

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2021-P-0733

TOCCI BUILDING CORPORATION

Plaintiff-Appellee,

v.

IRIV PARTNERS, LLC, BOSTON HARBOR INDUSTRIAL DEVELOPMENT,
LLC,

and others,

Defendants-Appellants.

On Appeal from a separate and final judgment entered by the Suffolk Superior
Court

AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

on behalf of the

The Associated Subcontractors of Massachusetts, Inc.

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January 18, 2022

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INTRODUCTION

The Associated Subcontractors of Massachusetts, Inc. (the “Association”)¹ submits this amicus brief to assist the Appeals Court understand: (a) the circumstances surrounding the construction industry’s historical need for a legal mechanism to ensure the prompt payment of subcontractor invoices in the private sector, (b) the legislative history of the Massachusetts Prompt Pay Statute (M.G.L. c. 149 §29E) (the “Statute”), and (c) the Statute’s impact upon the Commonwealth’s construction community. We conclude with a suggestion on how the Statute may be applied evenhandedly in order to balance the need to maintain the flow of construction funds while addressing the Appellants’ concern for the Commonwealth’s common law of contracts.

The instant appeal raises concerns considerably beyond the immediate parties involved. It is therefore the Association’s hope that the within brief will assist the Court in its understanding of how the construction industry’s payment scheme operated *prior* to and *after* the Statute’s adoption. The Association’s objective is to offer the Court a detached and pragmatic view of the Statute’s evolution and how it has achieved its objective of “promoting fairness in private construction projects”, a phrase coined within the text of the Statute’s preamble.

¹ The Association represents over 300 businesses and 25,000 employees throughout the Commonwealth.

The Association is uniquely qualified to assist the Appeals Court with these issues. Unlike other Massachusetts trade organizations whose constituency comprises primarily of contractors and subcontractors in the *public* domain, the Association's membership represents largely *private* subcontractors,² who unlike their public counterparts, do not have a robust statutory scheme to ensure downstream payment.³

When deciding the instant Appeal, it is the Association's intent that the Appeals Court will recognize that since its adoption, the Statute solved a significant problem in the Commonwealth's built environment. By securing prompt payment from upstream funding sources, it ensures that those who perform the work and pay all costs for labor and materials will be promptly compensated without the need to engage in costly legal battles on every project. Unlike the position urged by the Appellant, the Statute is more than just a timing protocol. By legislating that payment be *deemed approved* following a defined process embedded with multiple checks and balances, the Statute provides relief for those who need it most.

² Admittedly, the Association's constituency does include *some* subcontractors who perform public construction projects.

³ See M.G.L. c. 30 §§39F, 39G and 39K addressing prompt payment for those who work on public construction projects.

We begin with a summary of the circumstances surrounding the historical need for legislative intervention.

A. Prior to the Statute’s adoption, payments to subcontractors were being withheld without any clear or justifiable excuse and without the opportunity to address whatever legitimate concerns might be at issue.

The Honorable Bruce Tarr said it best on the Senate floor, when on July 31, 2010 he remarked that the Statute (then House Bill No. 4721) “... addresses a problem that affects the viability of a lot of contractors. They have been having trouble getting compensation in a timely way....As we all try to navigate through these hard times, this legislation does make a difference. This ensures that many, many small businesses, subcontractors, will be able to receive prompt payment.”⁴

Prior to the Statute’s passage, “*getting paid* was the No.1 business issue for many subcontractors.”⁵ (Italics added.) Indeed, in the time leading up to the Statute’s adoption, the construction industry suffered from chronic payment delays as funding was often “slower than ever”.⁶

⁴ State House News Service, Senate Session (11:00 AM-7:55PM) Saturday, July 31, 2010 (Addendum p. 19).

⁵ Transcript from Ms. Monica Lawton’s February 13, 2008 testimony before the Massachusetts Joint Committee on Labor & Workforce Development (Addendum p. 21). At the time, Ms. Lawlor was testifying in support of H1789, an earlier version of the Statute.

⁶ Transcript from Ms. Monica Lawton’s January 27, 2010 testimony before the Massachusetts Joint Committee on Labor & Workforce Development (Addendum

History shows that subcontractors often “wait[ed] months after their work has been completed for payment.”⁷ Upstream payors who had the money and were reluctant to part with it were relying upon obscure excuses (if any) in order to gain unfair leverage or to cover up inadequate funding sources. As a result, many projects were improperly being financed with the subcontractors’ overdue receivables.

It is important to note that from an industry perspective, subcontractors are responsible for “all of the upfront cost of materials and labor on [construction] projects.”⁸ Subcontractors provide “all of the various services such as steel, electrical, drywall and HVAC systems” necessary to construct a building.⁹ Prompt payment for their efforts is thus essential.

Without an effective Statutory vehicle to ensure that private owners and general contractors promptly pay what is due downstream, subcontractors and similar vendors find it difficult to meet their payroll, pension and other benefit obligations to their workers. Additionally, requiring the recalcitrant payor to certify the reasons why payment is not forthcoming gives unpaid vendors a full

p. 24). At the time, Ms. Lawlor was testifying in support of H1804, an earlier version of the Statute.

⁷ State House News Service, August 16, 2010 (Addendum p. 29).

⁸ *Id.*

⁹ *Id.*

understanding of what's at issue so that they may institute a remedy or timely challenge such decisions.

The Statute was a long time coming. For subcontractors in the Commonwealth, the legislation was a “top priority” as many had reduced staffing levels or gone out of business altogether.¹⁰ The ASM invested five (5) years into the legislation's development.¹¹ Upon its passage, Massachusetts became one of 30(+) states in the country to adopt similar legislation.¹²

B. The Statute was the result of an extensive negotiation between numerous industry groups and was intended to provide a fair and balanced way to ensure prompt payment of earned funds while protecting the interests of all parties.

Early versions of the Statute were controversial and it was revised no less than three times during its gestation.¹³ Even in the last moments before its passage, the Statute was the subject of a “torrent” of lobbying.¹⁴ Nevertheless, the final version represented a compromise of those involved in the construction of private buildings; including the Associated General Contractors of Massachusetts, the Massachusetts Building Trades Council, the New England Regional Council of

¹⁰ *Id.* at p. 28.

¹¹ Mass. Lawyers Weekly August 30, 2010, (2010 WLNR 28973847) (Addendum p. 31).

¹² State House News Service, August 16, 2010 (Addendum p. 29).

¹³ *See* Bills H. 1804, H. 4271 and S. 2577.

¹⁴ State House News Service, August 16, 2010 (Addendum p. 28).

Carpenters, Cement Masons & Plasterers, and local chapters for sheet metal workers, electrical workers, plumbers, pipefitters insulation and asbestos workers, ironworkers, brick layers and painters.¹⁵

C. Since its adoption, the Statute has solved an important payment problem by establishing strict timing and payment protocols as well as remedies for noncompliance. Diluting its influence will return the industry to a time when subcontractors were financing projects with their outstanding receivables.

Given the Statute's safeguards and the even-handed way it treats all stakeholders, it cleared both Houses of the Legislature on July 31, 2010 "with little discussion".¹⁶ Consistent with earlier predictions, the Statute has, over the past 12 years reduced the frequency of "needless litigation".¹⁷ Indeed, to ASM's

¹⁵ *Id.* at p. 30. Note that other trade organizations who intend to submit an amicus brief *on behalf of the Appellant herein*, did *not* participate in the legislative process as their constituents are comprised largely of contractors who construct public roads, bridges and utilities, *not building projects*.

¹⁶ *Id.* Key Massachusetts legislators supporting the Statute's passage included Rep. David Flynn (House Bill Sponsor), Rep. Cheryl Coakley Rivera (Chair of House Labor & Workforce Development Committee), Rep. Vincent Pedone (Chair of Committee on Bills in Third Reading), Sen. Thomas McGee (Chair of Senate Labor & Workforce Development Committee), Sen. Michael Morrissey (Chair of Telecommunications, Utilities and Energy Committee), Sen. Marc Pacheco (Senate Bill Sponsor), Sen Bruce Tarr (Asst. Minority Leader) and Sen Stephen Tolman (Assistant majority Whip). In addition to Governor Patrick's support, the Statute was likewise supported by Lt. Governor Tim Murray and Labor Secretary Joanne Goldstein.)

¹⁷ Mass. Lawyers Weekly August 30, 2010, (2010 WLNR 28973847) (Addendum p. 32).

knowledge, this dispute represents only the second reported decision in Massachusetts involving the Statute.

D. The Statute does not abrogate the common law of contracts, but merely maintains the *status quo* in order to allow those who performed the work to be paid for their efforts while allowing those who claim that their contract rights have been violated may still seek to enforce those rights in a subsequent forum.

The Statute's goal is to simply to *keep the payment process moving* so that monies flow as they should. The Statute requires upstream project participants to approve or expressly reject pay downstream invoices within certain prescribed timelines or else the overdue requisition is *by operation of law*, "deemed approved".

Appellant argues that by requiring payment, the *deemed approved* process represents an abrogation of well-established common law contract principles. Not so.

It is true that an upstream stakeholder who fails to comply with the Statute's requirements must make payment. However, making payment does not, as Appellant suggests, eviscerate the payor's contract rights. To the contrary, the payor's failure to comply with the Statute merely waives its right to withhold the funds *pending the ultimate resolution of the dispute*. The payor's contract rights

remain intact as it may still choose to avail itself of the contract's dispute resolution mechanism to enforce them.¹⁸

Consistent with the Trial Court's decision, the Appellants' failure to comply with the Statute results only in a waiver of their right to withhold funds *pending the resolution of the underlying dispute*. Appellants' right to contest and seek a remedy to correct defective work or any other alleged downstream performance failures are nevertheless left intact.

It is likewise important to recognize that when a payor *does comply* with the Statute (and whatever other non-conflicting contract terms may apply to the invoicing process), it nevertheless retains its right to withhold disputed funds pending a subsequent adjudication.

Appellants' failure to comply with the Statute simply means that it must pay now and wait until a tribunal decides whether such funds should be returned. A small price to pay for Statutory non-compliance when balancing the financial risks to those downstream who are relying upon this essential cash flow for survival.

¹⁸ Notably, M.G.L. c.149 §29E imposes no restrictions on an aggrieved party's ability to enforce the contract's dispute procedure. In fact, Subsection (d) of the Statute renders "void and unenforceable", any contract provision which requires a party to delay commencement of the procedure until a date later than 60 days after the rejection.

CONCLUSION

Contrary to the Appellants' position, their failure to comply with the Statute does not eviscerate their substantive contract rights. Their noncompliance merely results in a waiver of their right to withhold disputed funds *during the pendency of this dispute*. Should, following trial, the Appellants be successful in demonstrating that the Appellee is not entitled to the funds already paid, their remedy is a judgment for amounts previously paid, but for which the Appellee is not legally entitled to retain.

WHEREAS, the Association respectfully requests that this Honorable Court deny the appeal of Defendant-Appellants.

Respectfully submitted,
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January 18, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Associated Subcontractors of Massachusetts, Inc., the Amicus Curie herein, states that it has no parent corporation and no publicly-held corporation holds 10% or more of its stock.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

Joseph A. Barra, hereby certifies that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(13) (addendum);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs);

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents; and

Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 font, and contains 12,389 total non-excluded words as counted using the word count feature of Microsoft Word for Office 365.

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January 18, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on this date of January 18, 2022, I have made service of a copy of the within Amicus Brief upon counsel for all parties that have appeared in the within Appeal as identified by the Court's Docket. If the party has no attorney, then I made service directly to the self-represented party, by email to the following person(s) and addresses:

Parties with No e-Service:	
Hudson Insurance Company	Industrial Roofing and Siding Co.
KJ Maul Construction LLC	Marguerite Concrete Inc.
Middlesex Glass Co.	MP Masonry Inc.
Shepardville Construction LLC	Time Savers Services Corporation
Arch Insurance Company	Massachusetts Port Authority
Pentucket Glass and Aluminum Inc.	

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SENATE SESSION (11:00 A.M. - 7:55 P.M.) - SATURDAY, JULY 31, 2010

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RETURNS: Shortly before 11 am Sens. Tisei and Moore took to the rostrum, as several other members stood by. Sen. Tisei told Sen. Moore, maybe I should do this. At 11 am the president entered the chamber and, seeing Sen. Tisei, said to Sen. Moore, We're going to let the minority leader do it. With three loud raps, Sen. Tisei gavelled the Senate back from recess and said, unfortunately the Senate will stand in a very short recess subject to the call of the chair.

Members and staff applauded his performance.

RECESSES: At 11:01 am, the Senate stood in recess subject to the call of the chair.

RETURNS: At 1:06 pm the Senate president gavelled the Senate back.

PLEDGE: Members and guests rose to recite the Pledge of Allegiance.

HEALTH CARE CONFERENCE REPORT: Question came on S 2585 conference committee report on health care cost containment and efficiency.

Sen. Tisei said I just want to congratulate you and the Senate chairman of Ways and Means and health care on this piece. One thing you did not do is play politics with this. I looked through this and I believe it's really thoughtful. I see no artificial caps and I believe we're going to end up really helping small businesses throughout the state.

Sen. Montigny said this is a surprisingly strong conference committee report. It was extraordinary that a job this high quality was done while so much was going on in this

building. Sen. Montigny read a quote from Jon Hurst, the head of the Mass. Retailers Association, praising the legislation for its importance. We have a waiver process for insurers coming within a dangerous medical loss ratio. We have a very highly non-profit centered system and marketplace in this state, and that's fine. If you make non-profits and profits compete, the consumer wins. We have mechanisms in this to reduce gaming of the system. We allow the ability for associations and groups of associations to compete with big entities to fight to contain costs. The majority of people in this state work for small businesses. We also ban non-competitive payment processes...but we have more work to do in reforming our payment system. That's the real bugaboo here.

Sen. Moore said I commend the Senate conferees for their work. We did a fairly comprehensive bill last May, and the House took a long time to do theirs, and sent it back in such a way that we could start the conference only last Tuesday. There is more that we could have done, but we have gone a long way. We have contained costs without engaging in rate-setting. We tell insurers they must put 88 percent of the premium to paying member costs. We had discussions over the last couple of months to the extent that we moved from 85 percent toward 90 percent. We do set some guidelines for the increase of premiums. We do falls prevention and cost containment council. We extend the improvements implemented on the federal level. Most of our businesses are eligible for a major tax credit for paying for employees' health insurance. We will continue to work on the payment issue and I imagine we'll have legislation on that question, even in the informal sessions that will follow this. We'll have more issues before us, such as reducing the size of the Connector board. We'll see how that goes as the future unfolds. We give community health centers better access to the capital markets. This is a very positive achievement and a steppingstone for further reform.

Sen. Chandler said small businesses in our state face enormous uncertainty. They've been hit very hard by cost increases. Because of the late passage of this bill in the House, we were not able to tackle the very biggest issues. But we were committed to working productively on the issues that were before us, and we succeeded. Staffers and Sen. Montigny did an outstanding job. This bill is not a clear and final statement, but it is a good foundation as we move forward.

Sen. Chandler moved a roll call. Supported.

Sen. Knapik said I would like to address a few points made by the muse of health care, Sen. Moore. I am glad we able to take this up, given the House's late passage. I thought we'd have no bill at all. One of the major problems we had to grapple with in this sector was the administration's attempt to impose a cap on rate increases. I'd hate to think that was politically

motivated. Great work was done reforming health care in this state, but those goals were undermined by the administration moves on rate adjustments. Litigation proved the insurers justified in their request.

Sen. Murray said chair would remind members we will be voting two more times on this piece, if we could consider getting it back to the House?

Sen. Knapik said well observed, Madame president, and I will be delighted to speak on this matter twice more. The rate adjustment fiasco wreaked havoc on our attempts at policy-setting, and for that reason and others, this is a remarkable accomplishment.

Sen. Donnelly said I'm very disappointed about a provision that was in the House version and left out of this. It's the payment provisions for private ambulance companies. In my district, our communities provide a hospital based emergency network that depends on a high reimbursement rate to maintain the quality of EMS service, and many other communities do too. We have to correct this situation.

ON ROLL CALL VOTE OF 40-0, THE CONFERENCE COMMITTEE REPORT WAS ACCEPTED. Sen. Murray asked to be recorded and she voted yes.

GARDNER LAND: The Senate ordered to a third reading and engrossed H 4949 Gardner land conveyance.

Question came on House resolve H 4872 study of special commission on seafood marketing.

Sen. Tarr said I can see the expressions of appreciation on the faces of senators from rural areas - this is similar to the commission studying the promotion of local food marketing. The problem is that we have had onerous federal restrictions on our ability to harvest this food product. This will help not just the industry but consumers whose health can benefit from this product.

The resolve was engrossed on voice vote.

HINGHAM LEASE: The Senate ordered to a third reading and engrossed H 4823 Hingham land lease

GRAFTON: The Senate ordered to a third reading and engrossed H 4892 lease of land in Grafton.

HULL LAND: The Senate ordered to a third reading and engrossed H 4932 lease of land in Hull.

BRIMFIELD EXEMPTION: The Senate took a standing vote of 9-0 to attach an emergency preamble to S 2221 exemption from agricultural preservation restriction in Brimfield.

DARTMOUTH CONVEYANCE: The Senate took a standing vote of 5-0 to attach an emergency preamble to S 2198 conveyance of land in Dartmouth.

NATIONAL HERITAGE AREAS: The Senate took a standing vote of 6-0 to attach an emergency preamble to H 4492 National Heritage Commission and Corridors.

DUAL LICENSURE: The Senate enacted S 169 certain dual alcohol licensure.

CREDIT UNIONS: The Senate enacted H 468 credit union shares and deposits.

BECKET: The Senate enacted H 3701 Center pond in Becket.

IRAN: The Senate enacted H 4297 pension divestment from Iran

NOVELTY LIGHTERS: The Senate enacted H 4369 sale of novelty lighters

AMESBURY LIQUOR LICENSE: The Senate enacted H 4818 Amesbury liquor license.

MENDON SELECTMEN: The Senate enacted H 4849 Mendon selectman's vacancy on state ballot.

PRESCRIPTION MONITORING: The Senate enacted H 4879 prescription monitoring and enforcement

WATER STORAGE: The Senate enacted S 2449 government bodies entering into contracts for water storage facility maintenance, inspection, and repair.

SCRAP METAL DEALERS: Question came on amendment to S 328 secondary metal market.

Sen. Tisci asked for an explanation.

Sen. Timilty said this is an attempt to address the epidemic of scrap metal and secondary metal theft. We have been working on this and came up with a very strong bill I hope the House will recede.

The amendment was adopted and the bill was then ordered to a third reading.

LICENSES OF HEALTH PROVIDERS: Question came on H 971 licenses of certain health providers.

Sen Tisei said does this relate to the health conference report we just accepted? I also want to commend him on being named chairman of the National Conference of State Legislatures.

Sen. Moore said thank you for the kind remarks. This changes the annual licensure of providers from one year to two years. We think this will reduce administrative costs.

The bill was engrossed on voice vote.

BREWSTER LAND USE: A roll call vote was required on H 4450 Brewster land use purposes

ON ROLL VOTE OF 39-0 THE BILL WAS ENACTED.

HARVARD EASEMENT: Question came on enacting H 4850 relative to the granting of an easement in the town of Harvard for the construction of housing for elderly persons.

ON ROLL VOTE OF 39-0 THE BILL WAS ENACTED.

AFFILIATED INSURERS: The Senate ordered to a third reading H 959 succeeding policies offered by affiliated insurers.

NON-RENEWAL: The Senate engrossed a bill on non-renewal notices.

MORTGAGE DISCHARGES: The Senate ordered to a third reading and engross H 996 technical changes to legislation on the discharge of mortgages.

MANSLAUGHTER: Question came on H 1614 penalty for manslaughter, coming first on an amendment substituting the text of S 2587.

Sen. Tarr asked for an explanation of the amendment and from the rostrum Sen. Murray said, it's your bill!

There was a conference at the rostrum. A grinning Sen. Tarr said I want to reassure the members that the purpose of the bill is to substitute our language for a House bill and require the House to deal with our language in two separate vehicles, a deft parliamentary move by the president.

Amendment adopted on voice vote, and the bill was then engrossed

MILBURY BIKE PATH: Question came on ordering to a third reading H 3218 Milbury bike path Ways and Means and Rules Committee amendments were adopted and the bill as amended was then ordered to a third reading and engrossed.

TOWED VEHICLES: The Senate ordered to a third reading and engrossed H 4171 maximum storage charges on motor vehicles involuntarily towed.

INHALANTS: The Senate ordered to a third reading and engrossed H 4254 inhalant abuse.

The Senate ordered to a third reading and engrossed H 4922 eliminating use of the word "retardation" from the General Laws.

CONTRACT FAIRNESS: Question now came on H 4721 promoting fairness in private construction contracts.

Sen. Tarr said this addresses a problem that affects the viability of a lot of contractors. They have been having troubling getting compensation in a timely way. This sets rules for relations between subcontractors and contractors, to limit the use of "pay if not paid" clauses in contracts. As we all try to navigate through these hard times, this legislation does make a difference. This ensures that many many small businesses, subcontractors, will be able to receive prompt payment.

Bill engrossed on voice vote.

PITTSFIELD LICENSING BOARD: The Senate adopted a Downing amendment to H 4682 compensation of licensing board in Pittsfield. The bill was then engrossed.

DARTMOUTH LINCOLN PARK: Question came on H 4883 Lincoln Park improvement district in Dartmouth. The Senate adopted a Montigny amendment substituting a new text and the bill was engrossed.

NATIONAL HERITAGE AREAS: The Senate enacted H 4882 national heritage commission and corridors.

DARTMOUTH LAND: The Senate enacted S 2198 Dartmouth land conveyance.

TURNPIKE RIGHTS: Question came on ordering to a third reading H 3364 development rights over Mass. Turnpike.



TESTIMONY IN SUPPORT OF H.1789

Massachusetts Fairness in Private Construction Contracts

Before the Joint Committee on Labor & Workforce Development

February 13, 2008

Introduction:

- Thank you Chairmen McGee and Torrisi and members of the Committee for the opportunity to appear before you today.
- For the record, my name is Monica Lawton and I am here today with a number of our members, representing the Associated Subcontractors of Massachusetts (ASM).
- I believe this is our first time before your Committee. For those who don't know us, ASM is a trade association representing subcontractors of all trades, from steel erection and masonry, to HVAC and electrical, to drywall and flooring. Our members are both union and open shop companies, who work on many of the major commercial and institutional buildings across our state – from office towers and hotels, to hospitals and university campuses.
- We have two panels here this morning. We will all speak briefly, knowing you have a long agenda today.
- On our first panel are three members who will each introduce themselves in more detail.
 - Scott Packard is the President of ASM.
 - Rich Fisher is Chair of the Task Force that drafted our legislation.
 - Blake Underhill, an insulation contractor and long time active member of ASM.
- On our second panel we have:
 - Jim Burke, a flooring contractor, here representing the Flooring Contractors Association.
 - Mike Petrilli, a plumbing contractor representing himself and two other associations here today.
 - John DeVries, a steel supplier, and Dave McCarthy, a steel fabrication contractor.
- In addition, we have in the audience today executives from subcontracting companies from across the state, as well as representatives of other associations.

Background: To start, I'd like to put the issue in context and explain briefly what has brought us here today:

- I have been with ASM for over 10 years. For all of that time, the #1 business issue for our members has been "Getting Paid". We've held seminars and produced booklets on the subject, provided legal advice, and promoted model contract documents with fair payment terms. Yet it's a problem that doesn't go away...and in fact is getting worse.
- For companies doing public sector work, there are prompt pay protections in the law; but in the private sector, there is nothing.
- What happens that makes it so bad? You will hear some of those details from the people who live this problem every day.
- To summarize briefly, however.... It is important to understand that in construction, a subcontractor has to work for at least 30 days—buying materials, paying weekly payrolls, before he can submit a bill. Then he has to wait another 30 days, minimum, to see a check. In most cases, there are delays...and 60 days turns to 90, 120 days or more before he sees the first dime. Yet he's been paying all the bills – essentially bankrolling the job – for all of that time.
- Last month, a prominent economist speaking at one of our meetings said he knew of no other industry where payment delays are as bad as in construction.
- Yet even he admitted, there's not much an unpaid contractor can do.
 - If he stops work, he's in breach of contract.
 - If he chooses not to work for slow-paying companies – he might as well close his doors.
 - In short, he has no leverage.
- It's become such a serious problem that two years ago, our members came together and formed a committee to try to do something about it. The legislation that is before you is the result.
- We are not the first to propose such legislation, and Massachusetts is not the only place where payment is a problem. It's an issue in every state of the union, and more than half the states have already passed legislation making fair payment terms in private construction a matter of public policy. A list of those states is attached.
- In Massachusetts, we modeled our legislation on similar laws that have already been passed in Arizona, Connecticut, Kansas, New Jersey, New York and Oregon.
- Our legislation is different, however, in that it does not go as far. We tried to keep it as simple and un-intrusive as possible, because we understand the reluctance to interfere with private contracts.

Testimony in Support of H. 1789

Summary of the bill:

- Unlike most other "prompt pay" laws, ours does not say when payment must be made. The bill simply requires that all contracts have reasonable payment terms, negotiated by the parties. It doesn't mandate what the terms should be.
- It also requires that everyone adhere to the payment terms in the contract, or face consequences.
- If any party is not paid in accordance with the contract, then they have a right to suspend work (with plenty of notice), without being in breach of contract. This is virtually impossible to do now.
- If they still aren't paid, they have a right to terminate without being in breach of contract – also virtually impossible to do now.
- Getting paid for extra work that is outside the contract is one of the most difficult challenges on any project. This bill requires timely payments for all extra work as well, as long as it was approved in writing.
- This bill does not give subcontractors special advantage. It gives the same rights and responsibilities to everyone – owner, contractor, subcontractor, sub-subcontractor and material supplier – and sets up procedures that are fair to all parties equally.
- In short, it is a bill that restores balance to the system and corrects problems that can't be fixed any other way.
- By ensuring fair payment practices, the bill promotes the success and growth of small businesses in Massachusetts, which are fundamental to a healthy economy in our state.

For all these reasons, we respectfully urge you and your Committee to give this bill a favorable report.

Thank you for your consideration.



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States with Prompt Payment Laws for Private Construction

Dates indicate either date of first passage,
or date of major amendments expanding the law.

1. Alabama
2. Arizona – 2002
3. California – 2005
4. Connecticut – 1999
5. Delaware
6. Florida
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9. Kansas – 2005
10. Kentucky – 2007
11. Maine
12. Maryland
13. Minnesota
14. Mississippi
15. Missouri – 1999
16. Montana
17. Nevada
18. New Jersey – 2006
19. New Mexico – 2007
20. New York – 2003; 2009
21. North Carolina
22. Ohio
23. Oregon – 2004
24. Pennsylvania – 2004
25. South Carolina
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28. Utah
29. Vermont



TESTIMONY IN SUPPORT OF H.1804

An Act Promoting Fairness in Private Construction Contracts

Before the Joint Committee on Labor & Workforce Development

January 27, 2010

Thank you Chairman McGee, Chairwoman Coakley-Rivera and members of the Committee for the opportunity to appear before you today, to testify in support of H. 1804. For the record, my name is Monica Lawton and I am here today with several board members and counsel of the Associated Subcontractors of Massachusetts (ASM).

ASM is the state's largest association representing construction subcontractors. We have over 400 members, both union and open shop companies, who work in all trades and perform most of the work on major commercial and institutional building projects across our state – from office towers and hotels, to hospitals and schools.

To begin our testimony today, I will give you brief background and summary of the legislation. Our panelists, who will introduce themselves, will explain why it is so important. We will be brief, knowing you have a long agenda today.

We are speaking not just for ourselves, but for thousands of small construction businesses across the state. When we appeared before the committee two years ago, the room was filled with many of our member companies, who wanted to show their support. We know they would be here again, today, but in these tough times, we know their focus has to be on getting work, so we did not ask them to attend. We also wanted to be respectful of your time, as well.

In a nutshell, H. 1804 is simply about getting paid promptly for work performed. In the construction industry, getting paid in a reasonable time has always been difficult, and the norm is often 60-90 days or more. In this economic climate, however, the situation is even worse, and payment is often slower than ever. Yet there has never been a time when prompt payment is more important. With credit so hard to come by, strong cash flow is essential – especially for subcontractors, who do at least 80% of the work on any project, and pay most of the costs of labor and materials. **These companies have to be able to depend on regular, prompt payments in order to pay their own vendors, meet weekly payroll and keep workers employed. In the end, it's all about jobs.**

For companies doing public sector work, there are prompt payment protections in the law; but in the private sector, there is nothing.

Our members recognized, even before the recession, that the only real solution to payment problems in the industry would be legislation – and H. 1804 is the result.

We are not the first to propose such legislation, and Massachusetts is not the only place where payment is a problem. **Slow payment is an issue in every state of the union, and more than half the states have already passed legislation making fair payment terms in private construction a matter of public policy.** A list of those states is attached. Just last

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fall, the state of New York, which already had prompt pay law on the books, passed yet another one to give it more teeth.

In Massachusetts, we modeled our legislation on the laws that have been passed in other states, but our bill does not go as far. We tried to keep it as simple and un-intrusive as possible, because we understand the reluctance to interfere with private contracts.

We have provided a detailed summary of our bill in our materials, and would like to highlight just a few key elements:

- The bill simply requires that all contracts have reasonable payment terms, negotiated by the parties, that all must adhere to. Unlike other states, it doesn't dictate what the terms should be, or when payments should be made.
- If any party is not paid in accordance with the contract, then they have a right to suspend work (with plenty of notice), without being in breach of contract. This is virtually impossible to do now.
- If still not paid, they have a right to terminate without being in breach of contract – also virtually impossible to do now.
- Also very important, the bill provides a way to get paid timely for extra "change order" work that has been approved in writing, that otherwise often remains unpaid until the end of the job.

This bill does NOT give subcontractors special advantage. It gives the same rights and responsibilities to everyone – owner, contractor, subcontractor, sub-subcontractor and material supplier – and sets up procedures that are fair to all parties equally.

In short, it is a bill that restores balance to the system and corrects problems that can't be fixed any other way. We understand there are concerns about some of the provisions. But similar concerns in other states proved unfounded, and the laws of other states have been effective in improving the business climate for all concerned.

By ensuring fair payment practices, bill promotes the success and growth of small businesses in Massachusetts, which is critical as we struggle to return to a healthy economy in our state.

For all these reasons, we respectfully urge you and your Committee to give this bill a favorable report.

Thank you for your consideration.



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SUMMARY OF H. 1804
An Act Promoting Fairness in Private Construction Contracts
January 27, 2010

Unlike "prompt pay" statutes in other states, ASM's bill does not mandate when payments must be made for work performed. It simply requires that all contracts include specific, reasonable payment terms, and provides remedies to parties who are not paid in accordance with those terms – including the right to suspend work, without fear of unfair reprisal. The legislation leaves the specific timing of requisitions, approvals and payments to the discretion of the parties, in order to respect "private right of contract."

The legislation includes these key provisions:

- 1) The requirements of the statute apply equally to all parties up and down the tiers – owners, contractors, sub-contractors, and sub-subcontractors (including material suppliers).
- 2) All contracts must include a specific requisition and payment schedule. The legislation does not dictate the schedule, leaving it to the discretion of the parties; but in the absence of a specific schedule in the contract, the default billing and payment schedule will be 30 days.
- 3) All contracts must include a specific time for approval of requisitions, but the time is not set by statute. All parties must give timely notice of amounts not approved. Approved requisitions must be passed up the tiers timely, and failure to do so cannot be used as a reason to withhold payment.
- 4) Payment for changes in the work is due in the normal requisition & payment cycle, provided the changes were authorized in writing. Payment cannot be contingent on having formal written change orders adjusting the contract price.
- 5) All parties may withhold payment for legitimate reasons: i.e., for retainage reserved by the owner or for good faith claims or disputed amounts.
- 6) The contract must state a specific time for payments to be made. In the absence of a specific time in the contract, the Owner must pay within 30 days of receiving a requisition, and each lower tier party must pay within 7 days of receiving payment.
- 7) Contingent payment provisions (aka "pay-if-paid") are not allowed.
- 8) Interest, computed at the legal rate, is incurred for every day payment is late.
- 9) All parties have the right to suspend work, with 7 days notice, if payment is not received within 7 days after the due date; and the suspension cannot be considered a breach of contract.
- 10) The contract time must be extended, and contract sum increased, for contracts affected by suspension.
- 11) All parties have the right to terminate work, with 7 days notice and without penalty, after a suspension of more than 30 days.
- 12) There can be no provisions waiving litigation rights, or rights to resolve disputes through other means. Venue for all actions is to be Massachusetts only.
- 13) The prevailing party in any legal action is entitled to attorney's fees.
- 14) The law applies to all private construction except small residential projects and certain public-private projects.



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NEW LAW REQUIRES 'PROMPT PAY' FOR CONSTRUCTION CONTRACTORS

By Kyle Cheney
STATE HOUSE NEWS SERVICE

STATE HOUSE, BOSTON, AUG. 16, 2010.....Gov. Deval Patrick and lawmakers have thrown a lifeline to aggrieved construction contractors, agreeing on a new law that requires private construction project owners to pay them within 90 days after their work begins.

Signed by Gov. Deval Patrick last week, the law sets a schedule for the payment process - the filing of a payment application, approval or rejection of that application and the actual payment - for contractors and subcontractors on projects valued at more than \$3 million. Should owners and general contractors fail to abide by that schedule, payments are considered conditionally approved.

Backers of the law say it is a top priority of construction subcontractors, many of which have reduced staffing levels or gone out of business altogether amid the economic downturn. Association Subcontractors of Massachusetts estimates it represents 400 businesses and 25,000 employees, all of who stand to benefit from the new law.

Public construction projects, backers noted, are already subject to so-called prompt pay requirements.

The bill was the subject of a torrent of lobbying last month, with contractors enlisting the influence of Massachusetts Bay Associates, and subcontractors calling on Delaney & Associates, and Corwin & Corwin LLP, as well as marshalling their own troops.

The prompt pay law "is really intended to address routine and regular cash flow and processing of payments" as well as the "systemic delays that get built in" said Monica Lawton, CEO of

Associated Subcontractors of Massachusetts. With the governor's signature, Massachusetts became the 33rd state in the country to approve a similar policy, according to backers of the bill.

"Subcontractors provide all of the various services such as steel, electrical, drywall and HVAC systems that actually construct a building," Lawton said in a letter to lawmakers in the final days of the session. "Their work is essential, but what most people don't know is that these small businesses are responsible for all of the upfront cost of materials and labor on projects. Subcontractors often wait months after their work has been completed for payment ... In our industry, slow payment has become our single most important business issue."

The bill also permits contracted workers to halt work on projects when they haven't been paid promptly.

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Subcontractors, who drove the new law through the Legislature, said existing statutes set no timeframe, and companies doing work on major projects often don't see their pay until work is completed, and sometimes beyond, when payment levels are in dispute. Under the new law, payments may still be rejected but a dispute resolution process must begin within 60 days.

Similarly, when contracts are changed to add new work, changes in payment levels must be approved or rejected in 30 days.

The new law limits moves by contractors to withhold pay for subcontractors, even if the contractors haven't been paid by project owners. Such withholding is only permitted in instances when the subcontractors' work is in question or the owner of the project becomes insolvent and attempts to secure payment through legal means fail.

Contractors had previously opposed a broader version of the bill and negotiated out "the most objectionable elements," according to a memo circulated by Association General Contractors prior to the governor's approval, which described those negotiations as "contentious."

The bill cleared the Legislature on July 31, the final day of formal sessions for the year, with little discussion. Sen. Bruce Tarr (R-Gloucester) said the proposal would promote "the viability of a lot of contractors" who haven't been paid "in a timely way."

Union leaders lined up behind the bill in July, with the heads of the Mass Building Trades Council, the New England Regional Council of Carpenters, Cement Masons and Plasterers, and local chapters for sheet metal workers, electrical workers, plumbers, pipefitters, insulation and asbestos workers, ironworkers, bricklayers and painters issuing a letter of support.

-END-

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August 30, 2010

Legislation in Mass. promises major changes for construction law bar

Phillip Bantz

Massachusetts is now part of a string of states to have adopted laws that essentially end "pay-if-paid" clauses in construction contracts and establish strict deadlines on payment schedules.

The so-called "prompt pay bill," G.L.c. 149, §29E, goes into effect in November and significantly changes the payment responsibilities of all parties involved in most large-scale commercial and residential construction projects. The law severely restricts the ability of owners and general contractors to use the pay-if-paid clause to withhold payment from subcontractors and suppliers.

Contracts tied to projects that qualify under the non-retroactive bill will likely need to be rewritten, and lawyers who practice construction law also need to be prepared to advise their clients, whether they are owners, general contractors, subcontractors or suppliers, about their rights and obligations under the new measure.

Monica Lawton, CEO of Associated Subcontractors of Massachusetts, which spent five years working to get the bill passed, said it is the state's most important private construction legislation since the mechanic's lien law was overhauled in 1997.

"Construction law may be a small niche of the profession, but this law has major implications, particularly for anyone involved in commercial construction contracts," Lawton said. "The way this gets factored into contract language will be of great importance to anyone who practices construction law."

New standards

The prompt pay law brings several noteworthy changes to contracts for projects with price tags of \$3 million or more and at least five dwelling units.

The law requires expedient decisions on the approval or rejection of regular payments and change orders, restricts the use of pay-if-paid provisions, and allows contractors to cease work for nonpayment.

"I think contracts will have to be rewritten, relationships will have to be reassessed, and expectations regarding payment will have to be recalibrated," said Bradley L. Croft of Ruberto, Israel & Weiner in Boston.

Even if a project does not meet the statute's qualifications, contractors can still incorporate language from the law into their contracts, and any party who violates the terms of the agreement could face a breach of contract action, Croft said.

"We've allowed, in the past, contractual provisions and backdoors to sometimes get in the way of the fair administration of payments in a construction project," he said. "This is really a first step in addressing that."

The legislation, which has been adopted in various forms by more than 30 other states, is meant to protect parties in a construction project from nonpayment under the pay-if-paid clause, which should reduce "needless litigation," said the law's author, David E. Wilson of Corwin & Corwin.

"This statute will make routine the payment practices of the better contractors and owners, and make it easier, not harder, to perform construction work in Massachusetts," the Boston lawyer said. "I think it will help general contractors as much as subcontractors and suppliers."

Before the bill was passed, general contractors could withhold payments to subcontractors and the subs could refuse to pay suppliers if a project owner stopped the cash flow.

The law damps the trickle-down nonpayment effect by allowing general contractors to use pay-if-paid under only two scenarios: if a subcontractor's work is deemed defective or if an owner becomes insolvent after the general contractor placed a mechanic's lien on the project.

General contractors who decide against filing liens leave themselves open to the risk of having to pay subcontractors even if the owners run out of money. On the other side of the coin, general contractors who place liens on projects could risk souring their relationships with owners.

"I think it puts general contractors in a very tough position," said Croft, who represents general contractors, specialty contractors and suppliers.

Lawton disagrees. She argues that the law should erase the stigma attached to liens and allow general contractors to feel more comfortable about protecting themselves from financial risk.

"This should establish it as normal business practice," she said. "If there are no problems with a project, what's the harm done? And if problems develop, you're in a much better situation because you've filed the lien."

Advising clients

For years Croft has advised his clients to "kick the tires on the owner's financials," but the prompt pay law makes that advice more of a necessity than ever, he said.

"Unless you've established a level of comfort with the owner's financial condition or ability to meet the financial requirements of a project, you're now in risky waters," Croft said.

Michael D. Healan Jr. of Hinckley, Allen & Snyder co-chairs the Boston Bar Association's Construction Law Committee with Croft. Healan said that while general contractors, his main clients, gain protection from owner nonpayment under the new law, they also face additional risks.

"If you're going to reject any part of the payment application, you must set forth in detail reasons for the rejection, which is different from what other states have done" with the law, he said. "And if you haven't taken action on a payment request after 15 days, it is deemed approved. It really penalizes contractors and owners who aren't paying attention."

Boston lawyer James L. Rudolph of Rudolph Friedmann is general counsel for Associated Builders and Contractors, which took a neutral stance on the law. He said players in the construction industry have been contacting him with questions about how they should change contracts to comply with the law and how they can take advantage of the bill.

"My sense is that some general contractors feel that the bill overshot its mark," said Rudolph, who plans to hold a seminar on the law in September.

Like Rudolph, Croft also has been fielding questions from contractors who are curious about how they can make the law work for them. His advice goes back to kicking the tires.

"Whenever a statute like this comes to the industry, people look to see ... what are some allowable ways around it without being inconsistent with the bill?" he said. "I tell them that one of the best ways is to redouble your efforts of prequalifying contractors and owners."

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