

725--A

2013-2014 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2013

Introduced by M. of A. BRAUNSTEIN, TENNEY, NOJAY, SCHIMEL, MONTESANO, HEVESI, RUSSELL -- Multi-Sponsored by -- M. of A. STECK -- 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 -- reported and referred to the Committee on Ways and Means -- 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, ACCEPTED AND

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

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1 ARE COVERED BY A MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET
2 INDUSTRY STANDARDS, to the contractor except that the public owner may
3 retain in excess of five per centum but not more than ten per centum of
4 each progress payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT
5 TO THE PROJECT WHICH HAVE BEEN DELIVERED, ACCEPTED AND ARE COVERED BY A
6 MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS,
7 to the contractor provided that there are no requirements by the public
8 owner for the contractor to provide a performance bond and a labor and
9 material bond both in the full amount of the contract. The public owner
10 shall pay IN FULL, upon requisition from the contractor, for ALL materi-
11 als pertinent to the project which have been delivered to the site or
12 off-site by the contractor and/or subcontractor and suitably stored and
13 secured as required by the public owner and the contractor [provided,
14 the public owner may limit such payment to materials in short and/or
15 critical supply and materials specially fabricated for the project each
16 as defined in the contract]. When the work or major portions thereof as
17 contemplated by the terms of the contract are substantially completed,
18 the contractor shall submit to the public owner and/or [his] ITS agent a
19 requisition for payment of the remaining amount of the contract balance.
20 Upon receipt of such requisition the public owner shall approve and
21 promptly pay the remaining amount of the contract balance less two times
22 the value of any remaining items to be completed and an amount necessary
23 to satisfy any claims, liens or judgments against the contractor which
24 have not been suitably discharged. As the remaining items of work are
25 satisfactorily completed or corrected, the public owner shall promptly
26 pay, upon receipt of a requisition, for these remaining items less an
27 amount necessary to satisfy any claims, liens or judgments against the
28 contractor which have not been suitably discharged. Any claims, liens
29 and judgments referred to in this section shall pertain to the project
30 and shall be filed in accordance with the terms of the applicable
31 contract and/or applicable laws.

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

1 materialman] except that the contractor may retain in excess of five per
2 centum but not more than ten per centum of each payment to the subcon-
3 tractor provided that prior to entering into a subcontract with the
4 contractor, the subcontractor is unable or unwilling to provide a
5 performance bond and a labor and material bond, both in the full amount
6 of the subcontract, at the request of the contractor. THE CONTRACTOR
7 SHALL PAY IN FULL, UPON PAYMENT BY THE PUBLIC OWNER, FOR ALL MATERIALS
8 PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED TO AND ACCEPTED AT
9 THE SITE OR OFF-SITE BY A MATERIALMAN AND ARE COVERED BY A MANUFACTUR-
10 ER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS. However,
11 EXCEPT IN THE CASE OF A MATERIALMAN WHO IS ALSO CONTRACTED TO INSTALL A
12 PRODUCT HE/SHE DELIVERED, the contractor shall retain nothing from those
13 payments representing proceeds owed the subcontractor and/or materialman
14 from the public owner's payments to the contractor for the remaining
15 amounts of the contract balance as provided in subdivision one of this
16 section. If the contractor has failed to submit a requisition for
17 payment of the remaining amounts of the contract balance within ninety
18 days of substantial completion as provided in subdivision one of this
19 section, then any clause in the subcontract between the contractor and
20 the subcontractor or materialman which states that payment by the
21 contractor to such subcontractor or materialman is contingent upon
22 payment by the owner to the contractor shall be deemed invalid. Within
23 seven calendar days of the receipt of payment from the contractor, the
24 subcontractor and/or materialman shall pay each of [his] ITS subcontrac-
25 tors and materialmen in the same manner as the contractor has paid the
26 subcontractor, including interest as herein provided above. Nothing
27 provided herein shall create any obligation on the part of the public
28 owner to pay or to see to the payment of any moneys to any subcontractor
29 or materialman from any contractor nor shall anything provided herein
30 serve to create any relationship in contract or otherwise, implied or
31 expressed, between the subcontractor or materialman and the public
32 owner.

33 S 2. Paragraph (a) of subdivision 1 and subdivision 2 of section 106-b
34 of the general municipal law, paragraph (a) of subdivision 1 as amended
35 by chapter 98 of the laws of 1995 and subdivision 2 as amended by
36 section 15 of part MM of chapter 57 of the laws of 2008, are amended to
37 read as follows:

38 (a) The contractor shall periodically, in accordance with the terms of
39 the contract, submit to the public owner and/or [his] ITS agent a requi-
40 sition for a progress payment for the work performed and/or materials
41 furnished to the date of the requisition less any amount previously paid
42 to the contractor. The public owner shall in accordance with the terms
43 of the contract approve and promptly pay the requisition for the
44 progress payment less an amount necessary to satisfy any claims, liens
45 or judgments against the contractor which have not been suitably
46 discharged and less any retained amount as hereafter described. The
47 public owner shall retain not more than five per centum of each progress
48 payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT TO THE
49 PROJECT WHICH HAVE BEEN DELIVERED, ACCEPTED AND ARE COVERED BY A
50 MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS,
51 to the contractor except that the public owner may retain in excess of
52 five per centum but not more than ten per centum of each progress
53 payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT TO THE
54 PROJECT WHICH HAVE BEEN DELIVERED, ACCEPTED AND ARE COVERED BY A
55 MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS,
56 to the contractor provided that there are no requirements by the public

1 owner for the contractor to provide a performance bond and a labor and
2 material bond both in the full amount of the contract. The public owner
3 shall pay IN FULL, upon requisition from the contractor, for ALL materi-
4 als pertinent to the project which have been delivered to the site or
5 off-site by the contractor and/or subcontractor and suitably stored and
6 secured as required by the public owner and the contractor [provided,
7 the public owner may limit such payment to materials in short and/or
8 critical supply and materials specially fabricated for the project each
9 as defined in the contract]. When the work or major portions thereof as
10 contemplated by the terms of the contract are substantially completed,
11 the contractor shall submit to the public owner and/or [his] ITS agent a
12 requisition for payment of the remaining amount of the contract balance.
13 Upon receipt of such requisition the public owner shall approve and
14 promptly pay the remaining amount of the contract balance less two times
15 the value of any remaining items to be completed and an amount necessary
16 to satisfy any claims, liens or judgments against the contractor which
17 have not been suitably discharged. As the remaining items of work are
18 satisfactorily completed or corrected, the public owner shall promptly
19 pay, upon receipt of a requisition, for these items less an amount
20 necessary to satisfy any claims, liens or judgments against the contrac-
21 tor which have not been suitably discharged. Any claims, liens and judg-
22 ments referred to in this section shall pertain to the project and shall
23 be filed in accordance with the terms of the applicable contract and/or
24 applicable laws. Where the public owner is other than the city of New
25 York, the term "promptly pay" shall mean payment within thirty days,
26 excluding legal holidays, of receipt of the requisition unless such
27 requisition is not approvable in accordance with the terms of the
28 contract. Notwithstanding the foregoing, where the public owner is other
29 than the city of New York and is a municipal corporation which requires
30 an elected official to approve progress payments, "promptly pay" shall
31 mean payment within forty-five days, excluding legal holidays, of
32 receipt of the requisition unless such requisition is not approvable in
33 accordance with the terms of the contract.

34 2. Payment by contractors to subcontractors. Within seven calendar
35 days of the receipt of any payment from the public owner, the contractor
36 shall pay each of [his] ITS subcontractors and materialmen the proceeds
37 from the payment representing the value of the work performed and/or
38 materials furnished by the subcontractor and/or materialman and reflect-
39 ing the percentage of the subcontractor's work completed or the
40 materialman's material supplied in the requisition approved by the owner
41 and based upon the actual value of the subcontract or purchase order
42 less an amount necessary to satisfy any claims, liens or judgments
43 against the subcontractor or materialman which have not been suitably
44 discharged and, WITH REGARD TO SUBCONTRACTORS, less any retained amount
45 as hereafter described. Failure by the contractor to make any payment,
46 including any remaining amounts of the contract balance as hereinafter
47 described, to any subcontractor or materialman within seven calendar
48 days of the receipt of any payment from the public owner shall result in
49 the commencement and accrual of interest on amounts due to such subcon-
50 tractor or materialman for the period beginning on the day immediately
51 following the expiration of such seven calendar day period and ending on
52 the date on which payment is made by the contractor to such subcontract-
53 tor or materialman. Such interest shall be the sole responsibility of
54 the contractor, and shall be paid at the rate of interest in effect on
55 the date payment is made by the contractor. Notwithstanding any other
56 provision of law to the contrary, interest shall be computed at the rate

1 established in paragraph (b) of subdivision one of section seven hundred
2 fifty-six-b of the general business law. The contractor shall retain not
3 more than five per centum of each payment to the subcontractor [and/or
4 materialman] except that the contractor may retain in excess of five per
5 centum but not more than ten per centum of each payment to the subcon-
6 tractor provided that prior to entering into a subcontract with the
7 contractor, the subcontractor is unable or unwilling to provide a
8 performance bond and a labor and material bond both in the full amount
9 of the subcontract at the request of the contractor. THE CONTRACTOR
10 SHALL PAY IN FULL, UPON PAYMENT BY THE PUBLIC OWNER, FOR ALL MATERIALS
11 PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED TO AND ACCEPTED AT
12 THE SITE OR OFF-SITE BY A MATERIALMAN AND ARE COVERED BY A MANUFACTUR-
13 ER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS. However,
14 EXCEPT IN THE CASE OF A MATERIALMAN WHO IS ALSO CONTRACTED TO INSTALL A
15 PRODUCT HE/SHE DELIVERED, the contractor shall retain nothing from those
16 payments representing proceeds owed the subcontractor and/or materialman
17 from the public owner's payments to the contractor for the remaining
18 amounts of the contract balance as provided in subdivision one of this
19 section. If the contractor has failed to submit a requisition for
20 payment of the remaining amounts of the contract balance within ninety
21 days of substantial completion as provided in subdivision one of this
22 section, then any clause in the subcontract between the contractor and
23 the subcontractor or materialman which states that payment by the
24 contractor to such subcontractor or materialman is contingent upon
25 payment by the owner to the contractor shall be deemed invalid. Within
26 seven calendar days of the receipt of payment from the contractor, the
27 subcontractor and/or materialman shall pay each of [his] ITS subcontrac-
28 tors and materialmen in the same manner as the contractor has paid the
29 subcontractor, including interest as herein provided above. Nothing
30 provided herein shall create any obligation on the part of the public
31 owner to pay or to see to the payment of any moneys to any subcontractor
32 or materialman from any contractor nor shall anything provided herein
33 serve to create any relationship in contract or otherwise, implied or
34 expressed, between the subcontractor or materialman and the public
35 owner.

36 S 3. Section 756-c of the general business law, as added by chapter
37 127 of the laws of 2002, is amended to read as follows:

38 S 756-c. Retention. 1. By mutual agreement of the relevant parties an
39 owner may retain a reasonable amount of the contract sum as retainage. A
40 contractor or subcontractor may also retain a reasonable amount for
41 retainage so long as the amount does not exceed the actual percentage
42 retained by the owner. Retainage shall be released by the owner to the
43 contractor no later than thirty days after the final approval of the
44 work under a construction contract. In the event that an owner fails to
45 release retainage as required by this article, or the contractor or
46 subcontractor fails to release a proportionate amount of retainage to
47 the relevant parties after receipt of retainage from the owner, the
48 owner, contractor, or subcontractor, as the case may be, shall be
49 subject to the payment of interest at the rate of one percent per month
50 on the date retention was due and owing.

51 2. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION ONE OF THIS SECTION,
52 NO PORTION OF ANY PAYMENT DUE AND OWING TO A MATERIAL SUPPLIER FOR MATE-
53 RIALS WHICH HAVE BEEN DELIVERED, ACCEPTED AND ARE COVERED BY A MANUFAC-
54 Turer's WARRANTY, AND/OR GRADED TO MEET INDUSTRY STANDARDS SHALL BE
55 RETAINED BY AN OWNER, CONTRACTOR OR SUBCONTRACTOR.

1 S 4. This act shall take effect on the thirtieth day after it shall
2 have become a law and shall apply to materials delivered and accepted on
3 or after such effective date.