

# STATE OF NEW YORK

7166

2021-2022 Regular Sessions

## IN SENATE

June 4, 2021

Introduced by Sen. COMRIE -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

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 any state department, board, bureau,  
6 commission, division, office, council, or state committee or any state  
7 authority as defined in subdivision one of section two of the public  
8 authorities law. Such term shall not include the legislature or judi-  
9 ciary.

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

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

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

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

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

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

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1 (iii) the unavailability of the site for such an extended period of  
2 time which significantly affects the scheduled completion of the  
3 contract.

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

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

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

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

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

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

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

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

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

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

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

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

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