STATE OF NEW YORK

5498

2019-2020 Regular Sessions

IN SENATE

May 3, 2019

Introduced by Sen. BROOKS -- 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:

Section 1. Subdivisions 1 and 2 of section 139-f of the state finance law, subdivision 1 as added by chapter 769 of the laws of 1978 and subdivision 2 as amended by section 16 of part MM of chapter 57 of the laws of 2008, are 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~~] **its** 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**, not including any payment for materials pertinent to the project which have been delivered, accepted and are covered by a manufacturer's warranty, and/or are graded to meet industry standards,** 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**, not including any payment for materials pertinent to the project which have been delivered, accepted and are covered by a manufacturer's warranty, and/or are graded to meet industry standards,**

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

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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 **in full**, upon requisition from the contractor, for **all** 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, the contractor shall submit to the public owner and/or [~~**his**~~] **its** 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. Payment by contractors to subcontractors. Within seven calendar days of the receipt of any payment from the public owner, the contractor shall pay each of [~~**his**~~] **its** subcontractors and materialmen the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor's work completed or the materialman's material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order less an amount necessary to satisfy any claims, liens or judgments against the subcontractor or materialman which have not been suitably discharged and**, with regard to subcontractors,** less any retained amount as hereafter described. Failure by the contractor to pay any subcontractor or materialman within seven calendar days of the receipt of any payment from the public owner shall result in the commencement and accrual of interest on amounts due to such subcontractor or materialman for the period beginning on the day immediately following the expiration of such seven calendar day period and ending on the date on which payment is made by the contractor to such subcontractor or materialman. Such interest payment shall be the sole responsibility of the contractor, and shall be 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. **The contractor**

shall pay in full, upon payment by the public owner, for all materials pertinent to the project which have been delivered to and accepted at the site or off-site by a materialman and are covered by a manufacturer's warranty, and/or are graded to meet industry standards. However, except in the case of a materialman who is also contracted to install a product he/she delivered, 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~~] its 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.

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

(a) The contractor shall periodically, in accordance with the terms of the contract, submit to the public owner and/or [~~his~~] its 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, not including any payment for materials pertinent to the project which have been delivered, accepted and are covered by a manufacturer's warranty, and/or are graded to meet industry standards, 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, not including any payment for materials pertinent to the project which have been delivered, accepted and are covered by a manufacturer's warranty, and/or are graded to meet industry standards, 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 in full, upon requisition from the contractor, for all 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, the contractor shall submit to the public owner and/or [~~his~~] its 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.

2. Payment by contractors to subcontractors. Within seven calendar days of the receipt of any payment from the public owner, the contractor shall pay each of [~~his~~] its subcontractors and materialmen the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor's work completed or the materialman's material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order less an amount necessary to satisfy any claims, liens or judgments against the subcontractor or materialman which have not been suitably discharged and, with regard to subcontractors, less any retained amount as hereafter described. Failure by the contractor to make any payment, including any remaining amounts of the contract balance as hereinafter described, to any subcontractor or materialman within seven calendar days of the receipt of any payment from the public owner shall result in the commencement and accrual of interest on amounts due to such subcontractor or materialman for the period beginning on the day immediately following the expiration of such seven calendar day period and ending on the date on which payment is made by the contractor to such subcontractor or materialman. Such interest shall be the sole responsibility of the contractor, and shall be 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. **The contractor shall pay in full, upon payment by the public owner, for all materials pertinent to the project which have been delivered to and accepted at the site or off-site by a materialman and are covered by a manufacturer's warranty, and/or are graded to meet industry standards.** However, **except in the case of a materialman who is also contracted to install a product he/she delivered,** 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~~] **its** 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.

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

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

2. Notwithstanding the provisions of subdivision one of this section, no portion of any payment due and owing to a material supplier for materials which have been delivered, accepted and are covered by a manufacturer's warranty, and/or graded to meet industry standards shall be retained by an owner, contractor or subcontractor.

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