

House 1804

NOTE: H. 1804 is the ASM "Prompt Pay" bill currently on file in the House for 2009. The text of H.1804 is the same as H.1789 of the 2007 session, which was the original version of the bill. The text of H.1789 was replaced by a new version, H.4730 in May of 2008. The language of H.4730 from 2008 is what appears below. ASM will ask the Legislature to substitute this language, for H.1804.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year Two Thousand and Nine.

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:

Chapter 149 of the General Laws, as appearing in the 2006 Official Edition, is hereby amended by inserting after Section 29D the following section:-

29E. (a) The provisions of this section shall apply to all construction in the commonwealth except single family residential housing and multifamily residential housing of four units or less, public construction projects, construction projects funded in part by governmental sources of funding where governmental procurement requirements conflict with the requirements of this statute, or contracts entered into prior to the effective date of this statute.

(b) As used in this section, the following terms shall, unless the context clearly requires otherwise, have the following meanings:-

"Construction", the whole or the part of the construction, reconstruction, erection, installation, alteration, repair, maintenance, demolition or removal of a building, structure or other improvement to real property, whether underground or above ground, or the furnishing of material or rental equipment, appliances or tools therefor.

"Contract", a written agreement concerning construction made and entered into by and between an owner and a contractor, a contractor and a subcontractor, a subcontractor and a sub-subcontractor, or by and between sub-subcontractors regardless of tier, including all plans, specifications and addenda relating thereto.

"Contractor", a person performing construction who has a contract with the owner of the real property.

"Days", calendar days, unless otherwise stated.

"Owner", a person who owns any interest in the real property in a contract for

construction, or a person who enters into a contract for construction for, on behalf of, or with the consent of such owner.

"Person", an individual, a sole proprietorship, corporation, estate, trust, partnership, limited liability company, association, organization, joint venture or any other legal entity.

"Retainage", money earned by a person performing construction, but withheld in reserve by the owner as assurance that all persons performing construction will be paid and that the construction will be completed.

"Subcontractor", a person performing construction who has a contract with a contractor.

"Sub-subcontractor", a person performing construction who has a contract with a subcontractor or with a person of lower contractual tier than a subcontractor.

(c)(1) The rights and obligations prescribed by this statute shall not be waived or varied under the terms of any contract. The terms of any contract waiving the rights and obligations prescribed by this statute shall be against public policy and shall be void and unenforceable.

(2) The rights and obligations of this statute shall be incorporated by reference in all contracts as defined above.

(3) All persons who enter into a contract for construction after the effective date of this statute shall make all payments in accordance with the terms of that contract, which shall be in accordance with the provisions of this section.

(4) Written notice required under this statute shall be deemed to have been provided if the notice is delivered in person or is delivered by certified mail, return receipt requested, or other means that provides written, third-party verification of delivery.

(d)(1) All contracts for construction shall provide for a specific requisition and payment schedule, under which all payments shall be made by the owner, contractor, subcontractors and sub-subcontractors for work performed during the period covered by the requisition.

(2) All contracts for construction shall specify a reasonable time for the approval by the owner, contractor, subcontractors, or sub-subcontractors of requisitions for payment that are completed properly and submitted timely, in accordance with the terms of the contract.

(3) Within the specified time in the contract for approval of a requisition for payment, the person responsible for payment shall issue a written notice to the applicant approving the requisition or detailing the amounts in the requisition that are not approved and the

reasons therefor, pursuant to subsection (d)(7). Within 5 days of receiving a notice detailing amounts not approved for payment, the applicant shall provide written notice to all persons of lower tier contracts as are relevant, of the amounts not approved and the reasons therefor.

(4) After the specified time for approval, pursuant to subsection (d)(2), requisitions for payment shall be deemed approved in the absence of written notice to the contrary.

(5) Amounts in requisitions that are approved for payment by a contractor, a subcontractor, or a sub-subcontractor shall be included in that person's next requisition to a person of higher contractual tier. Failure to do so shall not be a reason to withhold payment of approved amounts due.

(6) Amounts for changes in or additions to the construction which were performed by a contractor, a subcontractor, or a sub-subcontractor in accordance with the terms of the contract, may be included in that person's next requisition for payment, provided that the contractor, subcontractor, or sub-subcontractor was directed in writing to perform said changes or additions by a person authorized to do so under the contract. The absence of a written change order adjusting the contract price shall not be a reason to withhold payment for said changes in or additions to the construction.

(7) Nothing in this statute shall prevent an owner, contractor, subcontractor, or sub-subcontractor from withholding the following amounts from payments otherwise due:-

- i. retainage reserved by the owner in accordance with the terms of the contract;
- ii. amounts representing the reasonable value of all claims made in good faith against the applicant for payment in accordance with the terms of the contract;
- iii. reasonable amounts disputed in good faith between the parties to the contract.

(8) All contracts for construction shall specify a reasonable time by which payment by the owner, contractor, subcontractor, or sub-subcontractor of amounts approved in accordance with the contract is due. In the absence of a time specified in the contract, the time by which payment is to be made by the owner shall be 30 days after receipt of a requisition for payment, and the time for payment by each successive person of lower contractual tier, pursuant to its own sub-contracts, shall be within 7 business days of receipt of payment for the performance of work.

(9) Any provision in a contract which makes payment to a person performing construction conditional upon receipt of payment from a person that is not directly signatory to the contract, shall be void and unenforceable.

(10) Upon the written request of an applicant for payment, the owner, contractor, subcontractor or sub-subcontractor shall notify such applicant within 5 days after a payment is issued.

(11) If the owner, contractor, subcontractor, or sub-subcontractor fails to make payments of all amounts due, pursuant to subsection (d)(8), within the time specified in the contract, the person responsible for payment shall pay interest on the amount due, accruing from the day after the due date for such payment until payment is made, computed at the legal rate, as provided in Section 6C of Chapter 231..

(e)(1) If the owner, contractor, subcontractor, or sub-subcontractor fails to make payment of all amounts due, within 7 business days after the expiration of the time for such payment, pursuant to subsection (d) , the applicant shall, regardless of tier and without prejudice to any other available remedy, be entitled, upon an additional 7 business days written notice to all persons of higher tier contracts, including the owner, contractor, subcontractor, and any sub-subcontractor(s) as are relevant, to suspend further performance of work until payment, including applicable interest, is made. If the owner, contractor, subcontractor, or sub-subcontractor fails to make payment for amounts due only for authorized changes in or additions to the construction, the applicant shall be entitled to suspend further performance of work not originally required by its contract.

(2) Suspension of work for non payment, pursuant to subsection (e)(1) shall not be deemed a breach of the contract.

(3) The contract time for each contract affected by suspension of performance, pursuant to subsection (e)(1), shall be extended for a reasonable time and the contract sum for each affected contract shall be increased by the suspending person's reasonable costs of demobilization, delay and remobilization.

(4) If performance is suspended for more than 30 days for failure to receive payment, the suspending person shall, regardless of tier and without prejudice to any other available remedy, be entitled, upon an additional 7 business days written notice to all persons of higher tier contracts, including the owner, contractor, subcontractor, and any sub-subcontractor(s) as are relevant, to terminate the contract and shall not be deemed in breach of the contract.

(f)(1) Any provision in a contract for construction that purports to waive, release or extinguish the right to resolve disputes through litigation in court, including the right to trial by jury, shall be against public policy and shall be void and unenforceable, except that a contract may require binding arbitration as a substitute for litigation and require non-binding alternative dispute resolution as a prerequisite to litigation or arbitration, provided, however, that any such requirement for binding arbitration or nonbinding alternative dispute resolution must be mutual and not subject to exercise or waiver by any one person.

(2) In any action arising out of or related to the contract, including arbitration or alternative dispute resolution, the venue for such action shall be the Commonwealth of Massachusetts, and any provision in a construction contract that requires such action be conducted under the laws of a state other than Massachusetts shall be void and

unenforceable. In any such action, successful claimants shall be awarded costs and reasonable attorney's fees as determined by the court or arbitrator.