

## Fighting Before Paying Will Cost You: Superior Court Rules that Failure to Strictly Abide by the “Order of Operations” under Prompt Pay Act Waives Your Defenses to Payment

The Massachusetts Superior Court recently issued a decision that will strike fear into the hearts (and wallets) of owners and upstream general contractors alike. In *J.C. Cannistraro, LLC vs. Columbia Construction Co.* (“Cannistraro”), the court issued a stunningly strict interpretation of the Massachusetts Prompt Pay Act, G.L. c. 149, § 29E (the “Act”) with respect to the technical “order of operations” previously laid out in the SJC’s decision in *Business Interiors Floor Covering Business Trust v. Graycor Construction Company Inc., et al.* (“Graycor”). In short, the Court rules that owners and contractors who do not wait to assert defenses for recoupment or setoff against payments owed for “deemed approved” applications waive those defenses altogether.

As explained in previous A&K updates, the Act applies to most private construction contracts of \$3 million or more and requires owners and upstream contractors to approve or reject payment applications within strict time periods and according to specific procedures. Failing to do so results in the payment application being “deemed approved” under the Act. Previously in Graycor, the SJC determined that even where an owner or upstream contractor had a valid defense for recoupment or setoff – for example, the “deemed approved” application contained blatant overcharges or other improperly billed items – they must pay the full invoice amount immediately and fight about any disputed amounts later, in litigation or otherwise. The new Cannistraro case delves into what qualifies as a valid “rejection” under the Act and deals a devastating blow to a general contractor who paid two “deemed approved” invoices in full, but purportedly waived any right to dispute those invoice amounts because it asserted its defenses at the “wrong” time.

At issue in Cannistraro were two requests for change orders submitted by the HVAC/plumbing subcontractor that proposed nearly \$1,000,000 in cost increases to its work. The general contractor timely rejected both the requests under the Act—or so it thought. The subcontractor then filed a lawsuit against the general contractor, the general contractor filed its answer, which included various defenses alleging overcharges by the subcontractor, after which (almost 6 months later) the court ordered the parties to arbitrate their dispute.

Two years after the initial filing, the arbitrator issued an interim order highlighting the general contractor’s first mistake: it had failed to certify that its payment rejections were made “in good faith,” as explicitly required by the Act, so those rejections were invalid. The absence of a certification with those 3 magic words resulted in the payment applications being “deemed approved” since they had neither been accepted nor validly rejected. Accordingly, the general contractor was ordered to pay the full amount of the invoices—which it did, on the very same day the arbitrator issued the interim order.

The parties then proceeded to arbitrate their payment dispute on the merits. In April of 2024, a year and a half after the arbitrator’s interim order, the arbitrator issued its final order finding that the subcontractor had inflated the cost of its additional work by nearly \$600,000. The subcontractor was ordered to pay that money back to the general contractor.

The subcontractor appealed the arbitrator’s award to the Superior Court, arguing that the arbitrator improperly granted an award that exceeded his authority under statutory law – i.e., the Act – which the subcontractor argued required the general contractor to forfeit its rights to challenge payment of the full value of the “deemed approved” payment applications at issue because the general contractor had asserted defenses in litigation before making payment in full. In other words, the subcontractor claimed that the general contractor had failed to abide by the “Pay Now, Fight Later” rule confirmed by *Graycor*.

The Superior Court agreed. The court held that the general contractor, by asserting its defenses when the suit was filed, and not actually paying the “deemed approved” invoice amounts until two years later, effectively waived all common law (and any other) challenges to that full payment amount.

The lesson in this hardline decision? The Act has become a blunt instrument against owners and upstream contractors who do not strictly follow the payment procedures of the Act to the letter – and specifically, to the day. Under the Superior Court’s reasoning, had the general contractor in *Cannistraro* simply paid the contested invoices in full before or at the same time as it filed its defenses in the initial lawsuit between the parties, it would have kept its arbitration award (and the hundreds of thousands of dollars that came with it). But its failure to comply with this formal “order of operations” proved fatal to its defenses, resulting in the complete forfeiture of its right to claw back money that the arbitrator had determined the subcontractor was otherwise not entitled to receive – and the payment of substantial interest, to boot.

As clear cut as the Court may have portrayed these issues to be, there are nuances in this case that are likely to result in an appeal. For instance, there was arguably a reasonable dispute over whether the general contractor’s rejection of the contested change orders was valid

under the Act to begin with, and specifically whether the omission of only the “good faith” certification should be grounds for non-compliance resulting in a “deemed approval.” In fact, it appeared to be undisputed that the general contractor’s payment rejections included all other requirements except the good faith certification. Under this logic, the general contractor may have a plausible argument that it had the right to litigate the issue of a “deemed approval” before being required to make full payment, and that its assertion of recoupment defenses in response to the subcontractor’s initial complaint was nothing more than a routine preservation of rights to be determined later if necessary.

Indeed, the general contractor made payment as soon as that issue was decided by the arbitrator’s interim order, and the parties did not litigate the general contractor’s recoupment defenses until after the general contractor made payment in full. From the general contractor’s perspective, it did follow the “Pay Now, Fight Later” rule. But it appears the Court viewed the general contractor’s challenge based on the “good faith certification” requirement as “fighting now” before payment, and that turned out to be enough to dismantle the general’s contractor’s case.

Time will tell whether the decision is overturned on appeal. For now, the harsh punishment of the *Cannistraro* case is the law in Massachusetts. So what is the message to owners and upstream contractors? In short:

1. Ensure any rejection of a payment application or change order proposal is issued in writing, within the prescribed time period, and includes: (1) an explanation of the factual and contractual basis for the rejection and most importantly (2) a sentence that includes these magic words: **“I hereby certify that this rejection is made in good faith.”** And make sure the document is signed. If validly rejected, there is nothing in the Act or this recent court decision that requires payment (partial or otherwise) before asserting any defense.
2. If you have not approved or rejected a pay application within the time periods required by the Act or have not included the “good faith” certification above, **you should assume that the application has been “deemed approved.”**
3. You must pay the “deemed approved” application within the contractual time period for payment of any other approved application.
4. Any defenses you might have to the “deemed approved” application – overbilling, invalidly claimed extra work, incorrect charges, etc. – must wait until after you’ve made payment in full. This does not mean you can’t send notice to the other party setting out these defenses (and in fact you should); but it does mean you cannot delay payment while you try to work things out, in mediation, court, or otherwise. If you determine litigation is necessary, do not file any claims – or assert them in response to a complaint filed against you – until after you have paid the disputed invoice in full.
5. Finally, and most importantly: Withholding payment because you believe it was validly rejected on time could still result in a complete waiver of your recoupment rights. The *Cannistraro* case suggests that if you pursue this path and a court or

arbitrator ultimately determines your rejection did not comply with the Act, your act of “fighting without paying” will preclude you from fighting – forever – and put you on the hook for the full amount in dispute, plus interest.

Stay tuned for updates as this issue continues to evolve in the courts.