

2972

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 Finance

AN ACT to amend the executive law, in relation to the recoupment of economic incentives to businesses

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

- 1 Section 1. The executive law is amended by adding a new section 163-b
2 to read as follows:
3 S 163-B. RECOUPMENT OF ECONOMIC INCENTIVES. 1. NOTWITHSTANDING ANY
4 INCONSISTENT PROVISION OF LAW, EACH CONTRACT, AGREEMENT OR UNDERSTANDING
5 BY WHICH A PERSON, FIRM, PARTNERSHIP, COMPANY, ASSOCIATION OR CORPO-
6 RATION RECEIVES AN AWARD, GRANT, LOAN, TAX ABATEMENT OR OTHER BUSINESS
7 INCENTIVE FROM THE STATE, ANY OF ITS POLITICAL SUBDIVISIONS, OR ANY
8 DEPARTMENT, BUREAU, BOARD, COMMISSION, AUTHORITY, OR ANY OTHER AGENCY OR
9 INSTRUMENTALITY OF THE STATE OR ITS POLITICAL SUBDIVISIONS, OR ANY
10 PUBLIC BENEFIT CORPORATION AS DEFINED IN SUBDIVISION FOUR OF SECTION
11 SIXTY-SIX OF THE GENERAL CONSTRUCTION LAW, OR ANY MUNICIPAL CORPORATION
12 AS DEFINED IN SUBDIVISION THREE OF SECTION THREE-A OF THE GENERAL MUNIC-
13 IPAL LAW FOR THE PURPOSES OF JOB TRAINING, JOB CREATION OR RETENTION, OR
14 THE DEVELOPMENT OF ITS OPERATION WITHIN THE STATE, SHALL CONTAIN THE
15 FOLLOWING PROVISIONS:
16 (A) A STATED PERIOD OF TIME WITHIN WHICH THE TERMS OF THE CONTRACT,
17 AGREEMENT OR UNDERSTANDING ARE TO BE FULLY EXECUTED AND COMPLETED;
18 (B) A STATED PURPOSE AND THE AMOUNT OF THE AWARD, GRANT OR OTHER BUSI-
19 NESS INCENTIVE;
20 (C) WHERE APPLICABLE, THE NUMBER OF PERSONS TO BE TRAINED PURSUANT TO
21 THE TERMS OF THE CONTRACT, AGREEMENT OR UNDERSTANDING;
22 (D) WHERE APPLICABLE, THE NUMBER OF JOBS TO BE CREATED OR RETAINED
23 PURSUANT TO THE TERMS OF THE CONTRACT, AGREEMENT OR UNDERSTANDING;

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

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1 (E) WHERE APPLICABLE, THE EXTENT OF THE OPERATIONS OR FACILITIES TO BE
2 DEVELOPED PURSUANT TO THE TERMS OF THE CONTRACT, AGREEMENT OR UNDER-
3 STANDING; AND

4 (F) NOTICE TO THE RECIPIENT THAT THE AWARD, GRANT OR OTHER BUSINESS
5 INCENTIVE SHALL BE SUBJECT TO RECOUPMENT PURSUANT TO THIS SECTION.

6 2. EXCEPT AS PROVIDED IN SUBDIVISION THREE OF THIS SECTION, EVERY
7 AWARD, GRANT OR OTHER BUSINESS INCENTIVE AWARDED PURSUANT TO THIS CHAP-
8 TER SHALL BE SUBJECT TO REPAYMENT WITH INTEREST, BY THE RECIPIENT UPON A
9 FINDING BY THE AWARDING ENTITY THAT THE PERSON, FIRM, PARTNERSHIP,
10 COMPANY, ASSOCIATION, OR CORPORATION HAS NOT FULLY EXECUTED AND
11 COMPLETED THE STATED PURPOSES OR OBJECTIVES OF THE AWARD, GRANT OR OTHER
12 BUSINESS INCENTIVE WITHIN THE STATED PERIOD OF TIME AS SET FORTH IN THE
13 CONTRACT, AGREEMENT OR UNDERSTANDING.

14 3. IF THE AWARDING ENTITY DETERMINES THAT THE RECIPIENT WHO HAS
15 RECEIVED AN AWARD, GRANT OR OTHER BUSINESS INCENTIVE UNDER THIS CHAPTER
16 IS NOT COMPLYING WITH THE CONTRACT, AGREEMENT OR UNDERSTANDING ENTERED
17 INTO WITH THE AWARDING ENTITY, IT SHALL NOTIFY THE RECIPIENT OF SUCH
18 NONCOMPLIANCE. SUCH NOTICE SHALL STATE THAT THE RECIPIENT IS ENTITLED
19 TO A HEARING AND AN OPPORTUNITY TO EXPLAIN THE NONCOMPLIANCE. IF THE
20 ENTITY FINDS THAT THE RECIPIENT HAS NOT COMPLIED WITH THE CONTRACT,
21 AGREEMENT OR UNDERSTANDING, THE RECIPIENT SHALL BE REQUIRED TO REFUND
22 THE FULL AMOUNT OF THE INCENTIVE PROVIDED, HOWEVER, THAT:

23 (A) UPON A FINDING THAT THE RECIPIENT HAS CREATED OR RETAINED SOME OF
24 THE JOBS PROMISED UNDER THE CONTRACT, AGREEMENT, OR UNDERSTANDING, THE
25 RECIPIENT SHALL ONLY BE REQUIRED TO REFUND THE AMOUNT WHICH REPRESENTS
26 THE JOBS WHICH IT FAILED TO CREATE OR RETAIN, OR

27 (B) UPON A FINDING THAT THE RECIPIENT HAS FAILED TO DEVELOP CERTAIN
28 FACILITIES OR OPERATIONS AS PROMISED UNDER THE CONTRACT, AGREEMENT, OR
29 UNDERSTANDING, THE RECIPIENT SHALL REFUND THE AMOUNT OF THE AWARD, GRANT
30 OR BUSINESS INCENTIVE AS FOLLOWS:

31 (I) WHERE THE RECIPIENT HAS DEVELOPED ONE-THIRD OR LESS OF THE FACILI-
32 TIES OR OPERATIONS, THE RECIPIENT SHALL REFUND AT LEAST TWO-THIRDS OF
33 THE AWARD, GRANT OR BUSINESS INCENTIVE;

34 (II) WHERE THE RECIPIENT HAS DEVELOPED TWO-THIRDS OR LESS OF THE
35 FACILITIES OR OPERATIONS, THE RECIPIENT SHALL REFUND AT LEAST ONE-THIRD
36 OF THE AWARD, GRANT OR BUSINESS INCENTIVE;

37 (III) WHERE THE RECIPIENT HAS DEVELOPED MORE THAN TWO-THIRDS BUT LESS
38 THAN ALL OF THE FACILITIES OR OPERATIONS AS PROMISED UNDER THE CONTRACT,
39 AGREEMENT OR UNDERSTANDING, THE RECIPIENT SHALL REFUND AN AMOUNT WHICH
40 THE ENTITY DETERMINES TO BE A REASONABLE PROPORTION OF THE AWARD, GRANT
41 OR BUSINESS INCENTIVE NOT FULFILLED.

42 4. UPON A FINDING THAT THE RECIPIENT OF THE AWARD, GRANT, OR OTHER
43 BUSINESS INCENTIVE HAS NOT FULLY EXECUTED AND COMPLETED THE PURPOSES OR
44 OBJECTIVES OF THE AWARD, GRANT OR BUSINESS INCENTIVE, THE AWARDING ENTI-
45 TY MAY WAIVE REPAYMENT OF SUCH AWARD, GRANT OR BUSINESS INCENTIVE AS
46 REQUIRED PURSUANT TO THIS SECTION, UPON A FINDING THAT THE FAILURE WAS
47 CAUSED BY UNFORESEEN CIRCUMSTANCES BEYOND THE DIRECT OR INDIRECT CONTROL
48 OF THE RECIPIENT PERSON, FIRM, PARTNERSHIP, COMPANY, ASSOCIATION OR
49 CORPORATION, AND WAS NOT ATTRIBUTABLE TO BAD FAITH OR FRAUD. UNFORESEEN
50 CIRCUMSTANCES SHALL INCLUDE, BUT NOT BE LIMITED TO, MARKET CONDITIONS
51 WHICH ADVERSELY IMPACT UPON A RECIPIENT AND WHICH ARE OF SUCH MAGNITUDE
52 THAT A WAIVER OF REPAYMENT IS ABSOLUTELY NECESSARY TO ENSURE THE CONTIN-
53 UED OPERATIONS OF THE RECIPIENT AT THE LOCATION FOR WHICH THE INCENTIVE
54 WAS GRANTED OR TO ENSURE CONTINUED EMPLOYMENT OF ITS EMPLOYEES AT SUCH
55 LOCATION. NO WAIVER OF FULL REPAYMENT MAY BE PROVIDED, HOWEVER, UPON THE
56 RELOCATION OUTSIDE OF NEW YORK STATE, OR FROM THE LOCATION SUCH RECIPI-

1 ENT OCCUPIED AT THE TIME THE RECIPIENT RECEIVED THE AWARD, GRANT OR
2 BUSINESS INCENTIVE TO ANOTHER LOCATION IN THE STATE. UPON THE DETERMI-
3 NATION OF UNFORESEEN CIRCUMSTANCES APPROPRIATE TO GRANT A WAIVER, THE
4 REPAYMENT OF THE OUTSTANDING BALANCE OF ANY AWARD, GRANT OR BUSINESS
5 INCENTIVE, OR OF ANY TAX CREDITS, INCLUDING INTEREST THEREON, MAY BE
6 DEFERRED FOR A PERIOD NOT TO EXCEED FIVE YEARS FROM THE DATE OF SUCH
7 WAIVER, PROVIDED THAT IF AT THE END OF FIVE YEARS THE CONDITIONS FOR
8 WHICH THE WAIVER WAS GRANTED CONTINUE, THE AWARDING ENTITY MAY GRANT AN
9 ADDITIONAL WAIVER.

10 5. EACH ENTITY OF THE STATE WHICH ENTERS INTO AGREEMENTS PURSUANT TO
11 THIS CHAPTER SHALL ESTABLISH RULES AND REGULATIONS RELATING TO THE
12 CONDUCT OF A HEARING AND THE TERMS AND CONDITIONS OF REPAYMENT.

13 6. ANY RECIPIENT AGGRIEVED BY A DETERMINATION OF THE AWARDING ENTITY
14 MAY SEEK REVIEW OF SUCH DETERMINATION PURSUANT TO ARTICLE SEVENTY-EIGHT
15 OF THE CIVIL PRACTICE LAW AND RULES.

16 7. UNLESS THE AGREEMENT BETWEEN THE ENTITY AND THE RECIPIENT OTHERWISE
17 PROVIDES FOR A PENALTY OF INTEREST IN THE EVENT OF NON-COMPLIANCE, FOR
18 PURPOSES OF THIS SECTION, INTEREST CHARGED IN THE REPAYMENT OF AN AWARD,
19 GRANT OR BUSINESS INCENTIVE SHALL BE CALCULATED AT A RATE EQUAL TO THE
20 UNDERPAYMENT RATE SET BY THE COMMISSIONER OF TAXATION AND FINANCE PURSU-
21 ANT TO THE PROVISIONS OF SUBSECTION (E) OF SECTION ONE THOUSAND NINETY-
22 SIX OF THE TAX LAW; AND SHALL BE CALCULATED FROM THE DATE OF DISBURSE-
23 MENT OF SUCH AWARD, GRANT OR BUSINESS INCENTIVE.

24 8. THE PROVISIONS OF THIS SECTION SHALL NOT BE DEEMED TO ALTER OR
25 ABRIDGE ANY RIGHT OR REMEDY EXISTING AT LAW OR EQUITY OTHERWISE AVAIL-
26 ABLE TO THE AWARDING ENTITY.

27 9. ON OR BEFORE SEPTEMBER FIRST, TWO THOUSAND ELEVEN, AND ANNUALLY
28 THEREAFTER, THE STATE, ANY OF ITS POLITICAL SUBDIVISIONS, OR ANY DEPART-
29 MENT, BUREAU, BOARD, COMMISSION, AUTHORITY, OR ANY OTHER AGENCY OR
30 INSTRUMENTALITY OF THE STATE OR ITS POLITICAL SUBDIVISIONS, OR ANY
31 PUBLIC BENEFIT CORPORATION AS DEFINED IN SUBDIVISION FOUR OF SECTION
32 SIXTY-SIX OF THE GENERAL CONSTRUCTION LAW, OR ANY MUNICIPAL CORPORATION
33 AS DEFINED IN SUBDIVISION THREE OF SECTION THREE-A OF THE GENERAL MUNIC-
34 IPAL LAW FOR THE PURPOSES OF JOB TRAINING, JOB CREATION OR RETENTION, OR
35 THE DEVELOPMENT OF ITS OPERATION WITHIN THE STATE, SHALL SUBMIT A REPORT
36 TO THE GOVERNOR, THE TEMPORARY PRESIDENT OF THE SENATE, THE SPEAKER OF
37 THE ASSEMBLY, THE SENATE MINORITY LEADER, THE ASSEMBLY MINORITY LEADER
38 AND THE STATE COMPTROLLER ON THE RECOUPMENT OF FINANCIAL INCENTIVES
39 PURSUANT TO THIS SECTION. SUCH REPORT SHALL INCLUDE: A LISTING OF RECIP-
40 IENTS OF AN AWARD, GRANT OR BUSINESS INCENTIVE WHO HAVE FAILED TO
41 EXECUTE AND COMPLETE THE TERMS OF A CONTRACT, AGREEMENT OR UNDERSTAND-
42 ING; THE AMOUNT AND TYPE OF AWARD, GRANT OR BUSINESS INCENTIVE; THE
43 DETERMINATION OF THE AWARDING ENTITY WITH RESPECT TO SUCH FAILURE,
44 INCLUDING THE REASONS THEREFOR; THE STATUS OF REPAYMENT OF THE AWARD,
45 GRANT OR BUSINESS INCENTIVE BY THE RECIPIENT; ANY WAIVER PROVIDED FOR
46 THE REPAYMENT OF AN AWARD, GRANT OR BUSINESS INCENTIVE AND THE REASONS
47 THEREFOR; AND ANY RECOMMENDATIONS OF THE ENTITY WITH RESPECT TO THE
48 RECOUPMENT OF FINANCIAL INCENTIVES PURSUANT TO THIS SECTION.

49 S 2. This act shall take effect immediately and shall apply only to
50 contracts, agreements and understandings entered into on or after such
51 date.