STATE OF NEW YORK

9117

IN ASSEMBLY

January 21, 2020

Introduced by M. of A. CUSICK, BICHOTTE, COOK, MAGNARELLI, ZEBROWSKI -- 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 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 139-f of the state finance law, as added by chapter 769 of the laws of 1978, is amended to read as follows:

1. Payment by public owners to contractors. The contractor shall periodically, in accordance with the terms of the contract, submit to the public owner and/or his agent a requisition for a progress payment for the work performed and/or materials furnished to the date of the requisition, less any amount previously paid to the contractor. The public owner shall in accordance with the terms of the contract approve and promptly pay the requisition for the progress payment less an amount necessary to satisfy any claims, liens or judgments against the contractor which have not been suitably discharged and less any retained amount as hereafter described. The public owner shall retain not more than five per centum of each progress payment to the contractor 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 contractor provided that there are no requirements by the public owner for the contractor 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, for materials pertinent to the project which have been delivered to the site or off-site by the contractor and/or subcontractor and suitably stored and secured as required by the public owner and the contractor 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~~] **has reached substantial completion which, for the purposes of this section, shall mean the state in the progress of the project when the work required by the contract**

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

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with the public owner is sufficiently complete in accordance with the contract so that the public owner may occupy or utilize the work for its intended use; provided further, that "substantial completion" shall apply to the entire project or a portion of the entire project if the contract with the public owner provides for occupancy or use of a portion of the project, the contractor shall submit to the public owner and/or his agent a requisition for payment of the remaining amount of the contract balance. 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 contractor 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 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.

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

1-a. Not later than forty-five business days after the date when the project has reached substantial completion, the public owner shall submit to the contractor a written list describing all remaining items to be completed by the contractor. Not later than seven calendar days after receiving a written list describing all remaining items to be completed by the contractor, the contractor shall submit to each subcontractor from whom the contractor is withholding retainage a written list of all remaining items required to be completed by the subcontractor. Such list may include items in addition to those items on the public owner's list.

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

1. Payment by public owners to contractors. (a) The contractor shall periodically, in accordance with the terms of the contract, submit to the public owner and/or his agent a requisition for a progress payment for the work performed and/or materials furnished to the date of the requisition less any amount previously paid to the contractor. The public owner shall in accordance with the terms of the contract approve and promptly pay the requisition for the progress payment less an amount necessary to satisfy any claims, liens or judgments against the contractor which have not been suitably discharged and less any retained amount as hereafter described. The public owner shall retain not more than five per centum of each progress payment to the contractor 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 contractor provided that there are no requirements by the public owner for the contractor 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, for materials pertinent to the project which have been delivered to the site or off-site by the contractor and/or subcontractor and suitably stored and secured as required by the public owner and the contractor 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~~] **has reached substantial completion which, for the purposes of this section, shall mean, for public owners other than school districts and boards of cooperative educational services, the state in the progress of the project when the work required by the contract with the public owner is sufficiently complete in accordance with the contract so that the public owner may occupy or utilize the work for its intended use and shall mean, for school districts and boards of cooperative educational services, is the date the partial or final certificate of substantial completion of the project which is the date certified by the architect or engineer when the construction is code compliant and substantially complete in accordance with the contract documents so the school district can occupy or utilize the project or portion thereof for its intended use**, the contractor shall submit to the public owner and/or his agent a requisition for payment of the remaining amount of the contract balance. 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 contractor 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 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) **Not later than forty-five business days after the date when the project has reached substantial completion, the public owner shall submit to the contractor a written list describing all remaining items to be completed by the contractor. Not later than seven calendar days after receiving a written list describing all remaining items to be completed by the contractor, the contractor shall submit to each subcontractor from whom the contractor is withholding retainage a written list of all remaining items required to be completed by the subcontractor. Such list may include items in addition to those items on the public owner's list.**

(c) 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)~~] **(d)** 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)~~] **(c)** 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.

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