APPROVAL OR REJECTION OF WRITTEN REQUESTS FOR PRICE INCREASES NOT TO EXCEED 30 AFTER THE LATTER OF:**
 - **COMMENCEMENT OF THE PERFORMANCE OF THE CHANGED WORK; OR,**
 - **SUBMISSION OF THE WRITTEN REQUEST.**

COMMENT:

- **UNLIKE THE PROGRESS PAYMENT APPLICATION PROVISIONS, SUBSECTION (d) EMPLOYS THE PHRASE “IN WHOLE OR IN PART” PERTAINING TO APPROVAL OR REJECTION OF A CONTRACT PRICE INCREASE.**



- **MAXIMUM TIME PERIOD FOR APPROVAL/REJECTION BY OWNER IS 30 DAYS.**
- **MAXIMUM TIME PERIOD FOR APPROVAL/REJECTION BY GENERAL CONTRACTORS IS 37 DAYS.**
- **TIME PERIOD FOR APPROVAL/REJECTION BY SUBCONTRACTORS IS 42 DAYS.**



COMMENTS:

- **SUBSECTION (d) CONTAINS PROVISIONS SUBSTANTIALLY SIMILAR TO THOSE IN SUBSECTION (c) REGARDING “DEEMED” APPROVAL OF CONTRACT PRICE INCREASE REQUESTS.**
- **CONTRACTORS, SUBCONTRACTORS AND SUBSUBCONTRACTORS CAN NOW INCLUDE ADDITIONAL COMPENSATION REQUESTS IN THE NEXT PAYMENT APPLICATION AFTER APPROVAL.**
- **AS WITH THE “REASONABLE TIME” LANGUAGE IN SUBSECTION (c), THERE WILL UNDOUBTEDLY BE CLAIMS THAT THE MAXIMUM TIME PERIODS CONTAINED IN SUBSECTION ARE UNREASONABLE.**



SAY “AUFIDERZEIN” TO MANY CONDITIONAL PAYMENT CLAUSES

- **§ 29E(e) PROVIDES THAT SO-CALLED “PAY IF PAID” PROVISIONS ARE VOID AND UNENFORCEABLE FOR APPLICABLE CONTRACTS.**

COMMENTS:

- **ACT ONLY APPLIES TO OWNERS, GENERAL CONTRACTORS AND TIER ONE AND TIER TWO SUBCONTRACTORS ON COMMERCIAL, RESIDENTIAL AND PRIVATE PROJECTS (CONTAINING MORE THAN FOUR DWELLING UNITS) WITH AN ORIGINAL CONTRACT PRICE OF \$3 MILLION OR MORE.**



COMMENTS (CONT'D.):

- **COMMON LAW RULE UPHOLDING ENFORCEABILITY OF “PAY IF PAID” PROVISIONS REMAINS UNCHANGED FOR CONTRACTS NOT SUBJECT TO THE ACT.**
- **PERFORCE, CONTRACTORS WILL BE REQUIRED TO MAINTAIN MULTIPLE SETS OF CONTRACT DOCUMENTS.**



- **THERE ARE TWO EXCEPTIONS TO THE UNENFORCEABILITY OF “PAY IF PAID” PROVISIONS.**

THE FIRST EXCEPTION:

- **PAYMENT NOT RECEIVED BECAUSE THE CONTRACTOR FAILED TO PERFORM AND FAILED TO CURE AFTER WRITTEN NOTICE WITHIN THE TIME REQUIRED IN THE CONTRACT, OR 14 DAYS AFTER WRITTEN NOTICE IF THE CONTRACT CONTAINS NO CURE OR NOTICE PROVISIONS.**



COMMENTS:

- **THIS VAGUELY WORDED SECTION ONLY CARVES OUT THE AMOUNT “NOT RECEIVED” WHICH IS DIRECTLY RELATED TO NON-PERFORMANCE AND WHICH IS NOT CURED AFTER WRITTEN NOTICE.**
- **THE NOTICE PROVISION IN SUBSECTION (e) APPEARS TO BE LESS STRINGENT THAN THE “EXPLANATION OF THE FACTUAL AND CONTRACTUAL BASES” FOR A PERIODIC PAYMENT REQUISITION REJECTION UNDER SUBSECTION (c) AND A CONTRACT PRICE INCREASE REJECTION UNDER SUBSECTION (d).**



COMMENTS (CONT'D.):

- **IT IS ESSENTIAL THAT CONSTRUCTION CONTRACTS CONTAIN NOTICE AND CURE PROVISIONS, ESPECIALLY SINCE MANY CURES WILL REQUIRE MORE THAN 14 DAYS.**
- **WHETHER YOU ARE AN OWNER, GENERAL CONTRACTOR OR SUBCONTRACTOR, YOU NEED TO ENSURE THAT NOTICE AND CURE PROVISIONS INCLUDE SPECIFICS.**



THE SECOND EXCEPTION:

- **FOR AMOUNTS NOT RECEIVED BECAUSE THE PAYOR IS OR BECOMES “INSOLVENT” WITHIN 90 DAYS AFTER REQUISITION SUBMISSION DATE.”**
- **CONTRACTORS AND SUBCONTRACTORS SEEKING TO ENFORCE THE CONDITIONAL PAYMENT LANGUAGE IN AN INSOLVENCY SITUATION EACH MUST HAVE:**
 - **TIMELY RECORDED A NOTICE OF CONTRACT UNDER G.L. C. 254 AND, WHERE APPLICABLE, SENT A NOTICE OF IDENTIFICATION (*SEE G.L. C. 254, § 4*) PRIOR TO THE SUBMISSION OF THE FIRST APPLICATION FOR PAYMENT;**



- **TIMELY RECORDED A STATEMENT OF ACCOUNT AND COMMENCED A CIVIL ACTION TO ENFORCE THE LIEN;
*AND,***
- **“PURSUE[S] ALL REASONABLE LEGAL REMEDIES TO OBTAIN PAYMENT FROM PAYOR “UNLESS AND UNTIL THERE IS A REASONABLE LIKELIHOOD THE ACTION SHALL NOT RESULT IN OBTAINING PAYMENT.”**



COMMENTS:

- **THE DEFINITION OF “INSOLVENT” UNDER § 29E(a) REFERS TO “FEDERAL BANKRUPTCY LAW” WHICH, PRESUMABLY MEANS THE UNITED STATES BANKRUPTCY CODE OR EQUIVALENT FOREIGN LAW OR PAYOR BEING INVOLVED IN A RECEIVERSHIP PROCEEDING, OR HAVING MADE AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**
- **OTHER THAN WHERE PAYOR IS PETITIONED INTO BANKRUPTCY, IS THE SUBJECT OF A RECEIVERSHIP PROCEEDING OR MAKES AN ASSIGNMENT FOR THE BENEFIT OF ITS CREDITORS, THE INSOLVENCY EXCEPTION WILL BE DIFFICULT TO PROVE.**



COMMENTS (CONT'D.):

- **ALSO REQUIRING THE FILING OF A MECHANIC'S LIEN NOTICE UP FRONT WILL LIKELY INCUR THE WRATH OF CONSTRUCTION LENDERS AND COULD ACTUALLY SLOW DOWN PAYMENTS.**
- **REQUIRING THE PURSUIT OF "ALL REASONABLE LEGAL REMEDIES" IN THE CASE OF AN INSOLVENT PAYOR COULD REQUIRE PURSUIT OF PRE-JUDGMENT REMEDIES, SUCH AS REAL ESTATE AND BANK ACCOUNT ATTACHMENTS, AND PROSECUTING CLAIMS IN RECEIVERSHIP PROCEEDINGS AND/OR BANKRUPTCY COURT.**
- **THE COSTS FOR PURSUING THESE REMEDIES COULD CONCEIVABLY EXCEED THE AMOUNT OWED.**



- **THE ACT ALSO REQUIRES THAT SUBSECTION (e) EXCEPTIONS MUST BE EXPRESSLY STATED IN ANY CONDITIONAL PAYMENT CONTRACT PROVISION.**
- **THE BURDEN OF PROOF ON ALL ELEMENTS SHIFTS TO THE PERSON SEEKING THE BENEFIT OF THE EXCEPTION.**
- **LOWER TIER SUBCONTRACTORS CAN REQUEST DISCLOSURE OF ALL REMEDIES THE CONTRACTOR OR SUBCONTRACTOR PURSUED.**



- **SUBCONTRACTOR'S/CONTRACTOR'S/OWNER'S RESPONSE TO A REQUEST IS DUE WITHIN 10 DAYS OF THE REQUEST.**
- **IF NO RESPONSE IS PROVIDED, OR IF THE SUBCONTRACTOR REQUESTS IN WRITING THAT ADDITIONAL REMEDIES BE PURSUED, AND THE UPPER TIER CONTRACTOR UNREASONABLY FAILS TO DO SO, THEN THE SUBCONTRACTOR CAN SEEK AN EXPEDITED DETERMINATION WHETHER CONTRACTOR HAS FAILED TO PURSUE ADDITIONAL LEGAL REMEDIES.**



COMMENTS:

- **THE SUMMARY DETERMINATION REFERENCED ABOVE WOULD INVOLVE THE FILING A LAWSUIT UNDER THE MECHANICS LIEN LAW BY THE AGGRIEVED SUBCONTRACTOR.**
- **THUS, THE AGGRIEVED SUBCONTRACTOR WOULD EITHER HAVE TO JOIN IN THE UPPER TIER CONTRACTOR'S MECHANICS LIEN LAWSUIT, OR COMMENCE A *SECOND* LAWSUIT.**



LIMITATIONS ON CONTINUED PERFORMANCE OBLIGATIONS

- **PROVISIONS REQUIRING CONTRACTORS TO CONTINUE PERFORMANCE IN THE EVENT OF NON-PAYMENT MORE THAN 30 DAYS AFTER DATE PAYMENT WAS DUE ARE “VOID AND UNENFORCEABLE.”**
- **THERE ARE TWO LIMITED EXCEPTIONS:**
 - **IF THERE IS A DISPUTE REGARDING THE QUALITY OR QUANTITY OF THE CONSTRUCTION FURNISHED; AND,**
 - **A DEFAULT AFTER-PAYMENT APPROVAL HAS OCCURRED BY THE PAYEE, PROVIDED THAT THE DEFAULTING PERSON HAS RECEIVE PRIOR NOTICE OF THE DISPUTE OR DEFAULT “CERTIFIED AS MADE IN GOOD FAITH” AND ALL UNDISPUTED AMOUNTS HAVE BEEN PAID.**



COMMENTS:

- **CONTRACTORS SHOULD PAY CLOSE ATTENTION TO WHAT UPPER TIER CONTRACT PROVISIONS PROVIDE REGARDING WORK CONTINUATION.**
- **FOR EXAMPLE, AIA A201 – 2007, § 9.7 GIVES THE CONTRACTOR THE RIGHT UPON 7 ADDITIONAL DAYS NOTICE TO OWNER AND ARCHITECT TO STOP WORK UNTIL PAYMENT HAS BEEN RECEIVED.**
- **CONTRACTORS SHOULD ALSO BE ACUTELY AWARE OF THE “DEEMED” APPROVAL AND REJECTION TIME PERIODS IN THE ACT.**



RECOMMENDATIONS

- **ACT WILL TRUMP ANY INCONSISTENT CONTRACT PROVISIONS, BUT REQUIRES CONTRACTORS AND SUBCONTRACTORS TO CRAFT PROVISIONS CONSISTENT WITH THE ACT.**
- **THIS WILL REQUIRE CAREFUL DRAFTING DUE TO ABSENCE IF CLEAR GUIDANCE IN ACT.**
- **OWNERS, CONTRACTORS AND SUBCONTRACTORS WILL, PERFORCE, BE REQUIRED TO TRAIN PROJECT PERSONNEL ON THE ACT.**
- **TIME LIMITS WILL LIKELY BE STRICTLY ENFORCED. *SEE E.G., NATIONAL UNION FIRE INS. CO. V. BRAMBLE*, 388 Md. 195 (CT. APP. 2005) (WHERE SURETY FAILED TO FULLY COMPLY WITH THE 45 DAY TIME PERIOD FOR DISPUTING CLAIM AMOUNTS, “ENTIRETY OF THE CLAIM BEING UNDISPUTED.”**



THANK YOU!

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