THE MASSACHUSETTS PROMPT PAY STATUTE:
A CAUTIONARY TALE FOR THOSE WHO DON’T READ THE FINE PRINT
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In a recent decision likely to have a significant impact upon the way private construction projects in Massachusetts are managed, the Superior Court recently construed the Massachusetts Prompt Pay Statute in the way the Statute (Statute) was meant to be enforced, but contrary to most current construction practice.

In Tocci Building Corp. v. IRIV Partners, LLC, Boston Harbor Industrial Development, LLC and Hudson Insurance Co., (November 19, 2020, Sup.Ct. 19-405), the Court strictly construed the Statute’s payment provisions against a project’s owner/manager (O/M), ordering the O/M to pay the contractor the outstanding balance on several unpaid requisitions because the O/M failed to comply with certain of the Statute’s requirements.

The decision involved the construction of a $3.8M building intended to house office and lab space in the Seaport. During construction, the O/M refused to pay certain portions of seven of the contractor’s requisitions. In response to most, if not all the requisitions, the O/M provided an e-mail or a letter rejecting the invoices in some fashion, but did not comply with the Statute’s exacting requirements for a proper response. Specifically, the Court held, “While [the O/M’s responses] may have been timely in rejecting some of the Requisitions, they did not specifically reject a Requisition in dispute, did not include an explanation of the factual and contractual basis for the rejection, and did not include a certification that the rejection was made in good faith.”

Notably, the Court rejected the O/M’s claim that its failure to comply with the Statute’s requirements were “merely technical errors”. In awarding the contractor relief, the Court exercised its seldom-used authority to enter separate and final judgment against the O/M—even though other issues in the case remained unresolved. When ordering the O/M to pay the contractor’s outstanding invoices, the Court reasoned that the Statute’s provisions are “mandatory…and reflect a public policy to ensure that contractors receive prompt payment, or prompt and complete notice of objections to payment requests…. Equally important was the Court’s holding that “whatever objections [the O/M] may have had under the Contract to the Requisitions were waived”. (Emphasis Added.)

The following are only some of the lessons learned from the decision:

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1 Mr. Barra has devoted his career to representing owners, contractors, subcontractors, design professionals and other members of the built environment in drafting contracts, defending and prosecuting claims, and advising participants whose projects are in distress. Mr. Barra also serves as a neutral construction arbitrator with the American Arbitration Association and is certified as a Mediator with The Conflict Lab in Pittsburgh, PA.
1. **Pay attention to the Statute’s detailed requirements:** E-mails vaguely objecting to or commenting upon deficiencies in a contractor’s pay requisitions are simply not enough to satisfy the Statute’s requirements.

2. **Underlying entitlement is not a factor in the Statutory analysis:** While it is not clear from the decision as to whether the contractor was truly entitled to full payment on each of its requisitions, the Court’s reasoning demonstrates that entitlement was not a factor the Court considered when analyzing the Statute’s applicability and enforcement.

3. **The decision applies equally to contractors, construction managers, and subcontractors:** While the decision applies fundamentally to an owner’s failure to properly respond to pay requisitions, the Statute has plenty of tripwires for contractors and subcontractors who seek to enforce their rights for payment, change orders, etc. The Court’s strict enforcement of the Statute’s requirements means that each of the primary parties to a project will be held to the *letter of the law*.

4. **An owner who fails to comply with the Statute waives its right to assert contract-based objections to payment:** In what may be considered the decision’s biggest takeaway, the Court’s holding appears to extinguish the right of an owner who has failed to comply with the Statute to object to a contractor’s request to be paid for defective work. More specifically, the Court’s finding that “whatever objections a project owner may have had under the Contract to the Requisitions were waived” seems to imply that a contractor who bills for defective or non-conforming work will nevertheless be entitled to payment just because the owner failed to comply with the Statute’s requisition requirements.

5. **The Statute controls:** While this concept wasn’t really the subject of significant debate within the construction bar, the decision puts to rest any doubt that when it comes to contract terms that may conflict with the Statute (or are not as strict as the Statute’s requirements), the Statute controls. Further, the Statute expressly disavows any attempt to *contract away* its terms or requirements.

The MA Construction Bar has been waiting for a decision interpreting *how strictly the Statute would be interpreted* since it was first adopted ten years ago. This decision is thus a loud warning bell for owners, their construction agents, their project managers and design professionals (who have construction phase responsibilities) as well as contractors, subcontractors and CM constructors to pay close attention to the Statute’s exacting requirements.