

# STATE OF NEW YORK

1387

2021-2022 Regular Sessions

## IN SENATE

January 11, 2021

Introduced by Sens. BROOKS, AKSHAR, GALLIVAN -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts

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

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

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

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

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

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

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

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

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

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

31 § 3. Section 756-c of the general business law, as added by chapter  
32 127 of the laws of 2002, is amended to read as follows:

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

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

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