

# 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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1 with the public owner is sufficiently complete in accordance with the  
2 contract so that the public owner may occupy or utilize the work for its  
3 intended use; provided further, that "substantial completion" shall  
4 apply to the entire project or a portion of the entire project if the  
5 contract with the public owner provides for occupancy or use of a  
6 portion of the project, the contractor shall submit to the public owner  
7 and/or his agent a requisition for payment of the remaining amount of  
8 the contract balance. Upon receipt of such requisition the public owner  
9 shall approve and promptly pay the remaining amount of the contract  
10 balance less two times the value of any remaining items to be completed  
11 and an amount necessary to satisfy any claims, liens or judgments  
12 against the contractor which have not been suitably discharged. As the  
13 remaining items of work are satisfactorily completed or corrected, the  
14 public owner shall promptly pay, upon receipt of a requisition, for  
15 these remaining items less an amount necessary to satisfy any claims,  
16 liens or judgments against the contractor which have not been suitably  
17 discharged. Any claims, liens and judgments referred to in this section  
18 shall pertain to the project and shall be filed in accordance with the  
19 terms of the applicable contract and/or applicable laws.

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

23 1-a. Not later than forty-five business days after the date when the  
24 project has reached substantial completion, the public owner shall  
25 submit to the contractor a written list describing all remaining items  
26 to be completed by the contractor. Not later than seven calendar days  
27 after receiving a written list describing all remaining items to be  
28 completed by the contractor, the contractor shall submit to each subcon-  
29 tractor from whom the contractor is withholding retainage a written list  
30 of all remaining items required to be completed by the subcontractor.  
31 Such list may include items in addition to those items on the public  
32 owner's list.

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

37 1. Payment by public owners to contractors. (a) The contractor shall  
38 periodically, in accordance with the terms of the contract, submit to  
39 the public owner and/or his agent a requisition for a progress payment  
40 for the work performed and/or materials furnished to the date of the  
41 requisition less any amount previously paid to the contractor. The  
42 public owner shall in accordance with the terms of the contract approve  
43 and promptly pay the requisition for the progress payment less an amount  
44 necessary to satisfy any claims, liens or judgments against the contrac-  
45 tor which have not been suitably discharged and less any retained amount  
46 as hereafter described. The public owner shall retain not more than five  
47 per centum of each progress payment to the contractor except that the  
48 public owner may retain in excess of five per centum but not more than  
49 ten per centum of each progress payment to the contractor provided that  
50 there are no requirements by the public owner for the contractor to  
51 provide a performance bond and a labor and material bond both in the  
52 full amount of the contract. The public owner shall pay, upon requis-  
53 ition from the contractor, for materials pertinent to the project which  
54 have been delivered to the site or off-site by the contractor and/or  
55 subcontractor and suitably stored and secured as required by the public  
56 owner and the contractor provided, the public owner may limit such

1 payment to materials in short and/or critical supply and materials  
2 specially fabricated for the project each as defined in the contract.  
3 When the work or major portions thereof as contemplated by the terms of  
4 the contract [~~are substantially completed~~] has reached substantial  
5 completion which, for the purposes of this section, shall mean, for  
6 public owners other than school districts and boards of cooperative  
7 educational services, the state in the progress of the project when the  
8 work required by the contract with the public owner is sufficiently  
9 complete in accordance with the contract so that the public owner may  
10 occupy or utilize the work for its intended use and shall mean, for  
11 school districts and boards of cooperative educational services, is the  
12 date the partial or final certificate of substantial completion of the  
13 project which is the date certified by the architect or engineer when  
14 the construction is code compliant and substantially complete in accord-  
15 ance with the contract documents so the school district can occupy or  
16 utilize the project or portion thereof for its intended use, the  
17 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.

40 (b) Not later than forty-five business days after the date when the  
41 project has reached substantial completion, the public owner shall  
42 submit to the contractor a written list describing all remaining items  
43 to be completed by the contractor. Not later than seven calendar days  
44 after receiving a written list describing all remaining items to be  
45 completed by the contractor, the contractor shall submit to each subcon-  
46 tractor from whom the contractor is withholding retainage a written list  
47 of all remaining items required to be completed by the subcontractor.  
48 Such list may include items in addition to those items on the public  
49 owner's list.

50 (c) Each public owner other than the city of New York which is  
51 required to make a payment from public funds pursuant to a contract and  
52 which does not make such contract payment by the required payment date  
53 shall make an interest payment to the contractor on the amount of the  
54 contract payment which is due unless failure to make such contract  
55 payment is the result of a lien, attachment, or other legal process  
56 against the money due said contractor, or unless the amount of the

1 interest payment as computed in accordance with the provisions set forth  
2 hereinafter is less than ten dollars. Interest payments on amounts due  
3 to a contractor pursuant to this paragraph shall be paid to the contrac-  
4 tor for the period beginning on the day after the required payment date  
5 and ending on the payment date for those payments required according to  
6 this section and shall be paid at the rate of interest in effect on the  
7 date when the interest payment is made. Notwithstanding any other  
8 provision of law to the contrary, interest shall be computed at the rate  
9 equal to the overpayment rate set by the commissioner of taxation and  
10 finance pursuant to subsection (e) of section one thousand ninety-six of  
11 the tax law. A pro rata share of such interest shall be paid by the  
12 contractor or subcontractor, as the case may be, to subcontractors and  
13 materialmen in a proportion equal to the percentage of their pro rata  
14 share of the contract payment. Such pro rata share of interest shall be  
15 due to such subcontractors and materialmen only for those payments which  
16 are not paid to such subcontractors and materialmen prior to the date  
17 upon which interest begins to accrue between the public owner and the  
18 contractor. Such pro rata shares of interest shall be computed daily  
19 until such payments are made to the subcontractors and materialmen.

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

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