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

5109

2009-2010 Regular Sessions

I N S E N A T E

April 27, 2009

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to an action for damages against a contractor for failure to pay prevailing wages or taxes, contributions, assessments or benefits

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

Section 1. The labor law is amended by adding a new section 220-i to read as follows:

S 220-I. ACTION FOR DAMAGES AGAINST CONTRACTOR FOR FAILURE TO PAY PREVAILING WAGES OR TAXES, CONTRIBUTIONS, ASSESSMENTS OR BENEFITS. 1. ANY PERSON WHO SUBMITS A BID DIRECTLY TO A PUBLIC BODY FOR A CONTRACT FOR ANY PUBLIC WORK SUBJECT TO THE PROVISIONS OF THIS ARTICLE AND IS NOT AWARDED THE CONTRACT AND WHOSE BID IS THE LOWEST BID OTHER THAN THE BID ACCEPTED BY THE PUBLIC BODY OR, IF, PURSUANT TO LAW, THE CONTRACT IS AWARDED ON THE BASIS OF FACTORS OTHER THAN OR IN ADDITION TO THE LOWEST BID, WHOSE BID IS THE HIGHEST IN RANK OTHER THAN THE BID ACCEPTED BY THE PUBLIC BODY, HEREINAFTER SHALL BE REFERRED TO IN THIS SECTION AS THE PLAINTIFF, MAY BRING AN ACTION FOR DAMAGES IN A COURT OF COMPETENT JURISDICTION AGAINST THE CONTRACTOR WHO WAS DIRECTLY AWARDED THE CONTRACT BY THE PUBLIC BODY OR ANY SUBCONTRACTOR OF THAT CONTRACTOR, HEREINAFTER SHALL BE REFERRED TO IN THIS SECTION AS THE DEFENDANT, ALLEGING THAT THE DEFENDANT HAS, IN CONNECTION WITH WORK PERFORMED PURSUANT TO THE CONTRACT, VIOLATED THE PROVISIONS OF THIS ARTICLE OR FAILED TO PAY ANY CONTRIBUTION, TAX, ASSESSMENT OR BENEFIT REQUIRED BY ANY OTHER APPLICABLE LAW. IF THERE IS MORE THAN ONE LOSING BIDDER, A BIDDER WITH A HIGHER BID THAN THE SECOND LOWEST BIDDER OR LOWER RANK THAN THE SECOND HIGHEST RANK, IF, PURSUANT TO LAW, THE CONTRACT IS AWARDED ON THE BASIS OF FACTORS OTHER THAN OR IN ADDITION TO THE LOWEST BID, MAY BRING AN ACTION IF THAT BIDDER GIVES WRITTEN NOTICE OF HIS OR HER INTENTION TO BRING AN ACTION, TO THE COMMISSIONER AND NONE OF THE

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

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OTHER BIDDERS FILES AN ACTION WITHIN THIRTY DAYS FOLLOWING THE DATE OF RECEIPT OF WRITTEN NOTICE TO THE DEPARTMENT. THE WRITTEN NOTICE OF INTENTION TO BRING AN ACTION MUST CONTAIN THE FOLLOWING: A. A STATEMENT OF THE SPECIFIC VIOLATIONS OR FAILURES TO PAY ALLEGEDLY COMMITTED, WHICH SHALL NOT PRECLUDE, IN THE COURSE OF THE ACTION, CONSIDERATION OF OTHER VIOLATIONS OR FAILURES TO PAY AS MAY BE REVEALED IN THE COURSE OF DISCOVERY,

B. A STATEMENT THAT THE ACTION IS TO BE FILED PURSUANT TO THIS SECTION, AND

C. A STATEMENT THAT THE OTHER BIDDERS MAY HAVE THE RIGHT TO FILE AN ACTION AND WILL BE PRECLUDED FROM DOING SO IF THEY DO NOT FILE AN ACTION WITHIN THIRTY DAYS OF THE WRITTEN NOTICE TO THE DEPARTMENT. IF NO OTHER LOSING BIDDER SO FILES AN ACTION WITHIN THIRTY DAYS OF THE WRITTEN NOTICE TO THE DEPARTMENT, THE LOSING BIDDER WHO SENT THE WRITTEN NOTICE SHALL FILE AN ACTION PURSUANT TO THIS SECTION WITHIN FIFTEEN DAYS OF THE LAST DAY ANY LOSING BIDDER COULD HAVE SENT WRITTEN NOTICE TO THE DEPARTMENT OF AN INTENTION TO FILE AN ACTION. IF MORE THAN ONE BIDDER FILES AN ACTION, ALL ACTIONS OTHER THAN THAT FILED BY THE BIDDER WHOSE BID IS THE LOWEST OF THE BIDDERS WHO FILED ACTIONS, OR, IF, PURSUANT TO LAW, THE CONTRACT IS AWARDED ON THE BASIS OF FACTORS OTHER THAN OR IN ADDITION TO THE LOWEST BID, WHOSE BID IS THE HIGHEST IN RANK OF THE BIDDERS WHO FILED ACTIONS, SHALL BE DISMISSED.

2. UPON A FINDING BY THE COURT THAT THE PLAINTIFF WAS A RESPONSIBLE BIDDER FOR THE CONTRACT AND A FINDING THAT ONE OR MORE DEFENDANTS VIOLATED THE PROVISIONS OF THIS ARTICLE OR FAILED TO PAY ANY CONTRIBUTION, TAX, ASSESSMENT OR BENEFIT REQUIRED BY ANY OTHER APPLICABLE LAW IN CONNECTION WITH WORK PERFORMED PURSUANT TO THE CONTRACT, AND THAT THE PLAINTIFF SUBMITTED A BID FOR THE CONTRACT WHICH WAS LESS THAN THE SUM TOTAL OF THE BID ACCEPTED BY THE PUBLIC BODY PLUS ANY ADDITIONAL AMOUNT THAT THE DEFENDANT OR DEFENDANTS WOULD HAVE PAID DURING THE TERM OF THE CONTRACT TO BE IN FULL COMPLIANCE WITH THIS ARTICLE AND OTHER APPLICABLE LAWS IN CONNECTION WITH THE CONTRACT, THE COURT SHALL ORDER THE DEFENDANT OR DEFENDANTS TO PAY TO THE PLAINTIFF THE ENTIRE AMOUNT OF DAMAGES SUSTAINED PLUS COSTS AND REASONABLE ATTORNEY'S FEES OR, IF THE COURT FINDS THE NONCOMPLIANCE TO BE INTENTIONAL, THREE TIMES THE AMOUNT OF DAMAGES SUSTAINED PLUS COSTS AND REASONABLE ATTORNEY'S FEES, EXCEPT THAT THE COURT SHALL ORDER NO PAYMENT TO THE PLAINTIFF IF THE COURT FINDS THAT THE VIOLATION OR FAILURE TO PAY WAS CAUSED BY MINOR RECORD KEEPING MISTAKES OR MINOR COMPUTATIONAL ERRORS OR BY OTHER MINOR MISTAKES. THE OCCURRENCE OF MORE THAN TWO VIOLATIONS OR FAILURES TO PAY SHALL LEAD TO THE REBUTTABLE PRESUMPTION THAT THE VIOLATION OR FAILURE TO PAY AT ISSUE IS NOT MINOR. IF THERE ARE TWO OR MORE DEFENDANTS, THE COURT SHALL ALLOCATE THE PAYMENTS FOR DAMAGES SUSTAINED AND ATTORNEY'S FEES AMONG THE DEFENDANTS IN A REASONABLE MANNER. NOTHING IN THIS SECTION SHALL BE CONSTRUED AS REQUIRING PAYMENTS TO A PLAINTIFF BY ANY CONTRACTOR OR SUBCONTRACTOR WHO HAS NOT VIOLATED THE PROVISIONS OF THIS ARTICLE OR FAILED TO PAY ANY CONTRIBUTION, TAX, ASSESSMENT OR BENEFIT REQUIRED BY ANY OTHER APPLICABLE LAW IN CONNECTION WITH WORK PERFORMED PURSUANT TO THE CONTRACT. A PLAINTIFF MAY DESIGNATE AN AGENT OR REPRESENTATIVE TO MAINTAIN THE ACTION IF THE VIOLATION OR FAILURE TO PAY HAS AN ADVERSE EFFECT ON THE AGENT OR REPRESENTATIVE OR, IF THE AGENT OR REPRESENTATIVE IS AN ORGANIZATION OR ASSOCIATION, OR ANY MEMBER OF THE ORGANIZATION OR ASSOCIATION. IF THE PLAINTIFF PREVAILS, THE AGENT OR REPRESENTATIVE SHALL BE ENTITLED TO REIMBURSEMENT FOR COSTS AND REASONABLE ATTORNEY'S FEES OF THE AGENT OR REPRESENTATIVE BUT NOT TO A FINANCIAL INTEREST IN THE DAMAGES AWARDED.

3. FOR THE PURPOSES OF THIS SECTION, THE DAMAGES SUSTAINED BY A PLAINTIFF SHALL INCLUDE THE PLAINTIFF'S COSTS OF PREPARING AND SUBMITTING THE BID AND MAY, IF SOUGHT BY THE PLAINTIFF, INCLUDE PROFITS THAT THE COURT DETERMINES THE PLAINTIFF WOULD HAVE MADE IF THE PLAINTIFF HAD BEEN AWARDED THE CONTRACT AND COMPLIED WITH THIS ARTICLE AND OTHER APPLICABLE LAWS.

4. IF THE COURT DETERMINES THAT THE DEFENDANT DID NOT, IN CONNECTION WITH WORK PERFORMED PURSUANT TO THE CONTRACT, VIOLATE THE PROVISIONS OF THIS ARTICLE OR FAIL TO PAY ANY CONTRIBUTION, TAX, ASSESSMENT OR BENEFIT REQUIRED BY OTHER APPLICABLE LAW, THE COURT SHALL ORDER THE PLAINTIFF TO PAY THE COSTS AND REASONABLE ATTORNEY'S FEES OF THE DEFENDANT.

5. AS USED IN THIS SECTION:

A. "PERSON" MEANS ANY INDIVIDUAL, CORPORATION, COMPANY, PARTNERSHIP, FIRM, ASSOCIATION OR BUSINESS;

B. "CONTRACTOR" MEANS A PERSON WHO IS DIRECTLY AWARDED A CONTRACT FOR A PUBLIC WORK BY A PUBLIC BODY; AND

C. "SUBCONTRACTOR" MEANS ANY SUBCONTRACTOR OR LOWER TIER SUBCONTRACTOR OF A CONTRACTOR.

S 2. This act shall take effect immediately.