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

5982

2009-2010 Regular Sessions

I N S E N A T E

June 19, 2009

Introduced by Sens. SAVINO, ADDABBO -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the labor law and the general business law, in relation to the prompt payment of employees and contractors engaged in private construction projects

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

Section 1. Section 196-a of the labor law, as added by chapter 605 of the laws of 1997, is amended to read as follows:

S 196-a. Complaints by employees to commissioner. (A) Any employee, or the recognized and certified collective bargaining agent acting on the employee's behalf, may file with the commissioner a complaint regarding a violation of THIS article [six], article nineteen, or article nineteen-A of this chapter for an investigation of such complaint and statement setting the appropriate remedy, if any. Failure of an employer to keep adequate records, in addition to exposing such employer to penalties authorized under subdivision one of section two hundred eighteen of this chapter, shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements.

(B) ANY EMPLOYEE, OR THE RECOGNIZED AND CERTIFIED COLLECTIVE BARGAINING AGENT ACTING ON THE EMPLOYEE'S BEHALF, CONTRACTOR, OR THE RECOGNIZED AND CERTIFIED LABOR ORGANIZATION WITH WHICH THE CONTRACTOR HAS EXECUTED A COLLECTIVE BARGAINING AGREEMENT COVERING WAGES, BENEFITS AND SUPPLEMENTS, MAY FILE WITH THE COMMISSIONER A COMPLAINT REGARDING AN ALLEGED VIOLATION OF THIS ARTICLE OR ARTICLE NINETEEN OF THIS CHAPTER OCCASIONED BY ANOTHER PERSON, CORPORATION, EMPLOYER OR ENTITIES IN VIOLATION OF ARTICLE THIRTY-FIVE-E OF THE GENERAL BUSINESS LAW FOR AN INVESTIGATION OF SUCH COMPLAINT AND STATEMENT SETTING THE APPROPRIATE REMEDY, IF ANY.

S 2. Subdivision 1 of section 756 of the general business law, as added by chapter 127 of the laws of 2002, is amended to read as follows:

1. "Construction contract" means a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demoli-

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

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tion of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds [two hundred fifty thousand dollars] ONE HUNDRED FIFTY THOUSAND DOLLARS. For the purposes of this article a construction contract shall not include any such contract made and awarded by the state, any public department, any public benefit corporation, any public corporation or official thereof, or a municipal corporation or official thereof for construction, reconstruction, alteration, repair, maintenance, moving or demolition of any public works project nor any contract with a contractor or subcontractor which is part of such project; or any such contract the purpose of which is the construction, reconstruction, alteration, repair, maintenance, moving or demolition of an individual one, two or three family residential dwelling or a residential tract development of one hundred [fifty] or less one or two family dwellings, or any residential construction project where the aggregate size of such project is [nine thousand] FOUR THOUSAND FIVE HUNDRED square feet or less, or any residential project of fewer than [one hundred fifty] SEVENTY-FIVE units which receives financial assistance from the federal government, the state or a municipal entity designed for households earning an average of one hundred twenty-five percent of the housing and urban development agency area median income.

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

S 756-a. Obligations. IT IS THE POLICY AND PURPOSE OF THIS ARTICLE TO EXPEDITE PAYMENT OF ALL MONIES OWED TO THOSE WHO PERFORM CONTRACTING SERVICES PURSUANT TO CONSTRUCTION CONTRACTS. Except as otherwise provided in this article, the terms and conditions of a construction contract shall supersede the provisions of this article and govern the conduct of the parties thereto.

1. Billing cycle. The parties to a construction contract may, by mutual agreement, establish a billing cycle for the submission of invoices requesting payment for work performed pursuant to a construction contract. In the absence of an agreement by the parties as to the billing cycle, the billing cycle shall be the calendar month within which the work is performed.

2. Invoices. (a) A contractor shall be entitled to invoice the owner for interim payments at the end of the billing cycle. A contractor shall be entitled to submit a final invoice for payment in full upon the performance of all the contractor's obligation under the contract.

(i) Upon delivery of an invoice and all contractually required documentation, an owner shall approve or disapprove all or a portion of such invoice within twelve business days. Owner approval of invoices shall not be unreasonably withheld nor shall an owner, in bad faith disapprove all or a portion of an invoice. If an owner declines to approve an invoice or a portion thereof, it must prepare and issue a written statement describing those items in the invoice that are not approved. An owner may decline to approve an invoice or portion of an invoice for:

(1) Unsatisfactory or disputed job progress;

(2) Defective construction work or material not remedied;

(3) Disputed work materials;

(4) Failure to comply with other material provisions of the construction contract;

(5) Failure of the contractor to make timely payments for labor including collectively bargained fringe benefit contributions, payroll taxes and insurance, equipment and materials, damage to the owner, or reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or

(6) Failure of the owner's architect to certify payment for any or all of the reasons set forth in this section so long as the reasons are included in the owner's written statement of disapproval.

(ii) Upon delivery of an invoice and all contractually required documentation, a contractor or subcontractor shall approve or disapprove all or a portion of such invoice within twelve business days. Contractor and subcontractor approval of invoices shall not be unreasonably withheld nor shall a contractor or subcontractor, in bad faith, disapprove all or a portion of an invoice. Nothing in this section shall prohibit the contractor or subcontractor, at the time of application to the owner or contractor, from withholding such application to the owner or contractor for payment to the subcontractor or material supplier for:

(1) Unsatisfactory or disputed job progress;

(2) Defective construction work or material not remedied;

(3) Disputed work;

(4) Failure to comply with other material provisions of the construction contract; or

(5) Failure of the subcontractor to make timely payments for labor including collectively bargained fringe benefit contributions; payroll taxes and insurance, equipment and materials, damage to contractor or another subcontractor or material supplier, or reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(b) Nothing in this subdivision shall authorize the withholding of an application to the owner or contractor for the payment to a subcontractor or material supplier when due to a delay in job progress by the owner, contractor or another subcontractor or material supplier other than the applicant or applicant's subcontractor or material supplier.

3. Payment. (a) The owner's payment of a contractor's interim and final invoices shall be made on the basis of a duly approved invoice of work performed and the material supplied during the billing cycle.

(i) Unless the provisions of this article provide otherwise, the owner shall pay the contractor strictly in accordance with the terms of the construction contract.

(ii) [Unless otherwise agreed to by the parties, payment] PAYMENT of an interim or final invoice shall be due from the owner not later than thirty days after approval of the invoice.

(iii) If payment by the owner is contingent upon lender approval, payment of a contractor's interim or final invoice or the amount of loan proceeds disbursed by the lender for payment of the contractor's interim or final invoice shall be due from the owner seven days after receipt by the owner of good funds except where the provisions of section seven hundred fifty-six-d of this article applies.

(iv) An owner may withhold from an interim payment only an amount that is sufficient to pay the costs and expenses the owner reasonably expects to incur in order to cure the defect or correct any items set forth in writing pursuant to subparagraph (i) of paragraph (a) of subdivision two of this section, or in the alternative, to withhold an amount not to exceed the line item amount appearing in the agreed schedule of values together with any change orders, additions and/or deletions, if such schedule has been previously submitted, and/or an amount sufficient to

cover liquidated damages as established in an agreed upon schedule in the construction contract.

(b) The contractor or subcontractor's payment of subcontractor or material supplier's interim or final invoice shall be made on the basis of a duly approved invoice of the work performed and materials supplied during the billing cycle.

(i) Unless the provisions of this article provide otherwise, the contractor or subcontractor shall pay the subcontractor strictly in accordance with the terms of the construction contract. Performance by a subcontractor in accordance with the provisions of its contract shall entitle it to payment from the party with which it contracts. Notwithstanding this article, where a contractor enters into a construction contract with a subcontractor as agent for a disclosed owner, the payment obligation shall flow directly from the disclosed owner as principal to the subcontractor and through the agent.

(ii) When a subcontractor has performed in accordance with the provisions of its construction contract, the contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportionate amount of funds received from the owner for each subcontractor's work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment, provided all contractually required documentation and waivers are received.

(iii) A contractor or subcontractor may withhold amounts received from an owner in connection with an interim payment due to a subcontractor or material supplier only such sums that are sufficient to pay the direct expenses as are reasonable to correct deficiencies identified pursuant to subparagraph (ii) of paragraph (a) of subdivision two of this section, or in the alternative, to withhold an amount not to exceed the line item amount appearing in the agreed schedule of values, together with any change order, additions or deletions, if such schedule has been previously submitted[, and/or an amount sufficient to cover liquidated damages as established in an agreed upon schedule in the construction contract].

(iv) If a contractor, after submitting an invoice to an owner under a construction contract, but before making a payment to a subcontractor or material supplier for the subcontractor's or material supplier's performance covered by such invoice, discovers that all or a portion of the payment otherwise due to the subcontractor or material supplier is subject to withholding from the subcontractor or material supplier in accordance with the construction contract and the conditions set forth in subparagraph (ii) of paragraph (a) of subdivision two of this section, then the contractor shall:

(1) As soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for a subcontractor or material supplier payment, furnish to the subcontractor or material supplier and the owner written notice of withholding specifying conditions for withholding payment and identifying the amount to be withheld;

(2) Reduce the subcontractor's or material supplier's interim payment by an amount not to exceed the amount specified in the notice of withholding; and

(3) Pay the subcontractor or material supplier amounts withheld within seven days after correction of the identified subcontractor or material supplier performance deficiency and receipt of all required documentation and waivers, unless the funds [therefore] THEREFOR must be obtained from the owner's next interim payment due to a reduction in the contrac-

tor's billing directly resulting from the subcontractor's or material supplier's performance deficiency identified in the notice of withholding.

(c) A written notice of any withholding under this subdivision shall be issued to a subcontractor or material supplier specifying:

(i) The amount to be withheld;

(ii) The specific causes for withholding under the terms of the construction contract and pursuant to this subdivision;

(iii) The remedial actions necessary to be taken by the subcontractor or material supplier in order to receive payments of the amounts withheld; and

(iv) The documentation and waivers required.

4. Notice. A contractor or subcontractor shall disclose to a subcontractor, at the time the construction subcontract is entered into, the due date for receipt of payments to the contractor or subcontractor from the owner or the contractor as the case may be. If a contractor or subcontractor fails to accurately disclose the due date to a subcontractor, the contractor or subcontractor shall be obligated to pay the subcontractor as though the due dates established in paragraph (a) of subdivision three of this section were met by the owner. In addition, upon written request of a subcontractor, the owner shall provide notice to such subcontractor within five days of making any interim or final payment to the contractor. The subcontractor's request shall remain in effect for the duration of the subcontractor's work on the project.

S 4. Section 756-b of the general business law, as added by chapter 127 of the laws of 2002, is amended to read as follows:

S 756-b. Remedies. 1. (a) If any interim or final payment to a contractor is delayed beyond the due date established in paragraph (a) of subdivision three of section seven hundred fifty-six-a of this article, the owner shall pay the contractor interest beginning on the next day at the rate of one percent per month or fraction of a month on the unpaid balance, or at a higher rate consistent with the construction contract.

(b) Notwithstanding any contrary agreement, if any interim or final payment to a subcontractor is delayed beyond the due date established in paragraph (b) of subdivision three of section seven hundred fifty-six-a of this article the contractor or subcontractor shall pay its subcontractor interest, beginning on the next day, at the rate of one percent a month or fraction of a month on the unpaid balance, or at a higher rate consistent with the construction contract.

2. (a) (i) If an owner fails to approve or disapprove an invoice within the time limits established in subparagraph (i) of paragraph (a) of subdivision two of section seven hundred fifty-six-a of this article, or to pay the contractor the undisputed invoice amount within the time limits provided by paragraph (a) of subdivision three of section seven hundred fifty-six-a of this article, the contractor may suspend contractually required performance, only after providing the owner written notice and an opportunity to cure consistent with subparagraph (ii) of this paragraph.

(ii) A contractor intending to suspend performance on the construction contract for failure of the owner to make timely payments or approvals within the time limits provided by this article must provide the owner written notice at least ten calendar days before the contractor's intended suspension. Such notice shall:

(A) inform the owner that payment for undisputed invoice amounts have not been received; and

(B) state the intent of the contractor to suspend performance for non-payment.

If after the tenth calendar day following written notice the owner has not cured the deficiency, the contractor may suspend performance.

(iii) A contractor shall not be deemed in breach of the construction contract for suspending performance pursuant to this section.

(b)(i) A subcontractor may suspend contractually required performance if any or all of the occurrences outlined in clauses (A), (B) and (C) of this subparagraph occur and only after providing written notice and an opportunity to cure consistent with subparagraph (ii) of this paragraph:

(A) If an owner fails to make timely payments for undisputed invoices within the time limits established by subdivision three of section seven hundred fifty-six-a of this article for the subcontractor's work and the contractor also fails to pay the subcontractor for the approved work;

(B) If an owner pays the contractor within the time limits established by subdivision three of section seven hundred fifty-six-a of this article for undisputed invoices for work performed by the subcontractor but the contractor fails to make payment to the subcontractor within the time frames established by this article for the subcontractor's work;

(C) If an owner fails to approve or disapprove a portion of contractor's invoice for work performed by the subcontractor within the time limits established in paragraph (a) of subdivision two of section seven hundred fifty-six-a of this article;

(D) If a contractor or subcontractor fails to approve or disapprove a subcontractor's invoice within the time limits established in paragraph (b) of subdivision three of section seven hundred fifty-six-a of this article; or

(E) If an owner fails to approve portions of the contractors' billing for work performed by the subcontractor within the time limits established by this article and the reasons for such failure are not the fault of or directly related to the subcontractor's work.

(ii) A subcontractor intending to suspend performance for failure to receive timely payments within the time limits established pursuant to this article must provide both the owner and the contractor written notice at least ten calendar days before the subcontractor's intended suspension. Such notice shall:

(A) inform the owner and the contractor that payment for undisputed billing amounts have not been received; and

(B) state the intent of the contractor to suspend performance for non-payment.

If after the tenth calendar day following written notice either the owner or the contractor has not cured the deficiency, the subcontractor may suspend performance AND/OR ATTEMPT TO RESOLVE IN COMPLIANCE WITH SUBDIVISION THREE OF THIS SECTION.

(iii) A subcontractor shall not be deemed in breach of the construction contract for suspending performance pursuant to this section.

(iv) (A) A contractor or subcontractor that suspends performance as provided in this section shall not be required to furnish further labor, materials or services until the contractor or subcontractor is paid the undisputed invoice amount at the time period for completion as provided in the construction contract, OR A FINAL DETERMINATION HAS BEEN MADE IN COMPLIANCE WITH SUBDIVISION THREE OF THIS SECTION AND COMPLIED WITH. All of the time frames established within [the construction contract of a contractor or subcontractor] THIS SECTION shall be extended for the length of time performance was suspended. Payment of documented actual

costs incurred for re-mobilization resulting from suspension shall be negotiated between the parties.

(B) In the event of suspension of a construction contract, as provided in this article, all materials, equipment, tools, construction equipment and machinery located at the job site shall remain the sole and exclusive property of the contractor or subcontractor and shall be removed from the job site, if necessary, within a reasonable period of time. Access to the contractor's or subcontractor's property shall not be unreasonably withheld.

3. (A) UPON RECEIPT OF WRITTEN NOTICE OF A COMPLAINT (I) THAT AN OWNER HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; (II) THAT A CONTRACTOR HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; (III) WHERE A CONTRACTOR ALLEGES A SUBCONTRACTOR HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; (IV) WHERE A SUBCONTRACTOR ALLEGES A CONTRACTOR HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; (V) WHERE A SUBCONTRACTOR ALLEGES THAT ANOTHER SUBCONTRACTOR HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; (VI) WHERE A CONTRACTOR OR SUBCONTRACTOR ALLEGES A MATERIAL SUPPLIER HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; OR (VII) WHERE A MATERIAL SUPPLIER ALLEGES A CONTRACTOR OR SUBCONTRACTOR HAS VIOLATED THE PROVISIONS OF THIS ARTICLE; THE PARTIES SHALL ATTEMPT TO RESOLVE THE MATTER GIVING RISE TO SUCH COMPLAINT.

(B) THE WRITTEN NOTICE REQUIRED UNDER THIS SECTION SHALL BE DELIVERED AT OR SENT BY ANY MEANS THAT PROVIDES WRITTEN, THIRD-PARTY VERIFICATION OF DELIVERY TO THE LAST BUSINESS ADDRESS KNOWN TO THE PARTY GIVING NOTICE.

(C) IF EFFORTS TO RESOLVE SUCH MATTER TO THE SATISFACTION OF ALL PARTIES ARE UNSUCCESSFUL, THE AGGRIEVED PARTY MAY REFER THE MATTER, NOT LESS THAN FIFTEEN DAYS OF THE RECEIPT OF THIRD PARTY VERIFICATION OF DELIVERY OF THE COMPLAINT, TO THE AMERICAN ARBITRATION ASSOCIATION FOR AN EXPEDITED ARBITRATION PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION.

(D) UPON CONCLUSION OF THE ARBITRATION PROCEEDINGS, THE ARBITRATOR SHALL SUBMIT TO THE PARTIES HIS OR HER OPINION AND AWARD REGARDING THE ALLEGED VIOLATION.

(E) THE AWARD OF THE ARBITRATOR SHALL BE FINAL AND MAY ONLY BE VACATED OR MODIFIED AS PROVIDED IN ARTICLE SEVENTY-FIVE OF THE CIVIL PRACTICE LAW AND RULES UPON AN APPLICATION MADE WITHIN THE TIME PROVIDED BY SECTION SEVENTY-FIVE HUNDRED TWO OF THE CIVIL PRACTICE LAW AND RULES.

S 5. Section 757 of the general business law is amended by adding two new subdivisions 3 and 4 to read as follows:

3. A PROVISION, COVENANT, CLAUSE OR UNDERSTANDING IN, COLLATERAL TO OR AFFECTING A CONSTRUCTION CONTRACT STATING THAT EXPEDITED ARBITRATION AS EXPRESSLY PROVIDED FOR AND IN THE MANNER ESTABLISHED BY SECTION SEVEN HUNDRED FIFTY-SIX-B OF THIS ARTICLE IS UNAVAILABLE TO ONE OR BOTH PARTIES.

4. A PROVISION, COVENANT, CLAUSE OR UNDERSTANDING IN COLLATERAL TO OR AFFECTING A CONSTRUCTION CONTRACT ESTABLISHING PAYMENT PROVISIONS WHICH DIFFER FROM THOSE ESTABLISHED IN SUBDIVISION THREE OF SECTION SEVEN HUNDRED FIFTY-SIX-A AND SECTION SEVEN HUNDRED FIFTY-SIX-B AS APPLICABLE.

S 6. This act shall take effect immediately and shall apply to construction contracts entered into after such date, except those contracts entered into as part of a construction project for which a permit or permits have been issued and work has begun on such projects prior to the effective date of this act.