

6158

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

AN ACT to amend the state finance law and the general municipal law, in relation to requiring full payment for delivered 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, to the
17 contractor except that the public owner may retain in excess of five per
18 centum but not more than ten per centum of each progress payment, NOT
19 INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT TO THE PROJECT WHICH HAVE
20 BEEN DELIVERED, to the contractor provided that there are no require-
21 ments by the public owner for the contractor to provide a performance
22 bond and a labor and material bond both in the full amount of the
23 contract. The public owner shall pay IN FULL, upon requisition from the
24 contractor, for ALL materials pertinent to the project which have been
25 delivered to the site or off-site by the contractor and/or subcontractor

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

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

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

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

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

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

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

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

1 this section, then any clause in the subcontract between the contractor
2 and the subcontractor or materialman which states that payment by the
3 contractor to such subcontractor or materialman is contingent upon
4 payment by the owner to the contractor shall be deemed invalid. Within
5 seven calendar days of the receipt of payment from the contractor, the
6 subcontractor and/or materialman shall pay each of [his] ITS subcontractors
7 and materialmen in the same manner as the contractor has paid the
8 subcontractor, including interest as herein provided above. Nothing
9 provided herein shall create any obligation on the part of the public
10 owner to pay or to see to the payment of any moneys to any subcontractor
11 or materialman from any contractor nor shall anything provided herein
12 serve to create any relationship in contract or otherwise, implied or
13 expressed, between the subcontractor or materialman and the public
14 owner.

15 S 3. Section 756-c of the general business law, as added by chapter
16 127 of the laws of 2002, is amended to read as follows:

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

30 2. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION,
31 NO PORTION OF ANY PAYMENT DUE AND OWING TO A MATERIAL SUPPLIER FOR MATE-
32 RIALS WHICH HAVE BEEN DELIVERED SHALL BE RETAINED BY AN OWNER, CONTRAC-
33 TOR OR SUBCONTRACTOR.

34 S 4. This act shall take effect on the thirtieth day after it shall
35 have become a law and shall apply to materials delivered on or after
36 such date.