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CONSTRUCTION

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LAW BULLETIN®

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NEW MASSACHUSETTS RETAINAGE LAW

Last year the Massachusetts legislature enacted a new law regarding the payment of retainage on private projects. The statute can be found at M.G.L. c. 149, sec. 29F and is a companion to the Prompt Payment Statute (section 29E).

The new law applies to private projects where the value of the general or prime contract is \$3,000,000.00 or more and which are lienable under the Mechanics' Lien Statute (sections 2 and 4 of Chapter 254). It applies to general contracts, subcontracts, sub-sub contracts, supply contracts, etc. It provides one exception in its scope. The statute does not apply to residential projects with 1-4 units.

The statute's main purpose is to provide a framework for the end stage of a construction project. It explains when invoices for retainage are to be submitted, when they should be paid, and what happens if there is a dispute. Most of the procedures in the statute arise after substantial completion.

THE STATUTE'S MAJOR COMPONENTS INCLUDE THE FOLLOWING:

- Retainage cannot exceed 5% of each progress payment.
- Within 60 days after substantial completion (or sooner if the contract says something different) contractors and subcontractors may invoice for retainage. The application shall be accompanied by a list of the completed items and be certified in good faith.
- A construction contract may establish the dates for submission of an application for payment of retainage but it must be submitted at least once per month. Any rejection of an application is subject to dispute resolution, which may be commenced 30 days after the rejection.
- Retainage invoices on the general contract must be paid within 30 days of submission. Each subcontract tier below this may be extended 7 days longer than the tier above (i.e. owner pays within 30 days, general contractor pays a first tier subcontractor within 37 days, etc.).
- Retainage cannot be withheld unless the person seeking payment has received a written detailed description of any incomplete or defective working and the basis for any claims and the value of each item.
- The statute provides that the following amounts may be withheld from the payment of retainage: (1) In regards to incomplete, incorrect or missing deliverables - the value of the deliverables as mutually agreed in writing by the contracting parties (if none, the reasonable value not to exceed 2.5% of the total adjusted contract price); (2) In regards to incomplete or defective work, 150% of the reasonable cost to complete/correct; (3) Reasonable values of any claims plus costs and attorney's fees (if provided in the contract).
- The statute cannot be waived by contract.
- The new law applies to all projects where the general contract was signed on or after November 6, 2014, the effective date of the statute.
- The statute provides a procedure for the parties to follow from substantial completion through project completion and receipt of retainage.

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Please contact Thomas W. Heald, Esq. with any Questions with respect to this newsletter.

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