

STATE OF NEW YORK

5758

2023-2024 Regular Sessions

IN ASSEMBLY

March 23, 2023

Introduced by M. of A. ZEBROWSKI, DeSTEFANO -- 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 December 31, 2021 but only for which mate-
19 rials were purchased or invoiced after March 1, 2020, require a contrac-
20 tor to furnish materials in such contract pertaining to such
21 construction materials may be adjusted upon a determination made by the
22 officer of the department, board, agency or public benefit corporation

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

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

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

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

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

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

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