

HOUSE No. 3266

By Mr. Walsh of Boston, petition of Martin J. Walsh and Stephen M. Brewer for legislation to require fair payment provisions in public construction contracts. State Administration and Regulatory Oversight.

The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT TO PROMOTE FAIR CONTRACT PROVISIONS.

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 1998 Official Edition by inserting
2 the following Section 29D after Section 29C:—
3 29D. Any provision in a contract for or relating to construction
4 services which makes payment to person furnishing the construc-
5 tion services conditioned upon receipt of payment from a third
6 person, is against public policy and is void and unenforceable,
7 except to the extent of amounts not received from such third
8 person because (1) the person furnishing the construction services
9 failed to perform under its contract and failed to cure such non-
10 performance after receipt of notice as provided in such contract;
11 or (2) the third person is insolvent, provided the person seeking to
12 assert the payment condition claimed a lien under chapter two
13 hundred fifty-four upon commencement of his performance, main-
14 tained and perfected such lien, and pursued all reasonable legal
15 remedies to obtain payment. The foregoing exceptions must be
16 expressly stated in any such provision, and the person seeking to
17 assert the payment condition shall have the burden of proof as to
18 each element. Nothing in this section or in any such provision
19 shall be valid as a defense to enforcement of a lien claimed under
20 chapter two hundred fifty-four by the person furnishing the con-
21 struction services. A party aggrieved by the failure of the party
22 seeking to assert the payment condition to pursue all reasonable

23 legal remedies to obtain payment may avail itself of the summary
24 procedure set forth in Chapter 254, Section 15A, for a summary
25 determination of whether all reasonable legal remedies have been
26 fulfilled with respect to the particular lien claim at issue. Nothing
27 contained in this section is intended in any way to amend the
28 statutes governing payments on public construction projects, or to
29 impose on a public agency any payment obligation beyond that
30 imposed by law. Words in this section have the following mean-
31 ings:—

32 “Construction Services”, all labor, materials or services,
33 including specially fabricated materials, rental equipment, appli-
34 ances, tools and transportation charges, and all claims related
35 thereto used or employed, or to be used or employed, in the con-
36 struction, reconstruction, alteration, erection, remodeling, repair,
37 demolition or removal of a building, structure, or other improve-
38 ment to real property, whether public or private.

39 “Person”, individuals, corporations, organizations, trusts, asso-
40 ciations, partnerships, companies and public agencies.

41 “Insolvency”, as defined under federal bankruptcy law.

42 “Commencement of Performance”, forthwith after first per-
43 forming, and in any event before receiving any payment.

44 “All reasonable legal remedies”, taking such legal action as is
45 necessary to obtain payment unless and until there is a reasonable
46 likelihood such action will not result in obtaining payment.