



5%

RETAINAGE Is Now the Law!

BY MONICA LAWTON

On Friday, Aug. 8, **Gov. Deval Patrick** signed into law S.2271 as Chapter 276 of the Acts of 2014, An Act Relative to Fair Retainage Payments in Private Construction. Four years in the making, the new law represents a great victory for ASM and the construction industry of Massachusetts – and indeed, for the commonwealth!

Taking effect Nov. 6, the new law restricts retainage to no more than 5 percent on all private projects over \$3 million in value, and sets up a clear process and timeline for closing out a construction project and releasing retainage. The new close-out process sets a new standard for the industry, not only speeding the payment of retainage to contractors and subcontractors but also accelerating the final completion of the work and submission of all “deliverables” – which is much to the benefit of project owners as well. (Read a summary of key provisions of the law on page 18.)



Monica Lawton is CEO of ASM.

Genesis of the New Law

The new law is a natural extension of the 2010 Prompt Pay Law, which was the most significant legislation in nearly 15 years affecting private construction in the commonwealth. The goal of Prompt Pay was to speed up periodic payments during the course of a project, while also accelerating the approval and payment of change orders, restricting pay-if-paid payment terms and providing the right to suspend work for nonpayment.

The Prompt Pay Law did nothing, however, to address the last and most difficult payment to collect on a private project – “retainage” – i.e., earned funds that are held back from every payment to contractors and subcontractors to assure the work will be completed to the owner’s satisfaction.

The problem with retainage is that the amount withheld – typically 10 percent – is too much, and

it is held too long – typically, for many months after a project is complete and the owner has moved in. The 10 percent holdback for retainage puts a severe strain on cash flow, particularly for subcontractors, while essentially providing free financing to project owners.

Less than two months after the Prompt Pay Law took effect in January 2011, the Associated Subcontractors of Massachusetts filed legislation to address the problem of retainage.

Path to Compromise

Originally, it was a simple bill, calling for a cap of 5 percent on retainage, and release of retainage within 30 days of substantial completion. But it met with heavy resistance from the outset, from general contractors, architects, owners and developers groups, and the bill died at the end of the legislative session in 2012. ASM re-filed the bill in January 2013, and at a public hearing in July, Labor & Workforce Development Committee Chairs Sen. Dan Wolf of Harwich and Rep. Tom Conroy of Wayland urged the parties to try to resolve their differences. Heeding that request, AGC of Massachusetts in August 2013 contacted ASM to express willingness to work together in a good faith effort to achieve consensus.

Over the next 10 months, teams from both sides engaged in negotiations that were at times challenging, but emerged in early June of this year with a classic compromise in which both sides made significant concessions, but still achieved their main goals. For ASM, the compromise preserved the core goal of limiting retainage to 5 percent; for AGC, the bill now included an extended, clearly defined close-out process with incentives to complete all final work before retainage is released.

Legislative Journey

Although it was late in the legislative session, the compromise bill quickly gained support and momentum on Beacon Hill. Despite strong, last-minute opposition from commercial real estate groups, it was enacted by the Legislature on the last day of formal sessions – July 31 – and laid on the governor’s desk. There it met with even heavier opposition, but also with an outpouring of calls and letters from the construction community urging the governor to sign the bill, which he did, two days before the deadline to act.

Massachusetts now becomes the 30th state to address the problems of retainage in the private sector by statute – but only the 10th to cap retainage at 5 percent on private work. It is an extraordinary achievement!

It happened not only because S.2271 was a fair and reasonable bill, but because of the extraordinary team effort to reach the goal, which was led by ASM in partnership with the AGC of Massachusetts but also involved 10 other industry associations, 17 trade unions, hundreds of companies and thousands of individual company owners and employees.

Even more important to our success was the support of key legislative leaders who championed the bill in the House and Senate and urged their colleagues to support it – recog-

nizing it would be a benefit not just to contractors, but to the economy, as funds tied up in retainage would now become available for businesses to spend and invest in growth.

We extend a special thanks to **Sen. Michael Rodrigues** of Westport (Senate sponsor of the bill), **Sen. Dan Wolf** of Harwich, and **Rep. Tom Conroy** of Wayland, who each played a very critical role in moving the bill forward in the past six months. We also express our appreciation to **Senate President Therese Murray** of Plymouth and **House Speaker Robert DeLeo** of Winthrop, and their respective chairs of Ways and Means, **Sen. Stephen Brewer of Barre** and **Rep. Brian Dempsey** of Haverhill, for making the bill a priority for passage in the final weeks of the legislative session.

And finally, we acknowledge the pivotal role of our own “ASM Team Retainage” – Russell Anderson of Southeastern Metal Fabricators; David Cannistraro of JC Cannistraro;

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Richard Fisher of Red Wing Construction; Steven Kenney of NB Kenney; Mac Lynch of William F. Lynch Co. and Scott Packard of Chapman Waterproofing – who took part in the compromise negotiations with AGC of Massachusetts, and ASM Counsel, attorney Carolyn Francisco of Corwin & Corwin, who authored the bill text, together with counsel for AGC.

Of course, it would not have happened at all if our colleagues at AGC did not step forward in August 2013, offering to work toward consensus. Exactly one year later, ASM and AGC join together in celebrating our success not only in reaching compromise, but achieving this milestone legislative victory!

Chapter 276 of the Acts of 2014 takes effect in 90 days, on all new contracts signed after Nov. 6, and with it begins a new era for commercial construction in the commonwealth.

In the words of construction attorney Stan Martin, “This law will fundamentally alter – and accelerate – project close-out on Massachusetts’ commercial projects.”

That was exactly the goal! We trust that those who have concerns about this legislation will one day recognize the benefits. ▲