

MCKINNEYS CONSOLIDATED LAWS OF NEW YORK ANNOTATED  
STATE FINANCE LAW  
CHAPTER 56 OF THE CONSOLIDATED LAWS  
ARTICLE IX--CONTRACTS

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

§ 139. Retained percentages

1. A clause shall be inserted in all specifications or contracts hereafter made or awarded by the state, or by any public department or official thereof for work to be executed except as provided in section thirty-eight of the highway law in which the execution and delivery by the contractor of a performance bond shall be required, providing that the state shall retain five per centum of the amount of each progress payment in accordance with section one hundred thirty-nine-f of the state finance law.

2. The clause specified in subdivision one of this section may be inserted in the specifications of any uncompleted public contract, of the kind referred to in such subdivision, heretofore made or awarded by the state or by any public department, or official thereof, with the written consent of the commissioner of general services and of the official of the public department by whom such contract was awarded and of the contractor, provided the surety or sureties upon the performance and labor and material bonds given by the contractor upon any such contract shall consent in writing thereto and the retained percentage of moneys earned under such contract shall, after the insertion of such clause, be payable in accordance with the provisions set forth in said clause.

3. Under any contract heretofore or hereafter made or awarded by the state, or by any public department or official thereof, the contractor may, from time to time, withdraw the whole or any portion of the amount retained from payments to the contractor pursuant to the terms of the contract, upon depositing with the state comptroller or, if so directed by the state comptroller, with a bank or trust company which has entered into an agreement with the state comptroller to provide the services which the state comptroller is required to perform pursuant to the provisions of this subdivision (1) United States treasury bonds, United States treasury notes, United States treasury certificates of indebtedness or United States treasury bills, (2) bonds or notes of the state of New York, (3) bonds of any political subdivision in the state of New York, (4) bonds of the New York state housing finance agency, or (5) bonds of the New York state medical care facilities finance agency, of a market value not exceeding par, at the time of deposit, equal to the amount so withdrawn. The state comptroller shall, from time to time, collect all interest or income on the obligations so deposited, and shall pay the same, when and as collected, to the contractor who deposited the obligations. If the deposit be in the form of coupon bonds, the coupons as they respectively become due shall be clipped, presented for payment, and the proceeds remitted to the contractor. The contractor shall not be entitled to interest or coupons or income on any of the deposited obligations, the proceeds of which shall be or shall have been used, or applied by the state, or by any public department or official thereof, pursuant to the terms of the contract. The state comptroller or any such bank or trust company when authorized by the state comptroller, may impose upon each contractor a service charge for receiving, handling and disbursing obligations, funds and coupons pursuant to the provisions of this subdivision in an amount to be determined by the state comptroller. The provisions of this section, as amended, shall supersede the provisions of any act inconsistent herewith.

CREDIT(S)

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(L.1940, c. 593; amended L.1952, c. 576, § 1; L.1957, c. 896, § 1; L.1958, c. 441, § 1; L.1962, c. 251, §

19; L.1963, c. 932, § 28; L.1968, c. 420, §§ 283 to 285; L.1968, c. 433, § 20; L.1970, c. 113, § 1; L.1977, c. 292, § 2; L.1978, C. 769, §§ 6, 7; L.1979, c. 536, § 1.)

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< Laws 1940, Chapter 593>

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

HISTORICAL AND STATUTORY NOTES

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L. 1979, c. 536 legislation

Subd. 3. L.1979, c. 536, § 1, eff. July 10, 1979, in sentence beginning "Under any contract" inserted "or, if so directed by the state comptroller, with a bank or trust company which has entered into an agreement with the state comptroller to provide the services which the state comptroller is required to perform pursuant to the provisions of this subdivision", in sentence beginning "If the deposit" substituted "clipped, presented for payment, and the proceeds remitted to the" for "delivered to the" and added sentence beginning "The state comptroller or."

Derivation

State Finance Law of 1909, c. 58, § 43a, added L. 1916, c. 176, § 2; and amended L. 1920, c. 857, § 2; L.1921, c. 394, § 2; L.1930, c. 697.

AMERICAN LAW REPORTS

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee. 7 ALR4th 1202.

LIBRARY REFERENCES

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American Digest System  
States ↻ 104.

Encyclopedias  
89 NY Jur 2d, Public Works and Contracts §§ 45, 62.  
64 Am Jur 2d, Public Works and Contracts §§ 95 to 96, 143.  
C.J.S. States §§ 168, 172 to 173.

Texts and Treatises  
14 Am Jur Trials 437, Representing the Government Contractor.

NOTES OF DECISIONS

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### 1. Construction and application

The clause relative to retained percentages now required to be inserted in certain specifications and contracts for state construction work, applies to all state work, except such as is undertaken under the Highway Law and the Canal Law, such as contracts for the construction of sewage disposal plants, water supply systems, railroad sidings and connections, fences, grading, roadways on state property, and all other appurtenances to state buildings. 1930, Op.Atty.Gen. 287.

### 2. Securities deposited

The comptroller may legally demand an amount of securities, the value of which is in excess of the amount of the moneys withdrawn, for it was the intention of this section that at all times the market value of the securities on deposit should equal the amount of money so withdrawn. 1931, Op.Atty.Gen. 338.

A certificate of deposit made payable to the order of the State Comptroller may be accepted by him as security for the release of money retained by the state upon state contracts. 1927, Op.Atty.Gen. 81.

### 3. Consent of surety

Under this section, comptroller's refusal to permit contractors to withdraw any portion of amount retained until surety, guaranteeing completion of work under contract, consented to the withdrawal, was unjustified, since comptroller is not clothed with any discretion when proper securities are tendered. *Agostini v. State* (3 Dept. 1938) 255 A. D. 264, 5 N.Y.S.2d 732.

Surety on completion bond of contractor who has completed a contract which had been accepted by State has no interest in retained percentages and need not consent to substitution of securities representing the same. Op.Atty.Gen., 1933, 48 St.Dept. 318.

### 4. Interest

Where public building contractors deposited securities with comptroller to secure withdrawal of retained percentages under contract and comptroller wrongfully refused to permit contractors to withdraw any portion of the amount retained, contractors were entitled to allowance of interest on

sum retained by comptroller for the period of retention. *Agostini v. State* (3 Dept. 1938) 255 A.D. 264, 5 N.Y.S.2d 732.

Claimant contractors could not recover interest on bonds deposited in lieu of retained percentages. *Fehlhaber Corp. v. State*, 1970, 64 Misc.2d 167, 314 N.Y.S.2d 574, affirmed 40 A.D.2d 881, 337 N.Y.S.2d 42.

State was not entitled to credit for interest received by claimants on securities deposited for period from February 26, 1968, the date on which State should have completed its final estimate and tendered final payment for highway construction work done by defendants, to date of entry of judgment against State for amount concededly due under contract, including interest. *Fehlhaber Corp. v. State*, 1969, 60 Misc.2d 13, 300 N.Y.S.2d 920.

### 5. Release of surety

Where a contractor has substituted securities for retained percentages, pursuant to subdivision 3 of this section and the Bureau of Highways, pursuant to Highway Law, § 38, subdivision 8, orders 75 per cent of such retained percentages paid, the work having been completed and accepted, the Comptroller may, and should, release 75 per cent of such securities. 1930, Op.Atty.Gen. 308.

Bonds and notes of the Local Government Assistance Corporation are securities which can be deposited for the release of retained percentages held by the State Comptroller or by a political subdivision. Op.State Compt. 91-50.

### 6. Cancellation of contract

Where state declared construction contract void under provision for avoidance upon contractor's default, and for forfeiture of security in such event, a strict forfeiture of retained percentages for purpose of depriving lienors of possible satisfaction would seem contrary to public policy, and whether unexpended balance of contract price remaining in state's hands constituted no fund to which liens might attach, was dependent on whether state suffered damage due to contractor's default. *Hartford Acc. & Indem. Co. v. First Nat. Bank & Trust Co. of Paterson, N.J.* (1 Dept. 1953) 281 A.D. 607, 121 N.Y.S.2d 308, appeal granted, reargument denied 282 A.D. 836, 124 N.Y.S.2d 340, motion denied 306 N.Y. 824, 118 N.E.2d

827, affirmed 307 N.Y. 634, 120 N.E.2d 833, reargument denied 307 N.Y. 879, 122 N.E.2d 755.

Where a contract for construction of a public building is cancelled as a result of the contractor's default, the moneys retained as security for completion of the contract work become the property of the State and may not be paid to a surety who has paid lienors and taken assignments

of the liens filed against the improvement. 1952, Op.Atty.Gen. 118.

McKinney's State Finance Law § 139

NY STATE FIN § 139

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