

STATE OF NEW YORK

967

2021-2022 Regular Sessions

IN ASSEMBLY

(Prefiled)

January 6, 2021

Introduced by M. of A. CUSICK -- 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:

1 Section 1. Subdivision 1 of section 139-f of the state finance law, as
2 amended by a chapter of the laws of 2020, amending the state finance law
3 and the general municipal law relating to payment in construction
4 contracts, as proposed in legislative bills numbers S.7664 and A.9117,
5 is amended to read as follows:

6 1. Payment by public owners to contractors. The contractor shall peri-
7 odically, in accordance with the terms of the contract, submit to the
8 public owner and/or his agent a requisition for a progress payment for
9 the work performed and/or materials furnished to the date of the requi-
10 sition, less any amount previously paid to the contractor. The public
11 owner shall in accordance with the terms of the contract approve and
12 promptly pay the requisition for the progress payment less an amount
13 necessary to satisfy any claims, liens or judgments against the contrac-
14 tor which have not been suitably discharged and less any retained amount
15 as hereafter described. The public owner shall retain not more than five
16 per centum of each progress payment to the contractor except that the
17 public owner may retain in excess of five per centum but not more than
18 ten per centum of each progress payment to the contractor provided that
19 there are no requirements by the public owner for the contractor to
20 provide a performance bond and a labor and material bond both in the
21 full amount of the contract. The public owner shall pay, upon requisition
22 from the contractor, for materials pertinent to the project which
23 have been delivered to the site or off-site by the contractor and/or
24 subcontractor and suitably stored and secured as required by the public

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

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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 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]~~ are substantially completed, 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, as added by a chapter of the laws of 2020, amending the state finance law and the general municipal law relating to payment in construction contracts, as proposed in legislative bills numbers S.7664 and A.9117, is amended to read as follows:

1-a. Not later than forty-five business days after the date when the project has reached substantial completion, as such term is defined in the contract or as it is contemplated by the terms of the contract, 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]~~ five business 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 a chapter of the laws of 2020, amending the state finance law and the general municipal law relating to payment in construction contracts, as proposed in legislative bills numbers S.7664 and A.9117, 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

1 as hereafter described. The public owner shall retain not more than five
2 per centum of each progress payment to the contractor except that the
3 public owner may retain in excess of five per centum but not more than
4 ten per centum of each progress payment to the contractor provided that
5 there are no requirements by the public owner for the contractor to
6 provide a performance bond and a labor and material bond both in the
7 full amount of the contract. The public owner shall pay, upon requisition
8 from the contractor, for materials pertinent to the project which
9 have been delivered to the site or off-site by the contractor and/or
10 subcontractor and suitably stored and secured as required by the public
11 owner and the contractor provided, the public owner may limit such
12 payment to materials in short and/or critical supply and materials
13 specially fabricated for the project each as defined in the contract.
14 When the work or major portions thereof as contemplated by the terms of
15 the contract [~~has reached substantial completion which, for the purposes~~
16 ~~of this section, shall mean, for public owners other than school~~
17 ~~districts and boards of cooperative educational services, the state in~~
18 ~~the progress of the project when the work required by the contract with~~
19 ~~the public owner is sufficiently complete in accordance with the~~
20 ~~contract so that the public owner may occupy or utilize the work for its~~
21 ~~intended use and shall mean, for school districts and boards of cooper-~~
22 ~~ative educational services, is the date the partial or final certificate~~
23 ~~of substantial completion of the project which is the date certified by~~
24 ~~the architect or engineer when the construction is code compliant and~~
25 ~~substantially complete in accordance with the contract documents so the~~
26 ~~school district can occupy or utilize the project or portion thereof for~~
27 ~~its intended use~~] are substantially completed, the contractor shall
28 submit to the public owner and/or his agent a requisition for payment of
29 the remaining amount of the contract balance. Upon receipt of such
30 requisition the public owner shall approve and promptly pay the remain-
31 ing amount of the contract balance less two times the value of any
32 remaining items to be completed and an amount necessary to satisfy any
33 claims, liens or judgments against the contractor which have not been
34 suitably discharged. As the remaining items of work are satisfactorily
35 completed or corrected, the public owner shall promptly pay, upon
36 receipt of a requisition, for these items less an amount necessary to
37 satisfy any claims, liens or judgments against the contractor which have
38 not been suitably discharged. Any claims, liens and judgments referred
39 to in this section shall pertain to the project and shall be filed in
40 accordance with the terms of the applicable contract and/or applicable
41 laws. Where the public owner is other than the city of New York, the
42 term "promptly pay" shall mean payment within thirty days, excluding
43 legal holidays, of receipt of the requisition unless such requisition is
44 not approvable in accordance with the terms of the contract. Notwith-
45 standing the foregoing, where the public owner is other than the city of
46 New York and is a municipal corporation which requires an elected offi-
47 cial to approve progress payments, "promptly pay" shall mean payment
48 within forty-five days, excluding legal holidays, of receipt of the
49 requisition unless such requisition is not approvable in accordance with
50 the terms of the contract.

51 (b) Not later than forty-five business days after the date when the
52 project has reached substantial completion, as such term is defined in
53 the contract or as it is contemplated by the terms of the contract, the
54 public owner shall submit to the contractor a written list describing
55 all remaining items to be completed by the contractor. Not later than
56 [~~seven-calendar~~] five business days after receiving a written list

1 describing all remaining items to be completed by the contractor, the
2 contractor shall submit to each subcontractor from whom the contractor
3 is withholding retainage a written list of all remaining items required
4 to be completed by the subcontractor. Such list may include items in
5 addition to those items on the public owner's list.

6 (c) Each public owner other than the city of New York which is
7 required to make a payment from public funds pursuant to a contract and
8 which does not make such contract payment by the required payment date
9 shall make an interest payment to the contractor on the amount of the
10 contract payment which is due unless failure to make such contract
11 payment is the result of a lien, attachment, or other legal process
12 against the money due said contractor, or unless the amount of the
13 interest payment as computed in accordance with the provisions set forth
14 hereinafter is less than ten dollars. Interest payments on amounts due
15 to a contractor pursuant to this paragraph shall be paid to the contrac-
16 tor for the period beginning on the day after the required payment date
17 and ending on the payment date for those payments required according to
18 this section and shall be paid at the rate of interest in effect on the
19 date when the interest payment is made. Notwithstanding any other
20 provision of law to the contrary, interest shall be computed at the rate
21 equal to the overpayment rate set by the commissioner of taxation and
22 finance pursuant to subsection (e) of section one thousand ninety-six of
23 the tax law. A pro rata share of such interest shall be paid by the
24 contractor or subcontractor, as the case may be, to subcontractors and
25 materialmen in a proportion equal to the percentage of their pro rata
26 share of the contract payment. Such pro rata share of interest shall be
27 due to such subcontractors and materialmen only for those payments which
28 are not paid to such subcontractors and materialmen prior to the date
29 upon which interest begins to accrue between the public owner and the
30 contractor. Such pro rata shares of interest shall be computed daily
31 until such payments are made to the subcontractors and materialmen.

32 (d) For projects of a public owner other than the city of New York, if
33 state funds directly related to and which have been budgeted for the
34 construction of the project for which the payment is due have not been
35 received prior to the expiration of the thirty or forty-five days speci-
36 fied in paragraph (a) of this subdivision, the interest provided for in
37 paragraph (c) of this subdivision shall not begin to accrue and payment
38 shall not be due, until ten days after receipt of the state funds. Noth-
39 ing in this paragraph shall prevent the public owner from approving the
40 requisition, subject to receipt of the state funds. State funds shall
41 mean monies provided to the public owner by the state, its officers,
42 boards, departments, commissions, or a public authority and public bene-
43 fit corporation, a majority of the members of which have been appointed
44 by the governor or who serve as members by virtue of holding a civil
45 office of the state, or a combination thereof.

46 § 4. This act shall take effect on the same date and in the same
47 manner as a chapter of the laws of 2020, amending the state finance law
48 and the general municipal law relating to payment in construction
49 contracts, as proposed in legislative bills numbers S.7664 and A.9117,
50 takes effect.