

1717

2013-2014 Regular Sessions

I N S E N A T E

(PREFILED)

January 9, 2013

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-

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

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1 TICE LAW AND RULES. THE COMPLAINT SHALL BE FILED IN CAMERA, SHALL REMAIN
2 UNDER SEAL FOR AT LEAST SIXTY DAYS, AND SHALL NOT BE SERVED UPON THE
3 DEFENDANT UNTIL THE COURT SO ORDERS. THE OFFICE OF THE ATTORNEY GENERAL
4 MAY ELECT TO INTERVENE AND PROCEED WITH THE ACTION WITHIN SIXTY DAYS
5 AFTER IT RECEIVES BOTH THE COMPLAINT AND THE MATERIAL EVIDENCE AND
6 INFORMATION.

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

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

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

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

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

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

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

44 7. THE OFFICE OF THE ATTORNEY GENERAL MAY ELECT TO PURSUE ITS CLAIM
45 THROUGH ANY ALTERNATE REMEDY AVAILABLE TO THE OFFICE OF THE ATTORNEY
46 GENERAL, INCLUDING ANY ADMINISTRATIVE PROCEEDING TO DETERMINE A CIVIL
47 MONEY PENALTY. IF ANY SUCH ALTERNATE REMEDY IS PURSUED IN ANOTHER
48 PROCEEDING, THE PERSON INITIATING THE ACTION SHALL HAVE THE SAME RIGHTS
49 IN SUCH PROCEEDING AS SUCH PERSON WOULD HAVE HAD IF THE ACTION HAD
50 CONTINUED UNDER THIS SECTION. ANY FINDING OF FACT OR CONCLUSION OF LAW
51 MADE IN SUCH OTHER PROCEEDING THAT HAS BECOME FINAL SHALL BE CONCLUSIVE
52 ON ALL PARTIES TO AN ACTION UNDER THIS SECTION. FOR PURPOSES OF THE
53 PRECEDING SENTENCE, A FINDING OR CONCLUSION IS FINAL IF IT HAS BEEN
54 FINALLY DETERMINED ON APPEAL TO THE APPROPRIATE COURT OF THE STATE OF
55 NEW YORK, IF ALL TIME FOR FILING SUCH AN APPEAL WITH RESPECT TO THE

1 FINDING OR CONCLUSION HAS EXPIRED, OR IF THE FINDING OR CONCLUSION IS
2 NOT SUBJECT TO JUDICIAL REVIEW.

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

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

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