



FLETCHER TILTON BUILDING BLOCKS.



Demands for Direct Payment on Public Construction Projects

By Adam C. Ponte, Esq.

Many subcontractors, after substantially completing their work, find themselves eagerly awaiting payment from their project general contractor – beyond the contractual deadline for payment. In such a situation, the general contractor also might be awaiting payment from the awarding authority for various reasons, even if the associated subcontractor’s work is fully completed. For example, the general contractor may have erroneously omitted a subcontractor’s completed work from a recent payment requisition to the awarding authority. Massachusetts law provides a potential remedy for particular subcontractors on **public** construction projects that have completed their work but have not been paid timely by the general contractor. That remedy is known as a “demand for direct payment” against the awarding authority.

I. DIRECT PAYMENT STATUTE AND ELIGIBILITY

Under Massachusetts General Laws, Chapter 30, Section 39F, certain subcontractors on public construction projects may bring a demand for direct payment against the awarding authority, such as a municipality or other public entity. To be eligible, the subcontractor seeking payment must have been (i) a filed sub-bidder on the project or (ii) approved, in writing, by the awarding authority to perform project work. A subcontractor is generally considered to be a filed sub-bidder when, in connection with submitting bids to perform work on a public construction project, it certifies and agrees to certain project requirements in writing pursuant to sub-bid forms furnished by the awarding authority. A common example of a sub-bid requirement is for the subcontractor to certify that its employees are trained in construction health and safety. See M.G.L. c. 149, § 44F. Massachusetts law, however, does not specify a particular form regarding the awarding authority’s written approval of a subcontractor’s project work. See *Hajjar v. City of Fitchburg*, 2010 WL 653987, at *3 (Mass. Super. Jan. 7, 2010); *Revoli Construction Co. v. Town of Andover*, 1999 WL 1203789, at *3 (holding daily project reports referring to subcontractor by name sufficient for written approval); but see *Regency Construction & Mgmt., Inc. v. BBC Company, Inc.*,

2005 WL 3721145 (Mass. Super. Dec. 16, 2005) (finding owner’s general awareness of subcontractor insufficient to constitute owner approval).

II. MAKING THE DEMAND.

An eligible subcontractor on a public construction project may seek direct payment from the awarding authority if the subcontractor does not receive payment within seventy (70) days after substantial completion of its work. To do so, the subcontractor must send a letter by certified mail to the awarding authority, providing (i) a detailed accounting of the monies due under the applicable subcontract; (ii) an itemization of the work performed; and (iii) the overall status of the subcontract; e.g., whether separate additional work remains. M.G.L. c. 30, § 30F(d). The letter also must be simultaneously sent to the general contractor. Importantly, the letter must be signed before a notary and affirmed under oath by the subcontractor’s authorized representative. *Id.*

The general contractor may object to the subcontractor’s demand within ten (10) days of receiving the demand. M.G.L. c. 30, § 30F(d). To do so, the general contractor must send a letter to the awarding authority, providing (i) a detailed accounting of the subcontract balance; (ii) a breakdown of work completed; (iii) an identification of amounts due for extra labor and materials furnished by the subcontractor to the general contractor; and (iv) an accounting of any monetary claims of the general contractor against the subcontractor. *Id.* The general contractor’s written objection also must be sent by certified mail, sworn to and notarized.

If the general contractor fails to timely object to said demand, the awarding authority must pay the balance due and owing to the subcontractor, minus an amount the awarding authority contends covers incomplete or unsatisfactory subcontract work, within fifteen (15) days of receipt of the demand. M.G.L. c. 30, § 30F(e).

III. PAYMENT PARTICULARS

In the event the general contractor timely submits an objection to the entire balance claimed by the subcontractor, the awarding authority must deposit the entire disputed amount into a joint bank account, in the names of both the general contractor and the subcontractor. M.G.L. c. 30, § 30F(f). Those monies then must be held by the bank until the parties jointly instruct the bank to release the funds or until a court instructs the bank to disburse the funds in a particular manner. If the general contractor disputes only a portion of the amounts demanded by the subcontractor, then the awarding authority must pay the acknowledged balance to the subcontractor and deposit the remaining, disputed amount into a joint account. M.G.L. c. 30, §§ 30F(e)-(f).

IV. CONCLUSION

Subcontractors should be aware of their potential right to demand direct payment on public construction projects for work that is substantially completed. The demand process afforded under M.G.L. c. 30, § 30F provides subcontractors with an avenue to compel general contractors to either pay amounts due or to dispute amounts due, under oath. This way, subcontractors know where they stand with respect to their contract balances and late payments. If you are a subcontractor, general contractor, or awarding authority, you should consult with an attorney in the event the demand for direct payment statutes are invoked on your project. **FT**

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