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I N   S E N A T E

May 12, 2016

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Introduced by Sen. AMEDORE -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

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  
19 retain in excess of five per centum but not more than ten per centum of  
20 each progress payment, NOT INCLUDING ANY PAYMENT FOR MATERIALS PERTINENT  
21 TO THE PROJECT WHICH HAVE BEEN DELIVERED, ACCEPTED AND ARE COVERED BY A  
22 MANUFACTURER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS,  
23 to the contractor provided that there are no requirements by the public  
24 owner for the contractor to provide a performance bond and a labor and  
25 material bond both in the full amount of the contract. The public owner

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

LBD02317-01-5

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 remaining items less an  
18 amount necessary to satisfy any claims, liens or judgments against the  
19 contractor which have not been suitably discharged. Any claims, liens  
20 and judgments referred to in this section shall pertain to the project  
21 and shall be filed in accordance with the terms of the applicable  
22 contract and/or applicable laws.

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

1 ER'S WARRANTY, AND/OR ARE GRADED TO MEET INDUSTRY STANDARDS. However,  
2 EXCEPT IN THE CASE OF A MATERIALMAN WHO IS ALSO CONTRACTED TO INSTALL A  
3 PRODUCT HE/SHE DELIVERED, the contractor shall retain nothing from those  
4 payments representing proceeds owed the subcontractor and/or materialman  
5 from the public owner's payments to the contractor for the remaining  
6 amounts of the contract balance as provided in subdivision one of this  
7 section. If the contractor has failed to submit a requisition for  
8 payment of the remaining amounts of the contract balance within ninety  
9 days of substantial completion as provided in subdivision one of this  
10 section, then any clause in the subcontract between the contractor and  
11 the subcontractor or materialman which states that payment by the  
12 contractor to such subcontractor or materialman is contingent upon  
13 payment by the owner to the contractor shall be deemed invalid. Within  
14 seven calendar days of the receipt of payment from the contractor, the  
15 subcontractor and/or materialman shall pay each of [his] ITS subcontractors  
16 and materialmen in the same manner as the contractor has paid the  
17 subcontractor, including interest as herein provided above. Nothing  
18 provided herein shall create any obligation on the part of the public  
19 owner to pay or to see to the payment of any moneys to any subcontractor  
20 or materialman from any contractor nor shall anything provided herein  
21 serve to create any relationship in contract or otherwise, implied or  
22 expressed, between the subcontractor or materialman and the public  
23 owner.

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

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

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

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

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

27 S 3. Section 756-c of the general business law, as added by chapter  
28 127 of the laws of 2002, is amended to read as follows:

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

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

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