

SENATE No. 4368

The Commonwealth of Massachusetts

House of Representatives, July 30, 2014.

BILL #: S2271

BILL STATUS: Favorable with Amendment

DISSENTERS:

None

ACCOMPANIED BILLS:

None

For the committee,

BRIAN S. DEMPSEY

HOUSE No. 4368

[Pin Slip]

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

1 SECTION 1. Chapter 149 of the General Laws as appearing in the 2012 Official edition,
2 is hereby amended by inserting after 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 required to be submitted by the person
15 seeking payment of retainage under the person’s contract for construction; provided, however,
16 that a lien waiver or release, which is a deliverable, shall comply with chapter 254; and provided
17 further, that “deliverable” shall not include any document affirming, certifying or confirming
18 completion or correction of labor, materials or other items furnished or incomplete or defective
19 work.

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

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

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

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

34 “Substantial completion”, the stage in the progress of the project when the work required
35 by the contract for construction with the project owner is sufficiently complete in accordance
36 with the contract for construction so that the project owner may occupy or utilize the work for its
37 intended use; provided further, that “substantial completion” may apply to the entire project or a
38 phase of the entire project if the contract for construction with the project owner expressly
39 permits substantial completion to apply to defined phases of the project.

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

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

45 FORM FOR NOTICE OF SUBSTANTIAL COMPLETION

46 NOTICE OF SUBSTANTIAL COMPLETION

47 Under M.G.L. c. 149, § 29F

48 For [project name]

49 To [project owner]:

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

53 By _____

54

55 [prime contractor]

56 Accepted:

57 By _____

58 [project owner]

59 Dated: _____

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

78 (e) Not later than 14 days after the express or deemed acceptance of the notice of
79 substantial completion or, in the case of a dispute, final and binding resolution of the dispute, the
80 project owner shall submit to the prime contractor a written list describing all incomplete or
81 defective work items and deliverables required of the prime contractor under the prime
82 contractor's contract for construction. The list shall be certified by the project owner as made in
83 good faith. Not later than 21 days after the express or deemed acceptance of the notice of
84 substantial completion or, in the case of a dispute, final and binding resolution of the dispute, the
85 prime contractor shall submit to each person from whom the prime contractor is withholding
86 retainage a written list describing all incomplete or defective work items and deliverables
87 required by the person under the person's contract for construction, which list may include items
88 beyond those on the project owner's list. The list shall be certified by the prime contractor as
89 made in good faith.

90 (f) The project owner and prime contractor shall fulfill their obligations under subsections
91 (c), (d) and (e) in good faith and in a timely manner. Except where the contract for construction
92 shall provide for an earlier submission, following the expiration of 60 days after substantial
93 completion or, in the case of a dispute under subsection (d), final and binding resolution of the
94 dispute, a person may submit a written application for payment of retainage in the form required
95 by the person's contract for construction. An application for payment of retainage shall be

96 accompanied by a written list identifying the incomplete or defective work items and
97 deliverables on its received list that the person has completed, repaired and delivered. The list
98 shall be certified by the person submitting the application for payment of retainage as made in
99 good faith.

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

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

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

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

134 (j) A contract for construction may establish the date of the month for submission of an
135 application for payment of retainage; provided, however, that the contract may not restrict the
136 submission to less frequently than 1 application per calendar month. An application submitted
137 prior to the date established in the contract for construction shall be deemed submitted as of the
138 date established in the contract. A rejection of an application for payment of retainage and a
139 dispute regarding incomplete or defective work items, deliverables or claims shall be subject to
140 the applicable dispute resolution procedure. A provision in a contract for construction that
141 requires a person to delay commencement of the applicable dispute resolution procedure for
142 more than 30 days after either the rejection of an application for payment of retainage or written
143 notice of the dispute is provided, whichever first occurs, shall be void and unenforceable. The
144 payment of retainage shall be subject to subsection (e) of section 29E of this chapter.

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

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

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