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Appeals Court strictly construes Prompt Payment Act

Statute's requirements material, not ministerial

■ **Eric T. Berkman**

A CONSTRUCTION PROJECT owner's failure to reject a contractor's applications for periodic progress payments according to the strict requirements of the Prompt Payment Act constituted approval of the requests, the Appeals Court has ruled.

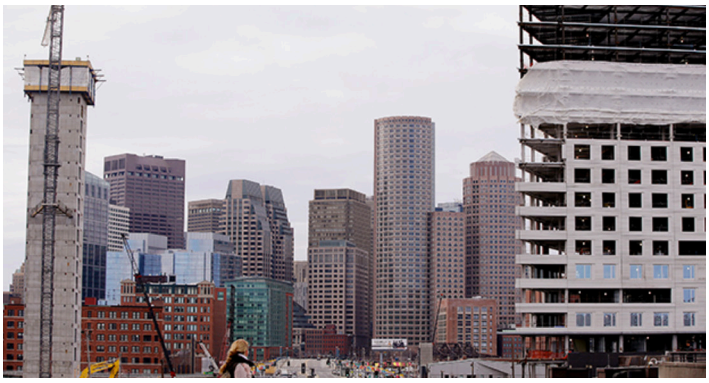
The Prompt Payment Act, G.L.c. 149, §29E, seeks to ensure that project owners review and process contractor invoices promptly by mandating that they approve or reject periodic payment requests within 15 days and make payment within 45 days. If an owner fails to provide a proper objection within 60 days, the request is deemed approved.

The law applies only to commercial projects with a base contract value of at least $3 million. It also requires that any rejection be in writing; that the owner specify its factual and contractual bases for the rejection; and that the owner certify its reasons as being in good faith.

The plaintiff in the case, Tocci Building Corp., served as general contractor on a large project in Boston's Seaport District. It made seven different progress payment applications that the project owner, defendant IRIV Partners, LLC, while replying to the requests via letter and email, failed to reject in the time or manner prescribed by the act.

A Superior Court judge found that in light of IRIV's lack of strict compliance with the act, the requests should be deemed approved. The judge ordered in a separate final judgment that IRIV make the $4.5 million in payments.

The Appeals Court affirmed, while also rejecting IRIV's argument that final judgment should not have entered because of Tocci's own alleged breaches of the contract.



The plaintiff in the case was the general contractor on a large project in Boston's Seaport District. *(AP PHOTO/STEPHAN SAVOIA)*

"To allow the defendants to retain the moneys wrongfully withheld in violation of the statute until the final resolution of their postcompletion contract action would eviscerate the scheme for prompt payment or rejection-and-resolution created by the Legislature," Judge Peter J. Rubin wrote for the panel. "The point of the legislation is that these payments may not be withheld, even on valid grounds that they are not due because of a breach of contract, unless a timely rejection is made in compliance with the statute."

The 18-page decision is *Tocci Building Corporation v. IRIV Partners, LLC, et al.* (and a companion case), Lawyers Weekly No. 11-046-22.

'CAREFUL CONSIDERATION'

Bradley L. Croft of Boston, who represented Tocci, said he and his client appreciated the court's careful consideration of both the legal implications of not complying with the act and the importance of the act's underlying policies.

> *A troubling scenario not addressed in the case is what happens if, after a payment requisition for a portion of the work is approved and paid, the paying party discovers that much of the work was defective or incomplete, said Boston construction lawyer Joel Lewin. "Can the non-breaching party reject payment of the next application or must it pay and litigate later?"*

Croft said the decision is noteworthy because it confirms that an act-compliant rejection must include the "magic words" that it has been certified as being made in good faith.

That requirement is important, he said, because, as the court emphasized, it helps a contractor distinguish a formal rejection of a payment application under the act from the ordinary correspondence commonly sent on construction projects relating to compliance and payment.

IRIV's attorney, Michael B. Donahue of Boston, could not be reached for comment prior to deadline.

But Joel Lewin, a Boston construction lawyer who filed an amicus brief on behalf of a pair of construction industry associations, said Massachusetts is an outlier in terms of the result in Tocci.

"With the exception of one state, I'm unaware of any federal or state laws that mandate payments for failure to timely reject," Lewin said. "Where the billing is demonstrably fraudulent or the work is defective, the party who missed the deadlines must pay and litigate to recover the overbilling."

Meanwhile, Lewin said, a troubling scenario not addressed in the case is what happens if, after a payment requisition for a portion of the work is approved and paid, the paying party discovers that much of the work was defective or incomplete.

"Can the non-breaching party reject payment of the next application or must it pay and litigate later?" Lewin asked. "Another important issue not directly addressed by the Appeals Court is whether the party seeking payment must, before seeking the protection of the PPA, demonstrate compliance with basic contract provisions requiring documentation to support payment, including invoices, payroll records, lien releases and other support."

Boston construction attorney Joseph A. Barra, who also submitted an amicus brief in the case, emphasized that while an owner or general contractor that fails to fully comply with the statute when attempting to reject all or part of a downstream invoice will be deemed to have waived its right to withhold payment, it can still later claim that payment was, in fact, not due because of a breach of contractual or other duty on the part of the requesting party.

At the same time, Barra said, while the court found the certification requirement to be essential, it failed to address the precise language needed to satisfy the requirement.

Leah A. Rochwarg of Boston, who represents project owners, developers and contractors, suggested in light of Tocci that parties incorporate the act's detailed requirements directly into a construction contract rather than merely by reference.

"Inclusion of the statute's detailed requirements in the contract may facilitate the submission and processing of progress payment applications," Rochwarg said.

But even if the act's requirements are not detailed in the contract, compliance is mandatory, she emphasized.

Accordingly, Rochwarg said, "parties would be wise to familiarize themselves with the detailed requirements of the law as well as the contract."

East Walpole lawyer Jonathan P. Sauer said he had problems with the statute itself — particularly the fact that the requisitions do not need to be certified, just the response, which he described as unfair.

Sauer also wondered what might happen if IRIV had won its breach of contract case, leaving Tocci as the party owing money.

"What if Tocci can't pay that judgment?" he said. "What if after receiving money as to this judgment, Tocci files for bankruptcy?"

PAYMENT REQUESTS

IRIV hired Tocci to construct a commercial building in the Seaport District.

The nearly $4 million contract gave IRIV a shorter window to reject all or part of an application for payment, or to pay it, than the act required. But in response to seven disputed payment applications, IRIV apparently did not meet either the contractual requirements or the more generous requirements under the act.

To the extent that IRIV did communicate with Tocci, it did not explain the factual and contractual basis for its partial rejection of the requisitions, and it did not certify that it was rejecting in good faith.

Instead, IRIV's attorney sent a letter informing Tocci that it was withholding nearly $3.2 million from unidentified payment requisitions without explaining its rationale for that decision.

IRIV also requested via email that Tocci provide more information, such as an analysis of the cost to date versus the budget.

Following project completion, Tocci sued IRIV for breach of contract, citing the allegedly wrongful withholding of the periodic payments. It also brought bad faith and Chapter 93A claims.

IRIV filed breach of contract, bad faith and Chapter 93A counterclaims alleging that Tocci performed defective work, failed to perform certain required work, and submitted fraudulent payment applications.

Tocci Building Corporation v. IRIV Partners, LLC, et al. (and a companion case)

THE ISSUE: Did a construction project owner's failure to reject a contractor's applications for periodic progress payments according to the strict requirements of the Prompt Payment Act constitute approval of the requests?
DECISION: Yes (Appeals Court)
LAWYERS: Bradley L. Croft and Roger L. Smerage, of Ruberto, Israel & Weiner, Boston (plaintiff) Michael B. Donahue of Duane Morris, Boston (defense)

In late 2020, Judge Michael D. Ricciuti granted Tocci partial summary judgment on its breach of contract claims, finding that the contractor's applications for the periodic progress payments should be deemed approved based on IRIV's lack of strict compliance with the Prompt Payment Act.

He also issued a final and separate judgment under Rule 54(b) ordering IRIV to pay $4.6 million within 45 days.

IRIV appealed.

ESSENTIAL COMPONENT

In affirming the judgment, the Appeals Court rejected IRIV's argument that the good-faith certification requirement was merely ministerial.

"[T]he certification requirement is an essential component of the scheme set up by the statute," Rubin wrote, emphasizing that on a complicated construction project, an enormous amount of communication may circulate between the owner and the contractor, much of it touching on payment.

A certification requirement ensures that the owner will be deliberate about rejecting applications while taking care to reject them only in good faith, he said.

The court similarly rejected IRIV's argument that because Tocci breached the construction contract, the defendant had good reason not to pay the applications.

"Tocci does not argue, and we do not hold, that the defendants' claims for breach of contract have been waived by their failure to include them in a proper rejection under the statute," Rubin said. "They may bring … any and all claims they have for breach of contract against Tocci, and they may recoup any money they may be owed. What the statute prohibits, though, is withholding a periodic progress payment in response to an application for it without issuing a timely rejection that complies with statutory requirements."