STATE OF NEW YORK

8844

IN SENATE

April 22, 2022

Introduced by Sen. REICHLIN-MELNICK -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts

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:

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

§ 2. Whenever the terms and conditions of a construction contract awarded by the state of New York or a public benefit corporation based upon bids submitted prior to April 1, 2020 but only for which materials were purchased or invoiced after March 1, 2020, require a contractor to furnish materials in such contract pertaining to such construction materials may be adjusted upon a determination made by the officer of the department, board, agency or public benefit corporation that awarded such contract that there has been an increase in the cost of acquisition by the contractor, subcontractor or supplier of materials of such mate-

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

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rials in excess of five percent, determined as of the time of the award. Such a determination shall be based upon the available evidence, including but not limited to, an appropriate nationally recognized economic index published by the United States department of labor or other appropriate organization. In the case of any state department or agency any such increase in contract price shall be subject to the approval of the state comptroller. Any contractor, subcontractor or supplier of materials who receives an increase in the cost of construction materials shall also be subject to a downward adjustment in construction materials prices for subsequent de-escalation which may result in a price being lower than the original bid price. Any contractor requesting an adjustment shall make application in writing submitting documentary evidence to the office of the department, board, agency or public benefit corporation that awarded the contract establishing such increase in accordance with the requirements of the department, board, agency or public benefit corporation, which evidence shall be subject to public inspection during regular business hours. Any subsequent decrease or de-escalation shall be made upon a determination by the officer of the department, board, agency or public benefit corporation that awarded such contract that there has been a subsequent decrease in the cost of acquisition of such construction materials by the contractor, subcontractor or supplier of materials. Such a determination shall be based upon the available evidence, including but not limited to, an appropriate nationally recognized economic index published by the United States department of labor or other appropriate organization. Upon the agreement of the parties, the contract may be amended in writing to reflect the increased or decreased cost of acquisition of such materials insofar as it exceeds five percent thereof and such contract amendment shall state the amount of adjustment and the basis therefor, but in no event shall direct labor costs, additional profit or overhead be part of such adjustment. To the extent a construction contract is subject to approval by the state comptroller, and as to the form and manner of execution, by the attorney general, every such contract amendment shall be subject to the approval of the state comptroller, and as to form and manner of execution, by the attorney general. No adjustment shall be granted in an amount which, together with any other sum obligated under the contract, shall exceed the money appropriated or otherwise lawfully available for the project.

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

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

(b) The commissioner of general services is further authorized, following the determination made pursuant to the provisions of subdivision (a) of this section that the contractor has incurred or will incur an actual net loss on such contract from the sales made under the contract, to grant an increase or increases in the prices of the commodities specified by the contract, in amounts necessary to prevent further net losses to the contractor on such contract from deliveries to be made thereafter under the contract, as compensation for and not exceeding increases of the contractor's acquisition costs during the contract term. Any such increase in contract prices shall be subject to the approval of the state comptroller. Any contractor who receives an increase in the price of the commodities shall also be subject to a downward adjustment in the price of the commodities for subsequent de-escalation which may result in a price being lower than the original bid price. Any subsequent decrease or de-escalation shall be made upon a determination by the officer of the department, board, agency or public benefit corporation that awarded such contract that there has been a subsequent decrease in the cost of acquisition of such construction materials by the contractor, subcontractor or supplier of materials. Such a determination shall be based upon the available evidence, including but not limited to, an appropriate nationally recognized economic index published by the United States department of labor or other appropriate organization.

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

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