S T A T E  O F  N E W  Y O R K

3854

2009-2010 Regular Sessions

I N  A S S E M B L Y

January 28, 2009

Introduced by M. of A. BRENNAN, JOHN -- Multi-Sponsored by -- M. of A. CAHILL, COOK, GLICK, GOTTFRIED, SWEENEY -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law, in relation to the authority of state agencies, public authorities, or public benefit corporations to debar contractors from selling or submitting bids to such entities

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The state finance law is amended by adding a new section 139-b-1 to read as follows:

S 139-B-1. DEBARMENT; AUTHORITY AND PROCEDURE. (A) DEFINITIONS. (I) "DEBARRING BODY" SHALL MEAN A STATE AGENCY, DEPARTMENT, BOARD, BUREAU, COMMISSION, DIVISION, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION, A MAJORITY OF WHOSE MEMBERS ARE APPOINTED BY THE GOVERNOR.

(II) "POTENTIAL CONTRACTOR" SHALL MEAN A PERSON, PARTNERSHIP, FIRM, CORPORATION OR BUSINESS ENTITY.

(B) THE HEAD OF THE DEBARRING BODY MAY, AFTER REASONABLE NOTICE BY CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED, TO THE POTENTIAL CONTRACTOR AND REASONABLE OPPORTUNITY FOR THEM TO BE HEARD, DEBAR SUCH POTENTIAL CONTRACTOR FOR CAUSE FROM SELLING TO OR SUBMITTING BIDS TO OR RECEIVING AWARDS FROM OR ENTERING INTO CONTRACTS WITH THE DEBARRING BODY FOR A PERIOD OF UP TO FIVE YEARS.

(C) CAUSES FOR DEBARMENT SHALL INCLUDE BUT NOT BE LIMITED TO A FINDING BY THE DEBARRING BODY OF THE FOLLOWING FACTORS BY SUCH POTENTIAL CONTRACTOR, ANY DIRECTOR OR OFFICER OR ANY HOLDER OF FIVE PERCENT OR MORE OF THE SHARES OR EQUITY OF SUCH POTENTIAL CONTRACTOR, OR ANY AFFILIATE OF SUCH POTENTIAL CONTRACTOR:

(I) FINAL DETERMINATION OF CONVICTION, WITH ALL APPEALS EXHAUSTED, FOR COMMISSION OF A CRIMINAL OFFENSE AS AN INCIDENT TO OBTAINING OR ATTEMPTING TO OBTAIN A PUBLIC OR PRIVATE CONTRACT OR SUBCONTRACT, OR IN THE PERFORMANCE OF SUCH CONTRACT OR SUBCONTRACT;

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

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(II) FINAL DETERMINATION OF CONVICTION, WITH ALL APPEALS EXHAUSTED, UNDER STATE OR FEDERAL STATUTES OF EMBEZZLEMENT, THEFT, FORGERY, BRIBERY, FALSIFICATION OR DESTRUCTION OF RECORDS, RECEIVING STOLEN PROPERTY, OR ANY OTHER OFFENSE INDICATING A LACK OF BUSINESS INTEGRITY OR BUSINESS HONESTY WHICH CURRENTLY, SERIOUSLY, AND DIRECTLY AFFECTS CAPABILITY IN ALL RESPECTS TO PERFORM FULLY CONTRACT REQUIREMENTS AS A STATE CONTRACTOR;

(III) FINAL DETERMINATION OF CONVICTION, WITH ALL APPEALS EXHAUSTED, UNDER STATE OR FEDERAL ANTITRUST STATUTES ARISING OUT OF THE SUBMISSION OF BIDS OR PROPOSALS;

(IV) FINAL JUDGEMENT OR DETERMINATION OF CONVICTION, WITH ALL APPEALS EXHAUSTED OF UNLAWFUL DISCRIMINATORY PRACTICE AS DEFINED IN THE HUMAN RIGHTS LAW;

(V) VIOLATION OF ANY DEBARRING BODY'S CONTRACT PROVISIONS, AS SET FORTH BELOW, OF A CHARACTER WHICH IS REASONABLY REGARDED BY THE HEAD OF SUCH DEBARRING BODY TO BE SO SERIOUS AS TO JUSTIFY DEBARMENT ACTION INCLUDING, BUT NOT LIMITED TO, A RECORD WITHIN THE LAST FIVE YEARS OF WILLFUL FAILURE TO PERFORM OR OF WILLFUL UNSATISFACTORY PERFORMANCE IN ACCORDANCE WITH THE TERMS OF ONE OR MORE SUCH CONTRACTS; PROVIDED THAT FAILURE TO PERFORM OR UNSATISFACTORY PERFORMANCE CAUSED BY ACTS BEYOND THE CONTROL OF THE CONTRACTOR SHALL NOT BE CONSIDERED TO BE A BASIS FOR DEBARMENT;

(VI) ANY OTHER CAUSE THAT THE HEAD OF A DEBARRING BODY REASONABLY DETERMINES TO BE SO SERIOUS AND COMPELLING AS TO PERVASIVELY AFFECT THE POTENTIAL CONTRACTOR'S CAPABILITY TO PERFORM FULLY THE CONTRACT REQUIREMENTS ON ALL CONTRACTS OF SUCH DEBARRING BODY, INCLUDING DEBARMENT BY ANOTHER DEBARRING BODY FOR ANY CAUSE LISTED IN THIS SUBDIVISION.

(D) IN CONSIDERING WHETHER OR NOT TO DEBAR A POTENTIAL CONTRACTOR, A DEBARRING BODY SHALL GIVE DUE CONSIDERATION TO ANY MITIGATING FACTORS BROUGHT TO SUCH BODY'S ATTENTION BY SUCH POTENTIAL CONTRACTOR; INCLUDING BUT NOT LIMITED TO ACTIONS TAKEN TO CORRECT THE CAUSES FOR WHICH THE DEBARMENT WAS IMPOSED, TIME LAPSED SINCE CONVICTION, OR BONA FIDE CHANGES IN OWNERSHIP OR MANAGEMENT. DEBARMENT SHALL BE FOR A PERIOD COMMENSURATE WITH THE SERIOUSNESS OF THE CAUSES FOR WHICH THE DEBARMENT WAS IMPOSED. THE HEAD OF EACH DEBARRING BODY SHALL ESTABLISH REGULATIONS CONCERNING THE LENGTH OF THE PERIOD OF DEBARMENT COMMENSURATE WITH THE CAUSES FOR WHICH THE DEBARMENT WAS IMPOSED.

(E) A WRITTEN NOTICE OF DEBARMENT, STATING THE BASIS THEREFOR, SHALL BE MAILED BY CERTIFIED MAIL, WITH RETURN RECEIPT REQUESTED, WITHIN TEN DAYS OF THE DECISION TO THE DEBARRED POTENTIAL CONTRACTOR BY THE HEAD OF THE DEBARRING BODY AND TO THE STATE COMPTROLLER AND OTHER DEBARRING BODIES FOR THE PURPOSE OF AIDING IN DETERMINATIONS OF DEBARMENT AND BIDDER RESPONSIBILITY AS APPROPRIATE. THE DEBARRING BODY SHALL PROMULGATE REGULATIONS GOVERNING AN INTERNAL APPEALS PROCEDURE FOR DEBARMENT. THE HEAD OF THE DEBARRING BODY SHALL MAKE THE FINAL ADMINISTRATIVE DETERMINATION.

(F) A DEBARRING BODY'S DECISION UNDER THIS SECTION SHALL BE FINAL AND CONCLUSIVE, AND SHALL BE SUBJECT TO APPEAL PURSUANT TO THE PROVISIONS OF ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES.

(G) THE DEBARRING BODY MAY REDUCE THE PERIOD OF DEBARMENT OR REVOKE THE ORDER OF DEBARMENT NOT LESS THAN SIX MONTHS AFTER NOTICE OF SUCH DEBARMENT UPON WRITTEN REQUEST OF THE DEBARRED POTENTIAL CONTRACTOR, SUPPORTED BY DOCUMENTATION, FOR REASONS INCLUDING, BUT NOT LIMITED TO:

(I) NEWLY DISCOVERED MATERIAL EVIDENCE;

(II) REVERSAL OF A CONVICTION OR CIVIL JUDGMENT UPON WHICH THE DEBARMENT WAS BASED;

(III) BONA FIDE CHANGE IN OWNERSHIP OR MANAGEMENT; OR

(IV) ELIMINATION OF OTHER CAUSES FOR WHICH THE DEBARMENT WAS IMPOSED.

(H) THE STATE COMPTROLLER SHALL MAINTAIN A CURRENT LIST OF DEBARRED POTENTIAL CONTRACTORS, WHICH LIST SHALL BE MADE AVAILABLE UPON REQUEST TO THE PUBLIC PURSUANT TO THE PROVISIONS OF THE FREEDOM OF INFORMATION LAW. THE DEBARRING BODY SHALL MAKE AVAILABLE TO THE LEGISLATURE AND THE GOVERNOR, UPON REQUEST, AN ANNUAL LISTING OF DEBARMENT ACTIVITY INCLUDING BUT NOT LIMITED TO NUMBERS OF POTENTIAL CONTRACTORS DEBARRED UNDER THIS SECTION, THE REASONS FOR SUCH DEBARMENT, AND THE PERIOD OF TIME FOR WHICH A POTENTIAL CONTRACTOR HAS BEEN SUSPENDED.

(I) NOTHING IN THIS SECTION SHALL BE CONSTRUED SO AS TO PREVENT A DEBARRING BODY FROM DETERMINING ON A CASE BY CASE BASIS THAT A POTENTIAL CONTRACTOR SUBMITTING A BID OR PROPOSAL IS NOT RESPONSIBLE.

S 2. This act shall take effect on the one hundred twentieth day after it shall have become a law provided, however, that any rules or regulations necessary for the implementation of this act are authorized and directed to be completed on or before such effective date.