

# STATE OF NEW YORK

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241

2017-2018 Regular Sessions

## IN ASSEMBLY

January 5, 2017

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Introduced by M. of A. BICHOTTE -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law and the general municipal law, in relation to payment by public owners to contractors and subcontractors

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The opening paragraph and subdivisions 1 and 2 of section  
2 139-f of the state finance law, the opening paragraph and subdivision 1  
3 as added by chapter 769 of the laws of 1978, and subdivision 2 as  
4 amended by section 16 of part MM of chapter 57 of the laws of 2008, are  
5 amended to read as follows:

6 Notwithstanding the provisions of any other law to the contrary,  
7 except the provisions of section thirty-eight of the highway law, all  
8 contracts made and awarded by the state, or by any public department, or  
9 by any public benefit corporation or by any public corporation or official  
10 thereof, hereafter referred to as the public owner, for  
11 construction, reconstruction or alteration of any public work project  
12 shall provide for payment by the public owner to the contractor and  
13 ~~[payment by the contractor]~~ to the subcontractor or subcontractors in  
14 accordance with the following:

15 1. Payment by public owners to contractors. The contractor shall periodically,  
16 in accordance with the terms of the contract, submit to the  
17 public owner and/or his agent a requisition for a progress payment for  
18 the work performed and/or materials furnished to the date of the requisition  
19 by the contractor and all subcontractors, less any amount previously  
20 paid to the contractor or subcontractors. The public owner shall  
21 in accordance with the terms of the contract approve and promptly pay  
22 the requisition for the progress payment less an amount necessary to  
23 satisfy any claims, liens or judgments against the contractor or subcontractors  
24 which have not been suitably discharged and less any retained  
25 amount as hereafter described. The public owner shall retain not more

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

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1 than five per centum of each progress payment to the contractor and  
2 subcontractors except that the public owner may retain in excess of five  
3 per centum but not more than ten per centum of each progress payment to  
4 the contractor provided that there are no requirements by the public  
5 owner for the contractor to provide a performance bond and a labor and  
6 material bond both in the full amount of the contract. The public owner  
7 shall pay, upon requisition from the contractor, for materials pertinent  
8 to the project which have been delivered to the site or off-site by the  
9 contractor [~~and/or subcontractor~~] and suitably stored and secured as  
10 required by the public owner and the contractor provided, the public  
11 owner may limit such payment to materials in short and/or critical  
12 supply and materials specially fabricated for the project each as  
13 defined in the contract. When the work or major portions thereof as  
14 contemplated by the terms of the contract are substantially completed,  
15 the contractor shall submit to the public owner and/or his agent a  
16 requisition for payment of the remaining amount of the contract balance,  
17 including balances owed to subcontractors. Upon receipt of such requi-  
18 sition the public owner shall approve and promptly pay the remaining  
19 amount of the contract balance less two times the value of any remaining  
20 items to be completed and an amount necessary to satisfy any claims,  
21 liens or judgments against the contractor which have not been suitably  
22 discharged. As the remaining items of work are satisfactorily completed  
23 or corrected, the public owner shall promptly pay, upon receipt of a  
24 requisition, for these remaining items less an amount necessary to  
25 satisfy any claims, liens or judgments against the contractor which have  
26 not been suitably discharged. Any claims, liens and judgments referred  
27 to in this section shall pertain to the project and shall be filed in  
28 accordance with the terms of the applicable contract and/or applicable  
29 laws.

30 2. Payment by [~~contractors~~] public owners to subcontractors. [~~Within~~  
31 ~~seven calendar days of the receipt~~] (a) Each subcontractor shall period-  
32 ically, in accordance with the terms of the contract, submit to the  
33 public owner and/or his agent and to the contractor and/or his agent a  
34 requisition for a progress payment for the work performed and/or materi-  
35 als furnished to the date of the requisition, less any amount previously  
36 paid to the contractor. At the time of any payment [~~from~~] by the public  
37 owner[7] to the contractor as provided in subdivision one of this  
38 section, the public owner shall pay each of [~~his~~] the subcontractors and  
39 materialmen the proceeds from the payment representing the value of the  
40 work performed and/or materials furnished by the subcontractor and/or  
41 materialman and reflecting the percentage of the subcontractor's work  
42 completed or the materialman's material supplied in the requisition  
43 approved by the owner and based upon the actual value of the subcontract  
44 or purchase order less an amount necessary to satisfy any claims, liens  
45 or judgments against the subcontractor or materialman which have not  
46 been suitably discharged and less any retained amount as hereafter  
47 described. [~~Failure by the contractor to pay any subcontractor or mater-~~  
48 ialman within seven calendar days of the receipt of any payment from the  
49 public owner shall result in the commencement and accrual of interest on  
50 amounts due to such subcontractor or materialman for the period begin-  
51 ning on the day immediately following the expiration of such seven  
52 calendar day period and ending on the date on which payment is made by  
53 the contractor to such subcontractor or materialman. Such interest  
54 payment shall be the sole responsibility of the contractor, and shall be  
55 paid at the rate of interest in effect on the date payment is made by  
56 the contractor. Notwithstanding any other provision of law to the

~~contrary, interest shall be computed at the rate established in paragraph (b) of subdivision one of section seven hundred fifty-six b of the general business law. The contractor shall retain not more than five per centum of each payment to the subcontractor and/or materialman except that the contractor may retain in excess of five per centum but not more than ten per centum of each payment to the subcontractor provided that prior to entering into a subcontract with the contractor, the subcontractor is unable or unwilling to provide a performance bond and a labor and material bond, both in the full amount of the subcontract, at the request of the contractor. However, the contractor shall retain nothing from those payments representing proceeds owed the subcontractor and/or materialman from the public owner's payments to the contractor for the remaining amounts of the contract balance as provided in subdivision one of this section. If the contractor has failed to submit a requisition for payment of the remaining amounts of the contract balance within ninety days of substantial completion as provided in subdivision one of this section, then any clause in the subcontract between the contractor and the subcontractor or materialman which states that payment by the contractor to such subcontractor or materialman is contingent upon payment by the owner to the contractor shall be deemed invalid. Within seven calendar days of the receipt of payment from the contractor, the subcontractor and/or materialman shall pay each of his subcontractors and materialmen in the same manner as the contractor has paid the subcontractor, including interest as herein provided above. Nothing provided herein shall create any obligation on the part of the public owner to pay or to see to the payment of any moneys to any subcontractor or materialman from any contractor nor shall anything provided herein serve to create any relationship in contract or otherwise, implied or expressed, between the subcontractor or materialman and the public owner.]~~

The public owner shall retain not more than five per centum of each progress payment to the subcontractor except that the public owner may retain in excess of five per centum but not more than ten per centum of each progress payment to the subcontractor provided that there are no requirements by the public owner for the subcontractor to provide a performance bond and a labor and material bond both in the full amount of the contract. The public owner shall pay, upon requisition from the contractor as provided in subdivision one of this section, for materials pertinent to the project which have been delivered to the site or off-site by the subcontractor and suitably stored and secured as required by the public owner and the subcontractor provided, the public owner may limit such payment to materials in short and/or critical supply and materials specially fabricated for the project each as defined in the contract. When the work or major portions thereof as contemplated by the terms of the contract are substantially completed, the subcontractor shall submit to the contractor and/or his or her agent a requisition for payment of the remaining amount of the contract balance. The contractor shall submit a contract requisition containing all requisitions from subcontractors to the public owner. Upon receipt of such requisition the public owner shall approve and promptly pay the remaining amount of the contract balance less two times the value of any remaining items to be completed and an amount necessary to satisfy any claims, liens or judgments against the subcontractor which have not been suitably discharged. As the remaining items of work are satisfactorily completed or corrected, the public owner shall promptly pay, upon receipt of a requisition, for these remaining items less an amount necessary to satisfy any claims, liens or judgments against the subcontractor which have not

1 been suitably discharged. Any claims, liens and judgments referred to in  
2 this section shall pertain to the project and shall be filed in accord-  
3 ance with the terms of the applicable contract and/or applicable laws.

4 (b) As used in this section, "subcontractor" means only those subcon-  
5 tractors that report directly to the main contractor with whom the  
6 public owner has entered into the contract, and does not include subcon-  
7 tractors of subcontractors.

8 § 2. The opening paragraph and subdivisions 1 and 2 of section 106-b  
9 of the general municipal law, the opening paragraph and subdivision 1 as  
10 amended by chapter 661 of the laws of 1992, paragraphs (a) and (c) of  
11 subdivision 1 as amended by chapter 98 of the laws of 1995, and subdivi-  
12 sion 2 as amended by section 15 of part MM of chapter 57 of the laws of  
13 2008, are amended to read as follows:

14 Notwithstanding the provisions of any other law to the contrary, all  
15 contracts made and awarded by the appropriate officer, board or agency  
16 of a political subdivision or of any district therein, hereafter  
17 referred to as the public owner, for construction, reconstruction or  
18 alteration of any public work project shall provide for payment by the  
19 public owner to the contractor and [~~payment by the contractor~~] to the  
20 subcontractor or subcontractors in accordance with the following:

21 1. Payment by public owners to contractors. (a) The contractor shall  
22 periodically, in accordance with the terms of the contract, submit to  
23 the public owner and/or his agent a requisition for a progress payment  
24 for the work performed and/or materials furnished to the date of the  
25 requisition by the contractor and all subcontractors less any amount  
26 previously paid to the contractor or subcontractors. The public owner  
27 shall in accordance with the terms of the contract approve and promptly  
28 pay the requisition for the progress payment less an amount necessary to  
29 satisfy any claims, liens or judgments against the contractor or subcon-  
30 tractors which have not been suitably discharged and less any retained  
31 amount as hereafter described. The public owner shall retain not more  
32 than five per centum of each progress payment to the contractor or  
33 subcontractors except that the public owner may retain in excess of five  
34 per centum but not more than ten per centum of each progress payment to  
35 the contractor provided that there are no requirements by the public  
36 owner for the contractor to provide a performance bond and a labor and  
37 material bond both in the full amount of the contract. The public owner  
38 shall pay, upon requisition from the contractor, for materials pertinent  
39 to the project which have been delivered to the site or off-site by the  
40 contractor [~~and/or subcontractor~~] and suitably stored and secured as  
41 required by the public owner and the contractor provided, the public  
42 owner may limit such payment to materials in short and/or critical  
43 supply and materials specially fabricated for the project each as  
44 defined in the contract. When the work or major portions thereof as  
45 contemplated by the terms of the contract are substantially completed,  
46 the contractor shall submit to the public owner and/or his agent a  
47 requisition for payment of the remaining amount of the contract balance  
48 including balances owed to subcontractors. Upon receipt of such requi-  
49 sition the public owner shall approve and promptly pay the remaining  
50 amount of the contract balance less two times the value of any remaining  
51 items to be completed and an amount necessary to satisfy any claims,  
52 liens or judgments against the contractor which have not been suitably  
53 discharged. As the remaining items of work are satisfactorily completed  
54 or corrected, the public owner shall promptly pay, upon receipt of a  
55 requisition, for these items less an amount necessary to satisfy any  
56 claims, liens or judgments against the contractor which have not been

1 suitably discharged. Any claims, liens and judgments referred to in this  
2 section shall pertain to the project and shall be filed in accordance  
3 with the terms of the applicable contract and/or applicable laws. Where  
4 the public owner is other than the city of New York, the term "promptly  
5 pay" shall mean payment within thirty days, excluding legal holidays, of  
6 receipt of the requisition unless such requisition is not approvable in  
7 accordance with the terms of the contract. Notwithstanding the forego-  
8 ing, where the public owner is other than the city of New York and is a  
9 municipal corporation which requires an elected official to approve  
10 progress payments, "promptly pay" shall mean payment within forty-five  
11 days, excluding legal holidays, of receipt of the requisition unless  
12 such requisition is not approvable in accordance with the terms of the  
13 contract.

14 (b) Each public owner other than the city of New York which is  
15 required to make a payment from public funds pursuant to a contract and  
16 which does not make such contract payment by the required payment date  
17 shall make an interest payment to the contractor on the amount of the  
18 contract payment which is due unless failure to make such contract  
19 payment is the result of a lien, attachment, or other legal process  
20 against the money due said contractor, or unless the amount of the  
21 interest payment as computed in accordance with the provisions set forth  
22 hereinafter is less than ten dollars. Interest payments on amounts due  
23 to a contractor pursuant to this paragraph shall be paid to the contrac-  
24 tor for the period beginning on the day after the required payment date  
25 and ending on the payment date for those payments required according to  
26 this section and shall be paid at the rate of interest in effect on the  
27 date when the interest payment is made. Notwithstanding any other  
28 provision of law to the contrary, interest shall be computed at the rate  
29 equal to the overpayment rate set by the commissioner of taxation and  
30 finance pursuant to subsection (e) of section one thousand ninety-six of  
31 the tax law. A pro rata share of such interest shall be paid by the  
32 contractor or subcontractor, as the case may be, to subcontractors and  
33 materialmen in a proportion equal to the percentage of their pro rata  
34 share of the contract payment. Such pro rata share of interest shall be  
35 due to such subcontractors and materialmen only for those payments which  
36 are not paid to such subcontractors and materialmen prior to the date  
37 upon which interest begins to accrue between the public owner and the  
38 contractor. Such pro rata shares of interest shall be computed daily  
39 until such payments are made to the subcontractors and materialmen.

40 (c) For projects of a public owner other than the city of New York, if  
41 state funds directly related to and which have been budgeted for the  
42 construction of the project for which the payment is due have not been  
43 received prior to the expiration of the thirty or forty-five days speci-  
44 fied in paragraph (a) of this subdivision, the interest provided for in  
45 paragraph (b) of this subdivision shall not begin to accrue and payment  
46 shall not be due, until ten days after receipt of the state funds. Noth-  
47 ing in this paragraph shall prevent the public owner from approving the  
48 requisition, subject to receipt of the state funds. State funds shall  
49 mean monies provided to the public owner by the state, its officers,  
50 boards, departments, commissions, or a public authority and public bene-  
51 fit corporation, a majority of the members of which have been appointed  
52 by the governor or who serve as members by virtue of holding a civil  
53 office of the state, or a combination thereof.

54 2. Payment by ~~[contractors]~~ public owners to subcontractors. ~~[Within~~  
55 ~~seven calendar days of the receipt]~~ (a) Each subcontractor shall period-  
56 ically, in accordance with the terms of the contract, submit to the



1 public owner and/or his agent and to the contractor and/or his agent a  
2 requisition for a progress payment for the work performed and/or materi-  
3 als furnished to the date of the requisition, less any amount previously  
4 paid to the contractor. At the time of any payment [from] by the public  
5 owner[7] to the contractor as provided in subdivision one of this  
6 section, the public owner shall pay each of [~~his~~] the subcontractors and  
7 materialman the proceeds from the payment representing the value of the  
8 work performed and/or materials furnished by the subcontractor and/or  
9 materialmen and reflecting the percentage of the subcontractor's work  
10 completed or the materialmen's material supplied in the requisition  
11 approved by the owner and based upon the actual value of the subcontract  
12 or purchase order less an amount necessary to satisfy any claims, liens  
13 or judgments against the subcontractor or materialman which have not  
14 been suitably discharged and less any retained amount as hereafter  
15 described. [~~Failure by the contractor to make any payment, including any~~  
16 ~~remaining amounts of the contract balance as hereinafter described, to~~  
17 ~~any subcontractor or materialman within seven calendar days of the~~  
18 ~~receipt of any payment from the public owner shall result in the~~  
19 ~~commencement and accrual of interest on amounts due to such subcontrac-~~  
20 ~~tor or materialman for the period beginning on the day immediately~~  
21 ~~following the expiration of such seven calendar day period and ending on~~  
22 ~~the date on which payment is made by the contractor to such subcontrac-~~  
23 ~~tor or materialman. Such interest shall be the sole responsibility of~~  
24 ~~the contractor, and shall be paid at the rate of interest in effect on~~  
25 ~~the date payment is made by the contractor. Notwithstanding any other~~  
26 ~~provision of law to the contrary, interest shall be computed at the rate~~  
27 ~~established in paragraph (b) of subdivision one of section seven hundred~~  
28 ~~fifty-six b of the general business law. The contractor shall retain not~~  
29 ~~more than five per centum of each payment to the subcontractor and/or~~  
30 ~~materialman except that the contractor may retain in excess of five per~~  
31 ~~centum but not more than ten per centum of each payment to the subcon-~~  
32 ~~tractor provided that prior to entering into a subcontract with the~~  
33 ~~contractor, the subcontractor is unable or unwilling to provide a~~  
34 ~~performance bond and a labor and material bond both in the full amount~~  
35 ~~of the subcontract at the request of the contractor. However, the~~  
36 ~~contractor shall retain nothing from those payments representing~~  
37 ~~proceeds owed the subcontractor and/or materialman from the public~~  
38 ~~owner's payments to the contractor for the remaining amounts of the~~  
39 ~~contract balance as provided in subdivision one of this section. If the~~  
40 ~~contractor has failed to submit a requisition for payment of the remain-~~  
41 ~~ing amounts of the contract balance within ninety days of substantial~~  
42 ~~completion as provided in subdivision one of this section, then any~~  
43 ~~clause in the subcontract between the contractor and the subcontractor~~  
44 ~~or materialman which states that payment by the contractor to such~~  
45 ~~subcontractor or materialman is contingent upon payment by the owner to~~  
46 ~~the contractor shall be deemed invalid. Within seven calendar days of~~  
47 ~~the receipt of payment from the contractor, the subcontractor and/or~~  
48 ~~materialman shall pay each of his subcontractors and materialmen in the~~  
49 ~~same manner as the contractor has paid the subcontractor, including~~  
50 ~~interest as herein provided above. Nothing provided herein shall create~~  
51 ~~any obligation on the part of the public owner to pay or to see to the~~  
52 ~~payment of any moneys to any subcontractor or materialman from any~~  
53 ~~contractor nor shall anything provided herein serve to create any~~  
54 ~~relationship in contract or otherwise, implied or expressed, between the~~  
55 ~~subcontractor or materialman and the public owner.] The public owner~~  
56 shall retain not more than five per centum of each progress payment to

1 the subcontractor except that the public owner may retain in excess of  
2 five per centum but not more than ten per centum of each progress  
3 payment to the subcontractor provided that there are no requirements by  
4 the public owner for the subcontractor to provide a performance bond and  
5 a labor and material bond both in the full amount of the contract. The  
6 public owner shall pay, upon requisition from the contractor as provided  
7 in subdivision one of this section, for materials pertinent to the  
8 project which have been delivered to the site or off-site by the subcon-  
9 tractor and suitably stored and secured as required by the public owner  
10 and the subcontractor provided, the public owner may limit such payment  
11 to materials in short and/or critical supply and materials specially  
12 fabricated for the project each as defined in the contract. When the  
13 work or major portions thereof as contemplated by the terms of the  
14 contract are substantially completed, the subcontractor shall submit to  
15 the contractor and/or his or her agent a requisition for payment of the  
16 remaining amount of the contract balance. The contractor shall submit a  
17 contract requisition containing all requisitions from subcontractors to  
18 the public owner. Upon receipt of such requisition the public owner  
19 shall approve and promptly pay the remaining amount of the contract  
20 balance less two times the value of any remaining items to be completed  
21 and an amount necessary to satisfy any claims, liens or judgments  
22 against the subcontractor which have not been suitably discharged. As  
23 the remaining items of work are satisfactorily completed or corrected,  
24 the public owner shall promptly pay, upon receipt of a requisition, for  
25 these remaining items less an amount necessary to satisfy any claims,  
26 liens or judgments against the subcontractor which have not been suit-  
27 ably discharged. Any claims, liens and judgments referred to in this  
28 section shall pertain to the project and shall be filed in accordance  
29 with the terms of the applicable contract and/or applicable laws.

30 (b) As used in this section, "subcontractor" means only those subcon-  
31 tractors that report directly to the main contractor with whom the  
32 public owner has entered into the contract, and does not include subcon-  
33 tractors of subcontractors.

34 § 3. This act shall take effect immediately.