

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

S. 802--A

A. 2347--A

2009-2010 Regular Sessions

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

January 15, 2009

IN SENATE -- Introduced by Sens. BRESLIN, HUNTLEY, SCHNEIDERMAN, STACHOWSKI, STAVISKY, THOMPSON -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

IN ASSEMBLY -- Introduced by M. of A. CUSICK, GABRYSZAK -- read once and referred to the Committee on Governmental Operations -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

1 Section 1. Subdivision 2 of section 139-f of the state finance law, as
2 amended by section 16 of part MM of chapter 57 of the laws of 2008, is
3 amended to read as follows:
4 2. Payment by contractors to subcontractors. Within seven calendar
5 days of the receipt of any payment from the public owner, the contractor
6 shall pay each of his subcontractors and materialmen the proceeds from
7 the payment representing the value of the work performed and/or materi-
8 als furnished by the subcontractor and/or materialman and reflecting the
9 percentage of the subcontractor's work completed or the materialman's
10 material supplied in the requisition approved by the owner and based
11 upon the actual value of the subcontract or purchase order less an
12 amount necessary to satisfy any claims, liens or judgments against the
13 subcontractor or materialman which have not been suitably discharged and
14 less any retained amount as hereafter described. Failure by the contrac-
15 tor to pay any subcontractor or materialman within seven calendar days
16 of the receipt of any payment from the public owner shall result in the
17 commencement and accrual of interest on amounts due to such subcontrac-

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

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1 tor or materialman for the period beginning on the day immediately
2 following the expiration of such seven calendar day period and ending on
3 the date on which payment is made by the contractor to such subcontrac-
4 tor or materialman. Such interest payment shall be the sole responsibil-
5 ity of the contractor, and shall be paid at the rate of interest in
6 effect on the date payment is made by the contractor. Notwithstanding
7 any other provision of law to the contrary, interest shall be computed
8 at the rate established in paragraph (b) of subdivision one of section
9 seven hundred fifty-six-b of the general business law. The contractor
10 shall retain not more than five per centum of each payment to the
11 subcontractor and/or materialman except that the contractor may retain
12 in excess of five per centum but not more than ten per centum of each
13 payment to the subcontractor provided that prior to entering into a
14 subcontract with the contractor, the subcontractor is unable or unwill-
15 ing to provide a performance bond and a labor and material bond, both in
16 the full amount of the subcontract, at the request of the contractor.
17 However, the contractor shall retain nothing from those payments repres-
18 enting proceeds owed the subcontractor and/or materialman from the
19 public owner's payments to the contractor for the remaining amounts of
20 the contract balance as provided in subdivision one of this section. If
21 the contractor has failed to submit a requisition for payment of the
22 remaining amounts of the contract balance within ninety days of substan-
23 tial completion as provided in subdivision one of this section, then any
24 clause in the subcontract between the contractor and the subcontractor
25 or materialman which states that payment by the contractor to such
26 subcontractor or materialman is contingent upon payment by the owner to
27 the contractor shall be deemed invalid. Within seven calendar days of
28 the receipt of payment from the contractor, the subcontractor and/or
29 materialman shall pay each of his subcontractors and materialmen in the
30 same manner as the contractor has paid the subcontractor, including
31 interest as herein provided above. Nothing provided herein shall create
32 any obligation on the part of the public owner to pay or to see to the
33 payment of any moneys to any subcontractor or materialman from any
34 contractor nor shall anything provided herein serve to create any
35 relationship in contract or otherwise, implied or expressed, between the
36 subcontractor or materialman and the public owner. NOTWITHSTANDING ANY
37 OTHER PROVISION OF THIS SECTION OR OTHER LAW, ANY RETAINAGE HELD BY A
38 PUBLIC OWNER OR CONTRACTOR REPRESENTING RETAINAGE FOR A SUBCONTRACTOR'S
39 WORK SHALL BE RELEASED, LESS AN AMOUNT NECESSARY TO SATISFY ANY CLAIMS,
40 LIENS OR JUDGMENTS AGAINST THE SUBCONTRACTOR OR MATERIALMAN WHICH HAVE
41 NOT BEEN SUITABLY DISCHARGED AND LESS AN AMOUNT NECESSARY TO SATISFY ANY
42 CHARGES FOR UNFINISHED PUNCH LIST ITEMS, NO LATER THAN SIXTY DAYS FROM
43 THE COMPLETION AND ACCEPTANCE BY THE PUBLIC OWNER OF THE SUBCONTRACTOR'S
44 WORK.

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

48 2. Payment by contractors to subcontractors. Within seven calendar
49 days of the receipt of any payment from the public owner, the contractor
50 shall pay each of his subcontractors and materialmen the proceeds from
51 the payment representing the value of the work performed and/or materi-
52 als furnished by the subcontractor and/or materialman and reflecting the
53 percentage of the subcontractor's work completed or the materialman's
54 material supplied in the requisition approved by the owner and based
55 upon the actual value of the subcontract or purchase order less an
56 amount necessary to satisfy any claims, liens or judgments against the

1 subcontractor or materialman which have not been suitably discharged and
2 less any retained amount as hereafter described. Failure by the contrac-
3 tor to make any payment, including any remaining amounts of the contract
4 balance as hereinafter described, to any subcontractor or materialman
5 within seven calendar days of the receipt of any payment from the public
6 owner shall result in the commencement and accrual of interest on
7 amounts due to such subcontractor or materialman for the period begin-
8 ning on the day immediately following the expiration of such seven
9 calendar day period and ending on the date on which payment is made by
10 the contractor to such subcontractor or materialman. Such interest shall
11 be the sole responsibility of the contractor, and shall be paid at the
12 rate of interest in effect on the date payment is made by the contrac-
13 tor. Notwithstanding any other provision of law to the contrary, inter-
14 est shall be computed at the rate established in paragraph (b) of subdi-
15 vision one of section seven hundred fifty-six-b of the general business
16 law. The contractor shall retain not more than five per centum of each
17 payment to the subcontractor and/or materialman except that the contrac-
18 tor may retain in excess of five per centum but not more than ten per
19 centum of each payment to the subcontractor provided that prior to
20 entering into a subcontract with the contractor, the subcontractor is
21 unable or unwilling to provide a performance bond and a labor and mate-
22 rial bond both in the full amount of the subcontract at the request of
23 the contractor. However, the contractor shall retain nothing from those
24 payments representing proceeds owed the subcontractor and/or materialman
25 from the public owner's payments to the contractor for the remaining
26 amounts of the contract balance as provided in subdivision one of this
27 section. If the contractor has failed to submit a requisition for
28 payment of the remaining amounts of the contract balance within ninety
29 days of substantial completion as provided in subdivision one of this
30 section, then any clause in the subcontract between the contractor and
31 the subcontractor or materialman which states that payment by the
32 contractor to such subcontractor or materialman is contingent upon
33 payment by the owner to the contractor shall be deemed invalid. Within
34 seven calendar days of the receipt of payment from the contractor, the
35 subcontractor and/or materialman shall pay each of his subcontractors
36 and materialmen in the same manner as the contractor has paid the
37 subcontractor, including interest as herein provided above. Nothing
38 provided herein shall create any obligation on the part of the public
39 owner to pay or to see to the payment of any moneys to any subcontractor
40 or materialman from any contractor nor shall anything provided herein
41 serve to create any relationship in contract or otherwise, implied or
42 expressed, between the subcontractor or materialman and the public
43 owner. NOTWITHSTANDING ANY OTHER PROVISION OF THIS SECTION OR OTHER
44 LAW, ANY RETAINAGE HELD BY A PUBLIC OWNER OR CONTRACTOR REPRESENTING
45 RETAINAGE FOR A SUBCONTRACTOR'S WORK SHALL BE RELEASED, LESS AN AMOUNT
46 NECESSARY TO SATISFY ANY CLAIMS, LIENS OR JUDGMENTS AGAINST THE SUBCON-
47 TRACTOR OR MATERIALMAN WHICH HAVE NOT BEEN SUITABLY DISCHARGED AND LESS
48 AN AMOUNT NECESSARY TO SATISFY ANY CHARGES FOR UNFINISHED PUNCH LIST
49 ITEMS, NO LATER THAN SIXTY DAYS FROM THE COMPLETION AND ACCEPTANCE BY
50 THE PUBLIC OWNER OF THE SUBCONTRACTOR'S WORK.

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