

2016 -- S 2196

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2016

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A N A C T

RELATING TO PUBLIC PROPERTY AND WORKS

Introduced By: Senators Lombardo, Ruggerio, Goodwin, Lombardi, and Ciccone

Date Introduced: January 27, 2016

Referred To: Senate Finance

It is enacted by the General Assembly as follows:

1 SECTION 1. Title 37 of the General Laws entitled "PUBLIC PROPERTY AND
2 WORKS" is hereby amended by adding thereto the following chapter:

3 CHAPTER 25

4 PAYMENTS TO CONTRACTORS AND SUBCONTRACTORS

5 **37-25-1. Applications for payment.** -- (a) A contractor shall, once in each month on the
6 day of the month corresponding to the day specified in the contractor agreement, on forms
7 provided and in the manner prescribed by the awarding authority, submit to the awarding
8 authority a statement showing the total amount of work done from the time of the estimate and
9 the value thereof as approved by the resident engineer and the designer. It shall be the
10 responsibility of the contractor to deliver, or cause to be delivered, to the resident engineer said
11 periodic estimate in proper form and approved as provided above. All periodic estimates shall
12 contain such certifications and other evidence supporting the contractor's right to payment as the
13 awarding authority may require, including without limitation, lien waivers, on forms as the
14 awarding authority may require. If there is no resident engineer assigned to the contract, the
15 designer shall act in lieu thereof. If there is neither a resident engineer, nor a designer, the
16 awarding authority shall designate a person at the office of the awarding authority. The contractor
17 shall include in the periodic estimate only materials incorporated in the work, except as may
18 otherwise be provided in herein. The awarding authority shall retain five percent (5%) of such
19 estimated value as security for the completion of the work and shall pay to the contractor while

1 carrying on the work the balance not retained, subject to the approval of the awarding authority
2 and after deducting therefrom all previous payments and all sums to be kept under the provisions
3 of the contract.

4 (b) Each periodic estimate shall constitute the contractor's representation that:

5 (1) The payment requested to be disbursed has been incurred by the contractor on account
6 of the work and is justly due to subcontractors or, to the contractor in the case of other work
7 performed by the contractor on account thereof;

8 (2) The materials, supplies and equipment for which application for payment is being
9 submitted have been installed or incorporated into the work or have been stored at the site or at
10 such off-site storage locations as the awarding authority shall have approved;

11 (3) The materials, supplies and equipment are insured in accordance with the provisions
12 of the contract;

13 (4) The materials, supplies and equipment are owned by the owner and are not subject to
14 any liens or encumbrances;

15 (5) The work which is the subject of the periodic estimate has been performed in
16 accordance with the contract; and

17 (6) That all due and payable bills with respect to the work have been paid to date or shall
18 be paid from the proceeds of the periodic estimate.

19 (c) The contractor may include in a periodic estimate the value of materials or equipment
20 delivered at the site (or at some other location agreed to in writing) only upon delivery to the
21 awarding authority of:

22 (1) An acceptable transfer of title on a form provided by the awarding authority;

23 (2) Written certification by the contractor (or applicable subcontractor) on a form
24 provided by the awarding authority that the contractor (or the subcontractor) is the lawful owner
25 and that the materials or equipment are free from all encumbrances, accompanied by invoices or
26 other acceptable proof of prior payment for such materials;

27 (3) A stored materials insurance binder that covers the materials for which payment is
28 requested that names the owner as an insured party should the stored materials be subjected to
29 any casualty, loss or theft prior to their inclusion in the work. The material(s) or equipment must,
30 in the judgment of the designer:

31 (i) Meet the requirements of the contract, including prior shop drawing, product data, and
32 sample approval;

33 (ii) Be ready for use; and

34 (iii) Be properly stored by the contractor and be adequately protected until incorporated

1 into the work.

2 (d) The awarding authority may make changes in any periodic estimate submitted by the
3 contractor and the payment due shall be computed in accordance with the changes made. The
4 provisions of the general laws shall govern payments on which the awarding authority has made
5 changes.

6 (e) No certificate for payment and no progress payment shall constitute acceptance of
7 work that is not in accordance with the contract documents.

8 (f) The contractor and all subcontractors furnishing labor on this contract agree to furnish
9 certified payroll reports if requested to do so, at no additional expense to the awarding authority.
10 The awarding authority may at all reasonable times audit such reports.

11 **37-25-2. Periodic payments.** – (a) The awarding authority shall make payment to the
12 contractor in accordance with existing law. Within fifteen (15) days (thirty (30) days in the case
13 of the state, including local housing authorities) after receipt from the contractor, at the place
14 designated by the awarding authority if such a place is so designated, of a periodic estimate
15 requesting payment of the amount due for the preceding month, the awarding authority shall
16 make a periodic payment to the contractor for the work performed during the preceding month
17 and for the materials not incorporated in the work but delivered and suitably stored at the site or
18 at some location agreed upon in writing to which the contractor has title or to which a
19 subcontractor has title and has authorized the contractor to transfer title to the awarding authority
20 upon certification by the contractor that they are the lawful owner and that the materials are free
21 from all encumbrances, but less:

22 (1) A retention based on its estimate of the fair value of its claims against the contractor;
23 less

24 (2) A retention for direct payments to subcontractors based on demands for same; and
25 less

26 (3) A retention not exceeding five percent (5%) of the approved amount of the periodic
27 payment.

28 (b) After the receipt of a periodic estimate requesting final payment and within sixty-five
29 (65) days after:

30 (1) The contractor fully completes the work or substantially completes the work so that
31 the value of the work remaining to be done is, in the estimate of the awarding authority, less than
32 one percent (1%) of the original contract price; or

33 (2) The contractor substantially completes the work and the awarding authority takes
34 possession for occupancy, whichever occurs first, the awarding authority shall pay the contractor

1 the entire balance due on the contract less:

2 (i) A retention based on its estimate of the fair value of its claims against the contractor
3 and of the cost of completing the incomplete and unsatisfactory items of work; and less

4 (ii) A retention for direct payments to subcontractors based on demands for same, or
5 based on the record of payments by the contractor to the subcontractors under this contract if such
6 record of payment indicates that the contractor has not paid subcontractors. If the awarding
7 authority fails to make payment as herein provided, there shall be added to each payment daily
8 interest at the rate of three (3) percentage points above the discount rate then charged by the
9 Federal Reserve Bank of Boston commencing on the first day after payment is due and
10 continuing until the payment is delivered or mailed to the contractor; provided, that no interest
11 shall be due, in any event, on the amount due on a periodic estimate for final payment until fifteen
12 (15) days (twenty-four (24) days in the case of the state) after receipt of such periodic estimate
13 from the contractor, at the place designated by the awarding authority if such a place is so
14 designated. The contractor agrees to pay to each subcontractor a portion of any interest paid in
15 accordance with the amount due each subcontractor.

16 (c) The awarding authority may make changes in any periodic estimate submitted by the
17 contractor and the payment due on said periodic estimate shall be computed in accordance with
18 the change so made, but such changes or any requirement for a corrected periodic estimate shall
19 not affect the due date for the periodic payment or the date for the commencement of interest
20 charges on the amount of the periodic payment computed in accordance with the changes made,
21 as provided herein; provided, that the awarding authority may, within seven (7) days after receipt,
22 return to the contractor for correction, any periodic estimate which is not in the required form or
23 which contains computations not arithmetically correct and, in that event, the date of receipt of
24 such periodic estimate shall be the date of receipt of the corrected periodic estimate in proper
25 form and with arithmetically correct computations. The date of receipt of a periodic estimate
26 received on a Saturday shall be the first working day thereafter. These provisions shall not apply
27 to any contract for the construction, reconstruction, alteration, remodeling, repair or demolition of
28 any public building to which this section applies.

29 (d) All periodic estimates shall be submitted to the awarding authority, or to its designee
30 as set forth in writing to the contractor, and the date of receipt by the awarding authority or its
31 designee shall be marked on the estimate. All periodic estimates shall contain a separate item for
32 each filed subtrade and each sub-subtrade listed in sub-bid form as required by specifications and
33 column listing the amount paid to each filed subcontractor as of the date of the periodic estimate
34 is filed. The person making payment for the awarding authority shall add the daily interest

1 provided for herein to each payment for each day beyond the due date of receipt marked on the
2 estimate. A certificate of the architect to the effect that the contractor has fully or substantially
3 completed the work shall be conclusive for the purposes of this section. Notwithstanding the
4 provisions of this section, at any time after the value of the work remaining to be done is, in the
5 estimation of the awarding authority, less than one percent (1%) of the adjusted contract price, or
6 the awarding authority has determined that the contractor has substantially completed the work
7 and the awarding authority has taken possession for occupancy, the awarding authority may send
8 to the general contractor by certified mail, return receipt requested, a complete and final list of all
9 incomplete and unsatisfactory work items, including, for each item on the list, a good faith
10 estimate of the fair and reasonable cost of completing such item. The general contractor shall then
11 complete all such work items within thirty (30) days of receipt of the list or before the contract
12 completion date, whichever is later. If the general contractor fails to complete all incomplete and
13 unsatisfactory work items within forty-five (45) days after receipt of such items furnished by the
14 awarding authority or before the contract completion date, whichever is later, subsequent to an
15 additional fourteen (14) days' written notice to the general contractor by certified mail, return
16 receipt requested, the awarding authority may terminate the contract and complete the incomplete
17 and unsatisfactory work items and charge the cost of same to the general contractor and such
18 termination shall be without prejudice to any other rights or remedies the awarding authority may
19 have under the contract. The awarding authority shall note any termination in the evaluation form
20 to be filed by the awarding authority.

21 **37-25-3. Payment of subcontractors. --** (a) Within five (5) business days after a general
22 contractor receives payment on account of a periodic estimate, the general contractor shall pay to
23 each subcontractor the amount paid for the labor performed and the materials furnished by that
24 subcontractor, less any amount specified in any court proceedings barring such payment and also
25 less any amount claimed due from the subcontractor by the general contractor.

26 (b) Not later than sixty-five (65) days after each subcontractor substantially completes
27 their work in accordance with the plans and specifications, the entire balance due under the
28 subcontract less amounts retained by the awarding authority as the estimated cost of completing
29 the incomplete and unsatisfactory items of work, shall be due the subcontractor; and the awarding
30 authority shall pay that amount to the general contractor. The general contractor shall, within five
31 (5) business days, pay to the subcontractor the full amount received from the awarding authority
32 less any amount as may be specified in any court proceedings barring such payment and also less
33 any amount claimed due from the subcontractor by the general contractor.

34 (c) Each payment made by the awarding authority to the general contractor for the labor

1 performed and the materials furnished by a subcontractor shall be made to the general contractor
2 for the account of that subcontractor, and the awarding authority shall take reasonable steps to
3 compel the general contractor to make each such payment to each such subcontractor. If the
4 awarding authority has received a demand for direct payment from a subcontractor for any
5 amount which has already been included in a payment to the general contractor or which is to be
6 included in a payment to the general contractor for payment to the subcontractor, the awarding
7 authority shall act upon the demand as provided in this section.

8 (d) If, within seventy (70) days after the subcontractor has substantially completed the
9 subcontract work, the subcontractor has not received from the general contractor the balance due
10 under the subcontract including any amount due for extra labor and materials furnished to the
11 general contractor, less any amount retained by the awarding authority as the estimated cost of
12 completing the incomplete and unsatisfactory items of work, the subcontractor may demand
13 direct payment of that balance from the awarding authority. The demand shall be by a sworn
14 statement delivered to or sent by certified mail to the awarding authority, and a copy shall be
15 delivered to or sent by certified mail to the general contractor at the same time. The reply shall
16 contain a detailed breakdown of the balance due under the subcontract and also a statement of the
17 status of completion of the subcontract work. Any demand made after substantial completion of
18 the subcontract work shall be valid even if delivered or mailed prior to seventy (70) days after the
19 subcontractor has substantially completed the subcontract work. Within ten (10) days after the
20 subcontractor has delivered or so mailed the demand to the awarding authority and delivered or
21 so mailed a copy to the general contractor, the general contractor shall reply to the demand. The
22 reply shall be by a sworn statement to or sent by certified mail to the awarding authority and a
23 copy shall be delivered to or sent by certified mail to the subcontractor at the same time. The
24 reply shall contain a detailed breakdown of the balance due under the subcontract including any
25 amount due for extra labor and materials furnished to the general contractor and of the amount
26 due for each claim made by the general contractor against the subcontractor.

27 (e) Within fifteen (15) days after receipt of the demand by the awarding authority, but in
28 no event prior to seventy (70) days after substantial completion of the subcontract work, the
29 awarding authority shall make direct payment to the subcontractor of the balance due under the
30 subcontract including any amount due for extra labor and materials furnished to the general
31 contractor, less any amount:

32 (1) Retained by the awarding authority as the estimated cost of completing the
33 incomplete or unsatisfactory items of work;

34 (2) Specified in any court proceedings barring such payment; or

1 (3) Disputed by the general contractor in the sworn reply; provided that the awarding
2 authority shall not deduct from a direct payment any amount if the reply is not sworn to, or for
3 which the sworn reply does not contain the detailed breakdown required. The awarding authority
4 shall make further direct payments to the subcontractor after the removal of the basis for
5 deduction from direct payments within five (5) business days.

6 (f) The awarding authority shall forthwith deposit the amount deducted from a direct
7 payment in an interest-bearing joint account in the names of the general contractor and the
8 subcontractor in a bank in Rhode Island selected by the awarding authority or agreed upon by the
9 general contractor and the subcontractor, and shall notify the general contractor and the
10 subcontractor of the date of the deposit and the bank receiving the deposit. The bank shall pay the
11 amount in the account, including accrued interest, as provided in an agreement between the
12 general contractor and the subcontractor or as determined by decree of a court of competent
13 jurisdiction.

14 (g) All direct payments and all deductions from demands for direct payments deposited in
15 an interest-bearing account or accounts in a bank shall be made out of amounts payable to the
16 general contractor at the time of receipt of a demand for direct payment from a subcontractor and
17 out of amounts which later become payable to the general contractor and in the order of receipt of
18 such demands from subcontractors. All direct payments shall discharge the obligation of the
19 awarding authority to the general contractor to the extent of such payment.

20 (h) The awarding authority shall deduct from payments to a general contractor amounts
21 which, together with the deposits in interest-bearing accounts, are sufficient to satisfy all unpaid
22 balances of demands for direct payment received from subcontractors. All such amounts shall be
23 earmarked for direct payments, and the subcontractors shall have a right to such deductions prior
24 to any claims against such amounts by creditors of the general contractor.

25 (i) If the subcontractor does not receive payment or if the general contractor does not
26 submit a periodic estimate for the value of the labor or materials performed or furnished by the
27 subcontractor and the subcontractor does not receive payment for same when due less the
28 deductions, the subcontractor may demand direct payment by following the procedure herein and
29 the general contractor may file a sworn reply. A demand made after the first day of the month
30 following that for which the subcontractor performed or furnished the labor and materials for
31 which the subcontractor seeks payment shall be valid even if delivered or mailed prior to the time
32 payment was due on a periodic estimate from the general contractor. Thereafter the awarding
33 authority shall proceed.

34 (j) Any assignment by a subcontractor of the rights under this section to a surety

1 company furnishing a bond shall be invalid. The assignment and subrogation rights of the surety
2 to amounts included in a demand for direct payment which are in the possession of the awarding
3 authority or which are on deposit pursuant to subsection (f) of this section shall be subordinate to
4 the rights of all subcontractors who are entitled to be paid under this section and who have not
5 been paid in full.

6 (k)(1) "Subcontractor" as used herein means a person who files a sub-bid and received a
7 subcontract as a result of that filed sub-bid or who is approved by the awarding authority in
8 writing as a person performing labor or both performing labor and furnishing materials pursuant
9 to a contract with the general contractor;

10 (2) "Contracts awarded" means a person approved by the awarding authority in writing as
11 a person performing labor or both performing labor and furnishing materials pursuant to a
12 contract with the general contractor, and

13 (3) "Contracts with the state not awarded" means a person contracting with the general
14 contractor to supply materials used or employed in a public works project for a price in excess of
15 five thousand dollars (\$5,000).

16 (l) A general contractor or a subcontractor shall enforce a claim to any portion of the
17 amount of a demand for direct payment deposit as provided in subsection (f) of this section by a
18 petition in the superior court against the other and the bank shall not be a necessary party. A
19 subcontractor shall enforce a claim for direct payment or a right to require a deposit as provided
20 in subsection (f) of this section by a petition in the superior court against the awarding authority
21 and the general contractor shall not be a necessary party. Upon motion of any party the court shall
22 advance for speedy trial any petition filed. The court shall enter an interlocutory decree upon
23 which execution shall issue for any part of a claim found due, upon motion of any party, and shall
24 advance for speedy trial the petition to collect the remainder of the claim. Any party aggrieved by
25 such interlocutory decree shall have the right to appeal therefrom. The court shall not consolidate
26 for trial the petition of any subcontractor with the petition of one or more subcontractors or the
27 same general contract unless the court finds that a substantial portion of the evidence is applicable
28 to the petitions sought to be consolidated and that such consolidation will prevent unnecessary
29 duplication of evidence. A decree in any such proceeding shall not include interest on the
30 disputed amount deposited in excess of the interest earned for the period of any such deposit. No
31 person except a subcontractor filing a demand for direct payment for which no funds due the
32 general contractor are available for direct payment shall have a right to file a petition against the
33 awarding authority claiming a demand for direct payment is premature and such subcontractor
34 must file the petition before the awarding authority has made a direct payment to the

1 subcontractor and has made a deposit of the disputed portion. In any petition to collect any claim
2 for which a subcontractor has filed a demand for direct payment the court shall, upon motion of
3 the general contractor, reduce by the amount of any deposit of a disputed amount by the awarding
4 authority any amount held under a writ of attachment or pursuant to a restraining order or
5 injunction.

6 SECTION 2. This act shall take effect upon passage.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO PUBLIC PROPERTY AND WORKS

1 This act would establish a procedure for the timely payment to contractors and
2 subcontractors in connection with state contracts. The act would provide for an awarding
3 authority to make a direct deposit into an interest-bearing joint account in the names of both the
4 general contractor and the subcontractor. The act also would authorize a subcontractor to enforce
5 a claim for a direct deposit directly against the awarding authority through an action in superior
6 court.

7 This act would take effect upon passage.

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