

GETTING PAID | PART TWO



By Hank Kita, *Executive Director*

In a recent issue of Subcontractors News, I addressed the issue of subcontractor payment. As a follow up to that article, I am including here for your review, testimony on this subject that I provided on May 23, 2016 in an appearance in Albany before the New York State Senate Labor Committee chaired by Senator Jack Martins. Along with other industry advocates, I pressed the Senate Committee to take action on several pieces of legislation generated by the STA and the Empire State Subcontractors Association designed to provide some relief to construction subcontractors where the issue of prompt and timely payment is concerned.

Chairman Martins and distinguished members of the Senate Labor Committee, good morning. I am Hank Kita, Executive Director of the Subcontractors Trade Association (STA) of New York City. I appreciate the opportunity to testify before you on the important issue of prompt payment to construction contractors and subcontractors in New York. The STA has over 300 union subcontractors in its organization and 350 members in total. In its day to day activities, the STA represents its members in dealing with the public agencies, authorities and private developers in New York City. The STA's philosophy centers on dispute resolution without the need for litigation, and the association has served its members well in this regard. And personally, I spend a significant amount of time trying to resolve payment issues for our members, on both private and public construction projects, so I appreciate your efforts in addressing this very real problem today.

I would like to illustrate the depth of the "payment" problem for our subcontractor members by sharing some actual stories.

For example.... a large subcontractor working in the energy field has been attempting to recover millions of dollars from a public agency for work that has been substantially completed for over five years at a power plant. The public agency in question has continued to force the subcontractor to maintain equipment that it has installed on this "legacy project" because it has not brought on the appropriate personnel to operate or maintain it. After many years of trying to receive final payment for work done, the subcontractor is attempting to close out the project and recover its money by now appealing to the comptroller's office. Unfortunately, there does not appear to be an end in sight to this matter. Obviously, this situation has caused great stress to the subcontractor's financial situation.

Another example...a small MWBE working in a public agency mentor/protégé program is in the process of going out of business because of the failure of the agency to allot sufficient funds for change orders on a particular project. The MWBE was forced to complete the change order work per the public contract but was told that there was not enough money appropriated for the project to pay them. Consequently, the MWBE has had to shutter its doors and lay off its workers. This MWBE is in the process of retaining legal counsel to file a lawsuit against the agency and the general contractor running the project.

Yet one more example...another subcontractor working on a public agency education construction project is out several hundred thousand dollars because of the unwillingness of the public agency to pay in full for change order work that the contractor is obligated to perform. According to the subcontractor, the project architect's design was deficient and faulty leading to the need for a slew of project change orders. The agency's staff have tried to negotiate down the cost of the change order work to "cents on the dollar" in order to come within their budget with no allowance or consideration made for the deficiency of the design. In other words, the contractor is being asked to pay the price for the agency's chosen design team's failures. This particular subcontractor is suffering a severe financial crisis as a result of this public agency's failure to meet its "change order" payment obligations.

But for time constraints today, I could relate other "horror stories" on subcontractors being put in untenable financial positions by public and private entities treating the subcontractor as a "bank" for projects when it comes time to "pay in full" for services rendered. This is the reality of public (and at times private) construction work in New York: subcontractors who work hard to win a bid and complete work in a timely fashion must wait and wait and wait to get paid, if they get paid at all. And when they do, the subcontractor often must settle on receiving a fraction on what's due them. These scenarios do beg the question...could any of you successfully grow a business, or even decide to keep your business in New York, under such challenging circumstances?

Frankly, many subcontractors can't, or won't. Construction businesses will close because a second generation of ownership has no interest in continuing to operate in New York, or a subcontractor will maintain a presence in New York but grow its business in another state with a more friendly business climate; or a highly regarded subcontractor who produces quality work will avoid bidding on public works projects altogether, because he or she doesn't need the expected hassle when it comes to properly getting paid; or project bids will have a premium built-in to compensate the subcontractor for anticipated, future payment problems. All of this is real and is happening right now.

In spite of the dire scenario that I have just related to you on this issue of subcontractor payment, I am happy to say that there are presently many positive bills pending in the State Senate that address the problem of prompt payment, as well as other related issues, and I thank Senator Martins and many other Senators for introducing them. I won't comment extensively on any of them at this time (unless you have specific questions), other than to say that these bills attempt to tackle many of the problems that are confronting construction subcontractors in New York, that they will improve the situation, and make New York a much more competitive place to do business. They are:

- S. 7613, S. 7615 and S. 7264, all introduced by Senator Martins, which reform the state's public and private Prompt Pay Laws;
- S. 6582, originally introduced by the late Sen. Libous and now Senator Hannon, which would allow contractors and subcontractors to seek appropriate compensation for "delay damages", when a project delay resulting in increased cost is not the contractor or subcontractor's fault;
- S. 37, S. 2924 and S. 6315, all introduced by Senator DeFrancisco, which address and reform the state's antiquated "retainage" laws, which could be a worthy topic for an entire hearing all its own. These bills call for the release of retainage, the payment of interest on retainage, or clarification of the term "substantial completion" which all boils down to the same thing: helping subcontractors get paid faster for the work they do.
- S. 6906, introduced by Senator Ranzenoer, which prohibits the inclusion of time-sensitive notice provisions in public works contracts that can result in the complete forfeiture of a contractor or subcontractor's valuable rights to a claim under a public construction contract. S. 6906 simply says that unless a public agency can show "prejudice" or "material harm" as a result of a contractor or subcontractor failing strictly to comply with a notice provision in a public works contract, the public agency cannot declare a complete forfeiture of the contractor or subcontractor's claim. Incredibly, this is actually happening today, as these "gotcha" notice provisions are becoming increasingly common in public works contracts across the state.

While we look forward to working with you on all these positive bills, S. 6315 (Retainage reform) and S. 6906 (public works notice provisions) have passed their respective Senate committees and are both on the Senate Floor Calendar (Cal. Nos. 810 and 722). We urge the full Senate to pass both of these important bills as quickly as possible, so we may focus on them in the Assembly, with just a few weeks left in the legislative session.

Both general contractors and subcontractors face tremendous challenges doing business in New York — excessive, duplicative and burdensome regulations, costly insurance, surety bond requirements, frequently late or entirely denied payments, and unresolved change orders are all too often the norm. This drives up the cost of construction, making New York a far less competitive place to do business, which in turn negatively impacts the state's economy. The problems we have discussed today are very real, and they are costing New York State both jobs and the economic opportunity. But we also discussed some solutions, in the form of remedial legislation that will help contractors and subcontractors get paid on time. It's really that simple: we just want to get paid within a reasonable period for the work we do, so in turn we can pay our workers and our bills. Some of the legislation I mentioned today was just introduced and requires further discussion. Others are bills that to your credit, consistently pass the Senate but face opposition in the Assembly by organizations and entities that are unfairly taking advantage of the status quo. And a few other bills seem to stand a reasonable chance of passage in both houses this year. I say, let's all work together over the next few weeks by getting at least one of these beneficial bills signed into law.