SENATE, No. 2913

STATE OF NEW JERSEY

219th LEGISLATURE

INTRODUCED SEPTEMBER 17, 2020

Sponsored by:
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District 3 (Cumberland, Gloucester and Salem)
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SYNOPSIS

Permits State agency to completely or partially terminate contract concerning marine terminal or attendant real property to serve important public purpose.

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 1/11/2021)

AN ACT concerning the complete or partial termination of certain public contracts concerning ports and marine terminals to serve an important public purpose and supplementing Title 32 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and declares:

a. This State's ports and marine terminals are vital resources upon which the welfare of New Jersey residents depends.

b. In addition to providing the means of importing essential goods into the State and serving as indispensable hubs for transportation and commerce, ports are of critical importance for State and national security and emergency preparedness.

c. An immutable aspect of marine terminals with which any state must contend is the constraint on the geographic location of the terminals and the specific land-use requirements for unloading, storing, and transporting goods that create inflexibility in relocating those terminals to other areas. Therefore, land that is adequate for port-related business is finite and particular, which necessitates greater interest on the part of the State.

d. The foregoing implicates the essential reserved power of the State to protect the security of its residents and to ensure that such an important, limited resource is serving the highest public purpose.

2. For the purposes of this act, P.L. , c. (C.) (pending before the Legislature as this bill):

"Contracting party" means the party with whom a State agency has entered into a contract or agreement concerning the use, control, or access of any marine terminal located in this State or any real property appurtenant or attendant thereto.

"Interest in real property" means any ownership, possessory security or other enforceable interest, including, but not limited to, fee title, easement rights, covenants or restrictions, leases and mortgages.

"Marine terminal" means developments, consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers.

"Real property" means lands within the State, above or below water, and improvements thereof or thereon, or any riparian or other rights or interests therein.

"Sale or transfer of real property" means the change of ownership of a fee simple interest in real property by any method.

"State agency" means any of the principal departments in the Executive Branch of the State Government; any division, board,

bureau, office, commission or other instrumentality within or created by such department; to the extent consistent with law, any interstate agency to which New Jersey is a party; and any independent State authority, commission, instrumentality or agency.

3. a. Notwithstanding any other provision of law to the contrary, a State agency may, without penalty or liability, terminate a contract or agreement concerning the use, control, or access of any marine terminal located in this State or any real property appurtenant or attendant thereto, except for contracts or agreements concerning the sale of real property, for convenience when the impairment to the contract is reasonable and necessary to serve an important public purpose. Such termination shall occur pursuant to this act, P.L. , c. (C.) (pending before the Legislature as this bill).

Nothing in this act shall be construed to impair the right of any State agency and contracting party to mutually agree, after the effective date of this act, to other terms governing the termination of a contract or agreement for convenience.

b. A State agency shall submit a written termination notice to the contracting party no later than 60 days prior to the termination date specified in the notice. The termination notice shall set forth the purpose and the grounds for termination; the effective date of termination; the extent of termination; and any special instructions. The agency shall forward a copy of such termination notice to any known assignee, guarantor, or surety of the contracting party, if any.

c. The State agency may amend a termination notice to correct a non-substantive or non-material mistake or mistakes in the notice, provide supplemental data or instructions, or rescind the notice when the price of the undelivered balance of the contract is less than $5,000 before the contracting party's receipt of the notice.

Upon written consent of the contracting party, the agency may reinstate the terminated portion of the contract in whole or in part by amending the termination notice if there has been a written determination that reinstatement is necessary or advantageous to the agency or public purpose.

d. The State agency may, pursuant to regulations issued by the State Treasurer, effect a no-cost settlement in lieu of issuing a termination notice when there are no outstanding payments, debts due the agency, or obligations of the contracting party.

4. a. Upon termination of a contract or agreement under this act, P.L. c. (C.) (pending before the Legislature as this bill), the contracting party shall comply with the notice and any requirements necessary to effect termination and shall take all reasonable measures to mitigate its disentanglement costs and expenses. The contracting party shall perform the continued portion of the contract.

b. The contracting party shall submit, no later than 30 days after receipt of the termination notice, a termination settlement proposal to

the State agency setting forth its requested termination fee and any request for an equitable adjustment of price for the continued portion of the contract or agreement, supported by evidence of any increase in cost if the termination is partial. If the contracting party fails to submit the termination settlement proposal within 30 days after receipt of the termination notice, the State agency may determine, on the basis of information available and the criteria set forth in subsection c. of this section, the amount, if any, due to the contracting party and shall pay that amount to the contracting party within 90 days of transmission of the termination notice.

c. If the State agency and the contracting party cannot agree on the termination settlement proposal, the termination fee shall be determined in accordance with the dispute resolution process set forth by the State Treasurer in regulations and shall be based upon the aggregate of the following:

(1) (a) the fair market value, at the time of the proposed termination of the contract and as determined by an independent appraisal, of the contracting party's interest in the real property or other appropriate interest in the contract, as determined through rules by the Department of the Treasury, of which the contracting party is being deprived; or

(b) unpaid payments due and owing to the contracting party, pro-rated for the applicable portion of the contract year until the termination date; the present value of unamortized capital expenditures incurred by the contracting party, the approval of which shall have been approved by the State agency prior to the incurrence of the obligation; and excluding any costs due to a breach of the contract or agreement by the contracting party; and

(2) reasonable documented expenses of the contracting party that are incurred in the disentanglement of the contracting party that are not included under subparagraph (b) of paragraph (1) of this subsection, including reasonable expenses relating to the termination and settlement of any subcontracts, accounting, legal, clerical and other expenses reasonably necessary for preparation of the termination settlement proposal and supporting data thereto, and storage, transportation and other incurred expenses reasonably necessary for the preservation, protection or disposition of the property that is the subject of the contract; and

(3) a sum equal to seven percent of the aggregate amount of the expenses described in subparagraph (2) of this paragraph; less

(4) any unpaid amounts owing to the State agency by the contracting party under the contract or agreement.

d. The termination fee shall be the State's and the State agency's sole and exclusive liability to the contracting party, and the contracting party's sole and exclusive remedy from the State and the State agency, resulting from the agency's exercise of its rights under this act, P.L. , c. (C.) (pending before the Legislature as this bill).

Payment of the termination fee shall be subject to and limited by appropriations and any other applicable statutory restrictions. Payment of the termination fee shall only apply to a termination for convenience by the State agency as set forth in this act. The State and the State agency shall not be liable for the payment of the termination fees or any other liabilities, costs, fees and expenses in connection with the State's or State agency's exercise of any other termination rights under law, rule, regulation, or executive order.

A termination, pursuant to this act, P.L. , c. (C.) (pending before the Legislature as this bill), of a contract or agreement entered into after the effective date of this act shall not terminate any provisions of that contract or agreement governing termination fees, and all such provisions shall continue in full force and effect until the contracting party has received full payment of the termination fee as specified under the contract or agreement.

5. The Department of the Treasury shall adopt rules and regulations to effectuate the purposes of this act, P.L. , c. (C.) (pending before the Legislature as this bill). The rules and regulations shall be effective immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed 18 months, and may, thereafter, be amended, adopted or readopted by the department in accordance with the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

6. This act, P.L. , c. (C.) (pending before the Legislature as this bill), shall apply to any contract in effect on the date of enactment unless the State Treasurer determines that the contract or agreement provides termination rights more generous or advantageous to the State agency or the State government than are provided pursuant to this act.

7. This act shall take effect immediately.

STATEMENT

This bill permits a State agency to completely or partially terminate a contract or agreement concerning marine terminal or attendant real property to serve an important public purpose.

Under the bill, a State agency may, without penalty or liability, terminate a contract or agreement concerning the use, control, or access of marine terminals or real property for convenience when the impairment to the contract is reasonable and necessary to serve an important public purpose. The bill does not apply to contracts or agreements concerning the sale or transfer of real property. The bill specifies that it will not impair the right of a State agency and

contracting party to mutually agree to other terms governing contract termination after the effective date of the bill.

Under the bill, a State agency must submit a written termination notice to the contracting party within 60 days of the termination date specified in the notice. The termination notice must state the purpose and the grounds for termination, the effective date of termination, the extent of termination, and any special instructions. The agency must also forward a copy of such termination notice to any known assignee, guarantor, or surety of the contracting party, if any. With consent of the contracting party, the agency may reinstate all or part of the terminated portion of the contract if there has been a determination that reinstatement is necessary or advantageous to the agency or public purpose. The bill also allows the State agency to effect a no-cost settlement in lieu of issuing a termination notice when there are no outstanding payments, debts due the agency, or obligations of the contracting party.

The bill requires the contracting party to comply with the notice and any requirements necessary to effect termination, take all reasonable measures to mitigate its disentanglement costs and expenses, and perform the continued portion of the contract. The contracting party is to submit a termination settlement proposal to the State within 30 days of receipt of the termination notice. The proposal must state its requested termination fee and any request for an equitable adjustment of price for the continued portion of the contract or agreement. If the contracting party does not submit the proposal within 30 days, the State agency may determine, based on criteria set forth in the bill, the amount, if any, due to the contracting party and is to pay that amount to the contracting party within 90 days of transmission of the termination notice.

If the State agency and the contracting party cannot agree on the termination settlement proposal, the termination fee will be determined in accordance with the dispute resolution process set forth by the State Treasurer in regulations. The termination fee must be based upon the aggregate of the following:

(1) the fair market value, at the time of the proposed termination of the contract and as determined by an independent appraisal, of the contracting party's interest in the real property or other appropriate interest in the contract of which the contracting party is being deprived; or

pro-rated unpaid payments owed to the contracting party and the present value of unamortized capital expenditures incurred by the contracting party, excluding any costs due to a breach of the contract or agreement by the contracting party; and

(2) reasonable expenses of the contracting party incurred in the disentanglement that are not otherwise included, such as reasonable expenses relating to the termination and settlement of any subcontracts, accounting, legal, clerical and other expenses reasonably necessary for preparation of the termination settlement

proposal, and storage, transportation and other incurred expenses reasonably necessary for the preservation, protection or disposition of the property that is the subject of the contract; and

(3) seven percent of the aggregate amount of the expenses described in subparagraph (2); less

(4) any unpaid amounts owing to the State agency by the contracting party under the contract or agreement.

The termination fee is the State's exclusive liability to the contracting party for terminating a contract under this bill. Payment of the termination fee is subject to and limited by appropriations and any other applicable statutory restrictions. The bill specifies that termination of a contract under this bill entered into after the effective date of this act shall not terminate any provisions of that contract or agreement governing termination fees.

The bill will take effect immediately and will apply to any contract in effect on the date of enactment unless the State Treasurer determines that the contract or agreement provides termination rights more generous or advantageous to the State agency or the State government than are provided pursuant to this act.