STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

VETO #355

December 28, 2018

TO THE SENATE:

I am returning herewith, without my approval, the following bill:

Senate Bill Number 6686, entitled:

"AN ACT to amend the state finance law, in relation to damages to contracts occasioned by delay"

NOT APPROVED

This bill would add a new Section 138-b to the State Finance Law to require every public contract for design, construction, reconstruction, demolition, alteration, repair or improvement of any public works to include a "damage for delay" clause. This clause would allow any contractor, subcontractor, or materialman to seek costs against the contracting public entity due to excusable "delay, disruption, interference, inefficiencies, impedance, hindrance or acceleration in the performance of the contract," which is a direct result of the act or omission of that public entity.

Currently, many State construction contracts include "no damage for delay" contract clauses that provide that a contractor will not be entitled to any additional compensation or reimbursed for any losses stemming from the construction delays with certain exceptions. A significant body of case law has been developed that interpret the scope of "no damage for delay" clauses and the exceptions that govern. See, *W.L. Staples Co. v. State, 178 A.D. 357, 358 (3d Dep't 1917)*; *Kalisch-Jarcho, Inc.* v. *City of New York, 58 N.Y.2d 377. 384 (1983)*. Of note, a "no damage for delay clause" does not grant the public owner unfettered relief from the consequences of unreasonable or unforeseeable delays caused by that public owner. Courts have recognized four exceptions to these clauses, none of which are included in this legislation, including (i) bad faith, willfulness, or grossly negligent conduct; (ii) uncontemplated delays; (iii) unreasonable delays constituting intentional abandonment by the public entity; and (iv) delays resulting from the public entities' breach of a fundamental obligation of the contract. See, *Corinno-Civetta Construction Corp. v. City of New York, 67 N.Y.2d 291 (1986)*. The existing legal framework allows contractors to seek relief under different delay scenarios, with an intent to adhere to the general provisions of the contracts that were negotiated, agreed to and signed by the parties. Overturning well-settled law at this juncture would have the impact of increasing the liability to the public entities.

This bill also suffers from certain technical deficiencies. For example, it would broadly permit recovery for delays "caused by the owner's acts or omissions" regardless of whether costs claimed are reasonable. By requiring public entities to place such clauses in all construction contracts, with no ability to define the terms or negotiate the circumstances under which certain costs may be compensable, the State and other public entities would be exposed to costly and complex litigation over the meaning and application of these terms and further delay projects while these issues are arbitrated or litigated.

Moreover, public entities would be subject to claims from subcontractors and materialman with whom the public entity has no contractual relationship, did not retain, and over whom it has no control. A prime contractor on a construction project may subcontract with a multitude of subcontractors and materialmen. This proposed legislation could result in a large quantity of claims being raised by individual subcontractors and materialmen under just one prime contract, thus exposing the public entities to an increased volume of claims and litigation costs.

Finally, this bill is apparently intended to track provisions from the Office of General Services general contract conditions. There are, however, significant changes that would have three enormous effects, specifically, the bill (i) expands the entities that can make a claim to include subcontractors and suppliers, (ii) removes provisions that limit and qualify what costs are recoverable as delay damages, and (iii) eliminates notice triggered by imputed knowledge, meaning that contractors do not have to submit claims when they ought to have known of the facts which form the basis of the claim. The elimination of this language would make it impossible for public owners to effectively mitigate risk by having early awareness of the facts giving rise to a delay claim and could allow contractors to delay notice thereby hampering the public entity's ability to mitigate that problem.

Rather than alleviate delays in public construction projects, the provisions of this bill would have the unintended impact of creating a significant administrative burden to all public entities, increasing public construction costs and legal costs, thereby transferring those costs to taxpayers, and impairing construction progress, all of which run counter to the public interest to facilitate the delivery of public projects on-time and on-budget. For these reasons, I am constrained to veto this bill.

The bill is disapproved.