

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
GENERAL MUNICIPAL LAW
CHAPTER 24 OF THE CONSOLIDATED LAWS
ARTICLE 5-A—PUBLIC CONTRACTS

Current through L.2003, chs. 4 to 9.

§ 106-b. Payment on public work projects

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 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 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 as hereafter described. The public owner shall retain not more than five per centum of each progress payment to the contractor 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 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 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) 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.

(c) 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 (b) 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 to subcontractors. Within fifteen calendar days of the receipt of any payment from the public owner, the contractor shall pay each of his 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. With respect to contracts entered into by public owners other than the city of New York, 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 fifteen 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 fifteen 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 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. **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 fifteen 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.

3. In the event that the terms of payment on a public works project, as provided in this section, are pre-empted or superseded as a result of the provisions of any federal statute, regulation or rule applicable to the project, the terms of this section shall not apply.

CREDIT(S)

1999 Main Volume

(Added L.1978, c. 769, § 2; amended L.1981, c. 166, § 1; L.1983, c. 884, § 1; L.1992, c. 661, § 1; L.1995, c. 98, §§ 1, 2.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

1999 Main Volume

L.1992, c. 661 legislation

L.1992, c. 661, § 2, amended L.1995, c. 98, § 3, eff. June 30, 1995, provided:

“This act [amending this section] shall take effect on the thirtieth day after it shall have become a law [became law July 31, 1992; eff. Aug. 30, 1992], and shall apply to contracts entered into on or after such date.” [Amendment by L. 1995, c. 98 cancelled the expiration of L. 1992, c. 661 which was to occur on July 1, 1995.]

L. 1983, c. 884 legislation

Section 3 of L.1983, c. 884, provided:

“This act [amending this section and State Finance Law § 139-f] shall take effect on the ninetieth day after it shall have become a law [Aug. 8, 1983] and shall apply to all applicable public work contract bid on or after the effective date of this act.”

L.1981, c. 166 legislation

Section 3 of L.1981, c. 166, provided:

“This act [amending subd. 2 of this section and subd. 2 of State Finance Law § 139-f] shall take effect on the ninetieth day after it shall have become a law [June 2, 1981] and shall apply to all applicable public work contracts bid on or after the effective date of this act.”

L. 1978, c. 769 legislation

L.1978, c. 769, § 10, provided:

“This act [adding this section and amending Education Law § 376] shall take effect on the ninetieth day after it

shall have become a law [Aug. 7, 1978] and shall apply to all applicable public work contracts bid on or after the effective date of this act.”

CROSS REFERENCES

Housing Authority construction contracts, conformance to this section, see Public Housing Law § 151.

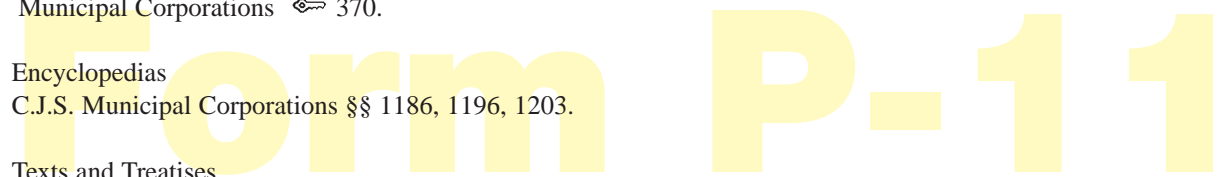
LIBRARY REFERENCES

1999 Main Volume

American Digest System
Municipal Corporations ⇄ 370.

Encyclopedias
C.J.S. Municipal Corporations §§ 1186, 1196, 1203.

Texts and Treatises
27 NY Jur 2d, Counties, Towns, and Municipal Corporations § 1250.



NOTES OF DECISIONS

Construction with other law 1/2
Private actions 4
Prompt payments 3
Public benefit corporations 1
Retention from payment 2

1/2. Construction with other law

Construction contractor’s action seeking to compel city to abide by the state law limiting the retention rate for construction contract was within the ambit of a mandamus to compel a municipality to perform a duty that is enjoined by law. McKinney’s CPLR 7801 et seq.; McKinney’s General Municipal Law §§ 106-b. Montco Const. Co., Inc. v. Giambra, 2000, 184 Misc.2d 970, 712 N.Y.S.2d 766.

City’s letter advising construction contractor of city’s refusal to adhere to contractor’s request to reduce retention rate for construction contract from ten percent to five percent commenced the running of the statute of limitations for contractor’s mandamus action alleging city’s failure to comply with statutory duty of requiring only a five percent retention. Montco Const. Co., Inc. v. Giambra, 2000, 184 Misc.2d 970, 712 N.Y.S.2d 766.

1. Public benefit corporations

The Suffolk County Water Authority, being a public benefit corporation, is not subject to the

provisions of this section, but is subject to the similar provisions of State Finance Law § 139-f. Op.State Compt. 79-688.

2. Retention from payment

Public contractor has no property interest, grounded in New York law, to prompt payment pending investigation when result of that very investigation will determine whether governmental entity tenders payment or declares contract void, at least where delay does not exceed reasonable delay contemplated by New York law. Christ Gatzonis Elec. Contractor, Inc. v. New York City School Const. Authority, C.A.2 (N.Y.)1994, 23 F.3d 636.

Material issues of fact existed, precluding summary judgment for contractor responsible for maintaining street lights on its claim for compensation due from city; city had made counterclaim alleging that it was owed liquidated damages for contractor’s failure to submit written request for extensions of time for delayed repairs and alleged failure to perform contractual duties to patrol area to find and fix broken street lights. A.I. Smith Elec. Contractors, Inc. v. City of New York (MJ-346) (1 Dept. 1995) 211 A.D.2d 485, 621 N.Y.S.2d 61.

Construction contractor was entitled to retention amount of five percent for contract to construct police precinct building for city, based on

requirement of performance and payment bonds, though the contract expressly set a retention rate of ten percent and the contract did not expressly require a payment bond, where the contract's general reference to being governed by current and future state laws invoked the law limiting retention rates and invoked the law requiring a payment bond for all city contracts. *Montco Const. Co., Inc. v. Giambra*, 2000, 184 Misc.2d 970, 712 N.Y.S.2d 766.

Under this section, moneys may be retained from payment of the balance due upon substantial completion of a public works contract, until the end of a "period of maintenance" provided for in the contract. Op.State Compt. 80-622.

3. Prompt payments

Electrical contractor which had contract with school construction authority (SCA), had no property interest, grounded under New York law, to prompt payment protected by due process clause; criminal allegations against president of contractor

placed doubt on what funds, if any, were owed to contractor and prevented contractor from asserting clear entitlement to prompt payment. *Christ Gatzonis Elec. Contractor, Inc. v. New York City School Const. Authority*, C.A.2 (N.Y.)1994, 23 F.3d 636.

4. Private actions

General Municipal Law section concerning payment on public works projects creates no private cause of action for municipality's failure to retain payments, and no such cause of action may be implied. *Murnane Associates, Inc. v. Harrison Garage Parking Corp.* (4 Dept. 1997) 239 A.D.2d 882, 659 N.Y.S.2d 665, leave to appeal denied 95 N.Y.2d 751, 711 N.Y.S.2d 153, 733 N.E.2d 225.

McKinney's General Municipal Law § 106-b

NY GEN MUN § 106-b

END OF DOCUMENT