

# STATE OF NEW YORK

2074

2019-2020 Regular Sessions

## IN ASSEMBLY

January 22, 2019

Introduced by M. of A. KIM, ORTIZ -- read once and referred to the Committee on Judiciary

AN ACT to amend the state finance law, in relation to damages to contracts occasioned by delay

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The state finance law is amended by adding a new section  
2 138-b to read as follows:

3 § 138-b. Damages occasioned by delay. 1. For purposes of this section  
4 the following terms shall have the following meanings:

5 (a) "Contract" shall mean any contract awarded by the state, any state  
6 agency, department, board, bureau, municipal corporation, public benefit  
7 corporation, public authority or any other state entity, any school  
8 district or any other special district, or any instrumentality of the  
9 state or a political subdivision of the state, which enters into a  
10 contract for design, construction, reconstruction, demolition, alter-  
11 ation, repair or improvement of any public works.

12 (b) "Delay" shall mean any delay, disruption, interference, ineffi-  
13 ciencies, impedance, hindrance or acceleration in the performance of the  
14 contract which causes damages to be incurred by a contractor, subcon-  
15 tractor or materialman to a contract and which is a direct result of the  
16 negligence, malfeasance, misfeasance of the person or entity for whom  
17 the contractor, subcontractor or materialman is providing services as  
18 provided for in the contract, or any disruption, interference, ineffi-  
19 ciencies, impedance, hindrance or acceleration causing damages to be  
20 similarly incurred by such person or entity.

21 (c) "Claim" shall mean a request for additional costs from the follow-  
22 ing causes listed in this subdivision attributable to delay in the  
23 performance of a contract, occasioned by any act or omission to act by  
24 the public entity with whom a contractor, subcontractor or materialman  
25 has contracted with, but shall not include delay from any other cause,

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 which delay shall be compensated for solely by an extension of time to  
2 complete the performance of the work:

3 (i) the failure of the public entity to take reasonable measures to  
4 coordinate and progress the work;

5 (ii) extended delays attributable to the public entity in the review  
6 or issuance of orders-on-contract or field orders, in shop drawing  
7 reviews and approvals or as a result of the cumulative impact of multi-  
8 ple orders on contract, which constitute a qualitative change to the  
9 project work and which have a verifiable impact on project costs;

10 (iii) the unavailability of the site for such an extended period of  
11 time which significantly affects the scheduled completion of the  
12 contract; or

13 (iv) the issuance of a stop work order relative to a substantial  
14 portion of work for a period exceeding thirty days.

15 2. All contracts made and awarded shall contain a clause which allows  
16 a contractor, subcontractor or materialman to make a claim for addi-  
17 tional costs arising from delay if such delay in the performance of the  
18 contract is caused by or occasioned by any act or omission of the entity  
19 with whom they have contracted in the contract, or any of such entity's  
20 representatives or agents.

21 3. The contractor, subcontractor or materialman shall provide a notice  
22 of claim of an anticipated claim for delay to a public entity by  
23 personal service or certified mail no more than fifteen days after such  
24 contractor knew the facts which form the basis of the claim. The public  
25 entity shall acknowledge receipt of the notice, in writing, within five  
26 days. No public entity shall incur any liability for any damages which  
27 accrue more than fifteen days prior to the delivery or mailing of the  
28 required notice. Such notice shall at a minimum provide a description of  
29 any operations that were, are being or will be delayed, and the date or  
30 dates and reasons for the delay. In no case shall oral notice constitute  
31 notice pursuant to this section or be deemed to constitute a waiver of  
32 the written notice requirement. For the purposes of this section, fail-  
33 ure to provide such notice shall be considered to have prejudiced the  
34 public entity.

35 4. Failure by a contractor to adequately progress the completion of  
36 work shall be considered in determining the causes of delay. For any  
37 claim asserted pursuant to this title, the contractor, subcontractor or  
38 materialman shall keep detailed written records of the costs and shall  
39 make them available for the purposes of audit and review. Failure to  
40 provide the required written notice or to maintain and furnish records  
41 of the costs of such claims shall constitute a waiver of the claim.

42 5. The following information shall be provided by the contractor upon  
43 request of a public entity if not previously supplied:

44 (a) a description of the operations that were delayed, the reasons for  
45 the delay and an explanation of how they were delayed;

46 (b) a detailed factual statement of the claim providing all necessary  
47 dates, locations and items of work affected by the claim;

48 (c) the date on which actions resulting in the claim occurred or  
49 conditions resulting in the claim became evident;

50 (d) the names, functions and activities of each contractor, subcon-  
51 tractor and materialman involved in, or knowledgeable about facts that  
52 gave rise to such claim;

53 (e) the identification of any pertinent documents, and the substance  
54 of any material oral communication relating to such claim;

55 (f) the amount of additional compensation sought; and

1     (g) if an extension of time is also requested, the specific number of  
2     days for which it is sought and the basis for such request as determined  
3     by an analysis of the construction progress schedule.

4     6. When submitting any claim, the contractor, subcontractor or materi-  
5     alman shall certify in writing and under oath that the supporting data  
6     is accurate and complete to his or her best knowledge or belief, and  
7     that any amount demanded reflects, in good faith, what he or she  
8     believes to be the public entity's liability.

9     § 2. This act shall take effect on the one hundred eightieth day after  
10    it shall have become a law and shall apply to all contracts entered into  
11    on and after such date.