

HOUSE No. 4721

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act PROMOTING FAIRNESS IN PRIVATE CONSTRUCTION CONTRACTS..

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, as appearing in the 2006 Official Edition, is hereby
2 amended by inserting after Section 29D the following section:

3 a) As used in this section, “contract for construction” shall mean any contract pursuant to
4 which a lien may be established under the provisions of Section 2 or Section 4 of Chapter 254.

5 b) Every contract for construction shall provide reasonable time periods within
6 which written applications for periodic progress payments shall be submitted for approval; shall
7 be approved or rejected, whether in whole or in part; and shall be paid. Such time periods for
8 each application for a periodic progress payment shall not exceed (i) for submission, thirty days,
9 beginning thirty days after commencement of performance; (ii) for approval or rejection, fifteen
10 days after submission; and (iii) for payment, thirty days after approval. An application for a
11 periodic progress payment which is neither approved nor rejected within such time period shall
12 be deemed to be approved unless it is rejected before the date payment is due. A rejection of any
13 application for a periodic progress payment, whether in whole or in part, shall be made in
14 writing, shall include a detailed explanation of the factual and contractual basis for the rejection,

and shall be certified as made in good faith. A rejection of any application for a periodic progress payment shall be subject to the applicable dispute resolution procedure, which may be commenced at any time by any party notwithstanding any provision in the contract purporting to prohibit commencement until a later date.

c) Every contract for construction shall provide a reasonable time period within which a written request for a change increasing the contract sum or price shall be approved or rejected, whether in whole or in part. Such time period shall not exceed thirty days after commencement of the work on which the request is based. A request which is neither approved nor rejected within such time period shall be deemed to be approved, and may be submitted for payment within the next application for a periodic progress payment, unless it is rejected before the date payment is due. A rejection of any request, whether in whole or in part, shall be made in writing, shall include a detailed explanation of the factual and contractual basis for the rejection, and shall be certified as made in good faith. A rejection of any request shall be subject to the applicable dispute resolution procedure, which may be commenced at any time by any party notwithstanding any provision in the contract purporting to prohibit commencement until a later date.

d) Any provision in a contract for construction which makes payment to a person performing such construction conditioned upon receipt of payment from a third person that is not a party to the contract shall be void and unenforceable, except to the extent of amounts not received from such third person because:

(1) the person performing such construction failed to perform under its contract and failed to cure such non-performance after receipt of written notice within the time provided in such contract; or

(2) the third person is insolvent as defined under federal bankruptcy law, provided the person seeking to enforce the payment condition claimed a lien under Chapter 254 upon commencement of his performance and before receiving any payment, maintained and perfected such lien, and pursued all reasonable legal remedies to obtain payment, unless and until there is a reasonable likelihood such action will not result in obtaining payment.

The foregoing exceptions must be expressly stated in any such conditional payment provision, and the person seeking to enforce the payment condition shall have the burden of proof as to each element. Nothing in this section or in any such conditional payment provision shall be valid as a defense to enforcement of a lien claimed under Chapter 254 by the person furnishing the construction. A party aggrieved by the failure of the party seeking to enforce the payment condition to pursue all reasonable legal remedies to obtain payment may avail itself of the procedure set forth in Section 15A of Chapter 254, for a summary determination of whether all reasonable legal remedies have been fulfilled with respect to the particular lien claim at issue.

e) Any provision in a contract for construction purporting to require a person to continue performance of such construction if payment is not received for performance of such construction and if more than thirty days have elapsed since the date payment was due, shall be void and unenforceable, except to the extent of a dispute regarding the quality or quantity of the construction so furnished, for which such person has received a prior written notice certified as made in good faith.