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THE CONTRACTING PROFESSIONAL

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New Construction Legislation

TCP is excited to announce that a ground breaking piece of legislation has just been passed in Massachusetts which will drastically impact the construction contracting industry. On August 10, 2010 the Governor signed into law "An Act Promoting Fairness in Private Construction Contracts" or more commonly referred to as the "Massachusetts Prompt Pay Act." This new legislation is the result of years of hard work on the part of some of the Commonwealth's most dedicated and knowledgeable construction professionals. Accordingly, it represents a shift towards a level of equality and responsibility which has been missing from the industry for quite some time.

While the new law does not go into effect until November of this year, and it will be well beyond that before its true implications are known, TCP is happy to provide an overview of the most signifi-



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cant provisions.

As suggested in the title of the Act, the law applies only to *private* construction projects. This legislation will have no effect on those of you work-

ing on State, Federal, or local government projects. That being said, the law applies to every privately owned construction project where the contract between the Owner and the General Contractor is \$3,000,000.00 or more. The only exception to this broad application are residential projects that contain less than four dwelling units. In other words, this law applies to every private construction project valued at \$3,000,000.00 or more, except for single family homes and very small condominium developments.

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Settlement of Workers Comp. Claims Does Not Provide Immunity from Lawsuit

A recent Massachusetts Court decision has ruled that contractors are not immune from lawsuits simply because they paid benefits under Massachusetts workers compensation laws. While this may not seem like a significant result, it changes the way many contractors and insurers will think about their workers compensation responsibilities in the future. Prior to this decision it has generally been assumed that an injured employee gives

up his right to sue in exchange for collecting workers compensation benefits. This trade off provides an incentive for employers to carry workers compensation insurance because they would not be sued for negligence if their employee received workers compensation benefits under their insurance policy. This recent decision has somewhat altered our basic understanding of that trade off.

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New Construction Law (Cont.)



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"It no longer matters what your contract says"

M.G.L. ch. 149 § 29E



Given that this new legislation will affect a very significant portion of the private construction that occurs in the Commonwealth, it is critical that construction professionals have a basic understanding of the two key elements of this new law. The first element affects the timing of payment application approvals, change order request approvals, and ultimately, the distribution of contract funds on the project. More specifically, the law states that a payment application must be approved or rejected within 15 days of submission of the application. If the payment application is approved it must be paid within 45 days of the approval. If the payment application is rejected, in whole or in part, the rejection must be made in writing and must include an explanation as to why it is being rejected. If a rejection is not made in writing within the 15 day period, the application will be deemed to have been approved.

In addition to the strict timelines for approval and payment of requisitions, the new law also imposes timelines on the approval of change order requests. The new law requires that change order requests be submitted in writing and that once they are submitted they

be acted upon within 30 days. If the change order request is approved it can then be included in the next pay application and will be paid in accordance with the above described procedures. However, just like with the payment application provisions, if the change order request is going to be rejected, it must be rejected in writing within the 30 day time frame. The written rejection must also include an explanation as to why the request is being rejected. If the rejection is not made within 30 days, or if there is no written explanation, the change order request will be deemed to have been accepted and the change order will automatically become part of the contract. These new timelines obviously have a huge impact on companies and individuals at every tier of the construction process. It no longer matters what your contract says about approval of payment applications or change order requests, these timelines will govern the process. These timelines apply to all aspects of the construction approval process starting with the Architect/Engineer and moving on down the chain. No longer will it be acceptable for construction professionals to simply wait on approvals. That is a huge change.

The second aspect of this new law that will have significant consequences is its

effect on "Pay if Paid" clauses. As a general rule this new legislation makes "Pay if Paid" clauses unenforceable in Massachusetts. Contractors at every tier will no longer be able to use the fact that they were not paid as an excuse for not paying their subcontractors. The only real exception to this rule occurs when the contractor has filed a Mechanic's Lien against the project property and does not get paid because the owner has gone bankrupt. Obviously, this change in the law levels the playing field significantly between contractors and their subcontractor and will encourage contractors at all tiers to protect themselves by filing Mechanic's Liens. Other than in instances where the owner of the project has gone bankrupt, "Pay if Paid" clauses are basically dead in Massachusetts. This is another huge change.

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"Pay if Paid clauses are basically dead in Massachusetts"

Vermont Wind Project Approved



After a rather lengthy legal battle over a proposed wind energy project’s compliance with environmental regulations, a Vermont Environmental Court has

ruled that the project is entitled to the permits it needs to begin construction. The dispute involves a proposed wind turbine project to be built on Granby Mountain in Sheffield, Vermont. The developer of the project, Boston based First Wind, started the permit application process over five years ago and has been at odds with some area

residents over the environmental effects of construction activities.

More specifically, the thrust of the dispute has been over whether the project would comply with Vermont’s Water Quality Standards Act (“VWQS”). The residents opposed to construction of the 16-turbine wind energy project argued that construction activities above 2,500 feet in elevation would result in discharges of water into area tributaries in violation of the VWQS. **Continued on Page 4**

Contractors can be forced to pay twice for the same injury.

Workers Comp. Immunity (Cont.)

In the case of Wentworth v. Henry Becker Custom Building Ltd., two employees of a subcontractor were severely injured when there was an explosion on a construction jobsite. The employees brought workers compensation claims against the subcontractor, but the subcontractor did not have any workers compensation insurance. Under Massachusetts law the general contractor was then found to be responsible for the workers compensation claims of the two injured workers even though they were not employees of the general contractor. The general contractor had workers compensation insurance and the two subcontractor employees received workers compensation benefits from the general contractor’s insurer. After settling the workers compensation claim through the general contractor the two subcontractor employees brought a lawsuit against the

general contractor for negligence.

In defending the lawsuit the general contractor argued that because he had paid the workers compensation claims of the two subcontractor employees he was released from any negligence suits brought by those workers. More specifically, the general contractor argued that the law clearly states that the original subcontractor could not be sued for negligence if the workers compensation claims would have been handled by the subcontractors insurance. The general contractor reasoned that this immunity should pass to him because it was his workers compensation insurance that paid the claims. Why should the general contractor have to pay the workers compensation claims and still be sued just because the subcontractor had no workers compensation insurance.

In ruling against the general contractor, the Court said that the workers were allowed to sue the general contractor even though he paid their workers compensation claims. The Court interpreted the relevant statutory language strictly and said that the release of claims only applies to employer-employee relationship. Where the general contractor was not the “employer” of the subcontractor employees, the immunity language of the statute did not apply to the general contractor. Thus, the basic ruling in the case is that immunity from lawsuits does not apply to workers compensation claims paid by those other than the actual employer of the injured worker. This is significant because it means that non-employers can actually be forced to pay twice for the



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Workers Comp Immunity (Cont.)

Clauses you have been relying on for years will no longer be enforceable in Mass.

same injury. While the implications of this decision are not fully known, it would certainly seem that it will cause increased investigation into the existence of workers compensation insurance policies. If a knowledgeable construction professional does not want to get caught having to pay twice, they had better make sure that their subcontractors have valid workers compensation policies.

New Construction Law (Cont.)

As stated previously, it will be some time before the true effects of this new legislation are known, but that does not mean constructions professionals should not be prepared for it. Any contractor that uses subcontractors and has a standard form subcontract should speak with a legal professional about the contents of subcontract. Many of the standard clauses that you have been relying on for years will no longer be enforceable in Massachusetts. You should also be preparing procedures so as to make sure you can turn around payment applications and change order requests in a timely fashion. This is an exciting new development in Massachusetts and informed construction professionals should be prepared to take full advantage of the opportunities it affords.

VT Wind (Cont.)

Under the VWQS, Vermont has a non-degradation water quality standard for native brook-trout streams above that elevation. The area residents argued that stormwater discharges associated with construction activities would pollute the streams and therefore run afoul of the VWQS.

After a trial on the issue, the Vermont Environmental Court ruled that while the VWQS does require that certain standards be maintained with regard to these area streams, the state follows a “best-management practices” standard that allows projects to be built if there are

significant safeguards for compliance. In this instance the Court found that First Wind had enough environmental safeguards in place to ensure that the VWQS was complied with. In other words, although it was possible for construction activities to violate the VWQS, the developer had taken enough steps to guard against it that the project could move forward. The decision is a reasonable compromise that allows development to move forward while appropriately protecting the environment.