

HOUSE No. 4229

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. Chapter 149 of the General Laws, as appearing in the 2008 Official Edition,
2 is hereby amended by inserting after section 29D the following section:—Section 29E. (a) As
3 used in this section the following words shall have the following meanings:“Construction
4 Services”, all labor, materials or services, including specially fabricated materials, rental
5 equipment, appliances, tools and transportation charges, and all claims related thereto used or
6 employed, or to be used or employed, in the construction, reconstruction, alteration, erection,
7 remodeling, repair, demolition or removal of a building, structure, or other improvement to real
8 property, whether public or private.“Person”, individuals, corporations, organizations, trusts,
9 associations, partnerships, companies and public agencies.“Insolvency”, as defined under federal
10 bankruptcy law.“Commencement of Performance”, forthwith after first performing, and in any
11 event before receiving any payment.“All reasonable legal remedies”, taking such legal action as
12 is necessary to obtain payment unless and until there is a reasonable likelihood such action will
13 not result in obtaining payment. (b) Any provision in a contract for or relating to construction
14 services that makes payment to person furnishing the construction services conditional upon

15 receipt of payment from a third person, is against public policy and is void and unenforceable,
16 except to the extent that amounts are not received from such third person because (1) the person
17 furnishing the construction services failed to perform under its contract and failed to cure such
18 non-performance after receipt of notice as provided in such contract; or (2) the third person is
19 insolvent, provided that the person seeking to assert the payment condition has claimed a lien
20 under chapter 254 of the General Laws upon commencement of his performance, maintained and
21 perfected such lien, and pursued all reasonable legal remedies to obtain payment. The foregoing
22 exceptions must be expressly stated in any such contract provision, and the person seeking to
23 assert the payment condition shall have the burden of proof as to each element. Nothing in this
24 section or in any such provision shall be valid as a defense to enforcement of a lien claimed
25 under said chapter 254 by the person furnishing the construction services. Any party aggrieved by
26 the failure of the party seeking to assert the payment condition to pursue all reasonable legal
27 remedies to obtain payment may avail itself of the summary procedure set forth in section 15A of
28 said chapter 254 for a determination of whether all reasonable legal remedies have been fulfilled
29 with respect to the particular lien claim at issue. Nothing contained in this section shall be
30 construed to in any way amend any law governing payments on public construction projects, or
31 to impose on a public agency any payment obligation beyond that imposed by law.