

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:

- 1 Section 1. The general business law is amended by adding a new section
2 399-j to read as follows:
3 S 399-J. FAIRNESS IN COMPETITIVE BIDDING. 1. FOR THE PURPOSES OF THIS
4 SECTION: (A) THE TERM "PERSON" SHALL INCLUDE ANY INDIVIDUAL, ORGANIZA-
5 TION, ASSOCIATION, SCHOOL DISTRICT, LOCAL GOVERNMENT, CORPORATION, PART-
6 NERSHIP, LIMITED LIABILITY COMPANY OR OTHER BUSINESS ENTITY; AND
7 (B) THE TERM "CONSTRUCTION PROJECT" SHALL INCLUDE ANY PROJECT WHICH IS
8 SUBJECT TO THE PROVISIONS OF ARTICLE EIGHT OF THE LABOR LAW AND WHICH
9 INVOLVES THE CONSTRUCTION, MODERNIZATION, IMPROVEMENT, REHABILITATION,
10 REPAIR, MAINTENANCE, REPLACEMENT OR RENOVATION OF A BUILDING, ROAD OR
11 STRUCTURE, OR ANY PORTION OF SUCH A PROJECT PERFORMED PURSUANT TO A
12 SUBCONTRACTING ARRANGEMENT.
13 2. (A) ANY PERSON MAY BRING A CIVIL ACTION FOR THE RECOVERY OF DAMAGES
14 AGAINST THE WINNING BIDDER IF THE WINNING BIDDER HAS VIOLATED THE LABOR
15 LAW BY FAILING TO PAY THE PREVAILING WAGE ON A CONSTRUCTION PROJECT.
16 SUCH AN ACTION MAY BE MAINTAINED SOLELY BY THE PERSON BRINGING THE
17 ACTION, OR BY SUCH PERSON, TOGETHER WITH THE ATTORNEY GENERAL. IF THE
18 WINNING BIDDER IS FOUND NOT TO BE PAYING THE PREVAILING WAGE, THE
19 PRESUMPTIVE MEASURE OF DAMAGES IS THE VALUE OF THE CONTRACT FOR THE
20 CONSTRUCTION PROJECT.
21 (B) A COPY OF THE COMPLAINT AND WRITTEN DISCLOSURE OF SUBSTANTIALLY
22 ALL MATERIAL EVIDENCE AND INFORMATION THAT THE PERSON POSSESSES SHALL BE
23 SERVED ON THE OFFICE OF THE ATTORNEY GENERAL PURSUANT TO THE CIVIL PRAC-
24 TICE 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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1 UNDER SEAL FOR AT LEAST SIXTY DAYS, AND SHALL NOT BE SERVED UPON THE
2 DEFENDANT UNTIL THE COURT SO ORDERS. THE OFFICE OF THE ATTORNEY GENERAL
3 MAY ELECT TO INTERVENE AND PROCEED WITH THE ACTION WITHIN SIXTY DAYS
4 AFTER IT RECEIVES BOTH THE COMPLAINT AND THE MATERIAL EVIDENCE AND
5 INFORMATION.

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

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

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

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

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

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

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

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

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

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

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