

SENATE NO. 1848

AN ACT PROMOTING ALTERNATIVE RESOLUTION OF CERTAIN PUBLIC WORKS DISPUTES

*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 30 of the General Laws is hereby amended by striking out section 39Q, as
2 appearing in the 2004 Official Edition, and inserting in place thereof the following section:

3 Section 39Q. (a) There shall be a mandatory alternative dispute resolution program for
4 contractually-based claims with a value of less than \$10,000,000 in connection with the
5 construction of public works and capital facilities for the commonwealth and all its state
6 agencies. For claims with a value of at least \$10,000,000, parties shall agree to participate in
7 either the alternative dispute resolution program established in this section or mediation. For
8 purposes of this section, a “state agency” shall be defined as that term is defined in section 1 of
9 chapter 6A. This section shall apply to all public construction contracts awarded by a state
10 agency. The alternative dispute resolution procedures set forth in this section shall apply only
11 to claims by persons, firms, or corporations that have direct contracts with a state agency. The
12 alternative dispute resolution procedures set forth in this section shall not apply to claims under

13 section 39F of this chapter and section 29 of chapter 149, and no claims under section 39F of
14 this chapter and section 29 of chapter 149 shall be consolidated with any claims under the
15 procedures in this section. Each state agency may propose and adopt its own alternative dispute
16 resolution procedure, provided that the procedure contains the minimum standards set forth in
17 subsection (b) of this section. If a state agency fails to adopt its own alternative dispute
18 resolution procedure within 60 days after the effective date of this act, subsection (c) of this
19 section shall apply to that state agency. A state agency which has adopted an alternative dispute
20 resolution procedure containing the standards set forth in subsection (b) shall include its
21 provisions in any public works or capital facilities construction-related contract. If the state
22 agency has not adopted an alternative dispute resolution procedure, the terms set forth in
23 subsection (c) shall be inserted in every contract for the construction, alteration, remodeling,
24 repair or demolition of any capital facility or public work. Where the terms set forth in
25 subsection (c) of this chapter were required to be included but are in fact omitted from a
26 contract, those terms shall be considered to be part of the contract.

27 (b) Each alternative dispute resolution procedure adopted under this section must at a
28 minimum:

29 (1) Require the opposing party to articulate its position in writing within 30 days after the
30 dispute is submitted in writing to it by the party initiating the process;

31 (2) Produce a decision to be issued within 210 days after the dispute is submitted in writing by
32 the party initiating the process, unless the parties mutually agree to extend that period, and
33 provide that failure to issue a decision within this period of 210 days or longer by agreement of

34 the parties shall be considered to be a denial of the claim, triggering the appellate rights
35 available under this section;

36 (3) Permit each party to inspect all documents supporting the opposing party's position,
37 including, without limitation, statements of both percipient and expert witnesses which have
38 been reduced to writing or orally recorded, without making those documents public records as
39 defined in clause Twenty-sixth of section 7 of chapter 4 of the General Laws. Attorney-client
40 privilege and the attorney work product doctrine shall apply to these documents;

41 (4) Provide for non-binding alternative dispute resolution before a neutral fact finder, or a fact-
42 finding panel which shall include an equal number of representatives of the parties [\[JF1\]](#) to the
43 dispute and must include at least 1 disinterested person, with the costs split by the state agency
44 and contractor;

45 (5) Allow both parties to agree to enter into binding arbitration from the outset.

46 (6) Require the fact finder to prepare a written record of proceedings sufficient for purposes of
47 judicial review;

48 (7) Permit either party to appeal from the non-binding decision set forth in the preceding clause
49 and authorize the contractor to elect (i) binding arbitration to be conducted in accordance with
50 subsection (c) or the rules of the American Arbitration Association, or (ii) judicial review. The
51 findings of fact and decision of the neutral fact finder, fact finding panel or the hearing
52 examiner shall be admissible in any subsequent administrative or judicial proceeding.

53 (c) Except as otherwise provided in subsections (a) and (b) of this chapter, and notwithstanding
54 any previously enacted general or special law to the contrary, every state agency shall apply
55 paragraphs 1 to 5, inclusive, to the terms of public construction contracts awarded by any state
56 agency:

57 (1) Disputes regarding changes in and interpretations of the terms or scope of the contract and
58 denials of or failures to act upon claims for payment for extra work or materials shall be
59 resolved according to either the administrative, judicial or arbitration procedures in this and the
60 following paragraphs, which shall constitute the exclusive methods for resolving these disputes.
61 Written notice of the matter in dispute shall be submitted by the claimant to the chief executive
62 official of the state agency which awarded the contract or the official's designee [\[JF2\]](#), or to the
63 chief executive officer of the contracting company, within a period which commences with [\[JF3\]](#)
64 the execution of the contract or the authorized commencement of work on the contract project,
65 whichever begins first, and ends when the claim would otherwise be foreclosed by the passage
66 of time and operation of applicable law. Acceptance of an amount offered as final payment
67 shall not preclude any person, firm or corporation from bringing a claim under this section
68 unless the claim has been expressly released before or upon final payment. All legal defenses
69 except governmental immunity shall be reserved to the state agency. Interest on any award
70 shall begin to accrue to a claimant under this paragraph 60 days after the claimant submits a
71 notice or demand to the state agency for the unpaid debt upon which that interest is to be based.
72 No person or business entity having a contract with a state agency shall delay, suspend, or
73 curtail performance under that contract as a result of any dispute subject to this paragraph. Any
74 disputed order, decision or action by the state agency or its authorized representative shall be
75 fully performed or complied with pending resolution of the dispute. No consolidation of

76 arbitration proceedings shall take place where the state agency is not a party to both arbitration
77 proceedings before the consolidation.

78 (2) Within 60 days after submission of the initial notice of the matter in dispute to the chief
79 executive official of the state agency or the official's designee, the chief executive official shall
80 issue a written decision stating the reasons for the decision, and shall notify the parties of their
81 options for appeal. If the chief executive official or the official's designee is unable to issue a
82 decision within 60 days, he shall notify the parties to the dispute in writing of the reasons why a
83 decision cannot be issued within 60 days and of the date by which a decision shall issue. Failure
84 to issue a decision within the 60-day period or within an additional time period specified in this
85 written notice, if any, and agreed upon by the claimant shall be considered to constitute a denial
86 of the claim and shall authorize resort to the appeal procedure described below. The decision of
87 the chief executive official or his designee shall be final and conclusive unless an appeal is
88 taken as provided below.

89 (3) Within 21 calendar days after the receipt of a written decision or of the date a denial is
90 considered to have occurred by virtue of a failure to issue a decision as stated in paragraph (2),
91 any aggrieved party may file a demand for arbitration under paragraph (4) and shall thereafter
92 serve copies upon all other parties in the form and manner prescribed by the rules governing the
93 conduct of adjudicatory proceedings of the division of administrative law appeals. The
94 aggrieved party may instead file an action directly in a court of competent jurisdiction. If an
95 aggrieved party exercises his option to file an action directly in court as provided in the previous
96 sentence, the 21-day period shall not apply to the filing and the period for filing this action shall
97 be the same period otherwise applicable for filing such a civil action in court.

98 (4) A demand for arbitration shall include the amount of damages sought and the alleged facts
99 and contractual or statutory provisions which form the basis of the claim. Arbitration of a claim
100 or claims shall be conducted under the rules of any dispute resolution entity, approved by this
101 person, firm or corporation and the chief executive official of the state agency or the official's
102 designee and the provisions of this paragraph, except that if the parties cannot agree upon a
103 dispute resolution entity, the arbitration shall be administered by the public construction rules of
104 the American Arbitration Association and this paragraph [\[JF4\]](#), and in the case of a conflict, this
105 paragraph shall govern. If a demand for arbitration is made to the chief executive official of the
106 state agency or the official's designee, each party shall allow the other to examine and copy any
107 nonprivileged documents which may be relevant either to the claimant's claims or to the state
108 agency's defenses to these claims. The attorney-client privilege and the attorney work-product
109 doctrine shall apply to the state agency's documentation. All issues not addressed by this
110 paragraph or by agreement, or by the rules of the mutually-designated dispute resolution entity
111 or the American Arbitration Association, whichever shall apply, shall be governed by chapter
112 251. Any documents obtained by the agency through discovery shall not be subject to
113 compelled disclosure under chapter 66 and shall not be disclosed by the state agency to any
114 person or entity that is not a party to or an agent of a party to the arbitration. These documents
115 shall be used only for settlement or litigation of the parties' claims. The arbitrators shall
116 determine any claim of privilege or issue as to the relevance of documents after an in camera
117 inspection. The arbitrators shall seal these documents during arbitration, and the arbitrators, as
118 well as any other party obtaining a copy during discovery, shall return the documents to the
119 appropriate party claimant after final disposition of the claim.

120 (5) Hearings shall be scheduled for arbitration in a manner that shall ensure that each party shall
121 have reasonable time and opportunity to prepare and present its case, taking into consideration
122 the size and complexity of the claims presented. Unless the parties mutually agree otherwise,
123 no evidentiary hearing on the merits of the claim may begin less than 30 nor more than 120 days
124 after the demand for arbitration is filed with the dispute resolution entity.

125 The arbitrators shall conduct the hearing and shall hear evidence of the facts and arguments as
126 to the interpretation and application of contractual provisions. After the hearing, the arbitrators
127 shall issue in writing the following: (i) findings of fact, (ii) a decision in which the arbitrators
128 interpret the contract and law and apply it to the facts found and (iii) an award. The arbitrators'
129 findings of fact shall be final and conclusive, and their decision and award shall be final and
130 binding, subject, in both cases, to vacation, rehearing or confirmation under section 12 of
131 chapter 251, and under the standards set forth in section 14 of chapter 30. Interest on any award
132 shall begin to accrue 60 days after an initial notice is filed.

133 (d) The secretary of administration and finance shall prepare annually a report concerning the
134 construction contract claims submitted to state agencies during the preceding 12 months, in such
135 form as the secretary shall prescribe. The report shall contain, at a minimum, the following
136 information: the number of claims submitted; the names of all parties to each claim; a brief
137 description of each claim; the date of submission and of disposition of each claim; its
138 disposition, whether by settlement, withdrawal, default, written agency decision, non-binding
139 arbitration under an agency plan approved under subsection (b), or binding arbitration under
140 subsection (c); and the number of claims currently pending. The original report shall be
141 submitted by the secretary of administration and finance to the clerks of the house and senate by

142 January 15, and a copy shall be filed with the state librarian and shall be a public document.

143 The fourth annual report so filed and each report thereafter shall set forth recommendations

144 concerning the implementation of the alternative dispute resolution program established by this

145 section, including a recommendation whether to eliminate the option available to each state

146 agency to adopt its own program under subsection (b) .

147 SECTION 2. This act, being remedial in nature, shall apply to all contracts executed after its

148 effective date and may be voluntarily applied with the consent of all parties to contracts in

149 existence as of the effective date of this act.