

STATE OF NEW YORK

4512

2017-2018 Regular Sessions

IN SENATE

February 16, 2017

Introduced by Sen. SANDERS -- 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 participation by minority group members and women with respect to certain state contracts; and to amend the state finance law, in relation to performance and payment bond requirements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions 3 and 4 of section 311 of the executive law,
2 subdivision 3 as added by chapter 261 of the laws of 1988, paragraphs
3 (d) and (e) of subdivision 3 as amended by chapter 55 of the laws of
4 1992, paragraphs (g) and (h) of subdivision 3 as amended and paragraph
5 (i) of subdivision 3 as added by section 1 of part BB of chapter 59 of
6 the laws of 2006 and subdivision 4 as amended by chapter 361 of the laws
7 of 2009, are amended to read as follows:

8 3. The director shall have the following powers and duties:

9 (a) to encourage and assist contracting agencies in their efforts to
10 increase participation by minority and women-owned business enterprises
11 on state contracts and subcontracts [~~so as~~] to facilitate the award of a
12 fair share of such contracts to them and to provide on the division's
13 website a list of each contracting agency's minority and women-owned
14 business enterprises certification outreach seminars;

15 (b) to develop standardized forms and reporting documents necessary to
16 implement this article;

17 (c) to conduct educational outreach programs to encourage the certifi-
18 cation of minority and women-owned business enterprises consistent with
19 the purposes of this article;

20 (d) to review [~~periodically~~] quarterly the practices and procedures of
21 each contracting agency with respect to compliance with the provisions
22 of this article, and to require them to file [~~periodic~~] quarterly
23 reports with the division of minority and women's business development

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

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1 as to the level of minority and women-owned business enterprises partic-
2 ipation in the awarding of agency contracts for goods and services
3 including but not limited to the number of state contracts awarded to
4 certified minority-owned or women-owned business enterprises, the maxi-
5 mum dollar amount obligated pursuant to all those contracts, and the
6 total expenditures made pursuant to all such contracts; the number of
7 state contracts awarded to certified minority or women-owned business
8 enterprises, the maximum dollar amount obligated pursuant to all those
9 contracts, and the total expenditures made pursuant to all such
10 contracts; the number of state contracts awarded which include a utili-
11 zation plan for business participation by certified minority or women-
12 owned business enterprises, the maximum amount obligated pursuant to
13 those contracts, and the total expenditures made pursuant to all such
14 contracts; the number of state contracts awarded upon which a waiver was
15 granted from goals required by the contracts for business participation
16 by certified minority or women-owned business enterprises, and the maxi-
17 mum amount obligated pursuant to those contracts; the number of state
18 contracts awarded which required goals for employment of minority group
19 members and women; and the number of state contracts awarded for which
20 waivers of employment goals required by the contracts have been granted;

21 (e) on January first of each year report to the governor, the tempo-
22 rary president of the senate, the speaker of the assembly, the minority
23 leaders of the senate and the assembly, and the chairpersons of the
24 senate finance and assembly ways and means committees on the [~~level~~]
25 actual versus projected levels of minority and women-owned business
26 enterprises participating in each agency's contracts for goods [~~and~~],
27 services and construction, including but not limited to the number of
28 state contracts awarded to certified minority-owned or women-owned busi-
29 ness enterprises, the maximum dollar amount obligated pursuant to all
30 those contracts, and the total expenditures made pursuant to all such
31 contracts, and on activities of the office and effort by each contract-
32 ing agency to promote employment of minority group members and women,
33 and to promote and increase participation by certified businesses with
34 respect to state contracts and subcontracts so as to facilitate the
35 award of a fair share of state contracts to such businesses. The comp-
36 troller shall assist the division in collecting information on the
37 participation of certified business for each contracting agency. Such
38 report may recommend new activities and programs to effectuate the
39 purposes of this article;

40 (f) the director shall list in the division's annual report the names
41 of non-compliant agencies and the extent of their noncompliance in
42 submitting its quarterly minority and women-owned business enterprise
43 utilization reports; and, shall implement a master list of all the state
44 agencies required to file quarterly compliance reports and shall attach
45 such list to the division's annual report.

46 (g) to prepare and update [~~periodically~~] quarterly a directory of
47 certified minority and women-owned business enterprises which shall,
48 wherever practicable, be divided into categories of labor, services,
49 supplies, equipment, materials and recognized construction trades and
50 which shall indicate areas or locations of the state where such enter-
51 prises are available to perform services, and to use this information to
52 create an internet based, centralized state registry to enable appropri-
53 ate state certified minority and women-owned business enterprises to
54 access contract and subcontract opportunities;

55 [~~g~~] (h) to appoint independent hearing officers who by contract or
56 terms of employment shall preside over adjudicatory hearings pursuant to

1 section three hundred fourteen of this article for the office and who
2 are assigned no other work by the office;

3 ~~[(h)]~~ (i) notwithstanding the provisions of section two hundred nine-
4 ty-six of this chapter, to file a complaint pursuant to the provisions
5 of section two hundred ninety-seven of this chapter where the director
6 has knowledge that a contractor may have violated the provisions of
7 paragraph (a), (b) or (c) of subdivision one of section two hundred
8 ninety-six of this chapter where such violation is unrelated, separate
9 or distinct from the state contract as expressed by its terms; and

10 ~~[(i)]~~ (j) to streamline the state certification process to accept
11 federal and municipal corporation certifications.

12 4. The director ~~[may]~~ shall provide assistance to, and facilitate
13 access to programs serving certified businesses as well as applicants to
14 ensure that such businesses benefit, as needed, from technical, manage-
15 rial and financial, and general business assistance; training; market-
16 ing; organization and personnel skill development; project management
17 assistance; technology assistance; bond and insurance education assist-
18 ance; and other business development assistance. In addition, the direc-
19 tor ~~[may]~~ shall, either independently or in conjunction with other state
20 agencies:

21 (a) develop a clearinghouse of information on programs and services
22 provided by entities that may assist such businesses;

23 (b) review bonding and paperwork requirements imposed by contracting
24 agencies that may unnecessarily impede the ability of such businesses to
25 compete; and

26 (c) seek to maximize utilization by minority and women-owned business
27 enterprises of available federal resources including but not limited to
28 federal grants, loans, loan guarantees, surety bonding guarantees, tech-
29 nical assistance, and programs and services of the federal small busi-
30 ness administration.

31 § 2. Subdivision 5 of section 312 of the executive law, as added by
32 chapter 261 of the laws of 1988, is amended to read as follows:

33 5. The director shall promulgate rules and regulations to ensure that
34 contractors and subcontractors undertake programs of affirmative action
35 and equal employment opportunity as required by this section. Such rules
36 and regulations as they pertain to any particular agency shall be devel-
37 oped after consultation with contracting agencies. Such rules and regu-
38 lations ~~[may]~~ shall require a contractor, after notice in a bid solici-
39 tation, to submit an equal employment opportunity program ~~[after bid
40 opening and prior to the award of any contract]~~ at the time bids are
41 submitted, and ~~[may]~~ shall require the contractor or subcontractor to
42 submit compliance reports relating to the contractor's or subcontrac-
43 tor's operation and implementation of any equal employment opportunity
44 program in effect as of the date the contract is executed. The contract-
45 ing agency ~~[may recommend to the director that]~~ shall have the right to
46 recommend that the director take appropriate action according to the
47 procedures set forth in section three hundred sixteen of this article
48 against the contractor for noncompliance with the requirements of this
49 section. The contracting agency shall be responsible for monitoring
50 compliance with this section.

51 § 3. Paragraphs (h) and (i) of subdivision 2-a of section 313 of the
52 executive law, as added by chapter 175 of the laws of 2010, are amended
53 and a new paragraph (j) is added to read as follows:

54 (h) provide for the collection of statistical data by each agency
55 concerning actual minority and women-owned business enterprise partic-
56 ipation; ~~[and]~~

(i) require each agency to consult the most current disparity study when calculating agency-wide and contract specific participation goals pursuant to this article~~[]~~; and

(j) encourage joint ventures, partnerships, and mentor-protégé relationships as defined in section one hundred forty-seven of the state finance law, between prime contractors and minority and women-owned business enterprises.

§ 4. Subdivision 3 and paragraph (a) of subdivision 5 of section 313 of the executive law, as amended by chapter 175 of the laws of 2010, are amended to read as follows:

3. Solely for the purpose of providing the opportunity for ~~[meaning-ful]~~ increased participation by certified businesses in the performance of state contracts as provided in this section, state contracts shall include leases of real property by a state agency to a lessee where: the terms of such leases provide for the construction, demolition, replacement, major repair or renovation of real property and improvements thereon by such lessee; and the cost of such construction, demolition, replacement, major repair or renovation of real property and improvements thereon shall exceed the sum of one hundred thousand dollars. Reports to the director pursuant to section three hundred fifteen of this article shall include activities with respect to all such state contracts. Contracting agencies shall include or require to be included with respect to state contracts for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon, such provisions as ~~[may]~~ shall be necessary to effectuate the provisions of this section in every bid specification and state contract, including, but not limited to: (a) provisions requiring contractors to make a good faith effort to solicit active participation by enterprises identified in the directory of certified businesses provided to the contracting agency by the office; (b) requiring the parties to agree as a condition of entering into such contract, to be bound by the provisions of section three hundred sixteen of this article; and (c) requiring the contractor to include the provisions set forth in paragraphs (a) and (b) of this subdivision in every subcontract in a manner that the provisions will be binding upon each subcontractor as to work in connection with such contract. Provided, however, that no such provisions shall be binding upon contractors or subcontractors in the performance of work or the provision of services that are unrelated, separate or distinct from the state contract as expressed by its terms, and nothing in this section shall authorize the director or any contracting agency to impose any requirement on a contractor or subcontractor except with respect to a state contract.

(a) Contracting agencies shall administer the rules and regulations promulgated by the director in a good faith effort to meet the maximum feasible portion of the agency's goals adopted pursuant to this article and the regulations of the director. Such rules and regulations: shall require a contractor to submit a utilization plan ~~[after bids are opened]~~ at the time bids are submitted, when bids are required~~[, but prior to the award of a state contract]~~; shall require the contracting agency to review the utilization plan submitted by the contractor and to post the utilization plan and any waivers of compliance issued pursuant to subdivision six of this section on the website of the contracting agency within a reasonable period of time as established by the director; shall require the contracting agency to notify the contractor in writing within a period of time specified by the director as to any deficiencies contained in the contractor's utilization plan; shall

1 require remedy thereof within a period of time specified by the direc-
2 tor; shall require the contractor to submit [~~periodic~~ quarterly compli-
3 ance reports relating to the operation and implementation of any utili-
4 zation plan; shall not allow any automatic waivers but shall allow a
5 contractor to apply for a partial or total waiver of the minority and
6 women-owned business enterprise participation requirements pursuant to
7 subdivisions six and seven of this section; shall allow a contractor to
8 file a complaint with the director pursuant to subdivision eight of this
9 section in the event a contracting agency has failed or refused to issue
10 a waiver of the minority and women-owned business enterprise partic-
11 ipation requirements or has denied such request for a waiver; and shall
12 allow a contracting agency to file a complaint with the director pursu-
13 ant to subdivision nine of this section in the event a contractor is
14 failing or has failed to comply with the minority and women-owned busi-
15 ness enterprise participation requirements set forth in the state
16 contract where no waiver has been granted.

17 § 5. Subdivisions 1 and 3 of section 315 of the executive law, subdivi-
18 sion 1 as added by chapter 261 of the laws of 1988 and subdivision 3
19 as amended by chapter 175 of the laws of 2010, are amended and three new
20 subdivisions 2-a, 3-a and 8 are added to read as follows:

21 1. Each contracting agency shall be responsible for monitoring state
22 contracts under its jurisdiction, and recommending matters to the office
23 respecting non-compliance with the provisions of this article so that
24 the office [~~may~~ shall take such action as [~~is appropriate~~ stated in
25 subdivision three of section three hundred sixteen of this article. Each
26 contracting agency shall have the right to recommend that the director
27 impose a sanction, penalty, or fine for three or more violations of
28 subdivision one of section three hundred sixteen of this article, to
29 insure compliance with the provisions of this article, the rules and
30 regulations of the director issued hereunder and the contractual
31 provisions required pursuant to this article. All contracting agencies
32 shall comply with the rules and regulations of the office and are
33 directed to cooperate with the office and to furnish to the office such
34 information and assistance as may be required in the performance of its
35 functions under this article.

36 2-a. Each contracting agency when notifying a contractor of a winning
37 bid award shall also notify any minority or women-owned business enter-
38 prises affiliated with such contractor, per the contractor's submitted
39 utilization plan, of such contractor's receipt of the winning bid award.

40 3. (a) Each contracting agency shall report to the commissioner of
41 economic development, the commissioner of general services and the
42 director with respect to activities undertaken to promote employment of
43 minority group members and women and promote and increase participation
44 by certified businesses with respect to state contracts and subcon-
45 tracts. Such reports shall be submitted [~~periodically, but not less~~
46 ~~frequently than annually, as required by the director,~~ quarterly and
47 shall include such information as is necessary for the director to
48 determine whether the contracting agency and contractor have complied
49 with the purposes of this article, including, without limitation, the
50 number of state contracts awarded to certified minority or women-owned
51 business enterprises; the maximum dollar amount obligated pursuant to
52 all those contracts, and the total expenditures made pursuant to all
53 such contracts; the number of state contracts awarded which include a
54 utilization plan for business participation by certified minority or
55 women-owned business enterprises, the maximum amount obligated pursuant
56 to those contracts, and the total expenditures made pursuant to all such

contracts; a summary of all waivers of the requirements of subdivisions six and seven of section three hundred thirteen of this article allowed by the contracting agency during the period covered by the report, including a description of the basis of the waiver request ~~[and]~~, the rationale for granting any such waiver and the maximum amount obligated pursuant to those contracts; the number of state contracts awarded which required goals for employment of minority group members and women; and the number of state contracts awarded for which waivers of employment goals required by the contracts have been granted. Each agency shall also include in such annual report whether or not it has been required to prepare a remedial plan, and, if so, the plan and the extent to which the agency has complied with each element of the plan.

(b) In addition, each contracting agency shall be responsible for the cost of an independent audit resulting from the agency's repeated violations of this section.

3-a. Within thirty days after completion, a copy of the quarterly minority and women-owned business enterprise report shall be transmitted to the commissioner of economic development, the commissioner of general services, and the director. A contracting agency, which has not let more than two million dollars in service and/or construction contracts within the applicable period may apply to the commissioner of economic development, and the director for a waiver of the required annual report. The waiver application shall be made on such form as the commissioner of economic development and the director may prescribe.

8. If a contracting agency shall fail to file or substantially complete, as determined by the commissioner of economic development and the director, the report required by this section, the director shall provide notice to the contracting agency. The notice shall state the following:

(a) that the failure to file a report as required is a violation of this section, or in the case of an insufficient report, the manner in which the report submitted is deficient;

(b) that the contracting agency has thirty days to comply with this section or provide an adequate written explanation to the commissioner of economic development and the commissioner of general services and the director of the contracting agency's reasons for the inability to comply; and

(c) that the contracting agency's continued failure to provide either the required report or an adequate explanation will result in an independent audit of the contracting agency, the cost of which shall be borne by the contracting agency.

§ 6. Section 316 of the executive law, as amended by chapter 175 of the laws of 2010, is amended to read as follows:

§ 316. ~~[Enforcement]~~ Violations and enforcement. 1. It shall be a violation for any person or entity to:

a. intentionally use or acquire an MWBE name through deceit or other dishonest means in order to negotiate a lower bid from a non-MWBE.

b. submit to the department of economic development, documents or other material as evidence of a good faith effort to comply with the provisions of this article without, in fact, having entered into any contract, agreement, subcontract, or sub-agreement with an MWBE for the use or purchase of such business enterprise's goods or services in the performance of the awarded state contract.

c. fail to provide an MWBE with sufficient information or other required supporting documentation in order for the MWBE to prepare a proper bid.

2. Upon receipt by the director of a complaint by a contracting agency that a contractor has violated the provisions of a state contract which have been included to comply with the provisions of this article or of a contractor that a contracting agency has violated such provisions or has failed or refused to issue a waiver where one has been applied for pursuant to subdivision six of section three hundred thirteen of this article or has denied such application, the director shall attempt to resolve the matter giving rise to such complaint. If efforts to resolve such matter to the satisfaction of all parties are unsuccessful, the director shall refer the matter, within thirty days of the receipt of the complaint, to the division's hearing officers. Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The director, within ten days of receipt of the decision, shall file a determination of such matter and shall cause a copy of such determination along with a copy of this article to be served upon the contractor by personal service or by certified mail return receipt requested. The decision of the hearing officer shall be final and may only be vacated or modified as provided in article seventy-eight of the civil practice law and rules upon an application made within the time provided by such article. The determination of the director as to the imposition of any fines, sanctions or penalties shall be reviewable pursuant to article seventy-eight of the civil practice law and rules. The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed five years following the final determination. The division of minority and women's business development shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

3. The director shall impose a sanction, penalty, or fine on any individual or entity that has three or more violations of this article within five years. Such fine shall be paid by such individual or entity. Such fine shall be remitted and deposited into a fund, to be managed by the commissioner of economic development. Such funds shall be used to subsidize the facilitation of the provisions of this article. Other sanctions shall include barring such entity or individual from contracting with such agency for a period not to exceed five years.

§ 7. Subdivision 1 of section 137 of the state finance law, as separately amended by section 17 of part MM of chapter 57 and chapter 619 of the laws of 2008, is amended to read as follows:

1. In addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a

1 public benefit corporation or a commission appointed pursuant to law, or
2 in the absence of any such requirement, the comptroller may or the other
3 appropriate official, respectively, shall nevertheless require prior to
4 the approval of any such contract a bond guaranteeing prompt payment of
5 moneys due to all persons furnishing labor or materials to the contrac-
6 tor or any subcontractors in the prosecution of the work provided for in
7 such contract. Whenever a municipal corporation issues a permit subject
8 to compliance with section two hundred twenty of the labor law, such
9 permittee or its contractor or subcontractors furnishing workers shall
10 post a payment bond subject to this section. Provided, however, that all
11 performance bonds and payment bonds may, at the discretion of the head
12 of the state agency, public benefit corporation or commission, or his or
13 her designee, be dispensed with for the completion of a work specified
14 in a contract for the prosecution of a public improvement for the state
15 of New York for which bids are solicited where the aggregate amount of
16 the contract is under one hundred thousand dollars and provided further,
17 that in a case where the contract is not subject to the multiple
18 contract award requirements of section one hundred thirty-five of this
19 article, such requirements may be dispensed with where the head of the
20 state agency, public benefit corporation or commission finds it to be in
21 the public interest and where the aggregate amount of the contract
22 awarded or to be awarded is less than two hundred thousand dollars. In a
23 case where a contract is awarded to a small business concern or to a
24 minority or women-owned business concern, all performance bonds and
25 payment bonds may be dispensed with when the aggregate amount of the
26 contract is under five hundred thousand dollars. Advertisements for bids
27 shall provide information as to the requirements for, or dispensation
28 of, performance and payment bonds. Provided further, that in a case
29 where a performance or payment bond is dispensed with, twenty per centum
30 may be retained from each progress payment or estimate until the entire
31 contract work has been completed and accepted, at which time the head of
32 the state agency, public benefit corporation or commission shall, pend-
33 ing the payment of the final estimate, pay not to exceed seventy-five
34 per centum of the amount of the retained percentage.

35 § 8. Subdivision 4 of section 139-f of the state finance law, as
36 amended by chapter 83 of the laws of 1995, is amended to read as
37 follows:

38 4. Notwithstanding any other provision of this section or other law,
39 requirements for the furnishing of a performance bond or a payment bond
40 may be dispensed with at the discretion of the head of the state agency
41 or corporation, or his or her designee, where the public owner is a
42 state agency or corporation described in subdivision one-a of this
43 section and the aggregate amount of the contract awarded or to be
44 awarded is under fifty thousand dollars and, in a case where the
45 contract is not subject to the multiple contract award requirements of
46 section one hundred thirty-five of this article, such requirements may
47 be dispensed with where the head of the state agency or corporation
48 finds it to be in the public interest and where the aggregate amount of
49 the contract awarded or to be awarded is under two hundred thousand
50 dollars. In a case where a contract is awarded to a small business
51 concern or to a minority or women-owned business concern, all perform-
52 ance bonds and payment bonds may be dispensed with when the aggregate
53 amount of the contract is under five hundred thousand dollars. Adver-
54 tisements for proposals shall provide information as to the requirements
55 for, or dispensation of, performance and payment bonds. Provided
56 further, that in a case where a performance or payment bond is dispensed

1 with, twenty per centum may be retained from each progress payment or
2 estimate until the entire contract work has been completed and accepted,
3 at which time the head of the state agency or corporation shall, pending
4 the payment of the final estimate, pay not to exceed seventy-five per
5 centum of the amount of the retained percentage.

6 § 9. The opening paragraph of section 139-g of the state finance law,
7 as amended by chapter 636 of the laws of 2003, is amended to read as
8 follows:

9 In every state agency, department and authority which has let more
10 than two million dollars in service and construction contracts and state
11 assisted project contracts in the prior fiscal year, the chief executive
12 officer of that agency, department or authority shall, with respect to
13 those contracts and state assisted project contracts let by his or her
14 agency, department or authority:

15 § 10. The opening paragraph of subdivision (b) of section 139-g of the
16 state finance law, as amended by chapter 636 of the laws of 2003, is
17 amended to read as follows:

18 identify all small-business and certified women and minority-owned
19 business concerns which, in the judgment of the chief executive officer
20 of that agency, department or authority, can bid on those contracts and
21 state assisted project contracts which are usually and customarily let
22 by that agency, department or authority, or in which that authority
23 provides a grant or loan or tax exempt financing, with a reasonable
24 expectation of success. Such chief executive officers shall carry out
25 the provisions of this subdivision:

26 § 11. Section 139-g of the state finance law is amended by adding a
27 new subdivision (e) to read as follows:

28 (e) for the purposes of this section, the following words shall have
29 the following meanings:

30 (i) "State assisted project contract" shall mean any written agreement
31 arising out of a state assisted housing project or state assisted
32 economic development project or state assisted higher education project
33 or state assisted hospital or health care facility project, for which
34 the total project cost exceeds two million dollars and for which the
35 project owner is committed to spend or does expend funds for the acqui-
36 sition, construction, demolition, replacement, major repair, or reno-
37 vation of real property and improvements thereon for such project.

38 (ii) "State assisted housing project" shall mean those projects which
39 receive from the New York state housing finance agency tax-exempt
40 financing for all or part of the total project cost.

41 (iii) "State assisted economic development project" shall mean those
42 projects which receive from the New York foundation of science technolo-
43 gy and innovation, or the urban development corporation and its subsid-
44 iaries a grant or loan or tax-exempt financing for all or part of the
45 total project cost.

46 (iv) "State assisted higher education project" shall mean those
47 projects which receive from the dormitory authority of the state of New
48 York a grant or loan or tax-exempt financing for all or part of the
49 total project cost.

50 (v) "State assisted hospital or health care facility project" shall
51 mean those projects which receive from the dormitory authority of the
52 state of New York a grant or loan or tax-exempt financing for all or
53 part of the total project cost.

54 § 12. This act shall take effect immediately, provided however, the
55 amendments to article 15-A of the executive law made by sections one

1 through six of this act shall not affect the expiration of such article
2 and shall expire therewith.