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

2967

2011-2012 Regular Sessions

I N S E N A T E

February 4, 2011

Introduced by Sen. ESPAILLAT -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to promoting fairness in competitive bidding by providing for enforcement of prevailing wage provisions applicable to public work construction projects

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

Section 1. The general business law is amended by adding a new section 399-j to read as follows:

S 399-J. FAIRNESS IN COMPETITIVE BIDDING. 1. FOR THE PURPOSES OF THIS SECTION: (A) THE TERM "PERSON" SHALL INCLUDE ANY INDIVIDUAL, ORGANIZATION, ASSOCIATION, SCHOOL DISTRICT, LOCAL GOVERNMENT, CORPORATION, PARTNERSHIP, LIMITED LIABILITY COMPANY OR OTHER BUSINESS ENTITY; AND

(B) THE TERM "CONSTRUCTION PROJECT" SHALL INCLUDE ANY PROJECT WHICH IS SUBJECT TO THE PROVISIONS OF ARTICLE EIGHT OF THE LABOR LAW AND WHICH INVOLVES THE CONSTRUCTION, MODERNIZATION, IMPROVEMENT, REHABILITATION, REPAIR, MAINTENANCE, REPLACEMENT OR RENOVATION OF A BUILDING, ROAD OR STRUCTURE, OR ANY PORTION OF SUCH A PROJECT PERFORMED PURSUANT TO A SUBCONTRACTING ARRANGEMENT.

2. (A) ANY PERSON MAY BRING A CIVIL ACTION FOR THE RECOVERY OF DAMAGES AGAINST THE WINNING BIDDER IF THE WINNING BIDDER HAS VIOLATED THE LABOR LAW BY FAILING TO PAY THE PREVAILING WAGE ON A CONSTRUCTION PROJECT. SUCH AN ACTION MAY BE MAINTAINED SOLELY BY THE PERSON BRINGING THE ACTION, OR BY SUCH PERSON, TOGETHER WITH THE ATTORNEY GENERAL. IF THE WINNING BIDDER IS FOUND NOT TO BE PAYING THE PREVAILING WAGE, THE PRESUMPTIVE MEASURE OF DAMAGES IS THE VALUE OF THE CONTRACT FOR THE CONSTRUCTION PROJECT.

(B) A COPY OF THE COMPLAINT AND WRITTEN DISCLOSURE OF SUBSTANTIALLY ALL MATERIAL EVIDENCE AND INFORMATION THAT THE PERSON POSSESSES SHALL BE SERVED ON THE OFFICE OF THE ATTORNEY GENERAL PURSUANT TO THE CIVIL PRACTICE LAW AND RULES. THE COMPLAINT SHALL BE FILED IN CAMERA, SHALL REMAIN

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

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UNDER SEAL FOR AT LEAST SIXTY DAYS, AND SHALL NOT BE SERVED UPON THE DEFENDANT UNTIL THE COURT SO ORDERS. THE OFFICE OF THE ATTORNEY GENERAL MAY ELECT TO INTERVENE AND PROCEED WITH THE ACTION WITHIN SIXTY DAYS AFTER IT RECEIVES BOTH THE COMPLAINT AND THE MATERIAL EVIDENCE AND INFORMATION.

(C) BEFORE THE EXPIRATION OF THE SIXTY-DAY PERIOD PROVIDED FOR IN THIS SECTION, THE OFFICE OF THE ATTORNEY GENERAL SHALL: (I) PROCEED WITH THE ACTION, IN WHICH CASE THE ACTION SHALL BE CONDUCTED BY THE OFFICE OF THE ATTORNEY GENERAL ON BEHALF OF THE STATE OF NEW YORK; OR

(II) NOTIFY THE COURT THAT IT DECLINES TO TAKE OVER THE ACTION, IN WHICH CASE THE PERSON BRINGING THE ACTION SHALL HAVE THE RIGHT TO CONDUCT THE ACTION.

3. WHENEVER A PERSON BRINGS AN ACTION UNDER THIS SECTION, NO PERSON OTHER THAN THE OFFICE OF THE ATTORNEY GENERAL MAY INTERVENE OR BRING A RELATED ACTION BASED ON THE FACTS UNDERLYING THE PENDING ACTION.

4. IF THE OFFICE OF THE ATTORNEY GENERAL PROCEEDS WITH THE ACTION, IT SHALL HAVE THE PRIMARY RESPONSIBILITY FOR PROSECUTING THE ACTION, AND SHALL NOT BE BOUND BY AN ACT OF THE PERSON BRINGING THE ACTION. SUCH PERSON SHALL HAVE THE RIGHT TO CONTINUE AS A PARTY TO THE ACTION, SUBJECT TO THE LIMITATIONS SET FORTH IN SUBDIVISION FIVE OF THIS SECTION.

5. (A) THE OFFICE OF THE ATTORNEY GENERAL MAY DISMISS THE ACTION NOTWITHSTANDING THE OBJECTIONS OF THE PERSON INITIATING THE ACTION IF THE PERSON HAS BEEN NOTIFIED BY THE OFFICE OF THE ATTORNEY GENERAL OF THE FILING OF THE MOTION AND THE COURT HAS PROVIDED THE PERSON WITH AN OPPORTUNITY FOR A HEARING ON THE MOTION.

(B) THE OFFICE OF THE ATTORNEY GENERAL MAY SETTLE THE ACTION WITH THE DEFENDANT NOTWITHSTANDING THE OBJECTIONS OF THE PERSON INITIATING THE ACTION IF THE COURT DETERMINES, AFTER A HEARING, THAT THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE UNDER ALL THE CIRCUM-STANCES. UPON A SHOWING OF GOOD CAUSE, SUCH HEARING MAY BE HELD IN CAMERA.

6. IF THE OFFICE OF THE ATTORNEY GENERAL ELECTS NOT TO PROCEED WITH THE ACTION, THE PERSON WHO INITIATED THE ACTION SHALL HAVE THE RIGHT TO CONDUCT THE ACTION. IF THE OFFICE OF THE ATTORNEY GENERAL SO REQUEST, IT SHALL BE SERVED WITH COPIES OF ALL PLEADINGS FILED IN THE ACTION AND SHALL BE SUPPLIED WITH COPIES OF ALL DEPOSITION TRANSCRIPTS (AT THE OFFICE OF THE ATTORNEY GENERAL'S EXPENSE). WHEN A PERSON PROCEEDS WITH THE ACTION, THE COURT, WITHOUT LIMITING THE STATUS AND RIGHTS OF THE PERSON INITIATING THE ACTION, MAY NEVERTHELESS PERMIT THE OFFICE OF THE ATTORNEY GENERAL TO INTERVENE AT A LATER DATE UPON A SHOWING OF GOOD CAUSE.

7. THE OFFICE OF THE ATTORNEY GENERAL MAY ELECT TO PURSUE ITS CLAIM THROUGH ANY ALTERNATE REMEDY AVAILABLE TO THE OFFICE OF THE ATTORNEY GENERAL, INCLUDING ANY ADMINISTRATIVE PROCEEDING TO DETERMINE A CIVIL MONEY PENALTY. IF ANY SUCH ALTERNATE REMEDY IS PURSUED IN ANOTHER PROCEEDING, THE PERSON INITIATING THE ACTION SHALL HAVE THE SAME RIGHTS IN SUCH PROCEEDING AS SUCH PERSON WOULD HAVE HAD IF THE ACTION HAD CONTINUED UNDER THIS SECTION. ANY FINDING OF FACT OR CONCLUSION OF LAW MADE IN SUCH OTHER PROCEEDING THAT HAS BECOME FINAL SHALL BE CONCLUSIVE ON ALL PARTIES TO AN ACTION UNDER THIS SECTION. FOR PURPOSES OF THE PRECEDING SENTENCE, A FINDING OR CONCLUSION IS FINAL IF IT HAS BEEN FINALLY DETERMINED ON APPEAL TO THE APPROPRIATE COURT OF THE STATE OF NEW YORK, IF ALL TIME FOR FILING SUCH AN APPEAL WITH RESPECT TO THE FINDING OR CONCLUSION HAS EXPIRED, OR IF THE FINDING OR CONCLUSION IS NOT SUBJECT TO JUDICIAL REVIEW.

8. IF A WINNING BIDDER IS FOUND NOT TO BE PAYING THE PREVAILING WAGE ON A CONSTRUCTION PROJECT, THE PRESUMPTIVE MEASURE OF DAMAGES IS THE VALUE OF THE CONTRACT FOR THE CONSTRUCTION PROJECT. (A) IF THE OFFICE OF THE ATTORNEY GENERAL PROCEEDS WITH AN ACTION BROUGHT BY A PERSON, SUCH PERSON SHALL, SUBJECT TO THE PROVISIONS OF THIS PARAGRAPH, RECEIVE AT LEAST FIFTEEN PERCENT BUT NOT MORE THAN TWENTY-FIVE PERCENT OF THE PROCEEDS OF THE ACTION OR SETTLEMENT OF THE CLAIM, DEPENDING UPON THE EXTENT TO WHICH THE PERSON SUBSTANTIALLY CONTRIBUTED TO THE PROSECUTION OF THE ACTION. ANY SUCH PERSON SHALL ALSO RECEIVE AN AMOUNT FOR REASONABLE EXPENSES THAT THE COURT FINDS TO HAVE BEEN NECESSARILY INCURRED, PLUS REASONABLE ATTORNEYS' FEES AND COSTS. ALL SUCH EXPENSES, FEES, AND COSTS SHALL BE AWARDED AGAINST THE DEFENDANT.

(B) IF THE OFFICE OF THE ATTORNEY GENERAL DOES NOT PROCEED WITH AN ACTION UNDER THIS SECTION, THE PERSON BRINGING THE ACTION OR SETTLING THE CLAIM SHALL RECEIVE AN AMOUNT WHICH THE COURT DECIDES IS REASONABLE FOR COLLECTING THE CIVIL PENALTY AND DAMAGES. THE AMOUNT SHALL BE NOT LESS THAN FIFTY PERCENT AND NOT MORE THAN SEVENTY-FIVE PERCENT OF THE PROCEEDS OF THE ACTION OR SETTLEMENT AND SHALL BE PAID OUT OF SUCH PROCEEDS. SUCH PERSON SHALL ALSO RECEIVE AN AMOUNT FOR REASONABLE EXPENSES THAT THE COURT FINDS TO HAVE BEEN NECESSARILY INCURRED, PLUS REASONABLE ATTORNEYS' FEES AND COSTS. ALL SUCH EXPENSES, FEES, AND COSTS SHALL BE AWARDED AGAINST THE DEFENDANT.

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