

# STATE OF NEW YORK

3520

2021-2022 Regular Sessions

## IN ASSEMBLY

January 27, 2021

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

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) "State agency" shall mean all entities as defined in section one  
6 hundred seventy-nine-e of this chapter and subdivision one of section  
7 two of the public authorities law.

8 (b) "Contract" shall mean any agreement awarded by a state agency for  
9 the design, construction, reconstruction, demolition, alteration, repair  
10 or improvement of any public works project.

11 (c) "Delay" shall mean any delay, disruption, interference, ineffi-  
12 ciencies, impedance, hindrance or acceleration in the performance of the  
13 contract which causes damages to be incurred by a contractor.

14 (d) "Claim" shall mean a request for additional costs only from the  
15 following causes:

16 (i) the failure of the state agency to take reasonable measures to  
17 coordinate and progress the work;

18 (ii) extended delays attributable to the state agency in the review or  
19 issuance of orders-on-contract or field orders, in shop drawing reviews  
20 and approvals or as a result of the cumulative impact of multiple orders  
21 on contract, which constitute a qualitative change to the project work  
22 and which have a verifiable impact on project costs; or

23 (iii) the unavailability of the site for such an extended period of  
24 time which significantly affects the scheduled completion of the  
25 contract.

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

LBD06065-01-1

1 2. All contracts made and awarded shall contain a clause which allows  
2 a contractor to make a claim for additional costs arising from delay in  
3 the performance of a contract if such delay is caused by a material act  
4 or omission of the state agency.

5 3. The contractor shall provide a notice of claim of an anticipated  
6 claim for delay to a state agency by personal service or certified mail  
7 no more than fifteen days after such contractor knew the facts which  
8 form the basis of the claim. The state agency shall acknowledge receipt  
9 of the notice, in writing, within five days. Such notice shall at a  
10 minimum provide a description of any operations that were, are being or  
11 will be delayed, and the date or dates and reasons for the delay. In no  
12 case shall oral notice constitute notice pursuant to this section or be  
13 deemed to constitute a waiver of the written notice requirement. For  
14 the purposes of this section, failure to provide such notice shall be  
15 considered to have prejudiced the state agency.

16 4. Failure by a contractor to adequately progress the completion of  
17 work shall be considered in determining the causes of delay. For any  
18 claim asserted pursuant to this title, the contractor shall keep  
19 detailed written records of the costs and shall make them available for  
20 the purposes of audit and review. Failure to provide the required writ-  
21 ten notice or to maintain and furnish records of the costs of such  
22 claims shall constitute a waiver of the claim.

23 5. The following information shall be provided by the contractor upon  
24 request of a state agency if not previously supplied:

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

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

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

31 (d) the names, functions and activities of each contractor involved  
32 in, or knowledgeable about facts that gave rise to such claim;

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

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

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

39 6. When submitting any claim, the contractor shall certify in writing  
40 and under oath that the supporting data is accurate and complete to his  
41 or her best knowledge or belief, and that any amount demanded reflects,  
42 in good faith, what he or she believes to be the state agency's liabil-  
43 ity.

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