

We were very happy to report last Friday that Governor Patrick signed into law S.2271, an "Act Relative to Fair Retainage in Private Construction". The law will be codified at Massachusetts General Law Chapter 149, Section 29F. The Associated Subcontractors of Massachusetts (ASM) spearheaded the law's enactment. Corwin & Corwin Attorney and ASM Counsel, Carolyn M. Francisco, represented ASM.

***How the Bill Became a Law***

In January, 2011, ASM filed a bill to address the last, oftentimes most difficult payment to collect on a private project – retainage. Owner/developer groups and the Associated General Contractors of Massachusetts (AGC) strongly opposed the bill. In the spring of 2012, the Office of the Senate President urged the parties to work together to try to resolve their differences. Heeding her office's request, ASM reached out and met with the owner/developer groups and AGC. ASM again filed its bill in January, 2013, and continued to advocate for its passage including at a public hearing in July, 2013. In the fall of 2013, AGC contacted ASM and indicated its willingness to work toward a consensus bill. Negotiations took place over the course of many months, and the parties emerged with a compromise bill authored by Attorney Francisco and AGC's counsel. The bill was enacted by the Legislature with wide support on the last day of the formal session – July 31. The bill was then laid on the Governor's desk, where it was met by heavy opposition from the owner/developer groups. Supporters of the bill, including not only ASM and AGC but many unions, industry associations and construction businesses, lobbied for the bill's passage. On August 8 Governor Patrick signed the bill into law, just two days before the deadline for the Governor to act. The new law takes effect on November 6, 2014 and will apply to all applicable private projects in which the prime contract is signed after that date.

***What Does the New Retainage Law Cover?***

The Retainage Law is a companion to the Prompt Pay Law (G.L. c. 149, sec. 29E), which was enacted in 2010. The Prompt Pay Law addresses periodic payments, change orders, pay-if-paid payment terms and the right to suspend work. The Retainage Law covers the amount that may be withheld for retainage, and the process for closing out jobs and paying retainage.

***Which Projects and Contracts Are Subject to the New Retainage Law?***

Like the Prompt Pay Law, the new Retainage Law applies to contracts governed by sections 2 and 4 of the mechanic's lien law (e.g., written prime contracts, subcontracts, sub-subcontracts, etc.) on private projects where the original value of the prime contract is at least 3 million; and it does not apply to residential projects of 1-4 units.

### ***What's Included in the New Retainage Law?***

- 1) Retainage may not exceed 5% of each progress payment.
- 2) “Substantial completion” is defined in the law as the stage of the project where the work is sufficiently complete under the terms of the contract so that the owner can occupy or utilize the work for its intended use. Substantial completion may apply to the entire project, or a specific phase if the prime contract allows for phased construction. The statute includes a detailed process and responsibilities of the prime contractor and owner to establish the date of substantial completion.
- 3) Once substantial completion has been achieved the owner and prime contractor must prepare the project punch lists within the time required by the statute. The punch lists must include all “incomplete and defective work items” and outstanding “deliverables” (close out documents). Punch lists must be certified as made in good faith.
- 4) No later than 60 days after substantial completion the prime contractor and subcontractors may invoice for the payment of retainage. The retainage requisition must be in the form required by the applicable contract, and include a list of the items completed or corrected and deliverables submitted for which the retainage payment is sought. This list must be certified as made in good faith.
- 5) Retainage requisitions must be paid within 30 days of submission. However, the time period for payment at each tier of contract below the owner may be extended 7 days longer than the time period applicable to tier above. For example, a prime contractor has 37 days to pay a retainage requisition; a first tier subcontractor has 44 days to pay, etc.
- 6) Not more than the following amounts may be withheld from the payment of retainage:
  - a. For incomplete, incorrect or missing deliverables, either the value of such deliverables as mutually agreed upon in writing by the parties to the contract; or if there is no agreement, the reasonable value not to exceed 2.5% of the total adjusted contract price.
  - b. For incomplete or defective work items, 150% of the cost to complete or correct the item.
  - c. For “claims” (defined as a breach of contract), the reasonable value of the claims, plus costs and attorneys’ fees if allowed in the contract.

The above sums may only be withheld if the person seeking payment of retainage has received, before the date payment is due, a detailed written list of the outstanding incomplete or incorrect work and deliverables, and the factual and contractual basis for the claims, along with the value attributable to each item, and such writing is certified as made in good faith.

- 7) Additional invoicing for retainage as items are completed, corrected and delivered, and claims are resolved, is permitted.
- 8) The prime contractor's retainage for self-performed work is payable to the same extent as a subcontractor's retainage is payable.
- 9) So long as the prime contractor has not been declared in default of its contract, the owner may not withhold the retainage of a subcontractor for a claim that the owner asserts against the prime contractor that is not based on the performance or default of the subcontractor.
- 10) Applications for payment of retainage may be submitted at least once per calendar month. Any rejection of an application for retainage is subject to the applicable dispute resolution procedures, which may be commenced within 30 days after the rejection.
- 11) Payment of retainage is subject to G.L. c. 149, sec. 29E(e), which prohibits pay-if-paid payment terms except in two limited circumstances.
- 12) Any written communications required under the law may be submitted in electronic form and by electronic means.
- 13) Any provision in a contract which attempts to waive or restrict rights under the law is void and unenforceable.

The purpose of the Retainage Law is to set a reasonable, not to exceed, limit on the amount of retainage that may be withheld; establish an organized and timely method of closing out a project; and provide a reasonable, not to exceed, time period in which retainage must be paid. The amount and timing for release of retainage are *not-to-exceed* provisions in the law. Retainage may be less than 5%, or may be released sooner than substantial completion, if the contract allows.

There are many more details of the new Retainage Law. The above represents some of the major, noteworthy items, and is intended as a general guide. In the next 90 days the industry will digest the new law, and contracts and subcontracts will be modified for compliance.

*Attorney Francisco will be the featured speaker at an ASM seminar on September 15, from 2 – 4 pm at the Westin Hotel in Waltham to discuss the new law. Call ASM for information, 617-742-3412.*

*The foregoing is intended as a general guide. It is not legal advice and should not be considered or relied upon as a substitution for consultation with an attorney. The legal and factual issues involved in any matter vary significantly from project to project and contract to contract. An attorney should be consulted with respect to the facts and law applicable to any specific construction law issue.*

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