

STATE OF NEW YORK

10109

IN ASSEMBLY

April 29, 2022

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 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-
25 rials 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.