

Pay Now, Argue Later: Appeals Court Affirms Strict Interpretation of Prompt Pay Act

On June 7, 2022, the Massachusetts Appeals Court affirmed a strict reading of the Prompt Pay Act, G. L. c. 149, § 29E (the “Act”) in *Tocci Building Corp. v. IRIV Partners, LLC*, Case Nos. 21-P-393 & 21-P-733. That case and its background were featured in a prior *Punch List* [post](#).

The trial court concluded that strict compliance was required of the Owner in reviewing payment requisitions, meaning that “unless a rejection, in whole or in part, *in compliance with the statute* is made” within 30 days of the application, “the application for periodic progress payment is ‘deemed approved’ by operation of law and must be paid.” In this case, the Owner failed to certify that the payment rejections were made in good faith.

The Owners believed the ruling to be too harsh. On appeal, it disputed the importance of the certification requirement as “merely ministerial,” but the Appeals Court rejected this argument. “The Legislature required this certification if a rejection is to be effective, and we are not free to ignore that requirement by deeming it merely ministerial.” And practically, “the certification requirement ensures...that the owner be deliberate about rejecting applications...it takes care to reject them only in good faith,” and it “provides a clear indication to the contractor that an application has been rejected.”

However, the Appeals Court went on to set forth a critical holding that where pay applications are deemed approved because of the Owner’s failure to meet the Act’s requirements, the Owner does *not* waive its right to claw back money that may be lawfully owed to it due to defective work or other contractual entitlement to those monies, even if the money is part of one or more of those “deemed approved” payments. Here, the Owner argued that the contractor breached its contract so it had good reason to not remit payment.

The practical effect is that the Owner must put its own funds at risk. It has to make quick payment and then wait to resolve its back charge claims through a separate action. With *Tocci* on the books, Owners who choose to flout this process and withhold payment may be opening themselves up to bad faith claims under G. L., c. 93A. Regardless of business strategy, though, one point remains clear: all parties to construction contracts on covered projects (\$3 million+ cost of construction at the prime contract level) need to familiarize themselves with the details of the Act’s payment provisions and ensure they have the people and policies in place to process requisitions in strict compliance with the Act’s requirements.