

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 Assem-
bly, 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 equita-
4 ble cost; and, the unforeseen emergency of unanticipated escalation in
5 construction materials prices having imposed substantial inequity upon
6 contractors who have heretofore been awarded contracts after public
7 bidding; and, such inequity having threatened the ability of contractors
8 to fulfill contracts so awarded; and, in order to perpetuate the bene-
9 fits derived by the general public from the existing system of public
10 bidding, and to assure the continuance of the orderly performance of
11 contracts heretofore awarded as a result of such public bidding; and, it
12 being in the best interest to provide equitable relief to those contrac-
13 tors who, having been awarded public contracts, have sustained damage by
14 reason of such construction materials price escalation, this act is
15 hereby enacted.

16 § 2. Whenever the terms and conditions of a construction contract
17 awarded by the state of New York or a public benefit corporation based
18 upon bids submitted prior to April 1, 2020 but only for which materials
19 were purchased or invoiced after March 1, 2020, require a contractor to
20 furnish materials in such contract pertaining to such construction mate-
21 rials may be adjusted upon a determination made by the officer of the
22 department, board, agency or public benefit corporation that awarded
23 such contract that there has been an increase in the cost of acquisition
24 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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1 rials in excess of five percent, determined as of the time of the award.
2 Such a determination shall be based upon the available evidence, includ-
3 ing but not limited to, an appropriate nationally recognized economic
4 index published by the United States department of labor or other appro-
5 priate organization. In the case of any state department or agency any
6 such increase in contract price shall be subject to the approval of the
7 state comptroller. Any contractor, subcontractor or supplier of materi-
8 als who receives an increase in the cost of construction materials shall
9 also be subject to a downward adjustment in construction materials pric-
10 es for subsequent de-escalation which may result in a price being lower
11 than the original bid price. Any contractor requesting an adjustment
12 shall make application in writing submitting documentary evidence to the
13 office of the department, board, agency or public benefit corporation
14 that awarded the contract establishing such increase in accordance with
15 the requirements of the department, board, agency or public benefit
16 corporation, which evidence shall be subject to public inspection during
17 regular business hours. Any subsequent decrease or de-escalation shall
18 be made upon a determination by the officer of the department, board,
19 agency or public benefit corporation that awarded such contract that
20 there has been a subsequent decrease in the cost of acquisition of such
21 construction materials by the contractor, subcontractor or supplier of
22 materials. Such a determination shall be based upon the available
23 evidence, including but not limited to, an appropriate nationally recog-
24 nized economic index published by the United States department of labor
25 or other appropriate organization. Upon the agreement of the parties,
26 the contract may be amended in writing to reflect the increased or
27 decreased cost of acquisition of such materials insofar as it exceeds
28 five percent thereof and such contract amendment shall state the amount
29 of adjustment and the basis therefor, but in no event shall direct labor
30 costs, additional profit or overhead be part of such adjustment. To the
31 extent a construction contract is subject to approval by the state comp-
32 troller, and as to the form and manner of execution, by the attorney
33 general, every such contract amendment shall be subject to the approval
34 of the state comptroller, and as to form and manner of execution, by the
35 attorney general. No adjustment shall be granted in an amount which,
36 together with any other sum obligated under the contract, shall exceed
37 the money appropriated or otherwise lawfully available for the project.

38 § 3. (a) The commissioner of general services in contracting for
39 commodities is authorized, with the approval of the state comptroller,
40 to terminate or suspend for a part of its term any state contract award
41 for the purchase of commodities upon written application for such termi-
42 nation or suspension by the vendor, where extraordinary and unforeseen
43 general market conditions have caused increases in the vendor's costs
44 for construction materials or other physical elements consisting of
45 construction materials to be sold under the contract, where the contract
46 covers materials which were purchased or invoiced after March 1, 2020,
47 and the commissioner of general services determines upon evidence
48 furnished by the vendor as required and deemed to be sufficient by the
49 commissioner that as the direct and sole result of such increases during
50 the term of the contract, which exceed five percent of the contractor's
51 aggregate acquisition costs determined as of the time of the award, the
52 contractor has incurred or will incur an actual net loss on such
53 contract from the estimated sales made under the contract and the
54 contractor would continue to incur such net losses unless the contract
55 is suspended or terminated. Such a determination shall be based upon the
56 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.