

STATE OF NEW YORK

1925

2023-2024 Regular Sessions

IN ASSEMBLY

January 23, 2023

Introduced by M. of A. BICHOTTE HERMELYN, HYNDMAN, SEAWRIGHT, WALKER --
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 Assem-
bly, do enact as follows:

1 Section 1. The opening paragraph and subdivisions 1 and 2 of section
2 139-f of the state finance law, the opening paragraph as added by chap-
3 ter 769 of the laws of 1978, subdivision 1 as amended by chapter 128 of
4 the laws of 2021 and subdivision 2 as amended by section 16 of part MM
5 of chapter 57 of the laws of 2008, are amended to read as follows:

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

15 1. Payment by public owners to contractors. The contractor shall peri-
16 odically, in accordance with the terms of the contract, submit to the
17 public owner and/or his agent a requisition for a progress payment for
18 the work performed and/or materials furnished to the date of the requi-
19 sition by the contractor and all subcontractors, less any amount previ-
20 ously paid to the contractor or subcontractors. The public owner shall
21 in accordance with the terms of the contract approve and promptly pay
22 the requisition for the progress payment less an amount necessary to
23 satisfy any claims, liens or judgments against the contractor or subcon-
24 tractors which have not been suitably discharged and less any retained
25 amount as hereafter described. The public owner shall retain not more

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

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

30 2. Payment by [~~contractors~~] public owners to subcontractors. [~~Within~~
31 ~~seven calendar days of the receipt~~] (a) Each subcontractor shall period-
32 ically, in accordance with the terms of the contract, submit to the
33 public owner and/or his agent and to the contractor and/or his agent a
34 requisition for a progress payment for the work performed and/or materi-
35 als furnished to the date of the requisition, less any amount previously
36 paid to the contractor. At the time of any payment [~~from~~] by the public
37 owner[7] to the contractor as provided in subdivision one of this
38 section, the public owner shall pay each of [~~his~~] the subcontractors and
39 materialmen the proceeds from the payment representing the value of the
40 work performed and/or materials furnished by the subcontractor and/or
41 materialman and reflecting the percentage of the subcontractor's work
42 completed or the materialman's material supplied in the requisition
43 approved by the owner and based upon the actual value of the subcontract
44 or purchase order less an amount necessary to satisfy any claims, liens
45 or judgments against the subcontractor or materialman which have not
46 been suitably discharged and less any retained amount as hereafter
47 described. [~~Failure by the contractor to pay any subcontractor or mater-~~
48 ~~ialman within seven calendar days of the receipt of any payment from the~~
49 ~~public owner shall result in the commencement and accrual of interest on~~
50 ~~amounts due to such subcontractor or materialman for the period begin-~~
51 ~~ning on the day immediately following the expiration of such seven~~
52 ~~calendar day period and ending on the date on which payment is made by~~
53 ~~the contractor to such subcontractor or materialman. Such interest~~
54 ~~payment shall be the sole responsibility of the contractor, and shall be~~
55 ~~paid at the rate of interest in effect on the date payment is made by~~
56 ~~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

1 been suitably discharged. Any claims, liens and judgments referred to in
2 this section shall pertain to the project and shall be filed in accord-
3 ance with the terms of the applicable contract and/or applicable laws.

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

8 § 2. The opening paragraph and subdivisions 1 and 2 of section 106-b
9 of the general municipal law, the opening paragraph as amended by chap-
10 ter 661 of the laws of 1992, subdivision 1 as amended by chapter 128 of
11 the laws of 2021, and subdivision 2 as amended by section 15 of part MM
12 of chapter 57 of the laws of 2008, are amended to read as follows:

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

20 1. Payment by public owners to contractors. (a) The contractor shall
21 periodically, in accordance with the terms of the contract, submit to
22 the public owner and/or his agent a requisition for a progress payment
23 for the work performed and/or materials furnished to the date of the
24 requisition by the contractor and all subcontractors less any amount
25 previously paid to the contractor or subcontractors. The public owner
26 shall in accordance with the terms of the contract approve and promptly
27 pay the requisition for the progress payment less an amount necessary to
28 satisfy any claims, liens or judgments against the contractor or subcon-
29 tractors which have not been suitably discharged and less any retained
30 amount as hereafter described. The public owner shall retain not more
31 than five per centum of each progress payment to the contractor or
32 subcontractors except that the public owner may retain in excess of five
33 per centum but not more than ten per centum of each progress payment to
34 the contractor provided that there are no requirements by the public
35 owner for the contractor to provide a performance bond and a labor and
36 material bond both in the full amount of the contract. The public owner
37 shall pay, upon requisition from the contractor, for materials pertinent
38 to the project which have been delivered to the site or off-site by the
39 contractor [~~and/or subcontractor~~] and suitably stored and secured as
40 required by the public owner and the contractor provided, the public
41 owner may limit such payment to materials in short and/or critical
42 supply and materials specially fabricated for the project each as
43 defined in the contract. When the work or major portions thereof as
44 contemplated by the terms of the contract are substantially completed,
45 the contractor shall submit to the public owner and/or his agent a
46 requisition for payment of the remaining amount of the contract balance,
47 including balances owed to subcontractors. Upon receipt of such requi-
48 sition the public owner shall approve and promptly pay the remaining
49 amount of the contract balance less two times the value of any remaining
50 items to be completed and an amount necessary to satisfy any claims,
51 liens or judgments against the contractor which have not been suitably
52 discharged. As the remaining items of work are satisfactorily completed
53 or corrected, the public owner shall promptly pay, upon receipt of a
54 requisition, for these items less an amount necessary to satisfy any
55 claims, liens or judgments against the contractor which have not been
56 suitably discharged. Any claims, liens and judgments referred to in this

1 section shall pertain to the project and shall be filed in accordance
2 with the terms of the applicable contract and/or applicable laws. Where
3 the public owner is other than the city of New York, the term "promptly
4 pay" shall mean payment within thirty days, excluding legal holidays, of
5 receipt of the requisition unless such requisition is not approvable in
6 accordance with the terms of the contract. Notwithstanding the forego-
7 ing, where the public owner is other than the city of New York and is a
8 municipal corporation which requires an elected official to approve
9 progress payments, "promptly pay" shall mean payment within forty-five
10 days, excluding legal holidays, of receipt of the requisition unless
11 such requisition is not approvable in accordance with the terms of the
12 contract.

13 (b) Not later than forty-five business days after the date when the
14 project has reached substantial completion, as such term is defined in
15 the contract or as it is contemplated by the terms of the contract, the
16 public owner shall submit to the contractor a written list describing
17 all remaining items to be completed by the contractor. Not later than
18 five business days after receiving a written list describing all remain-
19 ing items to be completed by the contractor, the contractor shall submit
20 to each subcontractor from whom the contractor is withholding retainage
21 a written list of all remaining items required to be completed by the
22 subcontractor. Such list may include items in addition to those items on
23 the public owner's list.

24 (c) Each public owner other than the city of New York which is
25 required to make a payment from public funds pursuant to a contract and
26 which does not make such contract payment by the required payment date
27 shall make an interest payment to the contractor on the amount of the
28 contract payment which is due unless failure to make such contract
29 payment is the result of a lien, attachment, or other legal process
30 against the money due said contractor, or unless the amount of the
31 interest payment as computed in accordance with the provisions set forth
32 hereinafter is less than ten dollars. Interest payments on amounts due
33 to a contractor pursuant to this paragraph shall be paid to the contrac-
34 tor for the period beginning on the day after the required payment date
35 and ending on the payment date for those payments required according to
36 this section and shall be paid at the rate of interest in effect on the
37 date when the interest payment is made. Notwithstanding any other
38 provision of law to the contrary, interest shall be computed at the rate
39 equal to the overpayment rate set by the commissioner of taxation and
40 finance pursuant to subsection (e) of section one thousand ninety-six of
41 the tax law. A pro rata share of such interest shall be paid by the
42 contractor or subcontractor, as the case may be, to subcontractors and
43 materialmen in a proportion equal to the percentage of their pro rata
44 share of the contract payment. Such pro rata share of interest shall be
45 due to such subcontractors and materialmen only for those payments which
46 are not paid to such subcontractors and materialmen prior to the date
47 upon which interest begins to accrue between the public owner and the
48 contractor. Such pro rata shares of interest shall be computed daily
49 until such payments are made to the subcontractors and materialmen.

50 (d) For projects of a public owner other than the city of New York, if
51 state funds directly related to and which have been budgeted for the
52 construction of the project for which the payment is due have not been
53 received prior to the expiration of the thirty or forty-five days speci-
54 fied in paragraph (a) of this subdivision, the interest provided for in
55 paragraph (c) of this subdivision shall not begin to accrue and payment
56 shall not be due, until ten days after receipt of the state funds. Noth-

ing 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 and completed on or before such date.