

STATE OF NEW YORK

5684

2023-2024 Regular Sessions

IN ASSEMBLY

March 20, 2023

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, 2021 but only for which materials
19 were purchased or invoiced after March 1, 2021, 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

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

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

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

1 is suspended or terminated. Such a determination shall be based upon the
2 available evidence, including but not limited to, an appropriate
3 nationally recognized economic index published by the United States
4 department of labor or other appropriate organization.

5 (b) The commissioner of general services is further authorized,
6 following the determination made pursuant to the provisions of subdivi-
7 sion (a) of this section that the contractor has incurred or will incur
8 an actual net loss on such contract from the sales made under the
9 contract, to grant an increase or increases in the prices of the commod-
10 ities specified by the contract, in amounts necessary to prevent further
11 net losses to the contractor on such contract from deliveries to be made
12 thereafter under the contract, as compensation for and not exceeding
13 increases of the contractor's acquisition costs during the contract
14 term. Any such increase in contract prices shall be subject to the
15 approval of the state comptroller. Any contractor who receives an
16 increase in the price of the commodities shall also be subject to a
17 downward adjustment in the price of the commodities for subsequent
18 de-escalation which may result in a price being lower than the original
19 bid price. Any subsequent decrease or de-escalation shall be made upon a
20 determination by the officer of the department, board, agency or public
21 benefit corporation that awarded such contract that there has been a
22 subsequent decrease in the cost of acquisition of such construction
23 materials by the contractor, subcontractor or supplier of materials.
24 Such a determination shall be based upon the available evidence, includ-
25 ing but not limited to, an appropriate nationally recognized economic
26 index published by the United States department of labor or other appro-
27 priate organization.

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

32 § 4. This act shall take effect immediately and shall expire and be
33 deemed repealed June 30, 2024.