

## Owners and Contractors Must Pay Now, Argue Later in Prompt Pay Act Disputes, SJC Rules

According to a decision issued by the SJC last week, owners and general contractors must pay subs for all unpaid invoices in order to preserve common-law defenses in payment dispute cases. The [decision](#) adds “meaningful consequences” to a party’s failure to comply with the Massachusetts Prompt Pay Act.

The Prompt Pay Act, G.L. c. 149, § 29E, applies to most private construction contracts of \$3 million or more. The Act requires that owners and upstream contractors approve or reject payment invoices within prescribed time periods and provide a factual and contractual basis for any rejection. Failing to do so results in the payment application being “deemed approved” under the Act.

At issue in *Business Interiors Floor Covering Business Trust v. Graycor Construction Company Inc., et al* (“*Graycor*”) were three subcontractor invoices for work on a movie theatre construction project in Boston. Because the contractor neither approved nor rejected the invoices, the subcontractor brought breach of contract claims under the Act. The contractor sought to raise the common-law defense of impossibility of performance due to the COVID-19 pandemic.

But the SJC held that the contractor had no right to raise that defense because the payment applications were “deemed approved” under the Act and remained unpaid at the time it raised its defense. The SJC explained that payment of invoices “must be made prior to, or contemporaneous with, raising common-law defenses, or the defenses cannot be raised.” As clarified by the SJC, “[w]hat the contractor cannot do is...raise the defenses without paying the invoice.”

The bottom line? Where an invoice is “deemed approved” under the Act, a contractor loses its right to raise valid common-law defenses to payment unless the subject invoices are paid in full before (or at the same time as) the contractor first raises those defenses. The decision creates a “pay now, argue later” requirement for a party wanting to preserve its common-law defenses.

Although the key issue in *Graycor* involved the preclusion of common-law defenses, its reasoning could be applied to preclude contractual defenses to the merits of “deemed approved” invoices—*e.g.*, that the work was defective, incomplete, or overbilled—in later proceedings. Of course, the most prudent approach for owners and contractors who want to avoid testing the limits of *Graycor*’s holding and preserve their defenses to “deemed approved” invoices is to pay now, and argue later..

As explained in previous [Punch List posts](#), the Prompt Pay Act creates potential consequences for owners and contractors that fail to comply with the Act’s deadlines and formalities for disputing payment applications. This latest case adds another possible consequence—the waiver of common-law (and potentially other) defenses—for a party that fails to comply with the Act, increasing the likelihood of full liability for the invoiced amounts.