

6158--A

Cal. No. 803

I N S E N A T E

January 9, 2012

Introduced by Sen. LIBOUS -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- reported favorably from said committee, ordered to first and second report, amended on second report, ordered to a third reading, and to be reprinted as amended, retaining its place in the order of third reading

AN ACT to amend the state finance law and the general municipal law, in relation to requiring full payment for delivered and accepted materials pertaining to public work projects; and to amend the general business law, in relation to prohibiting the retention of any payment due and owing a material supplier for a construction project

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivisions 1 and 2 of section 139-f of the state finance
2 law, subdivision 1 as added by chapter 769 of the laws of 1978 and
3 subdivision 2 as amended by section 16 of part MM of chapter 57 of the
4 laws of 2008, are amended to read as follows:
5 1. Payment by public owners to contractors. The contractor shall peri-
6 odically, in accordance with the terms of the contract, submit to the
7 public owner and/or [his] ITS agent a requisition for a progress payment
8 for the work performed and/or materials furnished to the date of the
9 requisition, less any amount previously paid to the contractor. The
10 public owner shall in accordance with the terms of the contract approve
11 and promptly pay the requisition for the progress payment less an amount
12 necessary to satisfy any claims, liens or judgments against the contrac-
13 tor which have not been suitably discharged and less any retained amount
14 as hereafter described. The public owner shall retain not more than five
15 per centum of each progress payment, NOT INCLUDING ANY PAYMENT FOR MATE-
16 RIALS PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED AND ACCEPTED,
17 to the contractor except that the public owner may retain in excess of
18 five per centum but not more than ten per centum of each progress
19 payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT TO THE
20 PROJECT WHICH HAVE BEEN DELIVERED AND ACCEPTED, to the contractor
21 provided that there are no requirements by the public owner for the
22 contractor to provide a performance bond and a labor and material bond

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 both in the full amount of the contract. The public owner shall pay IN
2 FULL, upon requisition from the contractor, for ALL materials pertinent
3 to the project which have been delivered to the site or off-site by the
4 contractor and/or subcontractor and suitably stored and secured as
5 required by the public owner and the contractor [provided, the public
6 owner may limit such payment to materials in short and/or critical
7 supply and materials specially fabricated for the project each as
8 defined in the contract]. When the work or major portions thereof as
9 contemplated by the terms of the contract are substantially completed,
10 the contractor shall submit to the public owner and/or [his] ITS agent a
11 requisition for payment of the remaining amount of the contract balance.
12 Upon receipt of such requisition the public owner shall approve and
13 promptly pay the remaining amount of the contract balance less two times
14 the value of any remaining items to be completed and an amount necessary
15 to satisfy any claims, liens or judgments against the contractor which
16 have not been suitably discharged. As the remaining items of work are
17 satisfactorily completed or corrected, the public owner shall promptly
18 pay, upon receipt of a requisition, for these remaining items less an
19 amount necessary to satisfy any claims, liens or judgments against the
20 contractor which have not been suitably discharged. Any claims, liens
21 and judgments referred to in this section shall pertain to the project
22 and shall be filed in accordance with the terms of the applicable
23 contract and/or applicable laws.

24 2. Payment by contractors to subcontractors. Within seven calendar
25 days of the receipt of any payment from the public owner, the contractor
26 shall pay each of [his] ITS subcontractors and materialmen the proceeds
27 from the payment representing the value of the work performed and/or
28 materials furnished by the subcontractor and/or materialman and reflect-
29 ing the percentage of the subcontractor's work completed or the
30 materialman's material supplied in the requisition approved by the owner
31 and based upon the actual value of the subcontract or purchase order
32 less an amount necessary to satisfy any claims, liens or judgments
33 against the subcontractor or materialman which have not been suitably
34 discharged and, WITH REGARD TO SUBCONTRACTORS, less any retained amount
35 as hereafter described. Failure by the contractor to pay any subcontract-
36 tor or materialman within seven calendar days of the receipt of any
37 payment from the public owner shall result in the commencement and
38 accrual of interest on amounts due to such subcontractor or materialman
39 for the period beginning on the day immediately following the expiration
40 of such seven calendar day period and ending on the date on which
41 payment is made by the contractor to such subcontractor or materialman.
42 Such interest payment shall be the sole responsibility of the contrac-
43 tor, and shall be paid at the rate of interest in effect on the date
44 payment is made by the contractor. Notwithstanding any other provision
45 of law to the contrary, interest shall be computed at the rate estab-
46 lished in paragraph (b) of subdivision one of section seven hundred
47 fifty-six-b of the general business law. The contractor shall retain not
48 more than five per centum of each payment to the subcontractor [and/or
49 materialman] except that the contractor may retain in excess of five per
50 centum but not more than ten per centum of each payment to the subcon-
51 tractor provided that prior to entering into a subcontract with the
52 contractor, the subcontractor is unable or unwilling to provide a
53 performance bond and a labor and material bond, both in the full amount
54 of the subcontract, at the request of the contractor. THE CONTRACTOR
55 SHALL PAY IN FULL, UPON PAYMENT BY THE PUBLIC OWNER, FOR ALL MATERIALS
56 PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED TO AND ACCEPTED AT

1 THE SITE OR OFF-SITE BY A MATERIALMAN. However, the contractor shall
2 retain nothing from those payments representing proceeds owed the
3 subcontractor and/or materialman from the public owner's payments to the
4 contractor for the remaining amounts of the contract balance as provided
5 in subdivision one of this section. If the contractor has failed to
6 submit a requisition for payment of the remaining amounts of the
7 contract balance within ninety days of substantial completion as
8 provided in subdivision one of this section, then any clause in the
9 subcontract between the contractor and the subcontractor or materialman
10 which states that payment by the contractor to such subcontractor or
11 materialman is contingent upon payment by the owner to the contractor
12 shall be deemed invalid. Within seven calendar days of the receipt of
13 payment from the contractor, the subcontractor and/or materialman shall
14 pay each of [his] ITS subcontractors and materialmen in the same manner
15 as the contractor has paid the subcontractor, including interest as
16 herein provided above. Nothing provided herein shall create any obli-
17 gation on the part of the public owner to pay or to see to the payment
18 of any moneys to any subcontractor or materialman from any contractor
19 nor shall anything provided herein serve to create any relationship in
20 contract or otherwise, implied or expressed, between the subcontractor
21 or materialman and the public owner.

22 S 2. Paragraph (a) of subdivision 1 and subdivision 2 of section 106-b
23 of the general municipal law, paragraph (a) of subdivision 1 as amended
24 by chapter 98 of the laws of 1995 and subdivision 2 as amended by
25 section 15 of part MM of chapter 57 of the laws of 2008, are amended to
26 read as follows:

27 (a) The contractor shall periodically, in accordance with the terms of
28 the contract, submit to the public owner and/or [his] ITS agent a requi-
29 sition for a progress payment for the work performed and/or materials
30 furnished to the date of the requisition less any amount previously paid
31 to the contractor. The public owner shall in accordance with the terms
32 of the contract approve and promptly pay the requisition for the
33 progress payment less an amount necessary to satisfy any claims, liens
34 or judgments against the contractor which have not been suitably
35 discharged and less any retained amount as hereafter described. The
36 public owner shall retain not more than five per centum of each progress
37 payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT TO THE
38 PROJECT WHICH HAVE BEEN DELIVERED AND ACCEPTED, to the contractor except
39 that the public owner may retain in excess of five per centum but not
40 more than ten per centum of each progress payment, NOT INCLUDING ANY
41 PAYMENT FOR MATERIALS PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED
42 AND ACCEPTED, to the contractor provided that there are no requirements
43 by the public owner for the contractor to provide a performance bond and
44 a labor and material bond both in the full amount of the contract. The
45 public owner shall pay IN FULL, upon requisition from the contractor,
46 for ALL materials pertinent to the project which have been delivered to
47 the site or off-site by the contractor and/or subcontractor and suitably
48 stored and secured as required by the public owner and the contractor
49 [provided, the public owner may limit such payment to materials in short
50 and/or critical supply and materials specially fabricated for the
51 project each as defined in the contract]. When the work or major
52 portions thereof as contemplated by the terms of the contract are
53 substantially completed, the contractor shall submit to the public owner
54 and/or [his] ITS agent a requisition for payment of the remaining amount
55 of the contract balance. Upon receipt of such requisition the public
56 owner shall approve and promptly pay the remaining amount of the

1 contract balance less two times the value of any remaining items to be
2 completed and an amount necessary to satisfy any claims, liens or judg-
3 ments against the contractor which have not been suitably discharged. As
4 the remaining items of work are satisfactorily completed or corrected,
5 the public owner shall promptly pay, upon receipt of a requisition, for
6 these items less an amount necessary to satisfy any claims, liens or
7 judgments against the contractor which have not been suitably
8 discharged. Any claims, liens and judgments referred to in this section
9 shall pertain to the project and shall be filed in accordance with the
10 terms of the applicable contract and/or applicable laws. Where the
11 public owner is other than the city of New York, the term "promptly pay"
12 shall mean payment within thirty days, excluding legal holidays, of
13 receipt of the requisition unless such requisition is not approvable in
14 accordance with the terms of the contract. Notwithstanding the forego-
15 ing, where the public owner is other than the city of New York and is a
16 municipal corporation which requires an elected official to approve
17 progress payments, "promptly pay" shall mean payment within forty-five
18 days, excluding legal holidays, of receipt of the requisition unless
19 such requisition is not approvable in accordance with the terms of the
20 contract.

21 2. Payment by contractors to subcontractors. Within seven calendar
22 days of the receipt of any payment from the public owner, the contractor
23 shall pay each of [his] ITS subcontractors and materialmen the proceeds
24 from the payment representing the value of the work performed and/or
25 materials furnished by the subcontractor and/or materialman and reflect-
26 ing the percentage of the subcontractor's work completed or the
27 materialman's material supplied in the requisition approved by the owner
28 and based upon the actual value of the subcontract or purchase order
29 less an amount necessary to satisfy any claims, liens or judgments
30 against the subcontractor or materialman which have not been suitably
31 discharged and, WITH REGARD TO SUBCONTRACTORS, less any retained amount
32 as hereafter described. Failure by the contractor to make any payment,
33 including any remaining amounts of the contract balance as hereinafter
34 described, to any subcontractor or materialman within seven calendar
35 days of the receipt of any payment from the public owner shall result in
36 the commencement and accrual of interest on amounts due to such subcon-
37 tractor or materialman for the period beginning on the day immediately
38 following the expiration of such seven calendar day period and ending on
39 the date on which payment is made by the contractor to such subcontrac-
40 tor or materialman. Such interest shall be the sole responsibility of
41 the contractor, and shall be paid at the rate of interest in effect on
42 the date payment is made by the contractor. Notwithstanding any other
43 provision of law to the contrary, interest shall be computed at the rate
44 established in paragraph (b) of subdivision one of section seven hundred
45 fifty-six-b of the general business law. The contractor shall retain not
46 more than five per centum of each payment to the subcontractor [and/or
47 materialman] except that the contractor may retain in excess of five per
48 centum but not more than ten per centum of each payment to the subcon-
49 tractor provided that prior to entering into a subcontract with the
50 contractor, the subcontractor is unable or unwilling to provide a
51 performance bond and a labor and material bond both in the full amount
52 of the subcontract at the request of the contractor. THE CONTRACTOR
53 SHALL PAY IN FULL, UPON PAYMENT BY THE PUBLIC OWNER, FOR ALL MATERIALS
54 PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED TO AND ACCEPTED AT
55 THE SITE OR OFF-SITE BY A MATERIALMAN. However, the contractor shall
56 retain nothing from those payments representing proceeds owed the

1 subcontractor and/or materialman from the public owner's payments to the
2 contractor for the remaining amounts of the contract balance as provided
3 in subdivision one of this section. If the contractor has failed to
4 submit a requisition for payment of the remaining amounts of the
5 contract balance within ninety days of substantial completion as
6 provided in subdivision one of this section, then any clause in the
7 subcontract between the contractor and the subcontractor or materialman
8 which states that payment by the contractor to such subcontractor or
9 materialman is contingent upon payment by the owner to the contractor
10 shall be deemed invalid. Within seven calendar days of the receipt of
11 payment from the contractor, the subcontractor and/or materialman shall
12 pay each of [his] ITS subcontractors and materialmen in the same manner
13 as the contractor has paid the subcontractor, including interest as
14 herein provided above. Nothing provided herein shall create any obli-
15 gation on the part of the public owner to pay or to see to the payment
16 of any moneys to any subcontractor or materialman from any contractor
17 nor shall anything provided herein serve to create any relationship in
18 contract or otherwise, implied or expressed, between the subcontractor
19 or materialman and the public owner.

20 S 3. Section 756-c of the general business law, as added by chapter
21 127 of the laws of 2002, is amended to read as follows:

22 S 756-c. Retention. 1. By mutual agreement of the relevant parties an
23 owner may retain a reasonable amount of the contract sum as retainage. A
24 contractor or subcontractor may also retain a reasonable amount for
25 retainage so long as the amount does not exceed the actual percentage
26 retained by the owner. Retainage shall be released by the owner to the
27 contractor no later than thirty days after the final approval of the
28 work under a construction contract. In the event that an owner fails to
29 release retainage as required by this article, or the contractor or
30 subcontractor fails to release a proportionate amount of retainage to
31 the relevant parties after receipt of retainage from the owner, the
32 owner, contractor, or subcontractor, as the case may be, shall be
33 subject to the payment of interest at the rate of one percent per month
34 on the date retention was due and owing.

35 2. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION,
36 NO PORTION OF ANY PAYMENT DUE AND OWING TO A MATERIAL SUPPLIER FOR MATE-
37 RIALS WHICH HAVE BEEN DELIVERED AND ACCEPTED SHALL BE RETAINED BY AN
38 OWNER, CONTRACTOR OR SUBCONTRACTOR.

39 S 4. This act shall take effect on the thirtieth day after it shall
40 have become a law and shall apply to materials delivered and accepted on
41 or after such date.