

9868--A

I N A S S E M B L Y

April 20, 2016

Introduced by M. of A. CUSICK -- 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 payment in construction contracts

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivision 1 of section 139-f of the state finance law, as
2 added by chapter 769 of the laws of 1978, is amended to read as follows:
3 1. Payment by public owners to contractors. The contractor shall peri-
4 odically, in accordance with the terms of the contract, submit to the
5 public owner and/or his agent a requisition for a progress payment for
6 the work performed and/or materials furnished to the date of the requi-
7 sition, less any amount previously paid to the contractor. The public
8 owner shall in accordance with the terms of the contract approve and
9 promptly pay the requisition for the progress payment less an amount
10 necessary to satisfy any claims, liens or judgments against the contrac-
11 tor which have not been suitably discharged and less any retained amount
12 as hereafter described. The public owner shall retain not more than five
13 per centum of each progress payment to the contractor except that the
14 public owner may retain in excess of five per centum but not more than
15 ten per centum of each progress payment to the contractor provided that
16 there are no requirements by the public owner for the contractor to
17 provide a performance bond and a labor and material bond both in the
18 full amount of the contract. The public owner shall pay, upon requisition
19 from the contractor, for materials pertinent to the project which
20 have been delivered to the site or off-site by the contractor and/or
21 subcontractor and suitably stored and secured as required by the public
22 owner and the contractor provided, the public owner may limit such
23 payment to materials in short and/or critical supply and materials
24 specially fabricated for the project each as defined in the contract.
25 When the work or major portions thereof as contemplated by the terms of
26 the contract [are substantially completed] HAS REACHED SUBSTANTIAL
27 COMPLETION WHICH, FOR THE PURPOSES OF THIS SECTION, SHALL MEAN THE STATE

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

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1 IN THE PROGRESS OF THE PROJECT WHEN THE WORK REQUIRED BY THE CONTRACT
2 WITH THE PUBLIC OWNER IS SUFFICIENTLY COMPLETE IN ACCORDANCE WITH THE
3 CONTRACT SO THAT THE PUBLIC OWNER MAY OCCUPY OR UTILIZE THE WORK FOR ITS
4 INTENDED USE; PROVIDED FURTHER, THAT "SUBSTANTIAL COMPLETION" SHALL
5 APPLY TO THE ENTIRE PROJECT OR A PORTION OF THE ENTIRE PROJECT IF THE
6 CONTRACT WITH THE PUBLIC OWNER PROVIDES FOR OCCUPANCY OR USE OF A
7 PORTION OF THE PROJECT, the contractor shall submit to the public owner
8 and/or his agent a requisition for payment of the remaining amount of
9 the contract balance. Upon receipt of such requisition the public owner
10 shall approve and promptly pay the remaining amount of the contract
11 balance less two times the value of any remaining items to be completed
12 and an amount necessary to satisfy any claims, liens or judgments
13 against the contractor which have not been suitably discharged. As the
14 remaining items of work are satisfactorily completed or corrected, the
15 public owner shall promptly pay, upon receipt of a requisition, for
16 these remaining items less an amount necessary to satisfy any claims,
17 liens or judgments against the contractor which have not been suitably
18 discharged. Any claims, liens and judgments referred to in this section
19 shall pertain to the project and shall be filed in accordance with the
20 terms of the applicable contract and/or applicable laws.

21 S 2. Subdivision 1-a of section 139-f of the state finance law is
22 renumbered 1-b and a new subdivision 1-a is added to read as follows:

23 1-A. NOT LATER THAN FOURTEEN CALENDAR DAYS AFTER THE DATE WHEN THE
24 PROJECT HAS REACHED SUBSTANTIAL COMPLETION, THE PUBLIC OWNER SHALL
25 SUBMIT TO THE CONTRACTOR A WRITTEN LIST DESCRIBING ALL REMAINING ITEMS
26 TO BE COMPLETED BY THE CONTRACTOR. NOT LATER THAN SEVEN CALENDAR DAYS
27 AFTER RECEIVING A WRITTEN LIST DESCRIBING ALL REMAINING ITEMS TO BE
28 COMPLETED BY THE CONTRACTOR, THE CONTRACTOR SHALL SUBMIT TO EACH SUBCON-
29 TRACTOR FROM WHOM THE CONTRACTOR IS WITHHOLDING RETAINAGE A WRITTEN LIST
30 OF ALL REMAINING ITEMS REQUIRED TO BE COMPLETED BY THE SUBCONTRACTOR.
31 SUCH LIST MAY INCLUDE ITEMS IN ADDITION TO THOSE ITEMS ON THE PUBLIC
32 OWNER'S LIST.

33 S 3. Subdivision 1 of section 106-b of the general municipal law, as
34 amended by chapter 661 of the laws of 1992, paragraphs (a) and (c) as
35 amended by chapter 98 of the laws of 1995, is amended to read as
36 follows:

37 1. Payment by public owners to contractors. (a) The contractor shall
38 periodically, in accordance with the terms of the contract, submit to
39 the public owner and/or his agent a requisition for a progress payment
40 for the work performed and/or materials furnished to the date of the
41 requisition less any amount previously paid to the contractor. The
42 public owner shall in accordance with the terms of the contract approve
43 and promptly pay the requisition for the progress payment less an amount
44 necessary to satisfy any claims, liens or judgments against the contrac-
45 tor which have not been suitably discharged and less any retained amount
46 as hereafter described. The public owner shall retain not more than five
47 per centum of each progress payment to the contractor except that the
48 public owner may retain in excess of five per centum but not more than
49 ten per centum of each progress payment to the contractor provided that
50 there are no requirements by the public owner for the contractor to
51 provide a performance bond and a labor and material bond both in the
52 full amount of the contract. The public owner shall pay, upon requisiti-
53 tion from the contractor, for materials pertinent to the project which
54 have been delivered to the site or off-site by the contractor and/or
55 subcontractor and suitably stored and secured as required by the public
56 owner and the contractor provided, the public owner may limit such

1 payment to materials in short and/or critical supply and materials
2 specially fabricated for the project each as defined in the contract.
3 When the work or major portions thereof as contemplated by the terms of
4 the contract [are substantially completed] HAS REACHED SUBSTANTIAL
5 COMPLETION WHICH, FOR THE PURPOSES OF THIS SECTION, SHALL MEAN, FOR
6 PUBLIC OWNERS OTHER THAN SCHOOL DISTRICTS AND BOARDS OF COOPERATIVE
7 EDUCATIONAL SERVICES, THE STATE IN THE PROGRESS OF THE PROJECT WHEN THE
8 WORK REQUIRED BY THE CONTRACT WITH THE PUBLIC OWNER IS SUFFICIENTLY
9 COMPLETE IN ACCORDANCE WITH THE CONTRACT SO THAT THE PUBLIC OWNER MAY
10 OCCUPY OR UTILIZE THE WORK FOR ITS INTENDED USE AND SHALL MEAN, FOR
11 SCHOOL DISTRICTS AND BOARDS OF COOPERATIVE EDUCATIONAL SERVICES, IS THE
12 DATE THE PARTIAL OR FINAL CERTIFICATE OF SUBSTANTIAL COMPLETION OF THE
13 PROJECT WHICH IS THE DATE CERTIFIED BY THE ARCHITECT OR ENGINEER WHEN
14 THE CONSTRUCTION IS CODE COMPLIANT AND SUBSTANTIALLY COMPLETE IN ACCORD-
15 ANCE WITH THE CONTRACT DOCUMENTS SO THE SCHOOL DISTRICT CAN OCCUPY OR
16 UTILIZE THE PROJECT OR PORTION THEREOF FOR ITS INTENDED USE, the
17 contractor shall submit to the public owner and/or his agent a requisiti-
18 tion for payment of the remaining amount of the contract balance. Upon
19 receipt of such requisition the public owner shall approve and promptly
20 pay the remaining amount of the contract balance less two times the
21 value of any remaining items to be completed and an amount necessary to
22 satisfy any claims, liens or judgments against the contractor which have
23 not been suitably discharged. As the remaining items of work are satis-
24 factorily completed or corrected, the public owner shall promptly pay,
25 upon receipt of a requisition, for these items less an amount necessary
26 to satisfy any claims, liens or judgments against the contractor which
27 have not been suitably discharged. Any claims, liens and judgments
28 referred to in this section shall pertain to the project and shall be
29 filed in accordance with the terms of the applicable contract and/or
30 applicable laws. Where the public owner is other than the city of New
31 York, the term "promptly pay" shall mean payment within thirty days,
32 excluding legal holidays, of receipt of the requisition unless such
33 requisition is not approvable in accordance with the terms of the
34 contract. Notwithstanding the foregoing, where the public owner is other
35 than the city of New York and is a municipal corporation which requires
36 an elected official to approve progress payments, "promptly pay" shall
37 mean payment within forty-five days, excluding legal holidays, of
38 receipt of the requisition unless such requisition is not approvable in
39 accordance with the terms of the contract.

40 (b) NOT LATER THAN FOURTEEN CALENDAR DAYS AFTER THE DATE WHEN THE
41 PROJECT HAS REACHED SUBSTANTIAL COMPLETION, THE PUBLIC OWNER SHALL
42 SUBMIT TO THE CONTRACTOR A WRITTEN LIST DESCRIBING ALL REMAINING ITEMS
43 TO BE COMPLETED BY THE CONTRACTOR. NOT LATER THAN SEVEN CALENDAR DAYS
44 AFTER RECEIVING A WRITTEN LIST DESCRIBING ALL REMAINING ITEMS TO BE
45 COMPLETED BY THE CONTRACTOR, THE CONTRACTOR SHALL SUBMIT TO EACH SUBCON-
46 TRACTOR FROM WHOM THE CONTRACTOR IS WITHHOLDING RETAINAGE A WRITTEN LIST
47 OF ALL REMAINING ITEMS REQUIRED TO BE COMPLETED BY THE SUBCONTRACTOR.
48 SUCH LIST MAY INCLUDE ITEMS IN ADDITION TO THOSE ITEMS ON THE PUBLIC
49 OWNER'S LIST.

50 (C) Each public owner other than the city of New York which is
51 required to make a payment from public funds pursuant to a contract and
52 which does not make such contract payment by the required payment date
53 shall make an interest payment to the contractor on the amount of the
54 contract payment which is due unless failure to make such contract
55 payment is the result of a lien, attachment, or other legal process
56 against the money due said contractor, or unless the amount of the

1 interest payment as computed in accordance with the provisions set forth
2 hereinafter is less than ten dollars. Interest payments on amounts due
3 to a contractor pursuant to this paragraph shall be paid to the contrac-
4 tor for the period beginning on the day after the required payment date
5 and ending on the payment date for those payments required according to
6 this section and shall be paid at the rate of interest in effect on the
7 date when the interest payment is made. Notwithstanding any other
8 provision of law to the contrary, interest shall be computed at the rate
9 equal to the overpayment rate set by the commissioner of taxation and
10 finance pursuant to subsection (e) of section one thousand ninety-six of
11 the tax law. A pro rata share of such interest shall be paid by the
12 contractor or subcontractor, as the case may be, to subcontractors and
13 materialmen in a proportion equal to the percentage of their pro rata
14 share of the contract payment. Such pro rata share of interest shall be
15 due to such subcontractors and materialmen only for those payments which
16 are not paid to such subcontractors and materialmen prior to the date
17 upon which interest begins to accrue between the public owner and the
18 contractor. Such pro rata shares of interest shall be computed daily
19 until such payments are made to the subcontractors and materialmen.

20 [(c)] (D) For projects of a public owner other than the city of New
21 York, if state funds directly related to and which have been budgeted
22 for the construction of the project for which the payment is due have
23 not been received prior to the expiration of the thirty or forty-five
24 days specified in paragraph (a) of this subdivision, the interest
25 provided for in paragraph [(b)] (C) of this subdivision shall not begin
26 to accrue and payment shall not be due, until ten days after receipt of
27 the state funds. Nothing in this paragraph shall prevent the public
28 owner from approving the requisition, subject to receipt of the state
29 funds. State funds shall mean monies provided to the public owner by the
30 state, its officers, boards, departments, commissions, or a public
31 authority and public benefit corporation, a majority of the members of
32 which have been appointed by the governor or who serve as members by
33 virtue of holding a civil office of the state, or a combination thereof.

34 S 4. This act shall take effect immediately and shall apply to
35 contracts entered into on and after such effective date.