S T A T E O F N E W Y O R K

S. 1974 A. 1660

2013-2014 Regular Sessions

S E N A T E - A S S E M B L Y

(PREFILED)

January 9, 2013

IN SENATE -- Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY -- Introduced by M. of A. CUSICK, GABRYSZAK -- Multi-Sponsored by -- M. of A. ROBINSON -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law and the general municipal law, in relation to release of subcontractor's retainage

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

Section 1. Subdivision 2 of section 139-f of the state finance law, as amended by section 16 of part MM of chapter 57 of the laws of 2008, is amended to read as follows:

2. Payment by contractors to subcontractors. Within seven calendar days of the receipt of any payment from the public owner, the contractor shall pay each of his subcontractors and materialmen the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor's work completed or the materialman's material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order less an amount necessary to satisfy any claims, liens or judgments against the subcontractor or materialman which have not been suitably discharged and less any retained amount as hereafter described. Failure by the contractor to pay any subcontractor or materialman within seven calendar days of the receipt of any payment from the public owner shall result in the commencement and accrual of interest on amounts due to such subcontractor or materialman for the period beginning on the day immediately following the expiration of such seven calendar day period and ending on the date on which payment is made by the contractor to such subcontrac-

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

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tor or materialman. Such interest payment shall be the sole responsibility of the contractor, and shall be paid at the rate of interest in effect on the date payment is made by the contractor. Notwithstanding any other provision of law to the contrary, interest shall be computed at the rate established in paragraph (b) of subdivision one of section seven hundred fifty-six-b of the general business law. The contractor shall retain not more than five per centum of each payment to the subcontractor and/or materialman except that the contractor may retain in excess of five per centum but not more than ten per centum of each payment to the subcontractor provided that prior to entering into a subcontract with the contractor, the subcontractor is unable or unwilling to provide a performance bond and a labor and material bond, both in the full amount of the subcontract, at the request of the contractor. However, the contractor shall retain nothing from those payments representing proceeds owed the subcontractor and/or materialman from the public owner's payments to the contractor for the remaining amounts of the contract balance as provided in subdivision one of this section. If the contractor has failed to submit a requisition for payment of the remaining amounts of the contract balance within ninety days of substantial completion as provided in subdivision one of this section, then any clause in the subcontract between the contractor and the subcontractor or materialman which states that payment by the contractor to such subcontractor or materialman is contingent upon payment by the owner to the contractor shall be deemed invalid. Within seven calendar days of the receipt of payment from the contractor, the subcontractor and/or materialman shall pay each of his subcontractors and materialmen in the same manner as the contractor has paid the subcontractor, including interest as herein provided above. Nothing provided herein shall create any obligation on the part of the public owner to pay or to see to the payment of any moneys to any subcontractor or materialman from any contractor nor shall anything provided herein serve to create any relationship in contract or otherwise, implied or expressed, between the subcontractor or materialman and the public owner. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION OR OTHER LAW, ANY RETAINAGE HELD BY A PUBLIC OWNER OR CONTRACTOR REPRESENTING RETAINAGE FOR A SUBCONTRACTOR'S WORK SHALL BE RELEASED, LESS AN AMOUNT NECESSARY TO SATISFY ANY CLAIMS, LIENS OR JUDGMENTS AGAINST THE SUBCONTRACTOR OR MATERIALMAN WHICH HAVE NOT BEEN SUITABLY DISCHARGED AND LESS AN AMOUNT NECESSARY TO SATISFY ANY CHARGES FOR UNFINISHED PUNCH LIST ITEMS, NO LATER THAN SIXTY DAYS FROM THE COMPLETION AND ACCEPTANCE BY THE PUBLIC OWNER OF THE SUBCONTRACTOR'S WORK.

S 2. Subdivision 2 of section 106-b of the general municipal law, as amended by section 15 of part MM of chapter 57 of the laws of 2008, is amended to read as follows:

2. Payment by contractors to subcontractors. Within seven calendar days of the receipt of any payment from the public owner, the contractor shall pay each of his subcontractors and materialmen the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor's work completed or the materialman's material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order less an amount necessary to satisfy any claims, liens or judgments against the subcontractor or materialman which have not been suitably discharged and less any retained amount as hereafter described. Failure by the contractor to make any payment, including any remaining amounts of the contract

balance as hereinafter described, to any subcontractor or materialman within seven calendar days of the receipt of any payment from the public owner shall result in the commencement and accrual of interest on amounts due to such subcontractor or materialman for the period beginning on the day immediately following the expiration of such seven calendar day period and ending on the date on which payment is made by the contractor to such subcontractor or materialman. Such interest shall be the sole responsibility of the contractor, and shall be paid at the rate of interest in effect on the date payment is made by the contractor. Notwithstanding any other provision of law to the contrary, interest shall be computed at the rate established in paragraph (b) of subdivision one of section seven hundred fifty-six-b of the general business law. The contractor shall retain not more than five per centum of each payment to the subcontractor and/or materialman except that the contractor may retain in excess of five per centum but not more than ten per centum of each payment to the subcontractor provided that prior to entering into a subcontract with the contractor, the subcontractor is unable or unwilling to provide a performance bond and a labor and material bond both in the full amount of the subcontract at the request of the contractor. However, the contractor shall retain nothing from those payments representing proceeds owed the subcontractor and/or materialman from the public owner's payments to the contractor for the remaining amounts of the contract balance as provided in subdivision one of this section. If the contractor has failed to submit a requisition for payment of the remaining amounts of the contract balance within ninety days of substantial completion as provided in subdivision one of this section, then any clause in the subcontract between the contractor and the subcontractor or materialman which states that payment by the contractor to such subcontractor or materialman is contingent upon payment by the owner to the contractor shall be deemed invalid. Within seven calendar days of the receipt of payment from the contractor, the subcontractor and/or materialman shall pay each of his subcontractors and materialmen in the same manner as the contractor has paid the subcontractor, including interest as herein provided above. Nothing provided herein shall create any obligation on the part of the public owner to pay or to see to the payment of any moneys to any subcontractor or materialman from any contractor nor shall anything provided herein serve to create any relationship in contract or otherwise, implied or expressed, between the subcontractor or materialman and the public owner. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION OR OTHER LAW, ANY RETAINAGE HELD BY A PUBLIC OWNER OR CONTRACTOR REPRESENTING RETAINAGE FOR A SUBCONTRACTOR'S WORK SHALL BE RELEASED, LESS AN AMOUNT NECESSARY TO SATISFY ANY CLAIMS, LIENS OR JUDGMENTS AGAINST THE SUBCONTRACTOR OR MATERIALMAN WHICH HAVE NOT BEEN SUITABLY DISCHARGED AND LESS AN AMOUNT NECESSARY TO SATISFY ANY CHARGES FOR UNFINISHED PUNCH LIST ITEMS, NO LATER THAN SIXTY DAYS FROM THE COMPLETION AND ACCEPTANCE BY THE PUBLIC OWNER OF THE SUBCONTRACTOR'S WORK.

S 3. This act shall take effect immediately and shall apply to all contracts entered into on or after such effective date.