February 18, 2020

MEMORANDUM IN SUPPORT

S.7664  (Breslin)
A.9117  (Cusick)

AN ACT to amend the state finance law and the general municipal law, in relation to payment in construction contracts.

The Empire State Subcontractors Association, Inc. (ESSA), representing over 1,000 subcontractors, specialty contractors and material supply firms engaged in public works construction projects throughout the State of New York strongly SUPPORT the above referenced bill, which would define “substantial completion” with regard to public work contracts, and would prescribe timelines and procedures to be followed by public owners and contractors with respect to the “punch list” once substantial completion has been reached.

Currently, when a public work contract has been substantially completed, the State Finance Law and the General Municipal Law require public agencies and political subdivisions to promptly pay the remaining amount of the contract balance less two times the value of any remaining items to be completed (punch list) and an amount necessary to satisfy any claims, liens or judgments against the contractor which have not been suitably discharged. In essence, current law calls for the contractor’s retainage to be reduced to no more than two times the value of the punch list in cases where there are no outstanding claims, liens or judgments.

Unfortunately, because the term “substantial completion” is not defined in the law, many public owners take advantage of this loophole to delay the payment of withheld retainage to a contractor for many months, even up to a year, after the project has been substantially completed and accepted by the public owner. By defining “substantial completion”, the law’s intent will be made clear; that public owners shall release a contractor’s retainage upon the reaching of substantial completion 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.

In addition, this legislation would prescribe timelines and procedures to be followed by public owners and contractors in managing the punch list once substantial completion of a project has been reached. More specifically, it would require the public

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owner to provide the contractor with a complete punch list no later than 45 days after substantial completion has been reached. The contractor, in turn, would be required to provide subcontractors with their portions of the punch list within 7 days after receiving the punch list from the public owner. Currently, some public owners prolong the procedure for completing the punch list for many months or even years, to the point where the “punch list” begins to look like free maintenance not contemplated under the contract.

Subcontractors’ cash flow is seriously impaired by retainage, and if the payment of a contractor’s retainage is delayed for months or years, this delay cascades down to the contractor’s subcontractors and material suppliers. It is important to note that retainage represents an inducement to performance and are funds the subcontractor has earned for work satisfactorily completed.

The practice of withholding retainage from progress payments creates a serious negative cash flow to subcontractors which becomes progressively more burdensome as the work progresses. The effect is particularly acute after subcontractors have completed their work because under current practices, their retainage is not released until completion of the entire project, which could be months, or years, away. When public owners delay and prolong the punch list procedure after the project has been substantially completed, a subcontractor’s already substantial cash flow burden is only exacerbated. Out of necessity, subcontractors must recoup at least a portion of this negative cash flow by increasing prices to the contractor. These increased prices are ultimately passed on to the public owner.

It is important to note that the vast majority of construction firms owned by minorities and women are subcontractors. This legislation would promote a more prompt release of withheld retainage to these firms and would greatly assist them in their efforts to grow and succeed in a very competitive industry.

The Empire State Subcontractors Association strongly supports this bill and urges its passage into law.

EMPIRE STATE SUBCONTRACTORS ASSOCIATION, INC.

[Signature]
Michael Misenhimer
Executive Director