

3287

2009-2010 Regular Sessions

I N S E N A T E

March 13, 2009

Introduced by Sen. ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to the prompt payment of construction contracts

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

1 Section 1. The general business law is amended by adding a new section
2 756-f to read as follows:

3 S 756-F. PROMPT PAYMENT. 1. AS USED IN THIS SECTION:

4 (A) "BILLING" MEANS, IN ACCORDANCE WITH THE TERMS AND DEFINITIONS OF
5 THE APPLICABLE CONTRACT, ANY PERIODIC PAYMENT, FINAL PAYMENT, WRITTEN
6 APPROVED CHANGED ORDER OR REQUEST FOR RELEASE OF RETAINAGE.

7 (B) "PRIME CONTRACTOR" MEANS A PERSON WHO CONTRACTS WITH AN OWNER TO
8 IMPROVE REAL PROPERTY.

9 (C) "IMPROVE" MEANS: TO BUILD, ALTER, REPAIR OR DEMOLISH ANY STRUCTURE
10 UPON, CONNECTED WITH, ON OR BENEATH THE SURFACE OF ANY REAL PROPERTY; TO
11 EXCAVATE, CLEAR, GRADE, FILL OR LANDSCAPE ANY REAL PROPERTY; TO
12 CONSTRUCT DRIVEWAYS AND PRIVATE ROADWAYS ON REAL PROPERTY; TO FURNISH
13 CONSTRUCTION RELATED MATERIALS, INCLUDING TREES AND SHRUBBERY, FOR ANY
14 OF THE ABOVE PURPOSES; OR TO PERFORM ANY LABOR UPON A STRUCTURE, INCLUD-
15 ING ANY DESIGN, PROFESSIONAL OR SKILLED SERVICES FURNISHED BY AN ARCHI-
16 TECT, ENGINEER, LAND SURVEYOR OR LANDSCAPE ARCHITECT LICENSED OR REGIS-
17 TERED PURSUANT TO THE LAWS OF THIS STATE.

18 (D) "STRUCTURE" MEANS ALL OR ANY PART OF A BUILDING AND OTHER IMPROVE-
19 MENTS TO REAL PROPERTY.

20 (E) "OWNER" MEANS ANY PERSON, INCLUDING ANY PUBLIC OR GOVERNMENTAL
21 ENTITY, WHO HAS AN INTEREST IN THE REAL PROPERTY TO BE IMPROVED AND WHO
22 HAS CONTRACTED WITH A PRIME CONTRACTOR FOR SUCH IMPROVEMENT TO BE MADE.
23 "OWNER" SHALL BE DEEMED TO INCLUDE ANY SUCCESSOR IN INTEREST OR AGENT
24 ACTING ON BEHALF OF AN OWNER.

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

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1 (F) "PRIME RATE" MEANS THE BASE RATE ON CORPORATE LOANS AT LARGE
2 UNITED STATES MONEY CENTER COMMERCIAL BANKS.

3 (G) "REAL PROPERTY" MEANS THE REAL ESTATE THAT IS IMPROVED UPON OR TO
4 BE IMPROVED UPON.

5 (H) "SUBCONTRACTOR" MEANS ANY PERSON WHO HAS CONTRACTED TO FURNISH
6 LABOR, MATERIALS OR OTHER SERVICES TO A PRIME CONTRACTOR IN CONNECTION
7 WITH A CONTRACT TO IMPROVE REAL PROPERTY.

8 (I) "SUBSUBCONTRACTOR" MEANS ANY PERSON WHO HAS CONTRACTED TO FURNISH
9 LABOR, MATERIALS OR OTHER SERVICES TO A SUBCONTRACTOR IN CONNECTION WITH
10 A CONTRACT TO IMPROVE REAL PROPERTY.

11 2. (A) IF A PRIME CONTRACTOR HAS PERFORMED IN ACCORDANCE WITH THE
12 PROVISIONS OF A CONTRACT WITH THE OWNER AND THE BILLING FOR THE WORK HAS
13 BEEN APPROVED AND CERTIFIED BY THE OWNER OR THE OWNER'S AUTHORIZED
14 APPROVING AGENT, THE OWNER SHALL PAY THE AMOUNT DUE TO THE PRIME
15 CONTRACTOR FOR EACH PERIODIC PAYMENT, FINAL PAYMENT OR RETAINAGE MONIES
16 NOT MORE THAN THIRTY CALENDAR DAYS AFTER THE BILLING DATE, WHICH FOR A
17 PERIODIC BILLING SHALL BE THE PERIODIC BILLING DATE SPECIFIED IN THE
18 CONTRACT. THE BILLING SHALL BE DEEMED APPROVED AND CERTIFIED TWENTY DAYS
19 AFTER THE OWNER RECEIVES IT UNLESS THE OWNER PROVIDES, BEFORE THE END OF
20 THE TWENTY-DAY PERIOD, A WRITTEN STATEMENT OF THE AMOUNT WITHHELD AND
21 THE REASON FOR WITHHOLDING PAYMENT, EXCEPT THAT IN THE CASE OF A PUBLIC
22 OR GOVERNMENTAL ENTITY THAT REQUIRES THE ENTITY'S GOVERNING BODY TO VOTE
23 ON AUTHORIZATIONS FOR EACH PERIODIC PAYMENT, FINAL PAYMENT OR RETAINAGE
24 MONIES, THE AMOUNT DUE MAY BE APPROVED AND CERTIFIED AT THE NEXT SCHED-
25 ULED PUBLIC MEETING OF THE ENTITY'S GOVERNING BODY, AND PAID DURING THE
26 ENTITY'S SUBSEQUENT PAYMENT CYCLE, PROVIDED THIS EXCEPTION HAS BEEN
27 DEFINED IN THE BID SPECIFICATIONS AND CONTRACT DOCUMENTS.

28 (B) IF A SUBCONTRACTOR OR SUBSUBCONTRACTOR HAS PERFORMED IN ACCORDANCE
29 WITH THE PROVISIONS OF ITS CONTRACT WITH THE PRIME CONTRACTOR OR SUBCON-
30 TRACTOR AND THE WORK HAS BEEN ACCEPTED BY THE OWNER, THE OWNER'S AUTHOR-
31 IZED APPROVING AGENT, OR THE PRIME CONTRACTOR, AS APPLICABLE, AND THE
32 PARTIES HAVE NOT OTHERWISE AGREED IN WRITING, THE PRIME CONTRACTOR SHALL
33 PAY TO ITS SUBCONTRACTOR AND THE SUBCONTRACTOR SHALL PAY TO ITS SUBSUB-
34 CONTRACTOR WITHIN TEN CALENDAR DAYS OF THE RECEIPT OF EACH PERIODIC
35 PAYMENT, FINAL PAYMENT OR RECEIPT OF RETAINAGE MONIES, THE FULL AMOUNT
36 RECEIVED FOR THE WORK OF THE SUBCONTRACTOR OR SUBSUBCONTRACTOR BASED ON
37 THE WORK COMPLETED OR THE SERVICES RENDERED UNDER THE APPLICABLE
38 CONTRACT. IN THE CASE OF ONGOING WORK ON THE SAME PROJECT FOR WHICH
39 PARTIAL PAYMENTS ARE MADE, THE AMOUNT OF MONEY OWED FOR WORK ALREADY
40 COMPLETED SHALL ONLY BE PAYABLE IF THE SUBCONTRACTOR OR SUBSUBCONTRACTOR
41 IS PERFORMING TO THE SATISFACTION OF THE PRIME CONTRACTOR OR SUBCONTRAC-
42 TOR, AS APPLICABLE.

43 (C) IF A PAYMENT DUE PURSUANT TO THE PROVISIONS OF THIS SECTION IS NOT
44 MADE IN A TIMELY MANNER, THE DELINQUENT PARTY SHALL BE LIABLE FOR THE
45 AMOUNT OF MONEY OWED UNDER THE CONTRACT, PLUS INTEREST AT A RATE EQUAL
46 TO THE PRIME RATE PLUS ONE PERCENT, BUT IN NO EVENT SHALL INTEREST BE
47 LESS THAN TWELVE PERCENT. INTEREST ON AMOUNTS DUE PURSUANT TO THIS
48 SECTION SHALL BE PAID TO THE PRIME CONTRACTOR, SUBCONTRACTOR OR SUBSUB-
49 CONTRACTOR FOR THE PERIOD BEGINNING ON THE DAY AFTER THE REQUIRED
50 PAYMENT DATE AND ENDING ON THE DAY ON WHICH THE CHECK FOR PAYMENT HAS
51 BEEN DRAWN. THE PROVISIONS OF THIS PARAGRAPH SHALL NOT APPLY TO ANY
52 TRANSPORTATION PROJECT IF THAT PROJECT RECEIVES FEDERAL FUNDING AND THE
53 AWARDING AGENCY HAS BEEN NOTIFIED BY THE FEDERAL GOVERNMENT THAT IT WILL
54 BE CLASSIFIED AS A HIGH RISK GRANTEE.

55 (D) A PRIME CONTRACTOR, SUBCONTRACTOR OR SUBSUBCONTRACTOR MAY, AFTER
56 PROVIDING SEVEN CALENDAR DAYS' WRITTEN NOTICE TO THE PARTY FAILING TO

1 MAKE THE REQUIRED PAYMENTS, SUSPEND PERFORMANCE OF A CONSTRUCTION
2 CONTRACT WITHOUT PENALTY FOR BREACH OF CONTRACT, UNTIL THE PAYMENT
3 REQUIRED PURSUANT TO THIS SECTION IS MADE, IF THE CONTRACTOR, SUBCON-
4 TRACTOR OR SUBSUBCONTRACTOR: IS NOT PAID AS REQUIRED BY THIS SECTION; IS
5 NOT PROVIDED A WRITTEN STATEMENT OF THE AMOUNT WITHHELD AND THE REASON
6 FOR THE WITHHOLDING; AND THE PAYOR IS NOT ENGAGED IN A GOOD FAITH EFFORT
7 TO RESOLVE THE REASON FOR THE WITHHOLDING. THE PROVISIONS OF THIS PARA-
8 GRAPH SHALL NOT APPLY TO ANY TRANSPORTATION PROJECT IF THAT PROJECT
9 RECEIVES FEDERAL FUNDING AND THE APPLICATION OF THIS PROVISION WOULD
10 JEOPARDIZE THE FUNDING BECAUSE THE OWNER COULD NOT MEET THE FEDERAL
11 STANDARDS FOR FINANCIAL MANAGEMENT SYSTEMS.

12 (E)(1) THE RIGHTS, REMEDIES OR PROTECTIONS PROVIDED BY THIS SECTION
13 FOR PRIME CONTRACTORS, SUBCONTRACTORS AND SUBSUBCONTRACTORS SHALL BE IN
14 ADDITION TO OTHER REMEDIES PROVIDED PURSUANT TO ANY OTHER PROVISION OF
15 LAW. TO THE EXTENT THAT THE PROVISIONS OF THIS SECTION PROVIDE GREATER
16 RIGHTS, REMEDIES OR PROTECTIONS FOR PRIME CONTRACTORS, SUBCONTRACTORS
17 AND SUBSUBCONTRACTORS THAN OTHER PROVISIONS OF LAW, THE PROVISIONS OF
18 THIS SECTION SHALL SUPERSEDE THOSE OTHER PROVISIONS.

19 (2) NO PROVISION OF THIS SECTION SHALL BE CONSTRUED AS RESTRICTING IN
20 ANY WAY THE RIGHTS OR REMEDIES PROVIDED BY ANY OTHER APPLICABLE STATE OR
21 FEDERAL LAW TO AN OWNER WHO IS A RESIDENT HOMEOWNER OR PURCHASER WITH
22 RESPECT TO THE REAL PROPERTY BEING IMPROVED.

23 (F) ALL CONTRACTS FOR THE IMPROVEMENT OF STRUCTURES ENTERED INTO AFTER
24 THE EFFECTIVE DATE OF THIS SECTION BETWEEN OWNERS, PRIME CONTRACTORS,
25 SUBCONTRACTORS OR SUBSUBCONTRACTORS SHALL PROVIDE THAT DISPUTES REGARD-
26 ING WHETHER A PARTY HAS FAILED TO MAKE PAYMENTS REQUIRED PURSUANT TO
27 THIS SECTION MAY BE SUBMITTED TO A PROCESS OF ALTERNATIVE DISPUTE RESOL-
28 UTION. ALTERNATIVE DISPUTE RESOLUTION PERMITTED BY THIS SECTION SHALL
29 NOT APPLY TO DISPUTES CONCERNING THE BID SOLICITATION OR AWARD PROCESS,
30 OR TO THE FORMATION OF CONTRACTS OR SUBCONTRACTS. IN ANY CIVIL ACTION
31 BROUGHT TO COLLECT PAYMENTS PURSUANT TO THIS SECTION, THE ACTION SHALL
32 BE CONDUCTED WITHIN THIS STATE AND THE PREVAILING PARTY SHALL BE AWARDED
33 REASONABLE COSTS AND ATTORNEY FEES.

34 S 2. This act shall take effect immediately, but shall not apply to
35 contracts for the improvement of structures entered into before such
36 effective date.