

# STATE OF NEW YORK

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967

2021-2022 Regular Sessions

## IN ASSEMBLY

(Prefiled)

January 6, 2021

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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 requisi-  
22 tion 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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1 owner and the contractor provided, the public owner may limit such  
2 payment to materials in short and/or critical supply and materials  
3 specially fabricated for the project each as defined in the contract.  
4 When the work or major portions thereof as contemplated by the terms of  
5 the contract [~~has reached substantial completion which, for the purposes~~  
6 ~~of this section, shall mean the state in the progress of the project~~  
7 ~~when the work required by the contract with the public owner is suffi-~~  
8 ~~ciently complete in accordance with the contract so that the public~~  
9 ~~owner may occupy or utilize the work for its intended use, provided~~  
10 ~~further, that "substantial completion" shall apply to the entire project~~  
11 ~~or a portion of the entire project if the contract with the public owner~~  
12 ~~provides for occupancy or use of a portion of the project] are substan-  
13 tially completed, the contractor shall submit to the public owner and/or  
14 his agent a requisition for payment of the remaining amount of the  
15 contract balance. Upon receipt of such requisition the public owner  
16 shall approve and promptly pay the remaining amount of the contract  
17 balance less two times the value of any remaining items to be completed  
18 and an amount necessary to satisfy any claims, liens or judgments  
19 against the contractor which have not been suitably discharged. As the  
20 remaining items of work are satisfactorily completed or corrected, the  
21 public owner shall promptly pay, upon receipt of a requisition, for  
22 these remaining items less an amount necessary to satisfy any claims,  
23 liens or judgments against the contractor which have not been suitably  
24 discharged. Any claims, liens and judgments referred to in this section  
25 shall pertain to the project and shall be filed in accordance with the  
26 terms of the applicable contract and/or applicable laws.~~

27 § 2. Subdivision 1-a of section 139-f of the state finance law, as  
28 added by a chapter of the laws of 2020, amending the state finance law  
29 and the general municipal law relating to payment in construction  
30 contracts, as proposed in legislative bills numbers S.7664 and A.9117,  
31 is amended to read as follows:

32 1-a. Not later than forty-five business days after the date when the  
33 project has reached substantial completion, as such term is defined in  
34 the contract or as it is contemplated by the terms of the contract, the  
35 public owner shall submit to the contractor a written list describing  
36 all remaining items to be completed by the contractor. Not later than  
37 [~~seven calendar~~ five business days after receiving a written list  
38 describing all remaining items to be completed by the contractor, the  
39 contractor shall submit to each subcontractor from whom the contractor  
40 is withholding retainage a written list of all remaining items required  
41 to be completed by the subcontractor. Such list may include items in  
42 addition to those items on the public owner's list.

43 § 3. Subdivision 1 of section 106-b of the general municipal law, as  
44 amended by a chapter of the laws of 2020, amending the state finance law  
45 and the general municipal law relating to payment in construction  
46 contracts, as proposed in legislative bills numbers S.7664 and A.9117,  
47 is amended to read as follows:

48 1. Payment by public owners to contractors. (a) The contractor shall  
49 periodically, in accordance with the terms of the contract, submit to  
50 the public owner and/or his agent a requisition for a progress payment  
51 for the work performed and/or materials furnished to the date of the  
52 requisition less any amount previously paid to the contractor. The  
53 public owner shall in accordance with the terms of the contract approve  
54 and promptly pay the requisition for the progress payment less an amount  
55 necessary to satisfy any claims, liens or judgments against the contrac-  
56 tor 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.