



LEGISLATIVE MEMO
CONTACT: WALTER PACHOLCZAK
VICE PRESIDENT OF GOVERNMENT AFFAIRS
T (518) 456-1134
WPACHOLCZAK@AGCNYS.ORG
WWW.AGCNYS.ORG

MEMORANDUM OF SUPPORT

BILL: S.5933-A (Comrie) / A.2040-A (Kim)

SUBJECT: Requires state agency and authority public works contracts to include a clause authorizing contractors to recover reasonable damages for delay under limited circumstances.

DATE: June 1, 2019

The Associated General Contractors of New York State, LLC (AGC NYS) the leading statewide trade association representing the construction industry strongly supports S.5933-A (Comrie) / A.2040-A (Kim), which requires state agency and authority public works contracts to include a clause authorizing contractors to recover reasonable damages for delay under limited circumstances.

This bill is good public policy because it follows specifications contained in the Office of General Services (OGS) General Conditions Standard Contract Clause – Article 17A-Delays. Several public agencies and authorities (NYS OGS, DOT and the MTA) have already recognized the unfairness of this restriction and have provided in their public contracts for a more equitable allowance for damages for delays resulting from public agency action.

No damages for delay clauses in contracts for public works projects create an inequity in the contracting process. The elimination of no damage for delay clauses will provide incentive for public owners to make decisions, provide required direction, and ensure construction projects are completed on time. Such an incentive will lower the cost of projects by avoiding the additional costs associated with delay-related disputes. This bill brings legal equality to the contracting process.

As stated in the sponsor's bill memorandum, in 2018, Governor Cuomo vetoed a more expansive version of this legislation. In his veto message, Governor Cuomo raised several technical issues of concern. This bill addresses the technical issues raised by Governor Cuomo and clarifies liability for damages where actions or omissions of a state agency or authority are directly associated with the damages incurred by a covered contractor. Specifically and in response to the Governor's concerns, this bill a) is limited in application and scope only to state agencies or authorities; b) removes prior language that the Governor was concerned could establish privity of contract between a subcontractor or material supplier and a public agency, and other third parties; and c) further limits and narrows the criteria for a delay damages claim against a state agency or authority.

Seventeen states allow for the specific recovery of damages related to expenses incurred by the contractor for a delay for which the state governmental unit is responsible, which was unreasonable under the circumstances, and which was not within the contemplation of the parties to the contract. Many more states recognize a common law right to damages for delay. New York should not be an exception to this trend.

*A Chapter of the Associated General Contractors of America
10 Airline Drive, Suite 203 Albany, NY 12205*

In 2008, the City of New York began a five-year pilot study comparing construction projects with and without no damages for delay contract clauses. The purpose of the study was to determine the impact of the clauses on bid prices, project delivery time, number of bidders, owner caused delays, and other issues. In 2013, the study resulted in the City of New York eliminating the standard no damages for delay clauses and permit claims for costs incurred by the contractor.

This bill would reform and create fairness in state agency and authority contracts by taking a uniform and coordinated approach. It would increase the efficiency and accountability and encourage more private firms to bid for contracts resulting in healthy competition for New Yorkers. **AGC strongly supports and urges the swift passage of S.5933-A / A.2040-A.**