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# Construction Law Advisory

The Newsletter of the Construction Practice

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## Retainage limited to 5 percent in Massachusetts: Outlier or coming to your state?

By Doreen M. Zankowski

Effective November 6, 2014, Massachusetts joined a minority of states that limit retainage to 5 percent of each progress payment under a contract. This new Massachusetts law only applies to large private projects in excess of \$3 million and does not apply to residential projects of up to four units.

The law was backed by both the Associated Subcontractors and Associated General Contractors ("AGC") of Massachusetts. To be expected, owners and developers strongly opposed the law. Importantly, the AGC opposed the initial versions of the bill. However, the AGC later worked with the Associated Subcontractors on drafting the bill's final version that was signed by Massachusetts's governor in August 2014.

A 5 percent retainage cap raises questions as to how Massachusetts's new retainage law will work with other laws that require the traditional 10 percent retainage. For example, many Housing and Urban Development ("HUD") projects require 10 percent retainage. One of the frequently asked questions on HUD.gov asks how states with 5 percent retainage laws can co-exist with HUD's 10 percent requirement. In response, HUD takes the position that its 10 percent retainage requirement does not trump state retainage law. However, this answer does not provide comfort to owners and developers who likely will have to provide lenders with other forms of security to quench their risk concerns. As a result, the 5 percent retainage law likely will harm owners and developers both at the front and back ends of a project.

Despite the passage of this new retainage law, Massachusetts is in the minority. Other states with forms of 5 percent retainage ceilings for private work include Connecticut, Idaho, Montana, Oregon, Tennessee and Utah. Several other states prohibit more than 5 percent retainage on certain public works projects. With the successful partnering of Associated Subcontractors and AGC of Massachusetts to pass the new retainage law, the construction industry should keep a close eye on legislation in other states to see if similar bills are in the pipeline to change the landscape of the construction industry.

## Pennsylvania overhauls mechanic's lien law with creation of state construction notices directory

By Nicholas V. Fox

Pennsylvania recently enacted a statute that will bring sweeping changes to its mechanic's lien law and substantially impact the rights of both owners and contractors. The new statute, Act 142 of 2014, features an online directory for lien-related notices on certain projects. This directory will allow owners to more easily assess their mechanic's lien exposure on projects, and also allow contractors (and others) to more easily search lien records. The directory is slated to come online by the end of 2016.

The statute will apply to construction projects with a value of at least \$1.5 million. Owners of qualifying projects may register in the online directory by first filing a "Notice of Commencement" before labor or materials are furnished to the project and then posting a copy of the Notice of Commencement in a conspicuous location at the jobsite throughout the project. Owners and general contractors must each make reasonable efforts to ensure that the Notice of Commencement also is included in all subcontracts and material purchase orders on the project.

In order to preserve their lien rights, first and second-tier subcontractors and suppliers are then required to file in the directory a "Notice of Furnishing" within 45 days of first furnishing labor or materials to the project. The Act makes it unlawful to deter a subcontractor from filing a Notice of Furnishing, and also provides subcontractors and suppliers with a civil cause of action in certain circumstances.

At project completion, the owner is to file a "Notice of Completion," which will be sent to all subcontractors and suppliers that filed a Notice of Furnishing. Any such subcontractors or suppliers may then file a "Notice of Nonpayment" in the directory.

Users of the notice directory will be able to search by owner, contractor, property address, or by an "identifier number" assigned to registered projects. The new requirements should therefore allow owners to more readily assess their lien exposure on a project, and also allow contractors (and others) better and more efficient access to lien records.

The statute appears to be part of a growing trend, as both Ohio and New Jersey have enacted similar notice requirements, and Utah has a "Construction Registry" similar to the directory that Pennsylvania aims to use.

The new statute will impact both owners and contractors. As registration of a project is left entirely to the owner's discretion, the owner must determine whether it would benefit from registering a particular project. At the same time, because the statute alters the filing and notice requirements, contractors must be aware of whether a project has been registered and must carefully follow the new requirements in order to preserve their lien rights.

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## Recent Massachusetts decision highlights limitations of AGO bid protest decisions

By Gregory M. Boucher

Bid decisions by the Massachusetts Attorney General's Office ("AGO") are not binding and government agencies are not required to follow them. As a result, contractors face a dilemma when protesting a bid award challenge: file a bid protest with the AGO, or go directly to court and seek an injunction. An AGO challenge is more cost effective, however, it does not provide any finality.

A recent Massachusetts Superior Court decision, *MIG Corporation, Inc. v. MassDOT*, decided on October 14, 2014, illustrates the non-binding nature of an AGO's decision, and the issues that can arise when the awarding authority decides not to follow that decision.

At the bid stage, MassDOT rejected the low bidder and stated it would award the contract to the second lowest bidder

because the low bidder allegedly did not meet all bid requirements.

The low bidder filed a bid protest with the AGO, and was successful, as the AGO determined that MassDOT had violated the public bid laws in its project solicitation. The AGO requested MassDOT re-bid the contract.

In response, the second lowest bidder filed a lawsuit and requested a preliminary injunction prohibiting MassDOT from rebidding in accordance with the AGO's request. MassDOT indicated that it would defy the AGO's request and would not re-bid the contract. The low bidder and two construction trade associations intervened and sought an injunction essentially forcing MassDOT to re-bid. The court awarded the second lowest bidder an injunction order, prohibiting a re-bid, effectively ending the low bidder's challenge. (The low bidder's request for appellate review was denied.)

This case serves as a reminder of the advisory role of the AGO in Massachusetts bid protests. While the statutory scheme gives the AGO the authority to investigate potential violations of the public bidding laws, and while the AGO has developed an "expertise" in this area over the years, awarding authorities are free to disregard the AGO's decisions.

Accordingly, in determining whether (and in which forum) to protest an award, contractors must weigh the benefits of a (relatively) low-cost procedure before an agency with an established familiarity of the public bid laws against the uncertainty that the awarding authority will comply with the agency's decision. Of course, contractors also need to be aware of the public bidding laws in each state in which they operate, as Massachusetts bidding laws may differ from other states.

#### IN BRIEF: SAUL EWING ATTORNEY AMANDA WEBSTER NAMED TO ACE BOARD



**Amanda Webster, an associate in Saul Ewing's Construction Practice, was appointed in October 2014 to the Board of Directors for the ACE Mentor Program in Baltimore. As a board member, Amanda will continue the firm's proud tradition of community and industry involvement by working closely with construction and design professionals in mentoring students interested in careers in construction, architecture, and engineering. Amanda is resident in Saul Ewing's Baltimore office.**

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