

**SENATE . . . . . No.**

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**The Commonwealth of Massachusetts**

PRESENTED BY:

**Mr. Baddour**

*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 bill:

An Act promoting alternative resolution of certain public works disputes.

PETITION OF:

NAME:

Mr. Baddour

DISTRICT/ADDRESS:

First Essex

[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE SENATE, NO. S01848 OF 2007-2008.]

**The Commonwealth of Massachusetts**

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**In the Year Two Thousand and Nine**

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**AN ACT PROMOTING ALTERNATIVE RESOLUTION OF CERTAIN PUBLIC WORKS  
DISPUTES.**

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

1 SECTION 1. Chapter 30 of the General Laws is hereby amended by striking out section 39Q, as  
2 appearing in the 2004 Official Edition, and inserting in place thereof the following section:

3 Section 39Q. (a) There shall be a mandatory alternative dispute resolution program for  
4 contractually-based claims with a value of less than \$10,000,000 in connection with the  
5 construction of public works and capital facilities for the commonwealth and all its state  
6 agencies. For claims with a value of at least \$10,000,000, parties shall agree to participate in  
7 either the alternative dispute resolution program established in this section or mediation. For  
8 purposes of this section, a “state agency” shall be defined as that term is defined in section 1 of  
9 chapter 6A. This section shall apply to all public construction contracts awarded by a state  
10 agency. The alternative dispute resolution procedures set forth in this section shall apply only to  
11 claims by persons, firms, or corporations that have direct contracts with a state agency. The

12 alternative dispute resolution procedures set forth in this section shall not apply to claims under  
13 section 39F of this chapter and section 29 of chapter 149, and no claims under section 39F of this  
14 chapter and section 29 of chapter 149 shall be consolidated with any claims under the procedures  
15 in this section. Each state agency may propose and adopt its own alternative dispute resolution  
16 procedure, provided that the procedure contains the minimum standards set forth in subsection  
17 (b) of this section. If a state agency fails to adopt its own alternative dispute resolution  
18 procedure within 60 days after the effective date of this act, subsection (c) of this section shall  
19 apply to that state agency. A state agency which has adopted an alternative dispute resolution  
20 procedure containing the standards set forth in subsection (b) shall include its provisions in any  
21 public works or capital facilities construction-related contract. If the state agency has not  
22 adopted an alternative dispute resolution procedure, the terms set forth in subsection (c) shall be  
23 inserted in every contract for the construction, alteration, remodeling, repair or demolition of any  
24 capital facility or public work. Where the terms set forth in subsection (c) of this chapter were  
25 required to be included but are in fact omitted from a contract, those terms shall be considered to  
26 be part of the contract.

27 (b) Each alternative dispute resolution procedure adopted under this section must at a minimum:

28 (1) Require the opposing party to articulate its position in writing within 30 days after the  
29 dispute is submitted in writing to it by the party initiating the process;

30 (2) Produce a decision to be issued within 210 days after the dispute is submitted in writing by  
31 the party initiating the process, unless the parties mutually agree to extend that period, and  
32 provide that failure to issue a decision within this period of 210 days or longer by agreement of

33 the parties shall be considered to be a denial of the claim, triggering the appellate rights available  
34 under this section;

35 (3) Permit each party to inspect all documents supporting the opposing party's position,  
36 including, without limitation, statements of both percipient and expert witnesses which have  
37 been reduced to writing or orally recorded, without making those documents public records as  
38 defined in clause Twenty-sixth of section 7 of chapter 4 of the General Laws. Attorney-client  
39 privilege and the attorney work product doctrine shall apply to these documents;

40 (4) Provide for non-binding alternative dispute resolution before a neutral fact finder, or a fact-  
41 finding panel which shall include an equal number of representatives of the parties to the dispute  
42 and must include at least 1 disinterested person, with the costs split by the state agency and  
43 contractor;

44 (5) Allow both parties to agree to enter into binding arbitration from the outset.

45 (6) Require the fact finder to prepare a written record of proceedings sufficient for purposes of  
46 judicial review;

47 (7) Permit either party to appeal from the non-binding decision set forth in the preceding clause  
48 and authorize the contractor to elect (i) binding arbitration to be conducted in accordance with  
49 subsection (c) or the rules of the American Arbitration Association, or (ii) judicial review. The  
50 findings of fact and decision of the neutral fact finder, fact finding panel or the hearing examiner  
51 shall be admissible in any subsequent administrative or judicial proceeding.

52 (c) Except as otherwise provided in subsections (a) and (b) of this chapter, and notwithstanding  
53 any previously enacted general or special law to the contrary, every state agency shall apply  
54 paragraphs 1 to 5, inclusive, to the terms of public construction contracts awarded by any state  
55 agency:

56 (1) Disputes regarding changes in and interpretations of the terms or scope of the contract and  
57 denials of or failures to act upon claims for payment for extra work or materials shall be resolved  
58 according to either the administrative, judicial or arbitration procedures in this and the following  
59 paragraphs, which shall constitute the exclusive methods for resolving these disputes. Written  
60 notice of the matter in dispute shall be submitted by the claimant to the chief executive official of  
61 the state agency which awarded the contract or the official's designee, or to the chief executive  
62 officer of the contracting company, within a period which commences with the execution of the  
63 contract or the authorized commencement of work on the contract project, whichever begins  
64 first, and ends when the claim would otherwise be foreclosed by the passage of time and  
65 operation of applicable law. Acceptance of an amount offered as final payment shall not  
66 preclude any person, firm or corporation from bringing a claim under this section unless the  
67 claim has been expressly released before or upon final payment. All legal defenses except  
68 governmental immunity shall be reserved to the state agency. Interest on any award shall begin  
69 to accrue to a claimant under this paragraph 60 days after the claimant submits a notice or  
70 demand to the state agency for the unpaid debt upon which that interest is to be based. No  
71 person or business entity having a contract with a state agency shall delay, suspend, or curtail  
72 performance under that contract as a result of any dispute subject to this paragraph. Any  
73 disputed order, decision or action by the state agency or its authorized representative shall be  
74 fully performed or complied with pending resolution of the dispute. No consolidation of

75 arbitration proceedings shall take place where the state agency is not a party to both arbitration  
76 proceedings before the consolidation.

77 (2) Within 60 days after submission of the initial notice of the matter in dispute to the chief  
78 executive official of the state agency or the official's designee, the chief executive official shall  
79 issue a written decision stating the reasons for the decision, and shall notify the parties of their  
80 options for appeal. If the chief executive official or the official's designee is unable to issue a  
81 decision within 60 days, he shall notify the parties to the dispute in writing of the reasons why a  
82 decision cannot be issued within 60 days and of the date by which a decision shall issue. Failure  
83 to issue a decision within the 60-day period or within an additional time period specified in this  
84 written notice, if any, and agreed upon by the claimant shall be considered to constitute a denial  
85 of the claim and shall authorize resort to the appeal procedure described below. The decision of  
86 the chief executive official or his designee shall be final and conclusive unless an appeal is taken  
87 as provided below.

88 (3) Within 21 calendar days after the receipt of a written decision or of the date a denial is  
89 considered to have occurred by virtue of a failure to issue a decision as stated in paragraph (2),  
90 any aggrieved party may file a demand for arbitration under paragraph (4) and shall thereafter  
91 serve copies upon all other parties in the form and manner prescribed by the rules governing the  
92 conduct of adjudicatory proceedings of the division of administrative law appeals. The  
93 aggrieved party may instead file an action directly in a court of competent jurisdiction. If an  
94 aggrieved party exercises his option to file an action directly in court as provided in the previous  
95 sentence, the 21-day period shall not apply to the filing and the period for filing this action shall  
96 be the same period otherwise applicable for filing such a civil action in court.

97 (4) A demand for arbitration shall include the amount of damages sought and the alleged facts  
98 and contractual or statutory provisions which form the basis of the claim. Arbitration of a claim  
99 or claims shall be conducted under the rules of any dispute resolution entity, approved by this  
100 person, firm or corporation and the chief executive official of the state agency or the official's  
101 designee and the provisions of this paragraph, except that if the parties cannot agree upon a  
102 dispute resolution entity, the arbitration shall be administered by the public construction rules of  
103 the American Arbitration Association and this paragraph, and in the case of a conflict, this  
104 paragraph shall govern. If a demand for arbitration is made to the chief executive official of the  
105 state agency or the official's designee, each party shall allow the other to examine and copy any  
106 nonprivileged documents which may be relevant either to the claimant's claims or to the state  
107 agency's defenses to these claims. The attorney-client privilege and the attorney work-product  
108 doctrine shall apply to the state agency's documentation. All issues not addressed by this  
109 paragraph or by agreement, or by the rules of the mutually-designated dispute resolution entity or  
110 the American Arbitration Association, whichever shall apply, shall be governed by chapter 251.  
111 Any documents obtained by the agency through discovery shall not be subject to compelled  
112 disclosure under chapter 66 and shall not be disclosed by the state agency to any person or entity  
113 that is not a party to or an agent of a party to the arbitration. These documents shall be used only  
114 for settlement or litigation of the parties' claims. The arbitrators shall determine any claim of  
115 privilege or issue as to the relevance of documents after an in camera inspection. The arbitrators  
116 shall seal these documents during arbitration, and the arbitrators, as well as any other party  
117 obtaining a copy during discovery, shall return the documents to the appropriate party claimant  
118 after final disposition of the claim.

119 (5) Hearings shall be scheduled for arbitration in a manner that shall ensure that each party shall  
120 have reasonable time and opportunity to prepare and present its case, taking into consideration  
121 the size and complexity of the claims presented. Unless the parties mutually agree otherwise, no  
122 evidentiary hearing on the merits of the claim may begin less than 30 nor more than 120 days  
123 after the demand for arbitration is filed with the dispute resolution entity.

124 The arbitrators shall conduct the hearing and shall hear evidence of the facts and arguments as to  
125 the interpretation and application of contractual provisions. After the hearing, the arbitrators  
126 shall issue in writing the following: (i) findings of fact, (ii) a decision in which the arbitrators  
127 interpret the contract and law and apply it to the facts found and (iii) an award. The arbitrators'  
128 findings of fact shall be final and conclusive, and their decision and award shall be final and  
129 binding, subject, in both cases, to vacation, rehearing or confirmation under section 12 of chapter  
130 251, and under the standards set forth in section 14 of chapter 30. Interest on any award shall  
131 begin to accrue 60 days after an initial notice is filed.

132 (d) The secretary of administration and finance shall prepare annually a report concerning the  
133 construction contract claims submitted to state agencies during the preceding 12 months, in such  
134 form as the secretary shall prescribe. The report shall contain, at a minimum, the following  
135 information: the number of claims submitted; the names of all parties to each claim; a brief  
136 description of each claim; the date of submission and of disposition of each claim; its disposition,  
137 whether by settlement, withdrawal, default, written agency decision, non-binding arbitration  
138 under an agency plan approved under subsection (b), or binding arbitration under subsection (c);  
139 and the number of claims currently pending. The original report shall be submitted by the  
140 secretary of administration and finance to the clerks of the house and senate by January 15, and a



141 copy shall be filed with the state librarian and shall be a public document. The fourth annual  
142 report so filed and each report thereafter shall set forth recommendations concerning the  
143 implementation of the alternative dispute resolution program established by this section,  
144 including a recommendation whether to eliminate the option available to each state agency to  
145 adopt its own program under subsection (b) .

146 SECTION 2. This act, being remedial in nature, shall apply to all contracts executed after its  
147 effective date and may be voluntarily applied with the consent of all parties to contracts in  
148 existence as of the effective date of this act.