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# SENATE . . . . . No. 1392

## The Commonwealth of Massachusetts

**In the Year Two Thousand Nine**

An Act promoting alternative resolution of certain public works disputes..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

SECTION 1. Chapter 30 of the General Laws is hereby amended by striking out section 39Q, as appearing in the 2004 Official Edition, and inserting in place thereof the following section:

Section 39Q. (a) There shall be a mandatory alternative dispute resolution program for contractually-based claims with a value of less than $10,000,000 in connection with the construction of public works and capital facilities for the commonwealth and all its state agencies. For claims with a value of at least $10,000,000, parties shall agree to participate in either the alternative dispute resolution program established in this section or mediation. For purposes of this section, a "state agency" shall be defined as that term is defined in section 1 of chapter 6A. This section shall apply to all public construction contracts awarded by a state agency. The alternative dispute resolution procedures set forth in this section shall apply only to claims by persons, firms, or corporations that have direct contracts with a state agency. The alternative dispute resolution procedures set forth in this section shall not apply to claims under section 39F of this chapter and section 29 of chapter 149, and no claims under section 39F of this

chapter and section 29 of chapter 149 shall be consolidated with any claims under the procedures in this section. Each state agency may propose and adopt its own alternative dispute resolution procedure, provided that the procedure contains the minimum standards set forth in subsection (b) of this section. If a state agency fails to adopt its own alternative dispute resolution procedure within 60 days after the effective date of this act, subsection (c) of this section shall apply to that state agency. A state agency which has adopted an alternative dispute resolution procedure containing the standards set forth in subsection (b) shall include its provisions in any public works or capital facilities construction-related contract. If the state agency has not adopted an alternative dispute resolution procedure, the terms set forth in subsection (c) shall be inserted in every contract for the construction, alteration, remodeling, repair or demolition of any capital facility or public work. Where the terms set forth in subsection (c) of this chapter were required to be included but are in fact omitted from a contract, those terms shall be considered to be part of the contract.

(b) Each alternative dispute resolution procedure adopted under this section must at a minimum:

(1) Require the opposing party to articulate its position in writing within 30 days after the dispute is submitted in writing to it by the party initiating the process;

(2) Produce a decision to be issued within 210 days after the dispute is submitted in writing by the party initiating the process, unless the parties mutually agree to extend that period, and provide that failure to issue a decision within this period of 210 days or longer by agreement of the parties shall be considered to be a denial of the claim, triggering the appellate rights available under this section;

(3) Permit each party to inspect all documents supporting the opposing party's position, including, without limitation, statements of both percipient and expert witnesses which have been reduced to writing or orally recorded, without making those documents public records as defined in clause Twenty-sixth of section 7 of chapter 4 of the General Laws. Attorney-client privilege and the attorney work product doctrine shall apply to these documents;

(4) Provide for non-binding alternative dispute resolution before a neutral fact finder, or a fact-finding panel which shall include an equal number of representatives of the parties to the dispute and must include at least 1 disinterested person, with the costs split by the state agency and contractor;

(5) Allow both parties to agree to enter into binding arbitration from the outset.

(6) Require the fact finder to prepare a written record of proceedings sufficient for purposes of judicial review;

(7) Permit either party to appeal from the non-binding decision set forth in the preceding clause and authorize the contractor to elect (i) binding arbitration to be conducted in accordance with subsection (c) or the rules of the American Arbitration Association, or (ii) judicial review. The findings of fact and decision of the neutral fact finder, fact finding panel or the hearing examiner shall be admissible in any subsequent administrative or judicial proceeding.

(c) Except as otherwise provided in subsections (a) and (b) of this chapter, and notwithstanding any previously enacted general or special law to the contrary, every state agency shall apply paragraphs 1 to 5, inclusive, to the terms of public construction contracts awarded by any state agency:

(1) Disputes regarding changes in and interpretations of the terms or scope of the contract and denials of or failures to act upon claims for payment for extra work or materials shall be resolved according to either the administrative, judicial or arbitration procedures in this and the following paragraphs, which shall constitute the exclusive methods for resolving these disputes. Written notice of the matter in dispute shall be submitted by the claimant to the chief executive official of the state agency which awarded the contract or the official's designee, or to the chief executive officer of the contracting company, within a period which commences with the execution of the contract or the authorized commencement of work on the contract project, whichever begins first, and ends when the claim would otherwise be foreclosed by the passage of time and operation of applicable law. Acceptance of an amount offered as final payment shall not preclude any person, firm or corporation from bringing a claim under this section unless the claim has been expressly released before or upon final payment. All legal defenses except governmental immunity shall be reserved to the state agency. Interest on any award shall begin to accrue to a claimant under this paragraph 60 days after the claimant submits a notice or demand to the state agency for the unpaid debt upon which that interest is to be based. No person or business entity having a contract with a state agency shall delay, suspend, or curtail performance under that contract as a result of any dispute subject to this paragraph. Any disputed order, decision or action by the state agency or its authorized representative shall be fully performed or complied with pending resolution of the dispute. No consolidation of arbitration proceedings shall take place where the state agency is not a party to both arbitration proceedings before the consolidation.

(2) Within 60 days after submission of the initial notice of the matter in dispute to the chief executive official of the state agency or the official's designee, the chief executive official

shall issue a written decision stating the reasons for the decision, and shall notify the parties of their options for appeal. If the chief executive official or the official's designee is unable to issue a decision within 60 days, he shall notify the parties to the dispute in writing of the reasons why a decision cannot be issued within 60 days and of the date by which a decision shall issue. Failure to issue a decision within the 60-day period or within an additional time period specified in this written notice, if any, and agreed upon by the claimant shall be considered to constitute a denial of the claim and shall authorize resort to the appeal procedure described below. The decision of the chief executive official or his designee shall be final and conclusive unless an appeal is taken as provided below.

(3) Within 21 calendar days after the receipt of a written decision or of the date a denial is considered to have occurred by virtue of a failure to issue a decision as stated in paragraph (2), any aggrieved party may file a demand for arbitration under paragraph (4) and shall thereafter serve copies upon all other parties in the form and manner prescribed by the rules governing the conduct of adjudicatory proceedings of the division of administrative law appeals. The aggrieved party may instead file an action directly in a court of competent jurisdiction. If an aggrieved party exercises his option to file an action directly in court as provided in the previous sentence, the 21-day period shall not apply to the filing and the period for filing this action shall be the same period otherwise applicable for filing such a civil action in court.

(4) A demand for arbitration shall include the amount of damages sought and the alleged facts and contractual or statutory provisions which form the basis of the claim. Arbitration of a claim or claims shall be conducted under the rules of any dispute resolution entity, approved by this person, firm or corporation and the chief executive official of the state agency or the official's designee and the provisions of this paragraph, except that if the parties cannot agree

upon a dispute resolution entity, the arbitration shall be administered by the public construction rules of the American Arbitration Association and this paragraph, and in the case of a conflict, this paragraph shall govern. If a demand for arbitration is made to the chief executive official of the state agency or the official's designee, each party shall allow the other to examine and copy any nonprivileged documents which may be relevant either to the claimant's claims or to the state agency's defenses to these claims. The attorney-client privilege and the attorney work-product doctrine shall apply to the state agency's documentation. All issues not addressed by this paragraph or by agreement, or by the rules of the mutually-designated dispute resolution entity or the American Arbitration Association, whichever shall apply, shall be governed by chapter 251. Any documents obtained by the agency through discovery shall not be subject to compelled disclosure under chapter 66 and shall not be disclosed by the state agency to any person or entity that is not a party to or an agent of a party to the arbitration. These documents shall be used only for settlement or litigation of the parties' claims. The arbitrators shall determine any claim of privilege or issue as to the relevance of documents after an in camera inspection. The arbitrators shall seal these documents during arbitration, and the arbitrators, as well as any other party obtaining a copy during discovery, shall return the documents to the appropriate party claimant after final disposition of the claim.

(5) Hearings shall be scheduled for arbitration in a manner that shall ensure that each party shall have reasonable time and opportunity to prepare and present its case, taking into consideration the size and complexity of the claims presented. Unless the parties mutually agree otherwise, no evidentiary hearing on the merits of the claim may begin less than 30 nor more than 120 days after the demand for arbitration is filed with the dispute resolution entity.

The arbitrators shall conduct the hearing and shall hear evidence of the facts and arguments as to the interpretation and application of contractual provisions. After the hearing, the arbitrators shall issue in writing the following: (i) findings of fact, (ii) a decision in which the arbitrators interpret the contract and law and apply it to the facts found and (iii) an award. The arbitrators' findings of fact shall be final and conclusive, and their decision and award shall be final and binding, subject, in both cases, to vacation, rehearing or confirmation under section 12 of chapter 251, and under the standards set forth in section 14 of chapter 30. Interest on any award shall begin to accrue 60 days after an initial notice is filed.

(d) The secretary of administration and finance shall prepare annually a report concerning the construction contract claims submitted to state agencies during the preceding 12 months, in such form as the secretary shall prescribe. The report shall contain, at a minimum, the following information: the number of claims submitted; the names of all parties to each claim; a brief description of each claim; the date of submission and of disposition of each claim; its disposition, whether by settlement, withdrawal, default, written agency decision, non-binding arbitration under an agency plan approved under subsection (b), or binding arbitration under subsection (c); and the number of claims currently pending. The original report shall be submitted by the secretary of administration and finance to the clerks of the house and senate by January 15, and a copy shall be filed with the state librarian and shall be a public document. The fourth annual report so filed and each report thereafter shall set forth recommendations concerning the implementation of the alternative dispute resolution program established by this section, including a recommendation whether to eliminate the option available to each state agency to adopt its own program under subsection (b) . SECTION 2. This act, being remedial in

nature, shall apply to all contracts executed after its effective date and may be voluntarily applied with the consent of all parties to contracts in existence as of the effective date of this act.