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

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2009-2010 Regular Sessions

I N A S S E M B L Y

January 28, 2009

Introduced by M. of A. BRENNAN, GREENE, REILLY, COLTON -- Multi-Sponsored by -- M. of A. CAHILL, CLARK, COOK, ENGLEBRIGHT, GALEF, GLICK, GOTTFRIED, HOOPER, JOHN, SWEENEY -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law, in relation to establishing guidelines for determining the responsibility of a bidder or subcontractor

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 169 to read as follows:

S 169. GUIDELINES FOR DETERMINING THE RESPONSIBILITY OF A BIDDER OR SUBCONTRACTOR. 1. DEFINITIONS. A. "CONTRACTING AGENCY" SHALL MEAN ANY NEW YORK STATE AGENCY, DEPARTMENT, BOARD, BUREAU, COMMISSION, DIVISION, OR ANY PUBLIC BENEFIT CORPORATION OR PUBLIC AUTHORITY A MAJORITY OF WHOSE MEMBERS ARE APPOINTED BY THE GOVERNOR, PROVIDED, HOWEVER, THAT THIS SECTION SHALL NOT BE DEEMED TO APPLY TO ANY MUNICIPAL GOVERNMENT.

B. "CONTRACT" SHALL MEAN ANY WRITTEN AGREEMENT ENTERED INTO BY A CONTRACTING AGENCY FOR THE PROCUREMENT OR DISPOSAL OF MATERIALS, SERVICES OR CONSTRUCTION, EXCEEDING A DOLLAR VALUE OF NOT LESS THAN TEN THOUSAND DOLLARS.

C. "BIDDER," "CONTRACTOR" AND "SUBCONTRACTOR" SHALL MEAN A PERSON, PARTNERSHIP, FIRM, CORPORATION OR BUSINESS ENTITY SUBMITTING A BID OR PROPOSAL FOR, OR SUBMITTED FOR APPROVAL AS A SUBCONTRACTOR FOR A CONTRACT BY ANY OF THE CONTRACTING AGENCIES.

D. "AFFILIATE OF THE BIDDER" SHALL MEAN A PERSON, FIRM, CORPORATION, PARTNERSHIP OR BUSINESS ENTITY WHICH OWNS, CONTROLS, OR HAS THE ABILITY TO CONTROL THE BIDDER OR PROPOSED SUBCONTRACTOR; OR IS OWNED BY, CONTROLLED BY OR IS ABLE TO BE CONTROLLED BY THE BIDDER OR PROPOSED SUBCONTRACTOR; OR IS NOT A BIDDER OR SUBCONTRACTOR BUT WHICH IS OWNED BY, CONTROLLED BY OR IS ABLE TO BE CONTROLLED BY A PERSON, FIRM, CORPO-

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

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RATION, PARTNERSHIP, BUSINESS ENTITY OR PROPRIETORSHIP WHICH OWNS, CONTROLS, OR HAS THE ABILITY TO CONTROL THE BIDDER OR PROPOSED SUBCONTRACTOR.

2. IN DETERMINING THE RESPONSIBILITY OF A BIDDER, CONTRACTOR OR A SUBCONTRACTOR, ALL CONTRACTING AGENCIES SHALL GIVE DUE CONSIDERATION TO ANY CREDIBLE EVIDENCE OR RELIABLE INFORMATION THAT THE PAST OR CURRENT RECORD OF A BIDDER, CONTRACTOR OR PROPOSED SUBCONTRACTOR INCLUDES ANY OF THE FOLLOWING:

A. LACK OF ADEQUATE EXPERTISE OR FINANCIAL RESOURCES TO PERFORM THE WORK OF THE CONTRACT OR SUBCONTRACT IN A TIMELY, COMPETENT, AND ACCEPTABLE MANNER. EVIDENCE OF SUCH A LACK OF ABILITY TO PERFORM MAY INCLUDE, BUT SHALL NOT BE LIMITED TO: EVIDENCE OF SUSPENSION OR REVOCATION FOR CAUSE OF ANY PROFESSIONAL LICENSE OF ANY DIRECTOR OR OFFICER, OR ANY HOLDER OF FIVE PERCENT OR MORE OF THE BIDDER'S OR PROPOSED SUBCONTRACTOR'S STOCK OR EQUITY; FAILURE TO SUBMIT SATISFACTORY EVIDENCE OF INSURANCE, SURETY BONDS OR FINANCIAL RESPONSIBILITY; OR A HISTORY OF TERMINATION OF PRIOR CONTRACTS FOR CAUSE. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO SUPERSEDE ANY OF THE PROVISIONS OF SECTION THREE HUNDRED THIRTEEN OF THE EXECUTIVE LAW OR SECTION ONE HUNDRED THIRTY-NINE-I OF THIS CHAPTER.

B. CRIMINAL CONDUCT IN CONNECTION WITH GOVERNMENT CONTRACTS, OR THE CONDUCT OF ANY BUSINESS ACTIVITIES INVOLVING:

(1) A PATTERN OF RACKETEERING, EXTORTION, OBSTRUCTION OF JUSTICE, OR OTHER COMPARABLE CRIMES AS DEFINED IN THE PENAL LAW OR IN FEDERAL STATUTE; OR

(2) ORGANIZED CRIMINAL ACTIVITY, ENTERPRISE CORRUPTION, BRIBERY, FRAUD, BID-RIGGING, EMBEZZLEMENT, OR OTHER COMPARABLE CRIMES AS DEFINED IN THE PENAL LAW OR IN FEDERAL STATUTE.

EVIDENCE OF SUCH CONDUCT MAY INCLUDE A JUDGMENT OF CONVICTION, PENDING CRIMINAL INDICTMENT OR FORMAL GRANT OF IMMUNITY IN CONNECTION WITH A CRIMINAL PROSECUTION OF THE BIDDER OR PROPOSED SUBCONTRACTOR, ANY DIRECTOR OR OFFICER, OR ANY HOLDER OF FIVE PERCENT OR MORE OF THE SHARES OR EQUITY OF THE BIDDER OR PROPOSED SUBCONTRACTOR, OR ANY AFFILIATE OF THE BIDDER OR THE PROPOSED SUBCONTRACTOR.

C. WILLFUL, REPEATED SERIOUS VIOLATIONS OF THE FEDERAL OCCUPATIONAL HEALTH AND SAFETY ACT, AND/OR EVIDENCE OF GRAVE AND SUBSTANTIAL DISREGARD FOR EMPLOYEE OR PUBLIC SAFETY.

D. DETERMINATION UNDER THE HUMAN RIGHTS LAW, THE LABOR LAW OR THE WORKERS' COMPENSATION LAW OF:

(1) UNLAWFUL DISCRIMINATORY PRACTICE AS DEFINED IN THE HUMAN RIGHTS LAW;

(2) WILLFUL NONCOMPLIANCE WITH THE PREVAILING WAGE AND SUPPLEMENTS PAYMENT REQUIREMENTS OF THE LABOR LAW;

(3) ANY OTHER LABOR LAW VIOLATIONS, INCLUDING, BUT NOT LIMITED TO, CHILD LABOR VIOLATIONS, FAILURE TO PAY WAGES, OR UNEMPLOYMENT INSURANCE TAX DELINQUENCIES;

(4) ANY VIOLATION OF THE WORKERS' COMPENSATION LAW, INCLUDING, BUT NOT LIMITED TO, THE FAILURE OF THE BIDDER OR PROPOSED SUBCONTRACTOR TO PROVIDE PROOF OF WORKERS' COMPENSATION DISABILITY BENEFITS COVERAGE; OR

(5) FAILURE TO PROVIDE ADEQUATE LEVELS OF WORKERS' COMPENSATION DISABILITY BENEFITS COVERAGE IN THE PAST FIVE YEARS.

E. CRIMINAL CONDUCT INVOLVING VIOLATIONS OF THE ENVIRONMENTAL CONSERVATION LAW OR OTHER FEDERAL OR STATE ENVIRONMENTAL STATUTES.

F. THE FAILURE OF A BIDDER OR CONTRACTOR TO DEMONSTRATE GOOD FAITH EFFORTS TO COMPLY WITH APPLICABLE FEDERAL OR STATE STATUTES AND REGULATIONS REQUIRING EFFORTS TO SOLICIT AND UTILIZE MINORITY-OWNED AND

WOMEN-OWNED BUSINESS ENTERPRISES AND DISADVANTAGED BUSINESS ENTERPRISES AS POTENTIAL SUBCONTRACTORS IN CONNECTION WITH A PENDING BID FOR THE PERFORMANCE OF A FEDERALLY AIDED OR STATE FUNDED OR ASSISTED PROJECT SUBJECT TO SUCH PROJECT'S STATUTORY AND REGULATORY REQUIREMENTS.

G. THE FAILURE OF A BIDDER TO COMPLY WITH FEDERAL AND STATE EQUAL OPPORTUNITY REQUIREMENTS.

H. A RECORD WITHIN THE LAST FIVE YEARS OF FAILURE TO PERFORM OR OF UNSATISFACTORY PERFORMANCE IN ACCORDANCE WITH THE TERMS OF ONE OR MORE CONTRACTS; PROVIDED THAT FAILURE TO PERFORM OR UNSATISFACTORY PERFORMANCE CAUSED BY ACTS BEYOND THE CONTROL OF THE CONTRACTOR SHALL NOT BE CONSIDERED.

I. CONVICTION UNDER STATE OR FEDERAL ANTITRUST STATUTES ARISING OUT OF THE SUBMISSION OF BIDS OR PROPOSALS.

J. ANY OTHER GROUNDS OR CIRCUMSTANCES CONCERNING THE PRESENT RESPONSIBILITY OF A CONTRACTOR OR SUBCONTRACTOR INCLUDING, BUT NOT LIMITED TO, SUBMISSION TO A CONTRACTING AGENCY OF A FALSE OR MISLEADING STATEMENT ON A UNIFORM QUESTIONNAIRE, PROPOSAL OR OTHER OFFICIAL SUBMISSION.

K. ANY OTHER FACTORS CONSIDERED BY THE CONTRACTING AGENCIES TO BEAR UPON RESPONSIBILITY, INCLUDING BUT NOT LIMITED TO, ANY MITIGATING FACTORS BROUGHT TO THE AGENCY'S ATTENTION BY THE BIDDER OR PROPOSED SUBCONTRACTOR.

3. ANY BIDDER, CONTRACTOR OR SUBCONTRACTOR WHO HAS BEEN DETERMINED, PURSUANT TO THIS SECTION, NOT TO BE A RESPONSIBLE BIDDER, SHALL BE GIVEN REASONABLE NOTICE BY THE CONTRACTING AGENCY BY CERTIFIED MAIL WITH RETURN RECEIPT REQUESTED AND A REASONABLE OPPORTUNITY TO BE HEARD. A BIDDER, CONTRACTOR OR SUBCONTRACTOR DECLARED NOT TO BE RESPONSIBLE MAY, WITHIN TEN DAYS OF BEING HEARD, APPEAL THE DECISION TO THE HEAD OF THE CONTRACTING AGENCY WHO WILL MAKE A FINAL DETERMINATION WITHIN TEN DAYS.

S 2. This act shall take effect on the one hundred twentieth day after it shall have become a law.