## The Commonwealth of Massachusetts

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**In the Year Two Thousand Fourteen**

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An Act relative to fair retainage payments in private construction.

*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 29E the following section:

3    Section 29F:    (a) As used in this section the following word(s) 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 has
7  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    "Claim", an allegation that the person seeking payment of retainage breached its contract
10  for construction for the project.  A claim shall be subject to the applicable dispute resolution
11  procedure, notice and other requirements in the contract for construction.

12    "Deliverable(s)", project close-out documents required to be submitted by the person
13  seeking payment of retainage under that person's contract for construction.  A lien waiver or
14  release which is a deliverable shall comply with chapter 254.  A deliverable shall not include a
15  document affirming, certifying or confirming completion or correction of labor, materials or
16  other items furnished or incomplete or defective work.

17    "Incomplete or defective work", labor, materials or any other items, except deliverables,
18  required for full performance by the person seeking payment of retainage which remain to be
19  furnished by such person under that person's contract for construction or which have been
20  furnished by such person but require correction, repair, further completion, revision or
21  replacement.  Incomplete or defective work shall not include labor, materials or other items to be

22 repaired or replaced after substantial or final completion pursuant to a warranty or guarantee or
23 other contractual obligations to correct defective work after substantial or final completion.

24     "Person", any natural person, joint venture, partnership, corporation or other business or
25 legal entity.

26     "Prime contractor", a person who enters into a contract for construction with the project
27 owner.

28     "Retainage", a portion of a payment due pursuant to a contract for construction that is
29 withheld to ensure full performance of such contract for construction.

30     "Substantial completion", the stage in the progress of the project when the work required
31 by the contract for construction with the project owner is sufficiently complete in accordance
32 with the contract for construction so that the project owner can occupy or utilize such work for
33 its intended use.  Substantial completion may apply to the entire project, or a phase of the entire
34 project if the contract for construction with the project owner expressly permits substantial
35 completion to apply to defined phases.

36     (b) Every contract for construction which provides for retainage shall also provide that
37 retainage shall not exceed 5% of each progress payment.

38     (c)  No later than fourteen days after substantial completion the prime contractor shall
39 submit to the project owner a notice of substantial completion, substantially in the form provided
40 in this subsection, stating the date on which the project was substantially complete.

41          FORM FOR NOTICE OF SUBSTANTIAL COMPLETION

42          NOTICE OF SUBSTANTIAL COMPLETION

43          Under M.G.L. c. 149, § 29F

44     For [project name]

45     To [project owner]:

46     The undersigned hereby gives notice that the project was substantially complete, as
47 defined under M.G.L. c. 149, § 29F, on [date of substantial completion].  This notice is certified
48 as made in good faith on [date of notice].

49                              By_____

50                              [prime contractor]

51     Accepted:

52      By_____

53      [project owner]

54      Dated: _____

55          (d) The project owner shall accept or reject the notice of substantial completion within
56      fourteen days of receipt of the notice.  The project owner shall indicate its acceptance by signing
57      the notice in the space provided and returning it to the prime contractor within such fourteen
58      days.  If the project owner rejects the notice of substantial completion it shall, within such
59      fourteen days, notify the prime contractor in writing of the rejection, and include in the writing
60      the factual and contractual basis for the rejection and a certification that the rejection is made in
61      good faith.  Any such rejection shall be subject to the dispute resolution provisions of the
62      contract for construction, which, notwithstanding any provision in such contract to the contrary,
63      shall be commenced by the prime contractor within seven days of receipt of the project owner's
64      rejection.  The prime contractor and project owner shall prosecute the dispute resolution
65      procedures diligently, expeditiously and in good faith.  Any notice of substantial completion not
66      rejected by the project owner within fourteen days of receipt of the notice and in accordance with
67      this subsection (d) shall be deemed accepted by the project owner.  Upon an express or deemed
68      acceptance of a notice of substantial completion, the date of substantial completion shall be the
69      date so stated in the prime contractor's notice for all purposes, and such acceptance shall be final
70      and binding on the project owner and its successors and assignees.

71          (e) No later than fourteen days after the express or deemed acceptance of the notice of
72      substantial completion, or in the case of a dispute, final and binding resolution of the dispute, the
73      project owner shall submit to the prime contractor a written list describing all the incomplete or
74      defective work items and deliverables required of the prime contractor under the prime
75      contractor's contract for construction.  Such list shall be certified by the project owner as made
76      in good faith.  No later than twenty one days after the express or deemed acceptance of the notice
77      of substantial completion, or in the case of a dispute, final and binding resolution of the dispute,
78      the prime contractor shall submit to each person from whom the prime contractor is withholding
79      retainage a written list describing all the incomplete or defective work items and deliverables
80      required by such person under that person's contract for construction, which list may include
81      items beyond those on the project owner's list.  Such list shall be certified by the prime
82      contractor as made in good faith.  Neither the project owner nor the prime contractor shall
83      include any items or deliverables on the list which are subject to a warranty, guarantee or other
84      contractual obligation to correct defective work after substantial or final completion.

85          (f) The project owner and prime contractor shall fulfill their obligations under sections
86      (c), (d) and (e) in a good faith and timely manner. Except where the contract for construction
87      provides for an earlier submission, following the expiration of sixty days after substantial
88      completion, or, in the case of a dispute under subsection (d), final and binding resolution of the

89   dispute, a person may submit a written application for payment of retainage in the form required
90   by such person's contract for construction.  Any application for payment of retainage shall be
91   accompanied by a written list identifying those incomplete or defective work items and
92   deliverables on its received list that the person has completed, repaired and delivered. Such list
93   shall be certified by the person submitting the application for payment of retainage as made in
94   good faith. Subject to subsection (g) of this section, an application for payment of retainage shall
95   be paid no later than thirty days following submission of the application; provided, however, that
96   the time period for payment of an application for retainage by the person at each tier of contract
97   below the owner of the project may be extended by seven days more than the time period
98   applicable to the person at the tier of contract above such person.

99   (g) The following may be withheld from the payment of retainage: (i) an amount of not
100  more than the reasonable value of deliverables, provided that the total value of all deliverables
101  shall not be assessed at more than 50% of the original retainage withheld under that person's
102  contract for construction; (ii) an amount of not more than 150% of the reasonable cost to
103  complete or correct incomplete or defective work items; and (iii) an amount of not more than the
104  reasonable value of  claims, and any costs, expenses and attorneys' fees incurred as a result of
105  the claims if permitted in the contract for construction of the person seeking payment of
106  retainage.  Provided, however, that no amount shall be withheld from the payment of retainage
107  unless the person seeking payment has received, before the date payment is due, a writing which
108  describes the incomplete or defective work items and deliverables, the factual and contractual
109  basis for the claims and the value attributable to each incomplete or defective work item,
110  deliverable and claim, and which is certified as made in good faith.  A person may submit
111  additional applications for payment of retainage in the form required by such person's contract
112  for construction following completion or correction of incomplete or defective work items, the
113  furnishing of deliverables or the resolution of claims.  Such additional applications shall be paid,
114  and amounts may be withheld from payment, in accordance with subsections (f) and (g).

115  (h) Retainage held by the project owner on account of the prime contractor's self-
116  performed labor, materials and equipment shall be eligible for payment to the same extent as if
117  such labor materials and equipment had been provided by a person under a contract for
118  construction with the prime contractor.

119  (i) Provided the prime contractor is not in breach of its contract for construction with the
120  project owner, and subject to the provisions of this Section 29F, the project owner shall not
121  withhold any part of the retainage of a person under a contract for construction with the prime
122  contractor, or the prime contractor's proportional retainage calculated thereon, for a claim that
123  the project owner asserts against the prime contractor that does not arise out of performance of
124  such person or the prime contractor or breach of such person's or the prime contractor's contract
125  for construction.

126        (j)  A contract for construction may establish date of the month for submission of an
127  application for payment of retainage provided such contract may not restrict such submission to
128  less frequently than one application per calendar month.  An application submitted prior to the
129  date established in the contract for construction shall be deemed submitted as of the date
130  established in such contract.  Any rejection of any application for payment of retainage and any
131  dispute regarding incomplete or defective work items, deliverables or claims shall be subject to
132  the applicable dispute resolution procedure.  A provision in a contract for construction which
133  requires a person to delay commencement of such procedure until a date later than 30 days after
134  the rejection of an application for payment of retainage or written notice of the dispute is
135  provided, whichever first occurs, is void and unenforceable.  Payment of retainage shall be
136  subject to subsection (e) of c. 149 sec 29E.

137        (k)  A communication required in this section to be in writing may be submitted in
138  electronic form and by electronic means.

139        (l) A provision in a contract for construction which purports to waive, limit or subvert
140  any provisions of this section, or to redefine or expand the conditions for achievement of
141  substantial completion or for payment of retainage shall be void and unenforceable.