

STATE OF NEW YORK

3250

2019-2020 Regular Sessions

IN ASSEMBLY

January 29, 2019

Introduced by M. of A. BICHOTTE, HYNDMAN, BLAKE, SEAWRIGHT, WALKER,
SOLAGES -- 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 Assem-
bly, 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 offi-
10 cial 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 peri-
16 odically, 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 requi-
19 sition by the contractor and all subcontractors, less any amount previ-
20 ously 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 subcon-
24 tractors which have not been suitably discharged and less any retained

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

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1 amount as hereafter described. The public owner shall retain not more
2 than five per centum of each progress payment to the contractor and
3 subcontractors except that the public owner may retain in excess of five
4 per centum but not more than ten per centum of each progress payment to
5 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, upon requisition from the contractor, for materials pertinent
9 to the project which have been delivered to the site or off-site by the
10 contractor [~~and/or subcontractor~~] and suitably stored and secured as
11 required by the public owner and the contractor provided, the public
12 owner may limit such payment to materials in short and/or critical
13 supply and materials specially fabricated for the project each as
14 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 agent a
17 requisition for payment of the remaining amount of the contract balance,
18 including balances owed to subcontractors. Upon receipt of such requi-
19 sition the public owner shall approve and promptly pay the remaining
20 amount of the contract balance less two times the value of any remaining
21 items to be completed and an amount necessary to satisfy any claims,
22 liens or judgments against the contractor which have not been suitably
23 discharged. As the remaining items of work are satisfactorily completed
24 or corrected, the public owner shall promptly pay, upon receipt of a
25 requisition, for these remaining items less an amount necessary to
26 satisfy any claims, liens or judgments against the contractor which have
27 not been suitably discharged. Any claims, liens and judgments referred
28 to in this section shall pertain to the project and shall be filed in
29 accordance with the terms of the applicable contract and/or applicable
30 laws.

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

~~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

1 any claims, liens or judgments against the subcontractor which have not
2 been suitably discharged. Any claims, liens and judgments referred to in
3 this section shall pertain to the project and shall be filed in accord-
4 ance with the terms of the applicable contract and/or applicable laws.

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

9 § 2. The opening paragraph and subdivisions 1 and 2 of section 106-b
10 of the general municipal law, the opening paragraph and subdivision 1 as
11 amended by chapter 661 of the laws of 1992, paragraphs (a) and (c) of
12 subdivision 1 as amended by chapter 98 of the laws of 1995, and subdivi-
13 sion 2 as amended by section 15 of part MM of chapter 57 of the laws of
14 2008, are amended to read as follows:

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

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

claims, liens or judgments against the contractor which have not been suitably discharged. Any claims, liens and judgments referred to in this section shall pertain to the project and shall be filed in accordance with the terms of the applicable contract and/or applicable laws. Where the public owner is other than the city of New York, the term "promptly pay" shall mean payment within thirty days, excluding legal holidays, of receipt of the requisition unless such requisition is not approvable in accordance with the terms of the contract. Notwithstanding the foregoing, where the public owner is other than the city of New York and is a municipal corporation which requires an elected official to approve progress payments, "promptly pay" shall mean payment within forty-five days, excluding legal holidays, of receipt of the requisition unless such requisition is not approvable in accordance with the terms of the contract.

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

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

2. Payment by ~~[contractors]~~ public owners to subcontractors. ~~[Within seven calendar days of the receipt]~~ (a) Each subcontractor shall period-

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

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

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

35 § 3. This act shall take effect immediately. Effective immediately
36 the addition, amendment and/or repeal of any rule or regulation neces-
37 sary for the implementation of this act on its effective date are
38 authorized to be made on or before such date.