

2013-2014 Regular Sessions

I N S E N A T E

(PREFILED)

January 9, 2013

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 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

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

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

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

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

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

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

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

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

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

21 S 3. Section 756-c of the general business law, as added by chapter
22 127 of the laws of 2002, is amended to read as follows:

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

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

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