

By Mr. Hermann of North Andover, petition of the Associated Subcontractors of Massachusetts that public agencies be required to make prompt payments to contractors and subcontractors on construction contracts. State Administration.

**The Commonwealth of Massachusetts**

In the Year One Thousand Nine Hundred and Ninety.

AN ACT TO REQUIRE PUBLIC AGENCIES TO MAKE PAYMENTS TO CONTRACTORS AND SUBCONTRACTORS ON BUILDING CONSTRUCTION CONTRACTS PROMPTLY AND TO USE REASONABLE PROCEDURES TO CLOSE OUT SUCH CONTRACTS PROMPTLY AFTER SUBSTANTIAL COMPLETION.

*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. Amend Section 39K of Chapter 30 of the General  
2 Laws as appearing in the 1988 Official Edition by striking the  
3 entire section 39K and inserting in its place the following sec-  
4 tion 39K: —  
5 Section 39K. This section shall apply to payments on every  
6 contract for the construction, reconstruction, installation,  
7 demolition, maintenance or repair of a building by every public  
8 agency as defined in section 39A, paragraph (r) of chapter seven,  
9 as appearing in the 1988 Official Edition.  
10 (1) Periodic Estimates. Within fifteen days after receipt of a  
11 periodic estimate requesting payment of the amount due for the  
12 preceding month, the public agency shall make a periodic payment  
13 to the contractor for the work performed during the preceding  
14 month and for the materials not incorporated in the work but  
15 delivered and suitably stored at the site or at some location agreed  
16 upon in writing, less the sum of (a) the public agency's itemized  
17 estimate of the fair value of its claims against the contractor,  
18 (b) the total of all demands for direct payments filed by  
19 subcontractors and not yet paid to subcontractors nor deposited  
20 in joint accounts pursuant to section thirty-nine F of this chapter

21 and (c) a retention not exceeding five percent of the approved  
22 payment.

23 Every contractor and every subcontractor having possession of  
24 materials to be incorporated in the work shall have the power to  
25 transfer full and complete title to such materials to the public  
26 agency for the purpose of securing payment for same in a periodic  
27 estimate regardless of any condition expressed between the  
28 contractor or the subcontractor and any seller of the materials.  
29 A public agency shall make payment for all such suitably stored  
30 materials upon the receipt of a bill of sale from the contractor  
31 or subcontractor transferring full and complete title to the  
32 material to the public agency and without requiring proof of  
33 transfer of title from the supplier or proof that the contractor or  
34 subcontractor has paid for the materials.

35 (2) Substantial Completion Estimates. The contract work is  
36 substantially completed when the value of the work remaining to  
37 be done is, in the itemized estimate of the public agency, less than  
38 one percent of the original contract price or, for all or part of new  
39 buildings for which the public agency has taken possession of all  
40 or part of the work for use and/or occupancy, whichever of the  
41 two occurs first. Upon substantial completion the contractor shall  
42 send the public agency a certification of substantial completion  
43 together with a list of the work items remaining to be completed  
44 in the work substantially completed and a substantial completion  
45 estimate for the contract balance due less deduction for the value  
46 of each of the incomplete work items listed in the substantial  
47 completion certification.

48 Within forty days after receipt of the contractor's certification  
49 of substantial completion the public agency shall send the  
50 contractor either (a) a written confirmation for all or part of the  
51 work that has been substantially completed or (b) an itemized  
52 list of incomplete or unsatisfactory work items with its estimate  
53 of the value of each work item sufficient to show lack of  
54 substantial completion. The public agency may include with such  
55 list a notice setting forth a reasonable date, which shall not be  
56 prior to the contract completion date, within which the contractor  
57 must substantially complete the work but such date shall not be  
58 treated as an extension of the contract completion date. In the

59 event that the public agency fails to confirm substantial  
60 completion or fails to send the contractor within the forty day  
61 period a sufficient itemized list of incomplete or unsatisfactory  
62 work items to show lack of substantial completion the contractor's  
63 certification shall take effect as the public agency's confirmation  
64 that the work has been substantially completed.

65 Within fifteen days after confirmation of substantial  
66 completion and after receipt of the contractor's substantial  
67 completion estimate the public agency shall make a substantial  
68 completion payment to the contractor for all work performed to  
69 date in all or part of the work substantially completed including  
70 the five percent retention less the sum of (a) all payments made  
71 to the contractor and subcontractors, (b) the estimated cost of  
72 completing all incomplete and unsatisfactory work items, (c) the  
73 public agency's estimate of the fair value of its claims against the  
74 contractor and (d) the total of all demands for direct payments  
75 filed by subcontractors and not yet paid to subcontractors nor  
76 deposited in joint accounts pursuant to section thirty-nine F of  
77 this chapter. At or before the time the public agency pays the  
78 substantial completion estimate the public agency shall send to  
79 the contractor a complete list of incomplete and unsatisfactory  
80 work items for the work substantially completed with its estimate  
81 of the value of each work item.

82 Unless delayed by causes beyond his control, the contractor  
83 shall complete all work items in the list within forty-five days after  
84 the receipt of such list or before the contract completion date,  
85 whichever is later but no such date established by the public  
86 agency shall be treated as an extension of the contract completion  
87 date. If the contractor fails to complete any work item within that  
88 time limit, the public agency may give the contractor seven days  
89 written notice of intention to complete the work item and, upon  
90 failure of the contractor to complete that work item within that  
91 seven day period, may contract to complete that work item using  
92 any procedure the public agency deems in its best interest to  
93 complete the work expeditiously and at reasonable costs and  
94 charge those costs to the contractor.

95 (3) Final Completion Estimates. Upon completion of all the  
96 incomplete and unsatisfactory work items sent to the contractor

97 at or before the time of the payment of the substantial completion  
98 estimate and any other incomplete or unsatisfactory work items  
99 of which the public agency has given the contractor written notice,  
100 the contractor shall submit the final completion estimate for all  
101 sums due on the contract. Within fifteen days after receipt of the  
102 final completion estimate, the public agency shall either make a  
103 final completion payment to the contractor for all sums due under  
104 the contract less the sums of (a) all payments to the contractor  
105 to date, (b) the public agency's itemized estimate of the fair value  
106 of its claims against the contractor and (c) the total of all  
107 demands for direct payments filed by subcontractors and not yet  
108 paid to subcontractors nor deposited in joint accounts pursuant  
109 to section thirty-nine F of this chapter, or return the final  
110 completion estimate to the contractor with a writing setting forth  
111 an itemized list of incomplete or unsatisfactory items of work not  
112 yet completed or other reasons why the public agency cannot  
113 make payment in full or in part.

114 After receipt of such writing the contractor shall complete all  
115 incomplete and unsatisfactory work items set forth in the writing  
116 promptly or the public agency may give the contractor seven days  
117 written notice of intention to complete any such work item and,  
118 upon failure of the contractor to complete that work item within  
119 the seven day period, may contract to complete that work item  
120 using any procedures the public agency deems in its best interest  
121 to complete the work expeditiously and at reasonable costs and  
122 charge those costs to the contractor. After completion of all the  
123 work the contractor may resubmit a final completion estimate for  
124 the balance due on the contract.

125 (4) General Provisions Applicable to All Estimates.

126 (a) Immediately after the execution of the general contract,  
127 the representative of the public agency responsible for approving  
128 payments to the contractor shall meet with the contractor to work  
129 out procedures for making periodic and final payments for that  
130 contract work to the contractor within the shortest possible time  
131 after receipt of the estimates for same and in any event within the  
132 time periods set forth herein, and for the addition of interest  
133 provided for herein with each late payment without any additional  
134 filing by the contractor, all for the purpose of improving the flow

135 of funds to the contractor and for the purpose of improving the  
136 flow of funds in the construction industry and decreasing building  
137 construction costs to public agencies.

138 (b) Contractors shall submit all periodic, substantial  
139 completion and final completion estimates to the public agency  
140 at its office or to a named designee at a place set forth in writing  
141 to the contractor and on forms provided by the public agency.  
142 The public agency or its designee shall stamp the date of receipt  
143 on all copies of estimates received. The estimate form shall contain  
144 a column with one or more work items, as determined by the  
145 public agency, for each filed subtrade including one or more work  
146 items for each class of work the sub-bid form required a listing  
147 and a column listing the amount paid to the date of the estimate  
148 for each work item to each filed subcontractor. Immediately after  
149 award of the general contract each subcontractor so listed in the  
150 selected subcontractor's sub-bid form shall submit to the public  
151 agency a copy of its subcontract with the filed subcontractor  
152 accompanied by a statement under oath executed by both the filed  
153 subcontractor and the sub-subcontractor that the subcontract  
154 submitted is a true copy of the subcontract between the parties  
155 and that the contract amount listed in the sub-bid form and in  
156 that subcontract is the true and correct amount to be paid by the  
157 filed subcontractor to the sub-subcontractor for the work listed  
158 in the sub-bid form.

159 (c) The public agency may make changes in any estimate  
160 submitted by the contractor and the public agency shall make the  
161 payment due in accordance with the changes so made, but the  
162 changes shall not change the due date for the payment or the date  
163 for the commencement of interest charges on the amount of the  
164 payment computed in accordance with the changes made,  
165 provided that the due date for the computation of interest may  
166 be extended up to twelve days when the public agency has to make  
167 changes due to mathematical error, or value of a quantity of units  
168 of work completed and provided further that no interest shall be  
169 due on an estimate when the changes are so extensive that the  
170 public agency has to return the estimate to the contractor for  
171 correction and resubmission.

172 (d) If the public agency fails to make payment for any  
173 estimate on the date provided herein, the person making payment

174 for the public agency shall add to each such payment without  
175 further application by the contractor daily interest at the rate of  
176 three percentage points above the rediscount rate then charged  
177 by the Federal Reserve Bank of Boston commencing on the first  
178 day after said payment is due and continuing until the payment  
179 is delivered or mailed to the contractor so that the overdue  
180 payment includes the interest for the time the payment is overdue.

181 (e) The contractor shall pay to each filed subcontractor and  
182 each filed subcontractor shall pay to each subcontractor required  
183 to be listed in the sub-bid form the part of any interest payment  
184 due from a public agency applicable to the amount due for the  
185 work of each filed subcontractor and each sub-subcontractor  
186 required to be listed in the sub-bid form.

187 (f) No payments by an public agency shall bar a contractor  
188 from reserving all rights to dispute the quantity and amount of  
189 or the failure of a public agency to approve a quantity and amount  
190 of all or part of any work item or extra work item or from making  
191 any claim against the public agency reserved in a release given  
192 to the public agency.

193 (g) A certificate of the architect that a contractor or a  
194 subcontractor has fully completed or has substantially completed  
195 the work shall, subject to section thirty-nine J, be conclusive in  
196 determining the rights to payment.

197 (h) Nothing contained in this section shall prevent a public  
198 agency from making a partial payment on a final completion  
199 estimate or on a substantial completion estimate even if the public  
200 agency determines that the work is not complete or substantially  
201 complete.

1 SECTION 2. Amend section thirty-nine O of chapter 30 by  
2 adding the following paragraph at the end,

3 No provision in any contract or subcontract for construction  
4 work subject to the provisions of section thirty-nine M of this  
5 chapter or subject to section forty-four A of chapter one hundred  
6 forty-nine shall bar or limit the right of a general contractor or  
7 subcontractor to recover extra costs incurred because of any  
8 suspension, hindrance, delay or interruption of the work.

1 SECTION 3. Section thirty-nine G of this chapter shall not  
2 apply to any contract for the construction, reconstruction,  
3 installation, demolition, maintenance or repair of any building to  
4 which this section applies.

1 SECTION 4. This act shall take effect upon its passage.

