

HOUSE No. 3053

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act to Promote Fair Contract Provisions..

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. Amend chapter 149 of the 1998 Official Edition by inserting the following
2 section 29D after section 29C,—29D. Any provision in a contract for or relating to construction
3 services which makes payment to person furnishing the construction services conditioned upon
4 receipt of payment from a third person, is against public policy and is void and unenforceable,
5 except to the extent of amounts not received from such third person because (1) the person
6 furnishing the construction services failed to perform under its contract and failed to cure such
7 non-performance after receipt of notice as provided in such contract; or (2) the third person is
8 insolvent, provided the person seeking to assert the payment condition claimed a lien under
9 chapter two hundred fifty-four upon commencement of his performance, maintained and
10 perfected such lien, and pursued all reasonable legal remedies to obtain payment. The foregoing
11 exceptions must be expressly stated in any such provision, and the person seeking to assert the
12 payment condition shall have the burden of proof as to each element. Nothing in this section or
13 in any such provision shall be valid as a defense to enforcement of a lien claimed under chapter
14 two hundred fifty-four by the person furnishing the construction services. A party aggrieved by

the failure of the party seeking to assert the payment condition to pursue all reasonable legal remedies to obtain payment may avail itself of the summary procedure set forth in Chapter 254, Section 15A, for a summary determination of whether all reasonable legal remedies have been fulfilled with respect to the particular lien claim at issue. Nothing contained in this section is intended in any way to amend the statutes governing payments on public construction projects, or to impose on a public agency any payment obligation beyond that imposed by law. Words in this section have the following meanings: “Construction Services”, all labor, materials or services, including specially fabricated materials, rental equipment, appliances, tools and transportation charges, and all claims related thereto used or employed, or to be used or employed, in the construction, reconstruction, alteration, erection, remodeling, repair, demolition or removal of a building, structure, or other improvement to real property, whether public or private. “Person”, individuals, corporations, organizations, trusts, associations, partnerships, companies and public agencies. “Insolvency”, as defined under federal bankruptcy law. “Commencement of Performance”, forthwith after first performing, and in any event before receiving any payment. “All reasonable legal remedies”, taking such legal action as is necessary to obtain payment unless and until there is a reasonable likelihood such action will not result in obtaining payment.