

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

8473--A

2011-2012 Regular Sessions

I N A S S E M B L Y

June 17, 2011

Introduced by M. of A. BRAUNSTEIN, TENNEY -- read once and referred to the Committee on Governmental Operations -- recommitted to the Committee on Governmental Operations in accordance with Assembly Rule 3, sec. 2 -- 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 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

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

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1 PROJECT WHICH HAVE BEEN DELIVERED AND ACCEPTED, to the contractor
2 provided that there are no requirements by the public owner for the
3 contractor to provide a performance bond and a labor and material bond
4 both in the full amount of the contract. The public owner shall pay IN
5 FULL, upon requisition from the contractor, for ALL materials pertinent
6 to the project which have been delivered to the site or off-site by the
7 contractor and/or subcontractor and suitably stored and secured as
8 required by the public owner and the contractor [provided, the public
9 owner may limit such payment to materials in short and/or critical
10 supply and materials specially fabricated for the project each as
11 defined in the contract]. When the work or major portions thereof as
12 contemplated by the terms of the contract are substantially completed,
13 the contractor shall submit to the public owner and/or [his] ITS agent a
14 requisition for payment of the remaining amount of the contract balance.
15 Upon receipt of such requisition the public owner shall approve and
16 promptly pay the remaining amount of the contract balance less two times
17 the value of any remaining items to be completed and an amount necessary
18 to satisfy any claims, liens or judgments against the contractor which
19 have not been suitably discharged. As the remaining items of work are
20 satisfactorily completed or corrected, the public owner shall promptly
21 pay, upon receipt of a requisition, for these remaining items less an
22 amount necessary to satisfy any claims, liens or judgments against the
23 contractor which have not been suitably discharged. Any claims, liens
24 and judgments referred to in this section shall pertain to the project
25 and shall be filed in accordance with the terms of the applicable
26 contract and/or applicable laws.

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

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

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

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

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

24 2. Payment by contractors to subcontractors. Within seven calendar
25 days of the receipt of any payment from the public owner, the contractor
26 shall pay each of [his] ITS subcontractors and materialmen the proceeds
27 from the payment representing the value of the work performed and/or
28 materials furnished by the subcontractor and/or materialman and reflect-
29 ing the percentage of the subcontractor's work completed or the
30 materialman's material supplied in the requisition approved by the owner
31 and based upon the actual value of the subcontract or purchase order
32 less an amount necessary to satisfy any claims, liens or judgments
33 against the subcontractor or materialman which have not been suitably
34 discharged and, WITH REGARD TO SUBCONTRACTORS, less any retained amount
35 as hereafter described. Failure by the contractor to make any payment,
36 including any remaining amounts of the contract balance as hereinafter
37 described, to any subcontractor or materialman within seven calendar
38 days of the receipt of any payment from the public owner shall result in
39 the commencement and accrual of interest on amounts due to such subcon-
40 tractor or materialman for the period beginning on the day immediately
41 following the expiration of such seven calendar day period and ending on
42 the date on which payment is made by the contractor to such subcontrac-
43 tor or materialman. Such interest shall be the sole responsibility of
44 the contractor, and shall be paid at the rate of interest in effect on
45 the date payment is made by the contractor. Notwithstanding any other
46 provision of law to the contrary, interest shall be computed at the rate
47 established 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 3. Section 756-c of the general business law, as added by chapter
24 127 of the laws of 2002, is amended to read as follows:

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

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

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