

HOUSE No. 01401

The Commonwealth of Massachusetts

PRESENTED BY:

Kevin J. Murphy

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

Act concerning fair retainage payments in private construction.

PETITION OF:

NAME:

Kevin J. Murphy

DISTRICT/ADDRESS:

18th Middlesex

HOUSE No. 01401

By Mr. Kevin J. Murphy of Lowell, petition (accompanied by bill, House, No. 01401) of Kevin J. Murphy relative to retainage payments in certain construction projects. Joint Committee on Labor and Workforce Development.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

Act concerning fair retainage payments in private construction.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 149 of the General Laws is hereby amended by inserting after section 29E the following
2 section:

3 Section 29F: (a) As used in this section the following word(s) shall have the following
4 meanings, unless the context clearly requires otherwise:

5 "Contract for construction", a contract for which a lien may be established under sections 2 or 4
6 of chapter 254 on a project for which the person whose contract with the project owner has an
7 original contract price of \$3,000,000 or more; provided, however, this shall not include projects
8 containing or designed to contain at least 1 but not more than 4 dwelling units.

9 "Claim", an allegation that the party seeking payment of retainage breached its contract for
10 construction for the project.

11 “Incomplete or defective work”, items required for full performance of the contract for
12 construction which remain to be performed or which have been performed but require repair or
13 replacement. Incomplete or defective work shall not include items to be repaired or replaced
14 pursuant to a warranty or guarantee.

15 “Retainage”, a portion of a payment due pursuant to a contract for construction that is withheld
16 to ensure full performance of such contract for construction.

17 “Substantial completion”, the stage in the progress of the project when the work required by the
18 contract for construction with the project owner is sufficiently complete in accordance with the
19 contract for construction so that the project owner can occupy or utilize such work for its
20 intended use. Substantial completion may apply to the entire project, or a phase of the entire
21 project if the contract for construction with the project owner provides for phased completion.

22 (b) Every contract for construction which provides for retainage shall also provide that retainage
23 shall not exceed 5% of each progress payment.

24 (c) Every contract for construction which provides for retainage shall provide a reasonable time
25 period within which all retainage shall be paid. Except as provided in paragraph (d) and (e) of
26 this section, and subject to subsection (e) of section 29E of chapter 149, the time period for
27 payment of all retainage shall not exceed 30 days after substantial completion; provided,
28 however, that the time period for payment of retainage by the person at each tier of contract
29 below the owner of the project may be extended by 7 days more than the time period applicable
30 to the person at the tier of contract above such person.

31 (d) Any amount withheld from the payment of retainage for incomplete or defective work items
32 shall not exceed the estimated cost to complete or correct the items under the contract for

33 construction, and shall be pursuant to a writing which describes the incomplete or defective work
34 items and the value attributable to each item, and which is certified as made in good faith.
35 Subject to subsection (e) of section 29E of chapter 149, the time period for payment of the
36 amount attributable to each incomplete or defective work item shall not exceed 30 days
37 following a written application for payment submitted after the item has been completed or
38 corrected.

39 (e) Any amount withheld from the payment of retainage for a claim shall not exceed the
40 estimated value of the claim for which the person seeking payment has received prior written
41 notice, and shall be pursuant to writing which describes the factual and contractual basis for the
42 claim, and which is certified as made in good faith. Any amount withheld from the payment of
43 retainage for a claim under this paragraph (e) shall be paid forthwith upon resolution of the
44 claim, which shall be subject to the applicable dispute resolution procedure.

45 (f) A communication required in this section to be in writing may be submitted in electronic
46 form and by electronic means.

47 (g) A provision in a contract for construction which purports to waive or limit any provisions of
48 this section shall be void and unenforceable.