

SENATE No. 2271

The Commonwealth of Massachusetts

—————
In the Year Two Thousand Fourteen
—————

SENATE, Tuesday, July 15, 2014

The committee on Ways and Means, to whom was referred the Senate Bill relative to fair retainage payments in private construction (Senate, No. 2120), reports, recommending that the same ought to pass with an amendment substituting a new draft with the same title (Senate, No. 2271).

For the committee,
Stephen M. Brewer

SENATE No. 2271

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

An Act relative to 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 SECTION 1. Chapter 149 of the General Laws is hereby amended by inserting after
2 section 29E the following section:-

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

5 “Claim”, an allegation that a person seeking payment of retainage breached the person’s
6 contract for construction for the project; provided, however, that a “claim” shall be subject to the
7 applicable dispute resolution procedure, notice and other requirements in the contract for
8 construction.

9 “Contract for construction”, a contract for which a lien may be established under sections
10 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has
11 an original contract price of not less than \$3,000,000; provided, however, that “contract for
12 construction” shall not include a project containing or designed to contain at least 1 but not more
13 than 4 dwelling units.

14 “Deliverable”, a project close-out document that shall be submitted by the person seeking
15 payment of retainage under the person’s contract for construction; provided, however, that a lien
16 waiver or release, which is a deliverable, shall comply with chapter 254; and provided further,
17 that “deliverable” shall not include any document affirming, certifying or confirming completion
18 or correction of labor, materials or other items furnished or incomplete or defective work.

19 “Incomplete or defective work”, labor, materials or any other item required for full
20 performance by a person seeking payment of retainage which remain to be furnished by the
21 person under the person’s contract for construction or which has been furnished by the person
22 but requires correction, repair, further completion, revision or replacement; provided, however,
23 that “incomplete or defective work” shall not include deliverables or labor, materials or any other
24 item to be repaired or replaced after substantial or final completion pursuant to a warranty,
25 guarantee or other contractual obligation to correct defective work after substantial or final
26 completion.

27 “Person”, any natural person, joint venture, partnership, corporation or other business or
28 legal entity who enters into a contract for construction.

29 “Prime contractor”, a person who enters into a contract for construction with the project
30 owner.

31 “Retainage”, a portion or percentage of a payment due pursuant to a contract for
32 construction that is withheld to ensure full performance of the contract for construction.

33 “Substantial completion”, the stage in the progress of the project when the work required
34 by the contract for construction with the project owner is sufficiently complete in accordance
35 with the contract for construction so that the project owner may occupy or utilize the work for its

36 intended use; provided further, that “substantial completion” may apply to the entire project or a
37 phase of the entire project if the contract for construction with the project owner expressly
38 permits substantial completion to apply to defined phases of the project.

39 (b) No contract for construction shall include retainage that exceeds 5 per cent of any
40 progress payment.

41 (c) Not later than 14 days after reaching substantial completion, the prime contractor shall
42 submit to the project owner a notice of substantial completion, which shall include the form
43 provided in this subsection, stating the date on which the project was substantially complete.

44 FORM FOR NOTICE OF SUBSTANTIAL COMPLETION

45 NOTICE OF SUBSTANTIAL COMPLETION

46 Under M.G.L. c. 149, § 29F

47 For [project name]

48 To [project owner]:

49 The undersigned hereby gives notice that the project was substantially complete, as defined
50 under M.G.L. c. 149, § 29F, on [date of substantial completion]. This notice is certified as made
51 in good faith on [date of notice].

52 By _____

53 [prime contractor]

54 Accepted:

55 By _____

56 [project owner]

57 Dated: _____

58 (d) The project owner shall accept or reject the notice of substantial completion within 14
59 days of receipt of the notice. The project owner shall indicate its acceptance by signing the
60 notice in the space provided and shall deliver the notice to the prime contractor within the same
61 14-day period. If the project owner fails to deliver the notice to the prime contractor within the
62 14-day period, the notice shall be considered accepted. If the project owner rejects the notice of
63 substantial completion, the project owner shall, within 14 days of receipt of the notice described
64 in subsection (c), notify the prime contractor in writing of the rejection and include in the
65 rejection the factual and contractual basis for the rejection and a certification that the rejection is
66 made in good faith. A rejection of the notice shall be subject to the dispute resolution provisions
67 of the contract for construction, which, notwithstanding any provision in the contract to the
68 contrary, shall be commenced by the prime contractor within 7 days of receipt of the rejection of
69 the project owner. The prime contractor and project owner shall prosecute the dispute resolution
70 procedures diligently, expeditiously and in good faith. A notice of substantial completion not
71 rejected by the project owner within 14 days of receipt of the notice and in accordance with this
72 subsection shall be considered accepted by the project owner. Upon an express or deemed
73 acceptance of a notice of substantial completion, the date of substantial completion shall be the
74 date stated in the prime contractor's notice for all purposes and the acceptance shall be final and
75 binding on the project owner and its successors and assignees.

76 (e) Not later than 14 days after the express or deemed acceptance of the notice of
77 substantial completion or, in the case of a dispute, final and binding resolution of the dispute, the
78 project owner shall submit to the prime contractor a written list describing any incomplete or
79 defective work items or deliverables required of the prime contractor under the prime
80 contractor's contract for construction. The list shall be certified by the project owner as made in

81 good faith. Not later than 21 days after the express or deemed acceptance of the notice of
82 substantial completion or, in the case of a dispute, final and binding resolution of the dispute, the
83 prime contractor shall submit to each person from whom the prime contractor is withholding
84 retainage a written list describing any and all incomplete or defective work items or deliverables
85 required by the person under the person's contract for construction, which list may include items
86 beyond those on the project owner's list. The list shall be certified by the prime contractor as
87 made in good faith.

88 (f) The project owner and prime contractor shall fulfill their obligations under subsections
89 (c), (d) and (e) in good faith and in a timely manner. Except where the contract for construction
90 shall provide for an earlier submission, following the expiration of 60 days after substantial
91 completion or, in the case of a dispute under subsection (d), final and binding resolution of the
92 dispute, a person may submit a written application for payment of retainage in the manner
93 required by the person's contract for construction. An application for payment of retainage shall
94 be accompanied by a written list identifying the incomplete or defective work items or
95 deliverables on its received list that the person has completed, repaired and delivered. The list
96 shall be certified by the person submitting the application for payment of retainage as made in
97 good faith.

98 Subject to subsection (g), an application for payment of retainage shall be paid not later
99 than 30 days following submission of the application; provided, however, that the time period for
100 payment of an application for retainage by the person at each tier of contract below the owner of
101 the project may be extended by 7 days longer than the time period applicable to the person at the
102 tier of contract above the person.

103 (g) Not more than the following amounts may be withheld from the payment of retainage:
104 (i) for incomplete, incorrect or missing deliverables, either (A) the value of the deliverables as
105 mutually agreed upon in writing by the parties to the contract for construction of the person
106 seeking payment of retainage pursuant to the contract or (B) if no value has been agreed upon by
107 the parties, the reasonable value of the deliverables which shall not exceed 2.5 per cent of the
108 total adjusted contract price of the person seeking payment of retainage; (ii) 150 per cent of the
109 reasonable cost to complete or correct incomplete or defective work items; and (iii) the
110 reasonable value of claims and any costs, expenses and attorneys' fees incurred as a result of the
111 claims if permitted in the contract for construction of the person seeking the payment of
112 retainage. No amount shall be withheld from the payment of retainage unless the person seeking
113 payment has received, before the date that the payment is due, a description, in writing, of the
114 incomplete or defective work items and incomplete, incorrect or missing deliverables, the factual
115 and contractual basis for the claims and the value attributable to each incomplete or defective
116 work item, deliverable and claim. The writing shall be certified as made in good faith. A person
117 may submit additional applications for payment of retainage in the manner required by the
118 person's contract for construction following completion or correction of incomplete or defective
119 work items, the furnishing of deliverables or the resolution of claims. The additional
120 applications shall be paid, and amounts may be withheld from payment, in accordance with
121 subsection (f) and this subsection.

122 (h) Retainage held by the project owner on account of the prime contractor's self-
123 performed labor, materials and equipment shall be eligible for payment to the same extent as if
124 the labor, materials and equipment had been provided by a person under a contract for
125 construction with the prime contractor.

126 (i) If the prime contractor has not violated the contract for construction with the project
127 owner and subject to this section, the project owner shall not withhold any part of the retainage
128 of a person under a contract for construction with the prime contractor or the prime contractor's
129 proportional retainage calculated under the contract for construction for a claim that the project
130 owner asserts against the prime contractor that is not based on the performance of the person or a
131 violation of the person's contract for construction.

132 (j) A contract for construction may establish the date of the month for submission of an
133 application for payment of retainage; provided, however, that the contract may not restrict the
134 submission to less frequently than 1 application per calendar month. An application submitted
135 prior to the date established in the contract for construction shall be considered submitted as of
136 the date established in the contract. A rejection of an application for payment of retainage and a
137 dispute regarding incomplete or defective work items, deliverables or claims shall be subject to
138 the applicable dispute resolution procedure. A provision in a contract for construction that
139 requires a person to delay commencement of the applicable dispute resolution procedure for
140 more than 30 days after either the rejection of an application for payment of retainage or written
141 notice of the dispute is provided, whichever first occurs, shall be void and unenforceable. The
142 payment of retainage shall be subject to subsection (e).

143 (k) A communication required by this section to be in writing may be submitted in
144 electronic form and by electronic means.

145 (l) A provision in a contract for construction which purports to waive, limit or subvert
146 this section or redefine or expand the conditions for achievement of substantial completion for
147 payment of retainage shall be void and unenforceable.

148 SECTION 2. Notwithstanding any general or special law to the contrary, section 29F of
149 chapter 149 of the General Laws shall not apply to a contract for construction relating to a
150 project for which the owner's contract was entered into prior to the effective date of this act.