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

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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:

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

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

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

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

(C) "IMPROVE" MEANS: TO BUILD, ALTER, REPAIR OR DEMOLISH ANY STRUCTURE UPON, CONNECTED WITH, ON OR BENEATH THE SURFACE OF ANY REAL PROPERTY; TO EXCAVATE, CLEAR, GRADE, FILL OR LANDSCAPE ANY REAL PROPERTY; TO CONSTRUCT DRIVEWAYS AND PRIVATE ROADWAYS ON REAL PROPERTY; TO FURNISH CONSTRUCTION RELATED MATERIALS, INCLUDING TREES AND SHRUBBERY, FOR ANY OF THE ABOVE PURPOSES; OR TO PERFORM ANY LABOR UPON A STRUCTURE, INCLUDING ANY DESIGN, PROFESSIONAL OR SKILLED SERVICES FURNISHED BY AN ARCHITECT, ENGINEER, LAND SURVEYOR OR LANDSCAPE ARCHITECT LICENSED OR REGISTERED PURSUANT TO THE LAWS OF THIS STATE.

(D) "STRUCTURE" MEANS ALL OR ANY PART OF A BUILDING AND OTHER IMPROVEMENTS TO REAL PROPERTY.

(E) "OWNER" MEANS ANY PERSON, INCLUDING ANY PUBLIC OR GOVERNMENTAL ENTITY, WHO HAS AN INTEREST IN THE REAL PROPERTY TO BE IMPROVED AND WHO HAS CONTRACTED WITH A PRIME CONTRACTOR FOR SUCH IMPROVEMENT TO BE MADE. "OWNER" SHALL BE DEEMED TO INCLUDE ANY SUCCESSOR IN INTEREST OR AGENT 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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(F) "PRIME RATE" MEANS THE BASE RATE ON CORPORATE LOANS AT LARGE UNITED STATES MONEY CENTER COMMERCIAL BANKS.

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

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

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

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

(B) IF A SUBCONTRACTOR OR SUBSUBCONTRACTOR HAS PERFORMED IN ACCORDANCE WITH THE PROVISIONS OF ITS CONTRACT WITH THE PRIME CONTRACTOR OR SUBCONTRACTOR AND THE WORK HAS BEEN ACCEPTED BY THE OWNER, THE OWNER'S AUTHORIZED APPROVING AGENT, OR THE PRIME CONTRACTOR, AS APPLICABLE, AND THE PARTIES HAVE NOT OTHERWISE AGREED IN WRITING, THE PRIME CONTRACTOR SHALL PAY TO ITS SUBCONTRACTOR AND THE SUBCONTRACTOR SHALL PAY TO ITS SUBSUBCONTRACTOR WITHIN TEN CALENDAR DAYS OF THE RECEIPT OF EACH PERIODIC PAYMENT, FINAL PAYMENT OR RECEIPT OF RETAINAGE MONIES, THE FULL AMOUNT RECEIVED FOR THE WORK OF THE SUBCONTRACTOR OR SUBSUBCONTRACTOR BASED ON THE WORK COMPLETED OR THE SERVICES RENDERED UNDER THE APPLICABLE CONTRACT. IN THE CASE OF ONGOING WORK ON THE SAME PROJECT FOR WHICH PARTIAL PAYMENTS ARE MADE, THE AMOUNT OF MONEY OWED FOR WORK ALREADY COMPLETED SHALL ONLY BE PAYABLE IF THE SUBCONTRACTOR OR SUBSUBCONTRACTOR IS PERFORMING TO THE SATISFACTION OF THE PRIME CONTRACTOR OR SUBCONTRACTOR, AS APPLICABLE.

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

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

MAKE THE REQUIRED PAYMENTS, SUSPEND PERFORMANCE OF A CONSTRUCTION CONTRACT WITHOUT PENALTY FOR BREACH OF CONTRACT, UNTIL THE PAYMENT REQUIRED PURSUANT TO THIS SECTION IS MADE, IF THE CONTRACTOR, SUBCONTRACTOR OR SUBSUBCONTRACTOR: IS NOT PAID AS REQUIRED BY THIS SECTION; IS NOT PROVIDED A WRITTEN STATEMENT OF THE AMOUNT WITHHELD AND THE REASON FOR THE WITHHOLDING; AND THE PAYOR IS NOT ENGAGED IN A GOOD FAITH EFFORT TO RESOLVE THE REASON FOR THE WITHHOLDING. THE PROVISIONS OF THIS PARAGRAPH SHALL NOT APPLY TO ANY TRANSPORTATION PROJECT IF THAT PROJECT RECEIVES FEDERAL FUNDING AND THE APPLICATION OF THIS PROVISION WOULD JEOPARDIZE THE FUNDING BECAUSE THE OWNER COULD NOT MEET THE FEDERAL STANDARDS FOR FINANCIAL MANAGEMENT SYSTEMS.

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

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

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

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