HOUSE DOCKET, NO. 1691 FILED ON: 1/20/2011

HOUSE . . . . . No. 1401

The Commonwealth of Massachusetts

PRESENTED BY:

Kevin J. Murphy

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act concerning fair retainage payments in private construction.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Kevin J. Murphy	*18th Middlesex*

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HOUSE . . . . . No. 1401

By Mr. Murphy of Lowell, a petition (accompanied by bill, House, No. 1401) of Kevin J. Murphy relative to retainage payments in certain construction projects. Labor and Workforce Development.

The Commonwealth of Massachusetts

An Act concerning fair retainage payments in private construction.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 149 of the General Laws is hereby amended by inserting after section 29E the following section:

Section 29F: (a) As used in this section the following word(s) shall have the following meanings, unless the context clearly requires otherwise:

"Contract for construction", a contract for which a lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of $3,000,000 or more; provided, however, this shall not include projects containing or designed to contain at least 1 but not more than 4 dwelling units.

“Claim”, an allegation that the party seeking payment of retainage breached its contract for construction for the project.

“Incomplete or defective work”, items required for full performance of the contract for construction which remain to be performed or which have been performed but require repair or replacement. Incomplete or defective work shall not include items to be repaired or replaced pursuant to a warranty or guarantee.

“Retainage”, a portion of a payment due pursuant to a contract for construction that is withheld to ensure full performance of such contract for construction.

“Substantial completion”, the stage in the progress of the project when the work required by the contract for construction with the project owner is sufficiently complete in accordance with the contract for construction so that the project owner can occupy or utilize such work for its intended use. Substantial completion may apply to the entire project, or a phase of the entire project if the contract for construction with the project owner provides for phased completion.

22 (b) Every contract for construction which provides for retainage shall also provide that
23 retainage shall not exceed 5% of each progress payment.

24 (c) Every contract for construction which provides for retainage shall provide a
25 reasonable time period within which all retainage shall be paid. Except as provided in paragraph
26 (d) and (e) of this section, and subject to subsection (e) of section 29E of chapter 149, the time
27 period for payment of all retainage shall not exceed 30 days after substantial completion;
28 provided, however, that the time period for payment of retainage by the person at each tier of
29 contract below the owner of the project may be extended by 7 days more than the time period
30 applicable to the person at the tier of contract above such person.

31 (d) Any amount withheld from the payment of retainage for incomplete or defective
32 work items shall not exceed the estimated cost to complete or correct the items under the contract
33 for construction, and shall be pursuant to a writing which describes the incomplete or defective
34 work items and the value attributable to each item, and which is certified as made in good faith.
35 Subject to subsection (e) of section 29E of chapter 149, the time period for payment of the
36 amount attributable to each incomplete or defective work item shall not exceed 30 days
37 following a written application for payment submitted after the item has been completed or
38 corrected.

39 (e) Any amount withheld from the payment of retainage for a claim shall not exceed the
40 estimated value of the claim for which the person seeking payment has received prior written
41 notice, and shall be pursuant to writing which describes the factual and contractual basis for the
42 claim, and which is certified as made in good faith. Any amount withheld from the payment of
43 retainage for a claim under this paragraph (e) shall be paid forthwith upon resolution of the
44 claim, which shall be subject to the applicable dispute resolution procedure.

45 (f) A communication required in this section to be in writing may be submitted in
46 electronic form and by electronic means.

47 (g) A provision in a contract for construction which purports to waive or limit any
48 provisions of this section shall be void and unenforceable.