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

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I N S E N A T E

May 11, 2016

Introduced by Sen. MARTINS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to the obligation to subcontractors in construction contracts

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

Section 1. Subdivision 1 of section 756 of the general business law, as amended by chapter 417 of the laws of 2009, is amended to read as follows:

1. "Construction contract" means a written or oral agreement for the construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement, or relating to the excavation of or other development or improvement to land, and where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds one hundred fifty thousand dollars. For the purposes of this article a construction contract shall not include any such contract made and awarded by the state, any public department, any public benefit corporation, any public corporation or official thereof, or a municipal corporation or official thereof for construction, reconstruction, alteration, repair, maintenance, moving or demolition of any public works project nor any contract with a contractor or subcontractor which is part of such project; or any such contract the purpose of which is the construction, reconstruction, alteration, repair, maintenance, moving or demolition of an individual one, two or three family residential dwelling or a residential tract development of one hundred or less one or two family dwellings, or any residential construction project where the aggregate size of such project is four thousand five hundred square feet or less, or any residential project of fewer than seventy-five units which receives financial assistance from the federal government, the state or a municipal entity designed for households earning an average of one hundred twenty-five percent of the housing and urban development agency area median income, PROVIDED, HOWEVER, THAT THE PROVISIONS OF THIS SUBDIVISION AS BETWEEN A CONTRACTOR AND A SUBCONTRACTOR SHALL NOT

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

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BE SO LIMITED AND THEY SHALL APPLY TO ALL ORAL OR WRITTEN CONTRACTS OR UNDERSTANDINGS.

S 2. The opening paragraph of section 756-a of the general business law, as amended by chapter 417 of the laws of 2009, is amended to read as follows:

It is the policy and purpose of this article to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts. Except as otherwise provided in this article, the terms and conditions of a construction contract shall supersede the provisions of this article and govern the conduct of the parties thereto. NO CONTRACT BETWEEN A CONTRACTOR AND A SUBCONTRACTOR SHALL EXPRESSLY OR IMPLIEDLY BE CONSTRUED IN A MANNER WHICH IS DETRIMENTAL TO THE RIGHTS OF A SUBCONTRACTOR TO BE PAID FOR WORK PERFORMED OR SERVICES PROVIDED IN OTHER THAN A TIMELY MANNER.

S 3. Subdivision 2 of section 756-a of the general business law is amended by adding two new paragraphs (c) and (d) to read as follows:

(C) NOTHING IN THIS SUBDIVISION SHALL AUTHORIZE AN OWNER OR CONTRACTOR TO WITHHOLD PAYMENT TO A SUBCONTRACTOR UNLESS BY CLEAR AND CONVINCING EVIDENCE, DOCUMENTED IN WRITING, THAT WORK PERFORMED BY A SUBCONTRACTOR WAS DEFICIENT OR DONE OTHER THAN AS SPECIFIED IN THE CONTRACT.

(D) WHERE THERE IS ANY OBJECTION TO ANY ALLEGATION MADE BY AN OWNER WITH RESPECT TO A SUBMITTED INVOICE, A CONTRACTOR OR SUBCONTRACTOR, AS THE CASE MAY BE, SHALL BE ENTITLED TO CURE ANY DEFECT OR SATISFY ANY OBJECTION FORTHWITH. SHOULD SUCH ATTEMPT TO CURE OR SATISFY BE DISAPPROVED BY THE OWNER, THE CONTRACTOR OR SUBCONTRACTOR MAY DEMAND AN IMMEDIATE EXPEDITED ARBITRATION BY THE AMERICAN ARBITRATION ASSOCIATION OF SUCH DISAPPROVAL. INCLUDED IN SUCH RIGHT TO ARBITRATION THERE SHALL BE THE RIGHT TO ARBITRATE ANY OBJECTION ALLEGING THAT THE NOTICE TO CURE IS NOT SUFFICIENTLY DETAILED SO AS TO ENABLE A TIMELY REPLACEMENT, REPAIR, OR SOLUTION TO ANY OBJECTION RAISED BY AN OWNER, OR THAT THE INVOICE SUBMITTED BY THE CONTRACTOR OR SUBCONTRACTOR IS NOT A FINAL INVOICE.

S 4. Subparagraph (i) of paragraph (a) of subdivision 3 of section 756-a of the general business law, as amended by chapter 417 of the laws of 2009, is amended to read as follows:

(i) Unless the provisions of this article provide otherwise, the owner shall pay the contractor strictly in accordance with the terms of the construction contract AND THE CONTRACTOR SHALL IMMEDIATELY PAY ANY SUBCONTRACTOR AMOUNTS DUE FROM SUCH PAYMENT.

S 5. Section 756-a of the general business law is amended by adding a new subdivision 5 to read as follows:

5. PERFORMANCE OF THE SUBCONTRACTOR. IT SHALL BE PRESUMED THAT ANY SUBCONTRACTOR PERFORMING WORK FOR A CONTRACTOR HAS ACTED IN GOOD FAITH IN ACCORDANCE WITH THE CONTRACT, USED PROPER MATERIALS AND OTHERWISE PERFORMED IN ACCORDANCE WITH GENERALLY APPLICABLE STANDARDS IN THE INDUSTRY AND A CONTRACTOR MAY REFUSE SUCH PRESUMPTION ONLY BY CLEAR AND CONVINCING EVIDENCE TO THE CONTRARY.

S 6. Clause (A) of subparagraph (iv) of paragraph (b) of subdivision 2 of section 756-b of the general business law, as amended by chapter 417 of the laws of 2009, is amended to read as follows:

(A) A contractor or subcontractor that suspends performance as provided in this section shall not be required to furnish further labor, materials or services until the contractor or subcontractor is paid the undisputed invoice amount at the time period for completion as provided in the construction contract, or a final determination has been made in compliance with subdivision three of this section and complied with. All of the time frames established within this section shall be extended for

the length of time performance was suspended. Payment of documented actual costs incurred for re-mobilization resulting from suspension shall be negotiated between the parties. WHERE A SUBCONTRACTOR CAN DEMONSTRATE THAT THE UNREASONABLE WITHHOLDING OF AMOUNTS DUE TO HIM OR HER HAVE RESULTED IN LOST TIME HE OR SHE MAY HAVE SPENT IN PERFORMING ADDITIONAL WORK FOR ANOTHER CONTRACTOR OR OWNER, THE ARBITRATOR CHARGED WITH CONDUCTING THE ARBITRATION PROCEEDING MAY AWARD MONIES OCCASIONED BY SUCH WITHHOLDING.

S 7. Paragraphs (c) and (d) of subdivision 3 of section 756-b of the general business law, as added by chapter 417 of the laws of 2009, are amended to read as follows:

(c) If efforts to resolve such matter to the satisfaction of all parties are unsuccessful, the aggrieved party may refer the matter, not less than fifteen days of the receipt of third party verification of delivery of the complaint, to the American Arbitration Association for an expedited arbitration pursuant to the Rules of the American Arbitration Association. WHERE THE DISPUTE IN QUESTION IS BROUGHT BY A SUBCONTRACTOR, THE ARBITRATOR SHALL FIRST REQUIRE THE CONTRACTOR OR OWNER TO POST A PERFORMANCE BOND IN THE AMOUNT OF THE DEMAND PAYMENT. FAILURE TO POST SUCH BOND WITHIN FIVE DAYS AFTER THE REQUIREMENT IS SO IMPOSED SHALL RESULT IN AN IMMEDIATE AWARD TO THE SUBCONTRACTOR AND SUCH DECISION SHALL NOT BE APPEALABLE.

(d) Upon conclusion of the arbitration proceedings, the arbitrator shall submit to the parties his or her opinion and award regarding the alleged violation. WHERE THE ARBITRATOR DETERMINES THAT A SUBCONTRACTOR IS ENTITLED TO AN AWARD HE OR SHE SHALL ORDER THE CONTRACTOR OR OWNER, AS THE CASE MAY BE, TO PAY THE REASONABLE ATTORNEY FEES INCURRED BY THE SUBCONTRACTOR AND ANY MONIES THE SUBCONTRACTOR MAY HAVE EARNED DURING THE TIME SPENT IN ATTENDING TO SUCH PROCEEDING. WHERE THE ARBITRATOR CONCLUDES THE WITHHOLDING PAYMENT TO A SUBCONTRACTOR WAS ESPECIALLY EGREGIOUS AND A DELAY IN PAYMENT WAS UNFAIRLY WITHHELD, HE OR SHE MAY AWARD PUNITIVE DAMAGES AS HE OR SHE DEEMS WARRANTED.

S 8. This act shall take effect on the ninetieth day after it shall have become a law.