

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:

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

5 1. Payment by public owners to contractors. The contractor shall peri-
6 odically, in accordance with the terms of the contract, submit to the
7 public owner and/or [~~his~~] its agent a requisition for a progress payment
8 for the work performed and/or materials furnished to the date of the
9 requisition, less any amount previously paid to the contractor. The
10 public owner shall in accordance with the terms of the contract approve
11 and promptly pay the requisition for the progress payment less an amount
12 necessary to satisfy any claims, liens or judgments against the contrac-
13 tor which have not been suitably discharged and less any retained amount
14 as hereafter described. The public owner shall retain not more than five
15 per centum of each progress payment, not including any payment for mate-
16 rials pertinent to the project which have been delivered, accepted and
17 are covered by a manufacturer's warranty, and/or are graded to meet
18 industry standards, to the contractor except that the public owner may
19 retain in excess of five per centum but not more than ten per centum of
20 each progress payment, not including any payment for materials pertinent
21 to the project which have been delivered, accepted and are covered by a
22 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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1 to the contractor provided that there are no requirements by the public
2 owner for the contractor to provide a performance bond and a labor and
3 material bond both in the full amount of the contract. The public owner
4 shall pay in full, upon requisition from the contractor, for all materi-
5 als pertinent to the project which have been delivered to the site or
6 off-site by the contractor and/or subcontractor and suitably stored and
7 secured as required by the public owner and the contractor [~~provided,~~
8 ~~the public owner may limit such payment to materials in short and/or~~
9 ~~critical supply and materials specially fabricated for the project each~~
10 ~~as defined in the contract~~]. When the work or major portions thereof as
11 contemplated by the terms of the contract are substantially completed,
12 the contractor shall submit to the public owner and/or [~~his~~] its agent a
13 requisition for payment of the remaining amount of the contract balance.
14 Upon receipt of such requisition the public owner shall approve and
15 promptly pay the remaining amount of the contract balance less two times
16 the value of any remaining items to be completed and an amount necessary
17 to satisfy any claims, liens or judgments against the contractor which
18 have not been suitably discharged. As the remaining items of work are
19 satisfactorily completed or corrected, the public owner shall promptly
20 pay, upon receipt of a requisition, for these remaining items less an
21 amount necessary to satisfy any claims, liens or judgments against the
22 contractor which have not been suitably discharged. Any claims, liens
23 and judgments referred to in this section shall pertain to the project
24 and shall be filed in accordance with the terms of the applicable
25 contract and/or applicable laws.

26 2. Payment by contractors to subcontractors. Within seven calendar
27 days of the receipt of any payment from the public owner, the contractor
28 shall pay each of [~~his~~] its subcontractors and materialmen the proceeds
29 from the payment representing the value of the work performed and/or
30 materials furnished by the subcontractor and/or materialman and reflect-
31 ing the percentage of the subcontractor's work completed or the
32 materialman's material supplied in the requisition approved by the owner
33 and based upon the actual value of the subcontract or purchase order
34 less an amount necessary to satisfy any claims, liens or judgments
35 against the subcontractor or materialman which have not been suitably
36 discharged and, with regard to subcontractors, less any retained amount
37 as hereafter described. Failure by the contractor to pay any subcontrac-
38 tor or materialman within seven calendar days of the receipt of any
39 payment from the public owner shall result in the commencement and
40 accrual of interest on amounts due to such subcontractor or materialman
41 for the period beginning on the day immediately following the expiration
42 of such seven calendar day period and ending on the date on which
43 payment is made by the contractor to such subcontractor or materialman.
44 Such interest payment shall be the sole responsibility of the contrac-
45 tor, and shall be paid at the rate of interest in effect on the date
46 payment is made by the contractor. Notwithstanding any other provision
47 of law to the contrary, interest shall be computed at the rate estab-
48 lished in paragraph (b) of subdivision one of section seven hundred
49 fifty-six-b of the general business law. The contractor shall retain not
50 more than five per centum of each payment to the subcontractor [~~and/or~~
51 ~~materialman~~] except that the contractor may retain in excess of five per
52 centum but not more than ten per centum of each payment to the subcon-
53 tractor provided that prior to entering into a subcontract with the
54 contractor, the subcontractor is unable or unwilling to provide a
55 performance bond and a labor and material bond, both in the full amount
56 of the subcontract, at the request of the contractor. The contractor

1 shall pay in full, upon payment by the public owner, for all materials
2 pertinent to the project which have been delivered to and accepted at
3 the site or off-site by a materialman and are covered by a manufactur-
4 er's warranty, and/or are graded to meet industry standards. However,
5 except in the case of a materialman who is also contracted to install a
6 product he/she delivered, the contractor shall retain nothing from those
7 payments representing proceeds owed the subcontractor and/or materialman
8 from the public owner's payments to the contractor for the remaining
9 amounts of the contract balance as provided in subdivision one of this
10 section. If the contractor has failed to submit a requisition for
11 payment of the remaining amounts of the contract balance within ninety
12 days of substantial completion as provided in subdivision one of this
13 section, then any clause in the subcontract between the contractor and
14 the subcontractor or materialman which states that payment by the
15 contractor to such subcontractor or materialman is contingent upon
16 payment by the owner to the contractor shall be deemed invalid. Within
17 seven calendar days of the receipt of payment from the contractor, the
18 subcontractor and/or materialman shall pay each of [~~his~~] its subcontrac-
19 tors and materialmen in the same manner as the contractor has paid the
20 subcontractor, including interest as herein provided above. Nothing
21 provided herein shall create any obligation on the part of the public
22 owner to pay or to see to the payment of any moneys to any subcontractor
23 or materialman from any contractor nor shall anything provided herein
24 serve to create any relationship in contract or otherwise, implied or
25 expressed, between the subcontractor or materialman and the public
26 owner.

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

32 (a) The contractor shall periodically, in accordance with the terms of
33 the contract, submit to the public owner and/or [~~his~~] its agent a requi-
34 sition for a progress payment for the work performed and/or materials
35 furnished to the date of the requisition less any amount previously paid
36 to the contractor. The public owner shall in accordance with the terms
37 of the contract approve and promptly pay the requisition for the
38 progress payment less an amount necessary to satisfy any claims, liens
39 or judgments against the contractor which have not been suitably
40 discharged and less any retained amount as hereafter described. The
41 public owner shall retain not more than five per centum of each progress
42 payment, not including any payment for materials pertinent to the
43 project which have been delivered, accepted and are covered by a
44 manufacturer's warranty, and/or are graded to meet industry standards,
45 to the contractor except that the public owner may retain in excess of
46 five per centum but not more than ten per centum of each progress
47 payment, not including any payment for materials pertinent to the
48 project which have been delivered, accepted and are covered by a
49 manufacturer's warranty, and/or are graded to meet industry standards,
50 to the contractor provided that there are no requirements by the public
51 owner for the contractor to provide a performance bond and a labor and
52 material bond both in the full amount of the contract. The public owner
53 shall pay in full, upon requisition from the contractor, for all materi-
54 als pertinent to the project which have been delivered to the site or
55 off-site by the contractor and/or subcontractor and suitably stored and
56 secured as required by the public owner and the contractor [~~provided,~~

1 ~~the public owner may limit such payment to materials in short and/or~~
2 ~~critical supply and materials specially fabricated for the project each~~
3 ~~as defined in the contract~~. When the work or major portions thereof as
4 contemplated by the terms of the contract are substantially completed,
5 the contractor shall submit to the public owner and/or [~~his~~] its agent a
6 requisition for payment of the remaining amount of the contract balance.
7 Upon receipt of such requisition the public owner shall approve and
8 promptly pay the remaining amount of the contract balance less two times
9 the value of any remaining items to be completed and an amount necessary
10 to satisfy any claims, liens or judgments against the contractor which
11 have not been suitably discharged. As the remaining items of work are
12 satisfactorily completed or corrected, the public owner shall promptly
13 pay, upon receipt of a requisition, for these items less an amount
14 necessary to satisfy any claims, liens or judgments against the contrac-
15 tor which have not been suitably discharged. Any claims, liens and judg-
16 ments referred to in this section shall pertain to the project and shall
17 be filed in accordance with the terms of the applicable contract and/or
18 applicable laws. Where the public owner is other than the city of New
19 York, the term "promptly pay" shall mean payment within thirty days,
20 excluding legal holidays, of receipt of the requisition unless such
21 requisition is not approvable in accordance with the terms of the
22 contract. Notwithstanding the foregoing, where the public owner is other
23 than the city of New York and is a municipal corporation which requires
24 an elected official to approve progress payments, "promptly pay" shall
25 mean payment within forty-five days, excluding legal holidays, of
26 receipt of the requisition unless such requisition is not approvable in
27 accordance with the terms of the contract.

28 2. Payment by contractors to subcontractors. Within seven calendar
29 days of the receipt of any payment from the public owner, the contractor
30 shall pay each of [~~his~~] its subcontractors and materialmen the proceeds
31 from the payment representing the value of the work performed and/or
32 materials furnished by the subcontractor and/or materialman and reflect-
33 ing the percentage of the subcontractor's work completed or the
34 materialman's material supplied in the requisition approved by the owner
35 and based upon the actual value of the subcontract or purchase order
36 less an amount necessary to satisfy any claims, liens or judgments
37 against the subcontractor or materialman which have not been suitably
38 discharged and, with regard to subcontractors, less any retained amount
39 as hereafter described. Failure by the contractor to make any payment,
40 including any remaining amounts of the contract balance as hereinafter
41 described, to any subcontractor or materialman within seven calendar
42 days of the receipt of any payment from the public owner shall result in
43 the commencement and accrual of interest on amounts due to such subcon-
44 tractor or materialman for the period beginning on the day immediately
45 following the expiration of such seven calendar day period and ending on
46 the date on which payment is made by the contractor to such subcontrac-
47 tor or materialman. Such interest shall be the sole responsibility of
48 the contractor, and shall be paid at the rate of interest in effect on
49 the date payment is made by the contractor. Notwithstanding any other
50 provision of law to the contrary, interest shall be computed at the rate
51 established in paragraph (b) of subdivision one of section seven hundred
52 fifty-six-b of the general business law. The contractor shall retain not
53 more than five per centum of each payment to the subcontractor [~~and/or~~
54 ~~materialman~~] except that the contractor may retain in excess of five per
55 centum but not more than ten per centum of each payment to the subcon-
56 tractor provided that prior to entering into a subcontract with the

1 contractor, the subcontractor is unable or unwilling to provide a
2 performance bond and a labor and material bond both in the full amount
3 of the subcontract at the request of the contractor. The contractor
4 shall pay in full, upon payment by the public owner, for all materials
5 pertinent to the project which have been delivered to and accepted at
6 the site or off-site by a materialman and are covered by a manufactur-
7 er's warranty, and/or are graded to meet industry standards. However,
8 except in the case of a materialman who is also contracted to install a
9 product he/she delivered, the contractor shall retain nothing from those
10 payments representing proceeds owed the subcontractor and/or materialman
11 from the public owner's payments to the contractor for the remaining
12 amounts of the contract balance as provided in subdivision one of this
13 section. If the contractor has failed to submit a requisition for
14 payment of the remaining amounts of the contract balance within ninety
15 days of substantial completion as provided in subdivision one of this
16 section, then any clause in the subcontract between the contractor and
17 the subcontractor or materialman which states that payment by the
18 contractor to such subcontractor or materialman is contingent upon
19 payment by the owner to the contractor shall be deemed invalid. Within
20 seven calendar days of the receipt of payment from the contractor, the
21 subcontractor and/or materialman shall pay each of [his] its subcontrac-
22 tors and materialmen in the same manner as the contractor has paid the
23 subcontractor, including interest as herein provided above. Nothing
24 provided herein shall create any obligation on the part of the public
25 owner to pay or to see to the payment of any moneys to any subcontractor
26 or materialman from any contractor nor shall anything provided herein
27 serve to create any relationship in contract or otherwise, implied or
28 expressed, between the subcontractor or materialman and the public
29 owner.

30 § 3. Section 756-c of the general business law, as added by chapter
31 127 of the laws of 2002, is amended to read as follows:

32 § 756-c. Retention. 1. By mutual agreement of the relevant parties an
33 owner may retain a reasonable amount of the contract sum as retainage. A
34 contractor or subcontractor may also retain a reasonable amount for
35 retainage so long as the amount does not exceed the actual percentage
36 retained by the owner. Retainage shall be released by the owner to the
37 contractor no later than thirty days after the final approval of the
38 work under a construction contract. In the event that an owner fails to
39 release retainage as required by this article, or the contractor or
40 subcontractor fails to release a proportionate amount of retainage to
41 the relevant parties after receipt of retainage from the owner, the
42 owner, contractor, or subcontractor, as the case may be, shall be
43 subject to the payment of interest at the rate of one percent per month
44 on the date retention was due and owing.

45 2. Notwithstanding the provisions of subdivision one of this section,
46 no portion of any payment due and owing to a material supplier for mate-
47 rials which have been delivered, accepted and are covered by a manufac-
48 turer's warranty, and/or graded to meet industry standards shall be
49 retained by an owner, contractor or subcontractor.

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