

# STATE OF NEW YORK

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10109

## IN ASSEMBLY

April 29, 2022

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Introduced by M. of A. ZEBROWSKI -- read once and referred to the  
Committee on Governmental Operations

AN ACT in relation to amending state construction and commodity contracts to provide equitable relief to contractors who have sustained unanticipated expenses by reason of construction materials price escalation; and providing for the repeal of such provisions upon the expiration thereof

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

1 Section 1. Declaration of policy and statement of purpose. It being in  
2 the vital interest of the general public that public works in the state  
3 of New York be administered efficiently and at a reasonable and equitable cost; and, the unforeseen emergency of unanticipated escalation in  
4 construction materials prices having imposed substantial inequity upon  
5 contractors who have heretofore been awarded contracts after public  
6 bidding; and, such inequity having threatened the ability of contractors  
7 to fulfill contracts so awarded; and, in order to perpetuate the benefits derived by the general public from the existing system of public  
8 bidding, and to assure the continuance of the orderly performance of  
9 contracts heretofore awarded as a result of such public bidding; and, it  
10 being in the best interest to provide equitable relief to those contractors who, having been awarded public contracts, have sustained damage by  
11 reason of such construction materials price escalation, this act is  
12 hereby enacted.

13 § 2. Whenever the terms and conditions of a construction contract  
14 awarded by the state of New York or a public benefit corporation based  
15 upon bids submitted prior to April 1, 2020 but only for which materials  
16 were purchased or invoiced after March 1, 2020, require a contractor to  
17 furnish materials in such contract pertaining to such construction materials may be adjusted upon a determination made by the officer of the  
18 department, board, agency or public benefit corporation that awarded  
19 such contract that there has been an increase in the cost of acquisition  
20 by the contractor, subcontractor or supplier of materials of such materials in excess of five percent, determined as of the time of the award.

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

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1 Such a determination shall be based upon the available evidence, includ-  
2 ing but not limited to, an appropriate nationally recognized economic  
3 index published by the United States department of labor or other appro-  
4 priate organization. In the case of any state department or agency any  
5 such increase in contract price shall be subject to the approval of the  
6 state comptroller. Any contractor, subcontractor or supplier of materi-  
7 als who receives an increase in the cost of construction materials shall  
8 also be subject to a downward adjustment in construction materials pric-  
9 es for subsequent de-escalation which may result in a price being lower  
10 than the original bid price. Any contractor requesting an adjustment  
11 shall make application in writing submitting documentary evidence to the  
12 office of the department, board, agency or public benefit corporation  
13 that awarded the contract establishing such increase in accordance with  
14 the requirements of the department, board, agency or public benefit  
15 corporation, which evidence shall be subject to public inspection during  
16 regular business hours. Any subsequent decrease or de-escalation shall  
17 be made upon a determination by the officer of the department, board,  
18 agency or public benefit corporation that awarded such contract that  
19 there has been a subsequent decrease in the cost of acquisition of such  
20 construction materials by the contractor, subcontractor or supplier of  
21 materials. Such a determination shall be based upon the available  
22 evidence, including but not limited to, an appropriate nationally recog-  
23 nized economic index published by the United States department of labor  
24 or other appropriate organization. Upon the agreement of the parties,  
25 the contract may be amended in writing to reflect the increased or  
26 decreased cost of acquisition of such materials insofar as it exceeds  
27 five percent thereof and such contract amendment shall state the amount  
28 of adjustment and the basis therefor, but in no event shall direct labor  
29 costs, additional profit or overhead be part of such adjustment. To the  
30 extent a construction contract is subject to approval by the state comp-  
31 troller, and as to the form and manner of execution, by the attorney  
32 general, every such contract amendment shall be subject to the approval  
33 of the state comptroller, and as to form and manner of execution, by the  
34 attorney general. No adjustment shall be granted in an amount which,  
35 together with any other sum obligated under the contract, shall exceed  
36 the money appropriated or otherwise lawfully available for the project.

37 § 3. (a) The commissioner of general services in contracting for  
38 commodities is authorized, with the approval of the state comptroller,  
39 to terminate or suspend for a part of its term any state contract award  
40 for the purchase of commodities upon written application for such termi-  
41 nation or suspension by the vendor, where extraordinary and unforeseen  
42 general market conditions have caused increases in the vendor's costs  
43 for construction materials or other physical elements consisting of  
44 construction materials to be sold under the contract, where the contract  
45 covers materials which were purchased or invoiced after March 1, 2020,  
46 and the commissioner of general services determines upon evidence  
47 furnished by the vendor as required and deemed to be sufficient by the  
48 commissioner that as the direct and sole result of such increases during  
49 the term of the contract, which exceed five percent of the contractor's  
50 aggregate acquisition costs determined as of the time of the award, the  
51 contractor has incurred or will incur an actual net loss on such  
52 contract from the estimated sales made under the contract and the  
53 contractor would continue to incur such net losses unless the contract  
54 is suspended or terminated. Such a determination shall be based upon the  
55 available evidence, including but not limited to, an appropriate

1 nationally recognized economic index published by the United States  
2 department of labor or other appropriate organization.

3 (b) The commissioner of general services is further authorized,  
4 following the determination made pursuant to the provisions of subdivi-  
5 sion (a) of this section that the contractor has incurred or will incur  
6 an actual net loss on such contract from the sales made under the  
7 contract, to grant an increase or increases in the prices of the commod-  
8 ities specified by the contract, in amounts necessary to prevent further  
9 net losses to the contractor on such contract from deliveries to be made  
10 thereafter under the contract, as compensation for and not exceeding  
11 increases of the contractor's acquisition costs during the contract  
12 term. Any such increase in contract prices shall be subject to the  
13 approval of the state comptroller. Any contractor who receives an  
14 increase in the price of the commodities shall also be subject to a  
15 downward adjustment in the price of the commodities for subsequent  
16 de-escalation which may result in a price being lower than the original  
17 bid price. Any subsequent decrease or de-escalation shall be made upon a  
18 determination by the officer of the department, board, agency or public  
19 benefit corporation that awarded such contract that there has been a  
20 subsequent decrease in the cost of acquisition of such construction  
21 materials by the contractor, subcontractor or supplier of materials.  
22 Such a determination shall be based upon the available evidence, includ-  
23 ing but not limited to, an appropriate nationally recognized economic  
24 index published by the United States department of labor or other appro-  
25 priate organization.

26 (c) All records, books and documents of the contractor which are  
27 related or useful to the determinations made by the commissioner of  
28 general services and to the approval of the state comptroller hereunder  
29 shall be subject to audit and examination by the state comptroller.

30 § 4. This act shall take effect immediately and shall expire and be  
31 deemed repealed June 30, 2023.