

# HOUSE . . . . . No. 1789

By Mr. Flynn of Bridgewater, petition of David L. Flynn and Marc R. Pacheco for legislation to promote fairness in private construction contracts. Labor and Workforce Development.

## The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT TO PROMOTE 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 *Amend Chapter 149 of the 2004 Official Edition by inserting the*  
2 *following Section 29E after 29D.*

1 SECTION 1. (a) Sections 1 through 7, and amendments thereto,  
2 shall be known as the Massachusetts fairness in private construction  
3 contract act.

4 (b) The rights and duties prescribed by this act shall not be waiv-  
5 able or varied under the terms of a contract. The terms of any con-  
6 tract waiving the rights and duties prescribed by this act shall be  
7 void and unenforceable.

1 SECTION 2. Definitions.

2 As used in this act:—

3 (a) “Construction” means the whole or the part of the erection,  
4 alteration, repair or removal of a building, structure or other  
5 improvement to real property, whether underground or above  
6 ground, or the furnishing of material or rental equipment, appliances  
7 or tools therefor.

8 (b) “Contract” means a written agreement concerning construc-  
9 tion made and entered into by and between an owner and a con-  
10 tractor, a contractor and a subcontractor or a subcontractor and  
11 another subcontractor, including all plans, specifications and  
12 addenda relating thereto.

13 (c) “Contractor” means a person performing construction who has  
14 a contract with the owner of the real property.

15 (d) “Owner” means a person who owns any interest in real prop-  
16 erty, or a person who enters into a contract for construction for, on  
17 behalf of, or with the consent of such owner.

18 (e) “Person” means an individual, corporation, estate, trust, part-  
19 nership, limited liability company, association, organization, joint  
20 venture or any other legal entity.

21 (f) “Retainage” means money earned by a contractor or subcon-  
22 tractor but withheld to ensure proper performance by the contractor  
23 or subcontractor.

24 (g) “Subcontractor” means any person performing construction  
25 covered by a contract between an owner and a contractor but not  
26 having a contract with the owner.

27 (h) “Days” means calendar days unless otherwise stated.

1 SECTION 3. Payment Requirements; Disputed Amounts; Penal-  
2 ties.

3 (a) All persons who enter into a contract for private construction  
4 after the effective date of this act, shall make all payments pursuant  
5 to the terms of the contract, which shall be in accordance with the  
6 provisions of subsections (b), (c), (d), (e), (f), (g), (h) and (i) and  
7 Sections 4 through 7, inclusive, and amendments thereto.

8 Specific billing cycle and payment schedule required.

9 (b) All contracts for private construction anticipated to last more  
10 than 60 days shall provide for a specific billing cycle and payment  
11 schedule, under which all payments shall be made by the owner,  
12 contractor and subcontractors for work performed during the pre-  
13 ceding billing cycle.

14 Right to withhold disputed amounts; penalty for claims made in  
15 bad faith.

16 (c) Nothing in this statute shall prevent an owner, contractor or  
17 subcontractor from withholding from payment under a construction  
18 contract, disputed amounts that are equal in value to any good faith  
19 claim(s) against the contractor or subcontractor who submitted the  
20 request for payment. An owner, contractor or subcontractor who is  
21 found to have withheld payments for disputed amounts on account  
22 of claims made in bad faith against the contractor or subcontractor

23 who submitted the request for payment, shall be subject to the provi-  
24 sions of c.93A.

25 Payments by owner, for all work including changes in the work,  
26 to be approved and paid timely.

27 (d) All contracts for private construction shall provide that  
28 requests for payment that are submitted to the owner timely and  
29 properly completed shall be approved and certified within a specific  
30 time stated in the contract, and shall be deemed approved and certi-  
31 fied in that time unless within that time the owner or owner's repre-  
32 sentative issues a written statement detailing the amounts in the  
33 request for payment that are not approved and the reasons therefor.  
34 Failure by the owner to issue a written order for changes in the work  
35 performed at the direction of the owner shall not be a reason to dis-  
36 approve a request for payment for work performed on said changes.  
37 All contracts shall further provide that payment of all undisputed  
38 amounts due a contractor from an owner, except retainage, shall be  
39 made within a specific time following receipt of the request for pay-  
40 ment or following approval and certification of the amounts due.

41 Penalties for failure to pay.

42 (e) If the owner fails to pay a contractor all undisputed amounts  
43 due within the time stated in the contract, the owner shall pay  
44 interest to the contractor on the undisputed amounts beginning on  
45 the day after the last date payment was due, computed at the legal  
46 rate, as provided in c.231 §6(c). In addition, if the owner fails to pay  
47 a contractor undisputed amounts for changes in the work within the  
48 billing cycle that follows the billing cycle in which the owner  
49 received a timely, properly completed request for payment, the con-  
50 tractor shall not be required to perform additional changes in the  
51 work until said amounts are paid in full, and shall not be held in  
52 breach of contract.

53 Payment to subcontractors to be made within 7 days

54 (f) A contractor shall pay its subcontractors all undisputed  
55 amounts due within seven business days of receipt of payment from  
56 the owner, including payment of retainage if retainage is released by  
57 the owner, if the subcontractor has provided a timely, properly com-  
58 pleted request for payment to the contractor. A subcontractor's  
59 timely and properly completed request for payment to a contractor  
60 shall be included in the contractor's next requisition to the owner  
61 unless the contractor, within a reasonable time stated in the contract,

62 issues a written statement detailing the amounts that will not be  
63 included in the requisition and the reasons therefor. Failure by an  
64 owner or a contractor to issue a written order for changes in the  
65 work performed at the direction of the owner or contractor shall not  
66 be a reason to disapprove a request for payment for work performed  
67 on said changes.

68 Owner to notify subcontractors of payments made

69 (g) On the written request of a subcontractor, the owner shall  
70 notify the subcontractor within five days after the issuance of a pay-  
71 ment to the contractor.

72 Penalties for failure to pay.

73 (h) If the contractor fails to pay a subcontractor all undisputed  
74 amounts within seven business days after receipt from the owner, the  
75 contractor shall pay interest to the subcontractor on the undisputed  
76 amount beginning on the eighth business day after receipt of pay-  
77 ment by the contractor, computed at the legal rate, as provided in  
78 c.231 §6(c). In addition, if the contractor fails to pay a subcontractor  
79 undisputed amounts for changes in the work within the billing cycle  
80 that follows the billing cycle in which the contractor received a  
81 timely, properly completed request for payment, the subcontractor  
82 shall not be required to perform additional changes in the work until  
83 said amounts are paid in full, and shall not be held in breach of con-  
84 tract.

85 Payment provisions apply to sub-subcontractors

86 (i) The provisions of subsections (f) and (g) and (h) shall apply to  
87 all payments from subcontractors to their subcontractors.

1 SECTION 4. Suspension or Termination of Work; Notice  
2 Requirements.

3 (a) If any undisputed payment is not made within seven business  
4 days after the payment date established in the contract, the con-  
5 tractor and any subcontractors, regardless of tier, upon seven addi-  
6 tional business days' written notice to the owner and, in the case of a  
7 subcontractor, written notice to the contractor, shall, without preju-  
8 dice to any other available remedy, be entitled to suspend further  
9 performance until payment, including applicable interest, is made.  
10 The contract time for each contract affected by the suspension shall  
11 be extended appropriately and the contract sum for each affected

12 contract shall be increased by the suspending party's reasonable  
13 costs of demobilization, delay and remobilization.

14 (b) If performance is suspended for more than 30 days for failure  
15 to receive payment, the contractor and any subcontractors, upon  
16 seven additional business days' written notice to the owner and, in  
17 the case of a subcontractor, written notice to the contractor, may ter-  
18minate the contract and may not be deemed in breach of the contract.

19 (c) Written notice required under this section shall be deemed to  
20 have been provided if the notice is delivered in person or is delivered  
21 by certified mail, return receipt requested, or other means that pro-  
22vides written, third-party verification of delivery.

1 SECTION 5. Provisions against public policy.

2 Any provision in a contract for private construction that purports  
3 to waive, release or extinguish the right to resolve disputes through  
4 litigation in court or substantive or procedural rights in connection  
5 with such litigation, shall be against public policy and shall be void  
6 and unenforceable, except that a contract may require binding arbi-  
7tration as a substitute for litigation or require non-binding alternative  
8 dispute resolution as a prerequisite to litigation, provided, however,  
9 that any such requirement for binding arbitration or non-binding  
10 alternative dispute resolution must be mutual and not subject to sub-  
11sequent exercise or waiver by one of the contracting parties.

1 SECTION 6. Venue for Action; Right to Attorney Fees.

2 In any action arising out of or related to the contract, including  
3 arbitration or alternative dispute resolution proceeding, the venue for  
4 such action shall be the Commonwealth of Massachusetts, and any  
5 provision in a construction contract that requires such action to be  
6 conducted under the laws of a state other than Massachusetts shall  
7 be void. In any such action, successful claimants shall be awarded  
8 costs and reasonable attorney fees as determined by the court.

1 SECTION 7. Application of the law.

2 The provisions of this act shall apply to all construction in the  
3 Commonwealth of Massachusetts, except:

4 (a) single family residential housing and multifamily residential  
5 housing of four units or less.

6 (b) public construction projects

- 7 (c) construction projects funded in part by governmental sources  
8 of funding where governmental procurement requirements conflict  
9 with the requirements of this act.
- 10 (d) contracts entered into prior to the effective date of this act.