STATE OF NEW YORK

6824

2021-2022 Regular Sessions

IN ASSEMBLY

April 8, 2021

Introduced by M. of A. BICHOTTE HERMELYN, HYNDMAN, 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 Assembly, do enact as follows:

Section 1. The opening paragraph and subdivisions 1 and 2 of section 139-f of the state finance law, the opening paragraph as added by chapter 769 of the laws of 1978, subdivision 1 as amended by chapter 341 or the laws of 2020 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:

Notwithstanding the provisions of any other law to the contrary, except the provisions of section thirty-eight of the highway law, all contracts made and awarded by the state, or by any public department, or by any public benefit corporation or by any public corporation or official thereof, hereafter referred to as the public owner, for construction, reconstruction or alteration of any public work project shall provide for payment by the public owner to the contractor and [~~payment by the contractor~~] to the subcontractor **or subcontractors** in accordance with the following:

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 **by the contractor and all subcontractors**, less any amount previously paid to the contractor **or subcontractors**. 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 **or subcontractors** 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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amount as hereafter described. The public owner shall retain not more than five per centum of each progress payment to the contractor **and subcontractors** 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**, including balances owed to subcontractors**. When the work or major portions thereof as contemplated by the terms of the contract 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 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. Payment by [~~contractors~~] **public owners** to subcontractors. [~~Within seven calendar days of the receipt~~] **(a) Each subcontractor shall periodically, in accordance with the terms of the contract, submit to the public owner and/or his agent and to the contractor 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. At the time** of any payment [~~from~~] **by** the public owner[~~,~~] **to** the contractor **as provided in subdivision one of this section, the public owner** shall pay each of [~~his~~] **the** 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 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. 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 any claims, liens or judgments against the subcontractor 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.

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

§ 2. The opening paragraph and subdivisions 1 and 2 of section 106-b of the general municipal law, the opening paragraph as amended by chapter 661 of the laws of 1992, subdivision 1 as amended by chapter 341 or the laws of 2020, 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:

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

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 by the contractor and all subcontractors less any amount previously paid to the contractor or subcontractors. 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 or subcontractors 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 or subcontractors 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 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, **including balances owed to subcontractors**. 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.

(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 (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.

2. Payment by [~~contractors~~] **public owners** to subcontractors. [~~Within seven calendar days of the receipt~~] **(a) Each subcontractor shall periodically, in accordance with the terms of the contract, submit to the public owner and/or his agent and to the contractor 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. At the time** of any payment [~~from~~] **by** the public owner[~~,~~] **to** the contractor **as provided in subdivision one of this section, the public owner** shall pay each of [~~his~~] **the** subcontractors and materialman the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materialmen and reflecting the percentage of the subcontractor's work completed or the materialmen'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 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. 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 any claims, liens or judgments against the subcontractor 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.

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

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