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.)

**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

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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 – recognizing 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; 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.
As counsel to the Associated Subcontractors of Massachusetts, we were pleased to represent ASM in negotiations with the Associated General Contractors of Massachusetts that resulted in a groundbreaking compromise on retainage legislation. We were even more pleased to report that Gov. Deval Patrick signed the compromise bill, S.2271, into law on Aug. 8 as Chapter 276 of the Acts of 2014, An Act Relative to Fair Retainage Payments in Private Construction. Following is a brief guide to the key provisions of the new law, which is codified at G.L. c.149 §29F.

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 percent 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:
   • 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 percent of the total adjusted contract price.
   • For incomplete or defective work items, 150 percent of the cost to complete or correct the item.
   • 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

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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 paid. The amount and timing for release of retainage are not-to-exceed provisions in the law. Retainage may be less than 5 percent, 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.

The foregoing is intended as a general guide. It is not legal advice and should not be considered or relied upon as a substitute 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.