

STATE OF NEW YORK

4473

2021-2022 Regular Sessions

IN SENATE

February 5, 2021

Introduced by Sens. JACKSON, COMRIE, LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts

AN ACT to amend the executive law, in relation to participation by minority group members and women with respect to certain state contracts; and to amend the state finance law, in relation to establishing a mentor-protege program for small and minority and women-owned business concerns and in relation to performance and payment bond requirements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivision 3 of section 311 of the executive law, as added
2 by chapter 261 of the laws of 1988, paragraphs (d) and (e) as amended by
3 chapter 55 of the laws of 1992, paragraphs (g) and (h) as amended by
4 section 1 of part BB of chapter 59 of the laws of 2006, paragraph (d-1)
5 as added and paragraphs (f), (i) and (j) as amended by chapter 96 of the
6 laws of 2019, is amended to read as follows:

7 3. The director shall have the following powers and duties:

8 (a) to encourage and assist contracting agencies in their efforts to
9 increase participation by minority and women-owned business enterprises
10 on state contracts and subcontracts so as to facilitate the award of a
11 fair share of such contracts to them and to provide on the division's
12 website a list of each contracting agency's minority and women-owned
13 business enterprises certification outreach seminars;

14 (b) to develop standardized forms and reporting documents necessary to
15 implement this article;

16 (c) to conduct educational outreach programs to encourage the certifi-
17 cation of minority and women-owned business enterprises consistent with
18 the purposes of this article;

19 (d) to review [~~periodically~~] quarterly the practices and procedures of
20 each contracting agency with respect to compliance with the provisions

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

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1 of this article, and to require them to file [~~periodic~~] quarterly
2 reports with the division of minority and women's business development
3 as to the level of minority and women-owned business enterprises partic-
4 ipation in the awarding of agency contracts for goods and services
5 including but not limited to the number of state contracts awarded to
6 certified minority-owned or women-owned business enterprises, the maxi-
7 mum dollar amount obligated pursuant to all those contracts, and the
8 total expenditures made pursuant to all such contracts; the number of
9 state contracts awarded to certified minority or women-owned business
10 enterprises, the maximum dollar amount obligated pursuant to all those
11 contracts, and the total expenditures made pursuant to all such
12 contracts; the number of state contracts awarded which include a utili-
13 zation plan for business participation by certified minority or women-
14 owned business enterprises, the maximum amount obligated pursuant to
15 those contracts, and the total expenditures made pursuant to all such
16 contracts; the number of state contracts awarded upon which a waiver was
17 granted from goals required by the contracts for business participation
18 by certified minority or women-owned business enterprises, and the maxi-
19 mum amount obligated pursuant to those contracts; the number of state
20 contracts awarded which required goals for employment of minority group
21 members and women; and the number of state contracts awarded for which
22 waivers of employment goals required by the contracts have been granted;

23 (d-1) to require all contracting state agencies to develop a four-year
24 growth plan to determine a means of promoting and increasing partic-
25 ipation by minority-owned and women-owned business enterprises with
26 respect to state contracts and subcontracts. Every four years, beginning
27 September fifteenth, two thousand twenty, each contracting state agency
28 shall submit a four-year growth plan as part of its annual report to the
29 governor and legislature pursuant to section one hundred sixty-four of
30 this chapter.

31 (e) on January first of each year report to the governor, the tempo-
32 rary president of the senate, the speaker of the assembly, the minority
33 leaders of the senate and the assembly, and the chairpersons of the
34 senate finance and assembly ways and means committees on the [~~level~~]
35 actual versus projected levels of minority and women-owned business
36 enterprises participating in each agency's contracts for goods [~~and~~],
37 services and construction, including but not limited to the number of
38 state contracts awarded to certified minority-owned or women-owned busi-
39 ness enterprises, the maximum dollar amount obligated pursuant to all
40 those contracts, and the total expenditures made pursuant to all such
41 contracts, and on activities of the office and effort by each contract-
42 ing agency to promote employment of minority group members and women,
43 and to promote and increase participation by certified businesses with
44 respect to state contracts and subcontracts so as to facilitate the
45 award of a fair share of state contracts to such businesses. The comp-
46 troller shall assist the division in collecting information on the
47 participation of certified business for each contracting agency. Such
48 report may recommend new activities and programs to effectuate the
49 purposes of this article;

50 (f) the director shall list in the division's annual report the names
51 of non-compliant agencies and the extent of their noncompliance in
52 submitting its quarterly minority and women-owned business enterprise
53 utilization reports; and, shall implement a master list of all the state
54 agencies required to file quarterly compliance reports and shall attach
55 such list to the division's annual report.

(g) to prepare and update, no less than ~~annually~~ quarterly, a directory of certified minority and women-owned business enterprises which shall, wherever practicable, be divided into categories of labor, services, supplies, equipment, materials and recognized construction trades and which shall indicate areas or locations of the state where such enterprises are available to perform services, and to use this information to create an internet based, centralized state registry to enable appropriate state certified minority and women-owned business enterprises to access contract and subcontract opportunities;

~~(g)~~ (h) to appoint independent hearing officers who by contract or terms of employment shall preside over adjudicatory hearings pursuant to section three hundred fourteen of this article for the office and who are assigned no other work by the office;

~~(h)~~ (i) notwithstanding the provisions of section two hundred ninety-six of this chapter, to file a complaint pursuant to the provisions of section two hundred ninety-seven of this chapter where the director has knowledge that a contractor may have violated the provisions of paragraph (a), (b) or (c) of subdivision one of section two hundred ninety-six of this chapter where such violation is unrelated, separate or distinct from the state contract as expressed by its terms; ~~and~~

~~(i)~~ (j) to streamline the state certification process to accept federal and municipal corporation certifications; and

~~(j)~~ (k) to make publicly available records of all waivers of compliance reported pursuant to paragraph (b) of subdivision six of section three hundred thirteen of this article on the division's website.

§ 2. Subdivision 5 of section 312 of the executive law, as added by chapter 261 of the laws of 1988, is amended to read as follows:

5. The director shall promulgate rules and regulations to ensure that contractors and subcontractors undertake programs of affirmative action and equal employment opportunity as required by this section. Such rules and regulations as they pertain to any particular agency shall be developed after consultation with contracting agencies. Such rules and regulations ~~[may]~~ shall require a contractor, after notice in a bid solicitation, to submit an equal employment opportunity program ~~[after bid opening and prior to the award of any contract]~~ at the time bids are submitted, and ~~[may]~~ shall require the contractor or subcontractor to submit compliance reports relating to the contractor's or subcontractor's operation and implementation of any equal employment opportunity program in effect as of the date the contract is executed. The contracting agency ~~[may recommend to the director that]~~ shall have the right to recommend that the director take appropriate action according to the procedures set forth in section three hundred sixteen of this article against the contractor for noncompliance with the requirements of this section. The contracting agency shall be responsible for monitoring compliance with this section.

§ 3. Subdivision 2-a of section 313 of the executive law, as amended by chapter 96 of the laws of 2019, is amended by adding a new paragraph (k) to read as follows:

2-a. The director shall promulgate rules and regulations that will accomplish the following:

(k) encourage joint ventures, partnerships, and mentor-protege relationships as defined in section one hundred forty-seven of the state finance law, between prime contractors and minority and women-owned business enterprises.

§ 4. Subdivision 3 and paragraph (a) of subdivision 5 of section 313 of the executive law, as amended by chapter 96 of the laws of 2019, are amended to read as follows:

3. Solely for the purpose of providing the opportunity for meaningful participation by certified businesses in the performance of state contracts as provided in this section, state contracts shall include leases of real property by a state agency to a lessee where: the terms of such leases provide for the construction, demolition, replacement, major repair or renovation of real property and improvements thereon by such lessee; and the cost of such construction, demolition, replacement, major repair or renovation of real property and improvements thereon shall exceed the sum of one hundred thousand dollars. Reports to the director pursuant to section three hundred fifteen of this article shall include activities with respect to all such state contracts. Contracting agencies shall include or require to be included with respect to state contracts for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon, such provisions as ~~may~~ shall be necessary to effectuate the provisions of this section in every bid specification and state contract, including, but not limited to: (a) provisions requiring contractors to make a good faith effort to solicit active participation by enterprises identified in the directory of certified businesses; (b) requiring the parties to agree as a condition of entering into such contract, to be bound by the provisions of section three hundred sixteen of this article; and (c) requiring the contractor to include the provisions set forth in paragraphs (a) and (b) of this subdivision in every subcontract in a manner that the provisions will be binding upon each subcontractor as to work in connection with such contract. Provided, however, that no such provisions shall be binding upon contractors or subcontractors in the performance of work or the provision of services that are unrelated, separate or distinct from the state contract as expressed by its terms, and nothing in this section shall authorize the director or any contracting agency to impose any requirement on a contractor or subcontractor except with respect to a state contract.

(a) Contracting agencies shall administer the rules and regulations promulgated by the director in a good faith effort to achieve the maximum feasible participation by minority and women owned business enterprises adopted pursuant to this article and the regulations of the director. Such rules and regulations: shall require a contractor to submit a utilization plan ~~[after bids are opened]~~ at the time the bids are submitted, when bids are required~~[, but prior to the award of a state contract]~~; shall require the contracting agency to review the utilization plan submitted by the contractor and to post the utilization plan and any waivers of compliance issued pursuant to subdivision six of this section on the website of the contracting agency; shall require the contracting agency to notify the contractor in writing within a period of time specified by the director as to any deficiencies contained in the contractor's utilization plan; shall require remedy thereof within a period of time specified by the director; shall require the contractor to submit ~~[periodic]~~ quarterly compliance reports relating to the operation and implementation of any utilization plan; shall not allow any automatic waivers but shall allow a contractor to apply for a partial or total waiver of the minority and women-owned business enterprise participation requirements pursuant to subdivisions six and seven of this section; shall allow a contractor to file a complaint with the director pursuant to subdivision eight of this section in the event a contracting

1 agency has failed or refused to issue a waiver of the minority and
2 women-owned business enterprise participation requirements or has denied
3 such request for a waiver; and shall allow a contracting agency to file
4 a complaint with the director pursuant to subdivision nine of this
5 section in the event a contractor is failing or has failed to comply
6 with the minority and women-owned business enterprise participation
7 requirements set forth in the state contract where no waiver has been
8 granted.

9 § 5. Subdivisions 1, 2-a and 3 of section 315 of the executive law,
10 subdivisions 1 and 3 as amended and subdivision 2-a as added by chapter
11 96 of the laws of 2019, are amended to read as follows:

12 1. Each contracting agency shall be responsible for monitoring state
13 contracts under its jurisdiction, and recommending matters to the office
14 respecting non-compliance with the provisions of this article so that
15 the office ~~[may]~~ shall take such action as ~~[is appropriate]~~ stated in
16 subdivision three of section three hundred sixteen of this article. Each
17 contracting agency shall have the right to recommend that the director
18 impose a sanction, penalty, or fine for three or more violations of
19 subdivision one of section three hundred sixteen of this article, to
20 ensure compliance with the provisions of this article, the rules and
21 regulations of the director issued hereunder and the contractual
22 provisions required pursuant to this article. All contracting agencies
23 shall comply with the rules and regulations of the office and are
24 directed to cooperate with the office and to furnish to the office such
25 information and assistance as may be required in the performance of its
26 functions under this article.

27 2-a. ~~[To the extent practicable, upon completion of the restrictive~~
28 ~~period of a procurement, each]~~ Each contracting agency when notifying a
29 contractor of a winning bid award shall also notify any minority or
30 women-owned business enterprise identified in the contractor's submitted
31 utilization plan of such contractor's receipt of the winning bid award.

32 3. ~~[Each contracting agency shall report to the director with respect~~
33 ~~to activities undertaken to promote employment of minority group members~~
34 ~~and women and promote and increase participation by certified businesses~~
35 ~~with respect to state contracts and subcontracts. Such reports shall be~~
36 ~~submitted no later than May fifteenth of every year and shall include~~
37 ~~such information as is necessary for the director to determine whether~~
38 ~~the contracting agency and any contractor to the contracting agency have~~
39 ~~complied with the purposes of this article, including, without limita-~~
40 ~~tion, a summary of all waivers of the requirements of subdivisions six~~
41 ~~and seven of section three hundred thirteen of this article allowed by~~
42 ~~the contracting agency during the period covered by the report, includ-~~
43 ~~ing a description of the basis of the waiver request and the rationale~~
44 ~~for granting any such waiver and any instances in which the contract~~
45 ~~agency has deemed a contractor to have committed a violation pursuant to~~
46 ~~section three hundred sixteen of this article and such other information~~
47 ~~as the director shall require. Each agency shall also include in such~~
48 ~~annual report whether or not it has been required to prepare a remedial~~
49 ~~plan, and, if so, the plan and the extent to which the agency has~~
50 ~~complied with each element of the plan.]~~ (a) Each contracting agency
51 shall prepare a quarterly report and submit copies to the commissioner
52 of economic development, the commissioner of general services, and the
53 director as to the level of minority and women-owned business enter-
54 prises participation in the awarding of agency contracts for goods and
55 services, including but not limited to, the number of state contracts
56 awarded to certified minority or women-owned business enterprises; the

1 maximum dollar amount obligated pursuant to all those contracts, and the
2 total expenditures made pursuant to all such contracts; the number of
3 state contracts awarded which include a utilization plan for business
4 participation by certified minority or women-owned business enterprises,
5 the maximum amount obligated pursuant to those contracts, and the total
6 expenditures made pursuant to all such contracts; the number of state
7 contracts awarded upon which a waiver was granted from goals required by
8 the contracts for business participation by certified minority or
9 women-owned business enterprises, and the maximum amount obligated
10 pursuant to those contracts; the number of state contracts awarded which
11 required goals for employment of minority group members and women; and
12 the number of state contracts awarded for which waivers of employment
13 goals required by the contracts have been granted;

14 (b) In addition, each contracting agency shall be responsible for the
15 cost of an independent audit resulting from the agency's repeated
16 violations of this section.

17 (c) Within thirty days after completion, a copy of the quarterly
18 minority and women-owned business enterprise report shall be transmitted
19 to the commissioner of economic development, the commissioner of general
20 services, and the director. A contracting agency, which has not let more
21 than two million dollars in service and/or construction contracts within
22 the applicable period may apply to the commissioner of economic develop-
23 ment, and the director for a waiver of the required annual report. The
24 waiver application shall be made on such form as the commissioner of
25 economic development and the director may prescribe.

26 (d) If a contracting agency shall fail to file or substantially
27 complete, as determined by the commissioner of economic development and
28 the director, the report required by this section, the director shall
29 provide notice to the contracting agency. The notice shall state the
30 following:

31 (i) that the failure to file a report as required is a violation of
32 this section, or in the case of an insufficient report, the manner in
33 which the report submitted is deficient;

34 (ii) that the contracting agency has thirty days to comply with this
35 section or provide an adequate written explanation to the commissioner
36 of economic development and the commissioner of general services and the
37 director of the contracting agency's reasons for the inability to
38 comply; and

39 (iii) that the contracting agency's continued failure to provide
40 either the required report or an adequate explanation will result in an
41 independent audit of the contracting agency, the cost of which shall be
42 borne by the contracting agency.

43 § 6. Section 316 of the executive law, as amended by chapter 175 of
44 the laws of 2010, is amended to read as follows:

45 § 316. [**Enforcement**] Violations and enforcement. 1. It shall be a
46 violation for any person or entity to:

47 (a) intentionally use or acquire an MWBE name through deceit or other
48 dishonest means in order to negotiate a lower bid from a non-MWBE.

49 (b) submit to the department of economic development, documents or
50 other material as evidence of a good faith effort to comply with the
51 provisions of this article without, in fact, having entered into any
52 contract, agreement, subcontract, or sub-agreement with an MWBE for the
53 use or purchase of such business enterprise's goods or services in the
54 performance of the awarded state contract.

(c) fail to provide an MWBE with sufficient information or other required supporting documentation in order for the MWBE to prepare a proper bid.

2. Upon receipt by the director of a complaint by a contracting agency that a contractor has violated the provisions of a state contract which have been included to comply with the provisions of this article or of a contractor that a contracting agency has violated such provisions or has failed or refused to issue a waiver where one has been applied for pursuant to subdivision six of section three hundred thirteen of this article or has denied such application, the director shall attempt to resolve the matter giving rise to such complaint. If efforts to resolve such matter to the satisfaction of all parties are unsuccessful, the director shall refer the matter, within thirty days of the receipt of the complaint, to the division's hearing officers. Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The director, within ten days of receipt of the decision, shall file a determination of such matter and shall cause a copy of such determination along with a copy of this article to be served upon the contractor by personal service or by certified mail return receipt requested. The decision of the hearing officer shall be final and may only be vacated or modified as provided in article seventy-eight of the civil practice law and rules upon an application made within the time provided by such article. The determination of the director as to the imposition of any fines, sanctions or penalties shall be reviewable pursuant to article seventy-eight of the civil practice law and rules. The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed five years following the final determination. The division of minority and women's business development shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

3. The director shall impose a sanction, penalty, or fine on any individual or entity that has three or more violations of this article within five years. Such fine shall be paid by such individual or entity. Such fine shall be remitted and deposited into a fund, to be managed by the commissioner of economic development. Such funds shall be used to subsidize the facilitation of the provisions of this article. Other sanctions shall include barring such entity or individual from contracting with such agency for a period not to exceed five years.

§ 7. Subdivision 1 of section 137 of the state finance law, as separately amended by section 17 of part MM of chapter 57 and by chapter 619 of the laws of 2008, is amended to read as follows:

1 1. In addition to other bond or bonds, if any, required by law for the
2 completion of a work specified in a contract for the prosecution of a
3 public improvement for the state of New York a municipal corporation, a
4 public benefit corporation or a commission appointed pursuant to law, or
5 in the absence of any such requirement, the comptroller may or the other
6 appropriate official, respectively, shall nevertheless require prior to
7 the approval of any such contract a bond guaranteeing prompt payment of
8 moneys due to all persons furnishing labor or materials to the contrac-
9 tor or any subcontractors in the prosecution of the work provided for in
10 such contract. Whenever a municipal corporation issues a permit subject
11 to compliance with section two hundred twenty of the labor law, such
12 permittee or its contractor or subcontractors furnishing workers shall
13 post a payment bond subject to this section. Provided, however, that all
14 performance bonds and payment bonds may, at the discretion of the head
15 of the state agency, public benefit corporation or commission, or his or
16 her designee, be dispensed with for the completion of a work specified
17 in a contract for the prosecution of a public improvement for the state
18 of New York for which bids are solicited where the aggregate amount of
19 the contract is under one hundred **fifty** thousand dollars and provided
20 further, that in a case where the contract is not subject to the multi-
21 ple contract award requirements of section one hundred thirty-five of
22 this article, such requirements may be dispensed with where the head of
23 the state agency, public benefit corporation or commission finds it to
24 be in the public interest and where the aggregate amount of the contract
25 awarded or to be awarded is less than two hundred thousand dollars. The
26 head of the state agency, public benefit corporation or commission, or
27 his or her designee, shall adjust the aggregate contract amounts listed
28 in this subdivision every year to account for increases in the costs of
29 construction. Advertisements for bids shall provide information on the
30 requirements for, or dispensation of, performance and payment bonds.
31 Provided further, that in a case where a performance or payment bond is
32 dispensed with, twenty per centum may be retained from each progress
33 payment or estimate until the entire contract work has been completed
34 and accepted, at which time the head of the state agency, public benefit
35 corporation or commission shall, pending the payment of the final esti-
36 mate, pay not to exceed seventy-five per centum of the amount of the
37 retained percentage.

38 § 8. Subdivision 4 of section 139-f of the state finance law, as
39 amended by chapter 83 of the laws of 1995, is amended to read as
40 follows:

41 4. Notwithstanding any other provision of this section or other law,
42 requirements for the furnishing of a performance bond or a payment bond
43 may be dispensed with at the discretion of the head of the state agency
44 or corporation, or his or her designee, where the public owner is a
45 state agency or corporation described in subdivision one-a of this
46 section and the aggregate amount of the contract awarded or to be
47 awarded is under fifty thousand dollars and, in a case where the
48 contract is not subject to the multiple contract award requirements of
49 section one hundred thirty-five of this article, such requirements may
50 be dispensed with where the head of the state agency or corporation
51 finds it to be in the public interest and where the aggregate amount of
52 the contract awarded or to be awarded is under ~~[two]~~ **three** hundred thou-
53 sand dollars. The head of the state agency, public benefit corporation
54 or commission, or his or her designee, shall adjust the aggregate
55 contract amounts listed in this subdivision every year to account for
56 increases in the costs of construction. Advertisements for bids shall

1 provide information on the requirements for, or dispensation of,
2 performance and payment bonds. Provided further, that in a case where a
3 performance or payment bond is dispensed with, twenty per centum may be
4 retained from each progress payment or estimate until the entire
5 contract work has been completed and accepted, at which time the head of
6 the state agency or corporation shall, pending the payment of the final
7 estimate, pay not to exceed seventy-five per centum of the amount of the
8 retained percentage.

9 § 9. The opening paragraph of section 139-g of the state finance law,
10 as amended by chapter 636 of the laws of 2003, is amended to read as
11 follows:

12 In every state agency, department and authority which has let more
13 than two million dollars in service and construction contracts and state
14 assisted project contracts in the prior fiscal year, the chief executive
15 officer of that agency, department or authority shall, with respect to
16 those contracts and state assisted project contracts let by his or her
17 agency, department or authority:

18 § 10. The opening paragraph of subdivision (b) of section 139-g of the
19 state finance law, as amended by chapter 636 of the laws of 2003, is
20 amended to read as follows:

21 identify all small-business and certified women and minority-owned
22 business concerns which, in the judgment of the chief executive officer
23 of that agency, department or authority, can bid on those contracts and
24 state assisted project contracts which are usually and customarily let
25 by that agency, department or authority, or in which that authority
26 provides a grant or loan or tax exempt financing, with a reasonable
27 expectation of success. Such chief executive officers shall carry out
28 the provisions of this subdivision:

29 § 11. Section 139-g of the state finance law is amended by adding a
30 new subdivision (e) to read as follows:

31 (e) For the purposes of this section, the following words shall have
32 the following meanings:

33 (i) "State assisted project contract" shall mean any written agreement
34 arising out of a state assisted housing project or state assisted
35 economic development project or state assisted higher education project
36 or state assisted hospital or health care facility project, for which
37 the total project cost exceeds two million dollars and for which the
38 project owner is committed to spend or does expend funds for the acqui-
39 sition, construction, demolition, replacement, major repair, or reno-
40 vation of real property and improvements thereon for such project.

41 (ii) "State assisted housing project" shall mean those projects which
42 receive from the New York state housing finance agency tax-exempt
43 financing for all or part of the total project cost.

44 (iii) "State assisted economic development project" shall mean those
45 projects which receive from the New York foundation of science technolo-
46 gy and innovation, or the urban development corporation and its subsid-
47 aries a grant or loan or tax-exempt financing for all or part of the
48 total project cost.

49 (iv) "State assisted higher education project" shall mean those
50 projects which receive from the dormitory authority of the state of New
51 York a grant or loan or tax-exempt financing for all or part of the
52 total project cost.

53 (v) "State assisted hospital or health care facility project" shall
54 mean those projects which receive from the dormitory authority of the
55 state of New York a grant or loan or tax-exempt financing for all or
56 part of the total project cost.

1 § 12. This act shall take effect immediately, provided however, the
2 amendments to article 15-A of the executive law made by sections one,
3 two, three, four, five and six of this act shall not affect the expira-
4 tion of such article and shall expire therewith.