

SENATE No. 2577

The Commonwealth of Massachusetts

In the Year Two Thousand Ten

An Act Text of the Senate amendment (Ethic and Rules) to the House Bill promoting fairness in private construction contracts, House, No. 4721.

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 is hereby amended by inserting after
2 section 29D the following section:-

3 Section 29E. (a) As used in this section the following words shall have the following
4 meanings, unless the context clearly requires otherwise:-

5 “Contract for construction”, a contract for which a lien may be established under sections
6 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner
7 has an original contract price of \$3,000,000 or more; provided, however, this shall not include
8 projects containing or designed to contain at least 1 but not more than 4 dwelling units.

9 "Insolvent", insolvent as defined under federal bankruptcy law or being a debtor in a
10 proceeding commenced under federal bankruptcy law or under the corresponding law of another
11 country, or being a debtor in a receivership proceeding or having made an assignment for the
12 benefit of creditors.

13 (b) A communication required in this section to be in writing may be submitted in
14 electronic form and by electronic means.

15 (c) Every contract for construction shall provide reasonable time periods within which: (i)
16 a person seeking payment under the contract shall submit written applications for periodic
17 progress payments; (ii) the person receiving the application shall approve or reject the
18 application, whether in whole or in part; and (iii) the person approving the application shall pay
19 the amount approved. The time periods for each application for a periodic progress payment
20 shall not exceed: (i) for submission, 30 days, beginning with the end of the first calendar month
21 occurring at least 14 days after the person seeking payment has commenced performance; (ii) for
22 approval or rejection, 15 days after submission; provided, however, that the time period, as
23 applicable to approval or rejection by the person at each tier of contract below the owner of the
24 project, may be extended by 7 days more than the time period applicable to the person at the tier
25 of contract above the person; and (iii) for payment, 45 days after approval, unless the payment is
26 subject to the condition of receipt of payment by a third person but only to the extent enforceable
27 under subsection (e). An application for a periodic progress payment which is neither approved
28 nor rejected within the time period shall be deemed to be approved unless it is rejected before the
29 date payment is due. A rejection of an application for a periodic progress payment, whether in
30 whole or in part, shall be made in writing and shall include an explanation of the factual and
31 contractual basis for the rejection and shall be certified as made in good faith. A rejection of an
32 application for a periodic progress payment shall be subject to the applicable dispute resolution
33 procedure. A provision in the contract which requires a party to delay commencement of the
34 procedure until a date later than 60 days after the rejection shall be void and unenforceable.

35 (d) Every contract for construction shall provide a reasonable time period within which a
36 written request submitted by a person seeking an increase in the contract price shall be approved
37 or rejected, whether in whole or in part. The time period shall not exceed 30 days after the later
38 of commencement of the performance of the work on which the request is based or submission
39 of the written request; provided, however, that the time period, as applicable to approval or
40 rejection by the person at each tier of contract below the owner of the project, may be extended
41 by 7 days more than the time period applicable to the person at the tier of contract above the
42 person. A request which is neither approved nor rejected within such time period shall be
43 deemed to be approved and may be submitted for payment within the next application for a
44 periodic progress payment, unless it is rejected before the date payment is due. A rejection of a
45 request, whether in whole or in part, shall be made in writing, shall include an explanation of the
46 factual and contractual basis for the rejection and shall be certified as made in good faith. A
47 rejection of a request shall be subject to the applicable dispute resolution procedure. A provision
48 in the contract which requires a party to delay commencement of the procedure until a date later
49 than 60 days after the rejection shall be void and unenforceable.

50 (e) A provision in a contract for construction which makes payment to a person
51 performing the construction conditioned upon receipt of payment from a third person that is not a
52 party to the contract shall be void and unenforceable, except:

53 (1) to the extent of amounts not received from the third person because the person
54 performing the construction failed to perform under its contract and failed to cure the non-
55 performance within the time required by the contract after receipt of written notice as provided in
56 the contract or, in the case of contract lacking a cure and notice provision, failed to cure the non-
57 performance within 14 days after receipt of written notice of the failure to perform; or

58 (2) to the extent of amounts not received from the third person because the third person is
59 insolvent or becomes insolvent within 90 days after the date of submission of the requisition for
60 which payment is sought; provided, however, that the person seeking to enforce the payment
61 condition (i) filed a notice of contract under chapter 254 and in the case of a person having no
62 direct contractual relationship with the original contractor, also sent a notice of identification
63 within the time required under said chapter 254, prior to the person's submission of the first
64 application for payment after commencement of performance at the project site and did not
65 dissolve the lien created by the filing of such notice of contract; and (ii) within the time periods
66 allowed by said chapter 254 files a statement of amount due and commenced or commences a
67 civil action to enforce the lien; and (iii) pursues all reasonable legal remedies to obtain payment
68 from the person with whom the person had a direct contract unless and until there is a reasonable
69 likelihood the action shall not result in obtaining payment.

70 The foregoing exceptions shall be expressly stated in any conditional payment provision
71 and the person seeking to enforce the payment condition shall have the burden of proof as to
72 each element. Nothing in this section or in a conditional payment provision shall be valid as a
73 defense to enforcement of a lien claimed under said chapter 254 by the person furnishing the
74 construction nor shall it excuse compliance with said chapter 254. A party aggrieved by the
75 failure of the party seeking to enforce the payment condition to pursue all reasonable legal
76 remedies to obtain payment may avail itself of the procedure set forth in section 15A of said
77 chapter 254, for a summary determination of whether all reasonable legal remedies have been
78 fulfilled with respect to the particular lien claim at issue; provided, however, that the aggrieved
79 party has first made a request in writing that the party seeking to assert the payment provision
80 identify the legal remedies the aggrieved party has pursued and either: (i) has not received a

81 response in writing within 10 days after making the request; or (ii) having received a response,
82 has requested the party to pursue specific additional legal remedies and the party has failed
83 unreasonably to take such actions.

84 (f) A provision in a contract for construction, including without limitation a payment
85 condition enforceable under subsection (e), purporting to require a person to continue
86 performance of the construction if payment of an approved amount is due under the terms of the
87 contract but is not received, and more than 30 days have elapsed since the date payment was due,
88 shall be void and unenforceable, except for: (i) a dispute regarding the quality or quantity of
89 the construction so furnished; or (ii) a default by the person under the contract for construction
90 after approval of the payment; provided, however, that the person has received (i) a prior written
91 notice of such dispute or default certified as made in good faith; and (ii) all sums due less any
92 amounts attributable to the dispute or default.

93 (g) A provision in a contract for construction which purports to waive or limit any
94 provisions of this section shall be void and unenforceable.

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