

# STATE OF NEW YORK

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8844

## IN SENATE

April 22, 2022

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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.