

By Mr. Hermann of North Andover, petition of the Associated Subcontractors of Massachusetts and Joseph N. Hermann for legislation 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. State Administration.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-One.

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 Edition by striking the entire
3 section 39K and inserting in its place the following section 39K: —

4 Section 39K. This section shall apply to payments on every
5 contract for the construction, reconstruction, installation,
6 demolition, maintenance or repair of a building by every public
7 agency as defined in section 39A, paragraph (r) of chapter seven,
8 as appearing in the 1988 Official Edition.

9 (1) Periodic Estimates. Within fifteen days after receipt of a
10 periodic estimate requesting payment of the amount due for the
11 preceding month, the public agency shall make a periodic payment
12 to the contractor for the work performed during the preceding
13 month and for the materials not incorporated in the work but
14 delivered and suitably stored at the site or at some location agreed
15 upon in writing, less the sum of (a) the public agency's itemized
16 estimate of the fair value of its claims against the contractor,
17 (b) the total of all demands for direct payments filed by
18 subcontractors and not yet paid to subcontractors nor deposited
19 in joint accounts pursuant to section thirty-nine F of this chapter

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

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

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

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

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

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

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

94 (3) Final Completion Estimates. Upon completion of all the
95 incomplete and unsatisfactory work items sent to the contractor
96 at or before the time of the payment of the substantial completion
97 estimate and any other incomplete or unsatisfactory work items
98 of which the public agency has given the contractor written notice,

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

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

124 (4) General Provisions Applicable to All Estimates.

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

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

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

171 (d) If the public agency fails to make payment for any estimate
172 on the date provided herein, the person making payment for the
173 public agency shall add to each such payment without further
174 application by the contractor daily interest at the rate of three
175 percentage points above the rediscount rate then charged by the

176 Federal Reserve Bank of Boston commencing on the first day after
177 said payment is due and continuing until the payment is delivered
178 or mailed to the contractor so that the overdue payment includes
179 the interest for the time the payment is overdue.

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

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

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

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

1 SECTION 2. 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 3. This act shall take effect upon its passage.

