

980--A

2013-2014 Regular Sessions

I N S E N A T E

(PREFILED)

January 9, 2013

Introduced by Sens. LIBOUS, GRIFFO, HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- recommitted to the Committee on Finance in accordance with Senate Rule 6, sec. 8 -- 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  
17 ARE COVERED BY A MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET  
18 INDUSTRY STANDARDS, to the contractor except that the public owner may

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

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

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

1 tractor provided that prior to entering into a subcontract with the  
2 contractor, the subcontractor is unable or unwilling to provide a  
3 performance bond and a labor and material bond, both in the full amount  
4 of the subcontract, at the request of the contractor. THE CONTRACTOR  
5 SHALL PAY IN FULL, UPON PAYMENT BY THE PUBLIC OWNER, FOR ALL MATERIALS  
6 PERTINENT TO THE PROJECT WHICH HAVE BEEN DELIVERED TO AND ACCEPTED AT  
7 THE SITE OR OFF-SITE BY A MATERIALMAN AND ARE COVERED BY A MANUFACTUR-  
8 ER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS. However,  
9 EXCEPT IN THE CASE OF A MATERIALMAN WHO IS ALSO CONTRACTED TO INSTALL A  
10 PRODUCT HE/SHE DELIVERED, the contractor shall retain nothing from those  
11 payments representing proceeds owed the subcontractor and/or materialman  
12 from the public owner's payments to the contractor for the remaining  
13 amounts of the contract balance as provided in subdivision one of this  
14 section. If the contractor has failed to submit a requisition for  
15 payment of the remaining amounts of the contract balance within ninety  
16 days of substantial completion as provided in subdivision one of this  
17 section, then any clause in the subcontract between the contractor and  
18 the subcontractor or materialman which states that payment by the  
19 contractor to such subcontractor or materialman is contingent upon  
20 payment by the owner to the contractor shall be deemed invalid. Within  
21 seven calendar days of the receipt of payment from the contractor, the  
22 subcontractor and/or materialman shall pay each of [his] ITS subcontrac-  
23 tors and materialmen in the same manner as the contractor has paid the  
24 subcontractor, including interest as herein provided above. Nothing  
25 provided herein shall create any obligation on the part of the public  
26 owner to pay or to see to the payment of any moneys to any subcontractor  
27 or materialman from any contractor nor shall anything provided herein  
28 serve to create any relationship in contract or otherwise, implied or  
29 expressed, between the subcontractor or materialman and the public  
30 owner.

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

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

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

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 make any payment,  
44 including any remaining amounts of the contract balance as hereinafter  
45 described, to any subcontractor or materialman within seven calendar  
46 days of the receipt of any payment from the public owner shall result in  
47 the commencement and accrual of interest on amounts due to such subcon-  
48 tractor or materialman for the period beginning on the day immediately  
49 following the expiration of such seven calendar day period and ending on  
50 the date on which payment is made by the contractor to such subcontrac-  
51 tor or materialman. Such interest shall be the sole responsibility of  
52 the contractor, and shall be paid at the rate of interest in effect on  
53 the date payment is made by the contractor. Notwithstanding any other  
54 provision of law to the contrary, interest shall be computed at the rate  
55 established in paragraph (b) of subdivision one of section seven hundred  
56 fifty-six-b of the general business law. The contractor shall retain not

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

34 S 3. Section 756-c of the general business law, as added by chapter  
35 127 of the laws of 2002, is amended to read as follows:

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

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

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