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I N S E N A T E

June 22, 2010

Introduced by Sen. HASSELL-THOMPSON -- (at request of the Governor) --
read twice and ordered printed, and when printed to be committed to
the Committee on Rules

AN ACT to amend the executive law and the state finance law, in relation
to expanding opportunities for women and minority-owned business
enterprises and increasing competition and diversity in procurements
by the state and its public authorities; and to amend chapter 261 of
the laws of 1988 amending the state finance law and other laws relat-
ing to the New York state infrastructure trust fund, in relation to
the effectiveness of article 15-A of the executive law

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

1 Section 1. Legislative findings. New York state ("the state") declares
2 that it is the public policy of the state to promote and encourage the
3 continuing economic development of minority and women-owned businesses,
4 that minority and women-owned businesses participate in the state
5 procurement process as both prime contractors and subcontractors and
6 that the state procurement process operate and award contracts in a
7 manner that is free from discrimination and bias against minority and
8 women-owned businesses that are ready, willing and able to engage in
9 business with the state.
10 The state first adopted its Minority and Women-Owned Business Enter-
11 prise Program in 1988 to address the significant underrepresentation of
12 minority and women-owned businesses in state contracts, despite rela-
13 tively large populations of minorities and women throughout the state.
14 The program, chaptered within article 15-A of the executive law,
15 supported the state's commitment to promote equal opportunity in employ-
16 ment for all persons, without discrimination on account of race, creed,
17 color, national origin, sex, age, disability or marital status, to
18 promote equality of economic opportunity for minority group members and
19 women, business enterprises owned by them, and to eradicate through
20 effective programs the barriers that have unreasonably impaired access
21 by minority and women-owned business enterprises to state contracting
22 opportunities.

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

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1 In 2006, a disparity study was commissioned by the empire state devel-
2 opment corporation, pursuant to executive law section 312-a, to evaluate
3 whether minority and women-owned businesses in the state contracting
4 marketplace had full and fair opportunities to compete for prime
5 contracts and associated subcontracts. Published on April 29, 2010, "the
6 State of Minority and Women-Owned Business Enterprise: Evidence From New
7 York" ("the 2010 disparity study"), found strong evidence of large,
8 adverse, and statistically significant disparities between minority and
9 women participation in business enterprise activity in the state's rele-
10 vant market area and the actual current availability of those busi-
11 nesses. The study further concluded that said disparities could not be
12 explained solely, or even mostly, by differences between minority and
13 women-owned businesses and non-minority and women-owned business popu-
14 lations in factors untainted by discrimination, and that the differences
15 therefore gave rise to a strong inference of the presence of discrimi-
16 nation. The findings of the study are hereby adopted by the legislature.

17 The legislature further finds that the Assembly conducted hearings on
18 the efficiency and effectiveness of services to minority and women-owned
19 businesses and on the effectiveness of article 15-A of the executive law
20 in Utica, New York on February 23, 2005, in New York City on March 3,
21 2005, and in Syracuse, New York on October 25, 2005; it conducted a
22 hearing on the efforts by public authorities to attract and retain women
23 and minority-owned businesses in securing contracts for construction,
24 goods, and services on June 11, 2002 in Albany, New York, and a hearing
25 on access to surety bonding on state contracts for small, minority and
26 women-owned businesses on April 14, 2005 in New York City. The Senate
27 conducted hearings on the efficiency and effectiveness of services to
28 minority and women-owned business and on the effectiveness of article
29 15-A of the executive law at the Legislative Office Building hearing
30 rooms in Albany, New York on February 12, 2009, on Minority and Women-
31 Owned Business Enterprise participation opportunities in public
32 finance/asset management, and on March 3, 2010 on the reform of article
33 15-A of the executive law.

34 At these hearings, testimony was received that supplemented and was
35 consistent with the anecdotal evidence set forth in the 2010 disparity
36 study that women and minority-owned businesses participate in state
37 procurements at significantly lower percentages than their numbers and
38 expertise would indicate would be expected if no discrimination had
39 existed and provided anecdotal evidence of continuing patterns of
40 discrimination.

41 The legislature further finds that in order to redress the discrimi-
42 nation documented by the study it is necessary to implement a program
43 that identifies businesses owned by minorities and by women and that
44 actively promotes the participation of such businesses in the state
45 procurement process. The legislature further finds that it is in the
46 best interests of the economic development of the state to enact the
47 2010 Business Diversification Act to redress discrimination against
48 minority and women-owned business enterprises in the state marketplace.

49 S 1-a. Short title. This act shall be known and may be cited as the
50 "2010 Business Diversification Act".

51 S 2. Subdivisions 7 and 15 of section 310 of the executive law, as
52 added by chapter 261 of the laws of 1988, are amended and five new
53 subdivisions 18, 19, 20, 21 and 22 are added to read as follows:

54 7. "Minority-owned business enterprise" shall mean a business enter-
55 prise, including a sole proprietorship, partnership or corporation that
56 is:

1 (a) at least fifty-one percent owned by one or more minority group
2 members;

3 (b) an enterprise in which such minority ownership is real, substan-
4 tial and continuing;

5 (c) an enterprise in which such minority ownership has and exercises
6 the authority to control independently the day-to-day business decisions
7 of the enterprise; [and]

8 (d) an enterprise authorized to do business in this state and inde-
9 pendently owned and operated[.];

10 (E) AN ENTERPRISE OWNED BY AN INDIVIDUAL OR INDIVIDUALS, WHOSE OWNER-
11 SHIP, CONTROL AND OPERATION ARE RELIED UPON FOR CERTIFICATION, WITH A
12 PERSONAL NET WORTH THAT DOES NOT EXCEED THREE MILLION FIVE HUNDRED THOU-
13 SAND DOLLARS, AS ADJUSTED ANNUALLY ON THE FIRST OF JANUARY FOR INFLATION
14 ACCORDING TO THE CONSUMER PRICE INDEX OF THE PREVIOUS YEAR; AND

15 (F) AN ENTERPRISE THAT IS A SMALL BUSINESS PURSUANT TO SUBDIVISION
16 TWENTY OF THIS SECTION.

17 15. "Women-owned business enterprise" shall mean a business enter-
18 prise, including a sole proprietorship, partnership or corporation that
19 is:

20 (a) at least fifty-one percent owned by one or more United States
21 citizens or permanent resident aliens who are women;

22 (b) an enterprise in which the ownership interest of such women is
23 real, substantial and continuing;

24 (c) an enterprise in which such women ownership has and exercises the
25 authority to control independently the day-to-day business decisions of
26 the enterprise; [and]

27 (d) an enterprise authorized to do business in this state and inde-
28 pendently owned and operated[.];

29 (E) AN ENTERPRISE OWNED BY AN INDIVIDUAL OR INDIVIDUALS, WHOSE OWNER-
30 SHIP, CONTROL AND OPERATION ARE RELIED UPON FOR CERTIFICATION, WITH A
31 PERSONAL NET WORTH THAT DOES NOT EXCEED THREE MILLION FIVE HUNDRED THOU-
32 SAND DOLLARS, AS ADJUSTED ANNUALLY ON THE FIRST OF JANUARY FOR INFLATION
33 ACCORDING TO THE CONSUMER PRICE INDEX OF THE PREVIOUS YEAR; AND

34 (F) AN ENTERPRISE THAT IS A SMALL BUSINESS PURSUANT TO SUBDIVISION
35 TWENTY OF THIS SECTION.

36 A FIRM OWNED BY A MINORITY GROUP MEMBER WHO IS ALSO A WOMAN MAY BE
37 CERTIFIED AS A MINORITY-OWNED BUSINESS ENTERPRISE, A WOMEN-OWNED BUSI-
38 NESS ENTERPRISE, OR BOTH, AND MAY BE COUNTED TOWARDS EITHER A MINORITY-
39 OWNED BUSINESS ENTERPRISE GOAL OR A WOMEN-OWNED BUSINESS ENTERPRISE
40 GOAL, IN REGARD TO ANY CONTRACT OR ANY GOAL, SET BY AN AGENCY OR AUTHOR-
41 ITY, BUT SUCH PARTICIPATION MAY NOT BE COUNTED TOWARDS BOTH SUCH GOALS.
42 SUCH AN ENTERPRISE'S PARTICIPATION IN A CONTRACT MAY NOT BE DIVIDED
43 BETWEEN THE MINORITY-OWNED BUSINESS ENTERPRISE GOAL AND THE WOMEN-OWNED
44 BUSINESS ENTERPRISE GOAL.

45 18. "LESSEE" SHALL MEAN AN INDIVIDUAL, A BUSINESS ENTERPRISE, INCLUD-
46 ING A SOLE PROPRIETORSHIP, A PARTNERSHIP, A CORPORATION, A NOT-FOR-PRO-
47 FIT CORPORATION, OR ANY OTHER PARTY TO A LEASE WITH A STATE AGENCY AS
48 DEFINED IN SUBDIVISION ELEVEN OF THIS SECTION, OR A RESPONDENT IN
49 CONJUNCTION WITH THE AWARD OF SUCH A LEASE OR A PROPOSED LESSEE WITH A
50 STATE AGENCY AS DEFINED IN SUBDIVISION ELEVEN OF THIS SECTION.

51 19. "PERSONAL NET WORTH" SHALL MEAN THE AGGREGATE ADJUSTED NET VALUE
52 OF THE ASSETS OF AN INDIVIDUAL REMAINING AFTER TOTAL LIABILITIES ARE
53 DEDUCTED. PERSONAL NET WORTH INCLUDES THE INDIVIDUAL'S SHARE OF ASSETS
54 HELD JOINTLY WITH SAID INDIVIDUAL'S SPOUSE AND DOES NOT INCLUDE THE
55 INDIVIDUAL'S OWNERSHIP INTEREST IN THE CERTIFIED MINORITY AND
56 WOMEN-OWNED BUSINESS ENTERPRISE, THE INDIVIDUAL'S EQUITY IN HIS OR HER

1 PRIMARY RESIDENCE, OR UP TO FIVE HUNDRED THOUSAND DOLLARS OF THE PRESENT
2 CASH VALUE OF ANY QUALIFIED RETIREMENT SAVINGS PLAN OR INDIVIDUAL
3 RETIREMENT ACCOUNT HELD BY THE INDIVIDUAL LESS ANY PENALTIES FOR EARLY
4 WITHDRAWAL.

5 20. "SMALL BUSINESS" AS USED IN THIS SECTION, UNLESS OTHERWISE INDI-
6 CATED, SHALL MEAN A BUSINESS WHICH HAS A SIGNIFICANT BUSINESS PRESENCE
7 IN THE STATE, IS INDEPENDENTLY OWNED AND OPERATED, NOT DOMINANT IN ITS
8 FIELD AND EMPLOYS, BASED ON ITS INDUSTRY, A CERTAIN NUMBER OF PERSONS AS
9 DETERMINED BY THE DIRECTOR, BUT NOT TO EXCEED THREE HUNDRED, TAKING INTO
10 CONSIDERATION FACTORS WHICH INCLUDE, BUT ARE NOT LIMITED TO, FEDERAL
11 SMALL BUSINESS ADMINISTRATION STANDARDS PURSUANT TO 13 CFR PART 121 AND
12 ANY AMENDMENTS THERETO. THE DIRECTOR MAY ISSUE REGULATIONS ON THE
13 CONSTRUCTION OF THE TERMS IN THIS DEFINITION.

14 21. "THE 2010 DISPARITY STUDY" SHALL REFER TO THE DISPARITY STUDY
15 COMMISSIONED BY THE EMPIRE STATE DEVELOPMENT CORPORATION, PURSUANT TO
16 SECTION THREE HUNDRED TWELVE-A OF THIS ARTICLE, AND PUBLISHED ON APRIL
17 TWENTY-NINE, TWO THOUSAND TEN.

18 22. "DIVERSITY PRACTICES" SHALL MEAN THE CONTRACTOR'S PRACTICES AND
19 POLICIES WITH RESPECT TO:

20 (A) UTILIZING CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES
21 IN CONTRACTS AWARDED BY A STATE AGENCY OR OTHER PUBLIC CORPORATION, AS
22 SUBCONTRACTORS AND SUPPLIERS; AND

23 (B) ENTERING INTO PARTNERSHIPS, JOINT VENTURES OR OTHER SIMILAR
24 ARRANGEMENTS WITH CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTER-
25 PRISES AS DEFINED IN THIS ARTICLE OR OTHER APPLICABLE STATUTE OR REGU-
26 LATION GOVERNING AN ENTITY'S UTILIZATION OF MINORITY OR WOMEN-OWNED
27 BUSINESS ENTERPRISES.

28 S 3. The executive law is amended by adding a new section 4-a to read
29 as follows:

30 S 4-A. CHIEF DIVERSITY OFFICER. A CHIEF DIVERSITY OFFICER FOR THE
31 STATE SHALL BE APPOINTED BY THE GOVERNOR AND SHALL RECEIVE A SALARY TO
32 BE FIXED BY THE GOVERNOR WITHIN THE AMOUNT APPROPRIATED THEREFOR. THE
33 CHIEF DIVERSITY OFFICER'S RESPONSIBILITIES SHALL INCLUDE THE FOLLOWING:

34 1. ADVISE AND ASSIST THE GOVERNOR IN FORMULATING POLICIES RELATING TO
35 WORKFORCE DIVERSITY AND MINORITY AND WOMEN'S BUSINESS ENTERPRISES;

36 2. WORK WITH THE DIRECTOR OF THE DIVISION OF MINORITY AND WOMEN'S
37 BUSINESS DEVELOPMENT TO PREPARE AN ANNUAL PLAN FOR ENSURING FULL COMPLI-
38 ANCE WITH ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW BY STATE AGENCIES AND
39 THE USE OF DIVERSITY PRACTICES BY SUCH AGENCIES;

40 3. ADVISE THE GOVERNOR AND THE AGENCIES REGARDING ANY MEASURES NECES-
41 SARY TO ENSURE FULL COMPLIANCE WITH ARTICLE FIFTEEN-A OF THIS CHAPTER
42 AND USE OF DIVERSITY PRACTICES BY STATE PUBLIC AUTHORITIES;

43 4. SERVE AS A MEMBER OF THE STATE PROCUREMENT COUNCIL ESTABLISHED
44 UNDER SECTION ONE HUNDRED SIXTY-ONE OF THE STATE FINANCE LAW;

45 5. SERVE AS THE GOVERNOR'S LIAISON WITH ORGANIZATIONS REPRESENTING
46 MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES AND OTHER ORGANIZATIONS
47 RELATED TO DIVERSITY IN THE STATE WORKFORCE AND IN STATE CONTRACTING;

48 6. SERVE AS THE GOVERNOR'S LIAISON TO THE SMALL BUSINESS ADVISORY
49 COUNCIL FOR ISSUES RELATED TO THE CREATION OF A DIVERSE WORKFORCE AND
50 STATE PROCUREMENT PRACTICES RELATING TO MINORITY AND WOMEN-OWNED BUSI-
51 NESS ENTERPRISES;

52 7. REVIEW AND CONSULT WITH THE DIRECTOR OF MINORITY AND WOMEN'S BUSI-
53 NESS DEVELOPMENT REGARDING POLICIES RELATING TO MINORITY AND WOMEN-OWNED
54 BUSINESS ENTERPRISE CONTRACT SPECIALISTS AT STATE AGENCIES; AND

55 8. ENGAGE IN OTHER ACTIONS ASSIGNED TO HIM OR HER BY THE GOVERNOR
56 RELATING TO DIVERSITY IN HIRING OR PROMOTION OF THE STATE WORKFORCE AND

1 IN ENCOURAGING DIVERSITY PRACTICES AND COMPLIANCE WITH ARTICLE FIFTEEN-A
2 OF THIS CHAPTER IN PROCUREMENT.

3 S 3-a. Paragraph a of subdivision 1 of section 161 of the state
4 finance law, as added by chapter 83 of the laws of 1995, is amended to
5 read as follows:

6 a. The state procurement council shall continuously strive to improve
7 the state's procurement process. Such council shall consist of [nine-
8 teen] TWENTY members, including the commissioner, the state comptroller,
9 the director of the budget, THE CHIEF DIVERSITY OFFICER and the commis-
10 sioner of economic development, or their respective designees; seven
11 members who shall be the heads of other large and small state agencies
12 chosen by the governor, or their respective designees; and eight at
13 large members appointed as follows: three appointed by the temporary
14 president of the senate, one of whom shall be a representative of local
15 government and one of whom shall be a representative of private busi-
16 ness; three appointed by the speaker of the assembly, one of whom shall
17 be a representative of local government and one of whom shall be a
18 representative of private business; one appointed by the minority leader
19 of the senate; and, one appointed by the minority leader of the assem-
20 bly; and two non-voting observers appointed as follows: one appointed by
21 the temporary president of the senate and one appointed by the speaker
22 of the assembly. The non-voting observers shall be provided, contempora-
23 neously, all documentation and materials distributed to members. The
24 council shall be chaired by the commissioner and shall meet at least
25 quarterly.

26 S 4. Section 312-a of the executive law, as added by section 6 of part
27 BB of chapter 59 of the laws of 2006, is amended to read as follows:

28 S 312-a. Study of minority and women-owned business enterprise
29 programs. 1. The director of the division of minority and women-owned
30 business development in the department of economic development is
31 authorized and directed to [commission] RECOMMISSION a statewide dispar-
32 ity study regarding the participation of minority and women-owned busi-
33 ness enterprises in state contracts since the [enactment] AMENDMENT of
34 this article TO BE DELIVERED TO THE GOVERNOR AND LEGISLATURE NO LATER
35 THAN FEBRUARY FIFTEENTH, TWO THOUSAND SIXTEEN. The study shall be
36 prepared by an entity independent of the department and selected through
37 a request for proposal process. The purpose of such study is:

38 (A) to determine whether there is a disparity between the number of
39 qualified minority and women-owned businesses ready, willing and able to
40 perform state contracts for commodities, services and construction, and
41 the number of such contractors actually engaged to perform such
42 contracts, and to determine what changes, if any, should be made to
43 state policies affecting minority and women-owned business enterprises;
44 AND (B) TO DETERMINE WHETHER THERE IS A DISPARITY BETWEEN THE NUMBER OF
45 QUALIFIED MINORITIES AND WOMEN READY, WILLING AND ABLE, WITH RESPECT TO
46 LABOR MARKETS, QUALIFICATIONS AND OTHER RELEVANT FACTORS, TO PARTICIPATE
47 IN CONTRACTOR EMPLOYMENT, MANAGEMENT LEVEL BODIES, INCLUDING BOARDS OF
48 DIRECTORS, AND AS SENIOR EXECUTIVE OFFICERS WITHIN CONTRACTING ENTITIES
49 AND THE NUMBER OF SUCH GROUP MEMBERS ACTUALLY EMPLOYED OR AFFILIATED
50 WITH STATE CONTRACTORS IN THE AFOREMENTIONED CAPACITIES, AND TO DETER-
51 MINE WHAT CHANGES, IF ANY, SHOULD BE MADE TO STATE POLICIES AFFECTING
52 MINORITY AND WOMEN GROUP POPULATIONS WITH REGARD TO STATE CONTRACTORS'
53 EMPLOYMENT AND APPOINTMENT PRACTICES RELATIVE TO DIVERSE GROUP MEMBERS.
54 Such study shall include, but not be limited to, an analysis of the
55 [impact of court decisions regarding the use of quotas and set-asides]
56 HISTORY OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAMS AND

1 THEIR EFFECTIVENESS as a means of securing and ensuring participation by
2 minorities and women, and a disparity analysis by market area and region
3 of the state. SUCH STUDY SHALL DISTINGUISH BETWEEN MINORITY MALES,
4 MINORITY FEMALES AND NON-MINORITY FEMALES IN THE STATISTICAL ANALYSIS.

5 2. The director of the division of minority and women-owned business
6 development is directed to transmit the disparity study to the governor
7 and the legislature not later than [eighteen months after the effective
8 date of this subdivision] FEBRUARY FIFTEENTH, TWO THOUSAND SIXTEEN, and
9 to post the study on the website of the department of economic develop-
10 ment.

11 S 5. Section 313 of the executive law, as added by chapter 261 of the
12 laws of 1988, paragraph (a) of subdivision 4 as amended by chapter 429
13 of the laws of 2009, is amended to read as follows:

14 S 313. Opportunities for minority and women-owned business enter-
15 prises. 1. [The director shall promulgate rules and regulations that
16 provide measures and procedures to ensure that certified businesses
17 shall be given the opportunity for meaningful participation in the
18 performance of state contracts and to identify those state contracts for
19 which certified businesses may best bid to actively and affirmatively
20 promote and assist their participation in the performance of state
21 contracts so as to facilitate the award of a fair share of state
22 contracts to such businesses. Such rules and regulations as they pertain
23 to any particular agency shall be developed after consultation with the
24 contracting agency. Nothing in the provisions of this article shall be
25 construed to limit the ability of any certified business to bid on any
26 contract.

27 2.] GOALS AND REQUIREMENTS FOR AGENCIES AND CONTRACTORS. EACH AGENCY
28 SHALL STRUCTURE PROCUREMENT PROCEDURES FOR CONTRACTS MADE DIRECTLY OR
29 INDIRECTLY TO MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES, IN ACCORD-
30 ANCE WITH THE FINDINGS OF THE TWO THOUSAND TEN DISPARITY STUDY, CONSIST-
31 ENT WITH THE PURPOSES OF THIS ARTICLE, TO ATTEMPT TO ACHIEVE THE FOLLOW-
32 ING RESULTS WITH REGARD TO TOTAL ANNUAL STATEWIDE PROCUREMENT:

33 (A) CONSTRUCTION INDUSTRY FOR CERTIFIED MINORITY-OWNED BUSINESS ENTER-
34 PRISES: FOURTEEN AND THIRTY-FOUR HUNDREDTHS PERCENT;

35 (B) CONSTRUCTION INDUSTRY FOR CERTIFIED WOMEN-OWNED BUSINESS ENTER-
36 PRISES: EIGHT AND FORTY-ONE HUNDREDTHS PERCENT;

37 (C) CONSTRUCTION RELATED PROFESSIONAL SERVICES INDUSTRY FOR CERTIFIED
38 MINORITY-OWNED BUSINESS ENTERPRISES: THIRTEEN AND TWENTY-ONE HUNDREDTHS
39 PERCENT;

40 (D) CONSTRUCTION RELATED PROFESSIONAL SERVICES INDUSTRY FOR CERTIFIED
41 WOMEN-OWNED BUSINESS ENTERPRISES: ELEVEN AND THIRTY-TWO HUNDREDTHS
42 PERCENT;

43 (E) NON-CONSTRUCTION RELATED SERVICES INDUSTRY FOR CERTIFIED MINORI-
44 TY-OWNED BUSINESS ENTERPRISES: NINETEEN AND SIXTY HUNDREDTHS PERCENT;

45 (F) NON-CONSTRUCTION RELATED SERVICES INDUSTRY FOR CERTIFIED
46 WOMEN-OWNED BUSINESS ENTERPRISES: SEVENTEEN AND FORTY-FOUR HUNDREDTHS
47 PERCENT;

48 (G) COMMODITIES INDUSTRY FOR CERTIFIED MINORITY-OWNED BUSINESS ENTER-
49 PRISES: SIXTEEN AND ELEVEN HUNDREDTHS PERCENT;

50 (H) COMMODITIES INDUSTRY FOR CERTIFIED WOMEN-OWNED BUSINESS ENTER-
51 PRISES: TEN AND NINETY-THREE HUNDREDTHS PERCENT;

52 (I) OVERALL AGENCY TOTAL DOLLAR VALUE OF PROCUREMENT FOR CERTIFIED
53 MINORITY-OWNED BUSINESS ENTERPRISES: SIXTEEN AND FIFTY-THREE HUNDREDTHS
54 PERCENT;

1 (J) OVERALL AGENCY TOTAL DOLLAR VALUE OF PROCUREMENT FOR CERTIFIED
2 WOMEN-OWNED BUSINESS ENTERPRISES: TWELVE AND THIRTY-NINE HUNDREDTHS
3 PERCENT; AND

4 (K) OVERALL AGENCY TOTAL DOLLAR VALUE OF PROCUREMENT FOR CERTIFIED
5 MINORITY, WOMEN-OWNED BUSINESS ENTERPRISES: TWENTY-EIGHT AND NINETY-TWO
6 HUNDREDTHS PERCENT.

7 1-A. THE DIRECTOR SHALL ENSURE THAT EACH STATE AGENCY HAS BEEN
8 PROVIDED WITH A COPY OF THE TWO THOUSAND TEN DISPARITY STUDY.

9 1-B. EACH AGENCY SHALL DEVELOP AND ADOPT AGENCY-SPECIFIC GOALS BASED
10 ON THE FINDINGS OF THE TWO THOUSAND TEN DISPARITY STUDY.

11 2. THE DIRECTOR SHALL PROMULGATE RULES AND REGULATIONS PURSUANT TO THE
12 GOALS ESTABLISHED IN SUBDIVISION ONE OF THIS SECTION THAT PROVIDE MEAS-
13 URES AND PROCEDURES TO ENSURE THAT CERTIFIED MINORITY AND WOMEN-OWNED
14 BUSINESSES SHALL BE GIVEN THE OPPORTUNITY FOR MAXIMUM FEASIBLE PARTIC-
15 IPATION IN THE PERFORMANCE OF STATE CONTRACTS AND TO ASSIST IN THE AGEN-
16 CY'S IDENTIFICATION OF THOSE STATE CONTRACTS FOR WHICH MINORITY AND
17 WOMEN-OWNED CERTIFIED BUSINESSES MAY BEST BID TO ACTIVELY AND AFFIRMA-
18 TIVELY PROMOTE AND ASSIST THEIR PARTICIPATION IN THE PERFORMANCE OF
19 STATE CONTRACTS SO AS TO FACILITATE THE AGENCY'S ACHIEVEMENT OF THE
20 MAXIMUM FEASIBLE PORTION OF THE GOALS FOR STATE CONTRACTS TO SUCH BUSI-
21 NESSES.

22 2-A. THE DIRECTOR SHALL PROMULGATE RULES AND REGULATIONS THAT WILL
23 ACCOMPLISH THE FOLLOWING:

24 (A) PROVIDE FOR THE CERTIFICATION AND DECERTIFICATION OF MINORITY AND
25 WOMEN-OWNED BUSINESS ENTERPRISES FOR ALL AGENCIES THROUGH A SINGLE PROC-
26 ESS THAT MEETS APPLICABLE REQUIREMENTS;

27 (B) REQUIRE THAT EACH CONTRACT SOLICITATION DOCUMENT ACCOMPANYING EACH
28 SOLICITATION SET FORTH THE EXPECTED DEGREE OF MINORITY AND WOMEN-OWNED
29 BUSINESS ENTERPRISE PARTICIPATION BASED, IN PART, ON:

30 (I) THE POTENTIAL SUBCONTRACT OPPORTUNITIES AVAILABLE IN THE PRIME
31 PROCUREMENT CONTRACT; AND

32 (II) THE AVAILABILITY, AS CONTAINED WITHIN THE STUDY, OF CERTIFIED
33 MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES TO RESPOND COMPETITIVELY
34 TO THE POTENTIAL SUBCONTRACT OPPORTUNITIES;

35 (C) REQUIRE THAT EACH AGENCY PROVIDE A CURRENT LIST OF CERTIFIED
36 MINORITY BUSINESS ENTERPRISES TO EACH PROSPECTIVE CONTRACTOR;

37 (D) ALLOW A CONTRACTOR THAT IS A CERTIFIED MINORITY-OWNED OR
38 WOMEN-OWNED BUSINESS ENTERPRISE TO USE THE WORK IT PERFORMS TO MEET
39 REQUIREMENTS FOR USE OF CERTIFIED MINORITY-OWNED OR WOMEN-OWNED BUSINESS
40 ENTERPRISES AS SUBCONTRACTORS;

41 (E) PROVIDE FOR JOINT VENTURES, WHICH A BIDDER MAY COUNT TOWARD MEET-
42 ING ITS MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PARTICIPATION;

43 (F) CONSISTENT WITH SUBDIVISION SIX OF THIS SECTION, PROVIDE FOR
44 CIRCUMSTANCES UNDER WHICH AN AGENCY MAY WAIVE OBLIGATIONS OF THE
45 CONTRACTOR RELATING TO MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE
46 PARTICIPATION;

47 (G) REQUIRE THAT AN AGENCY VERIFY THAT MINORITY AND WOMEN-OWNED BUSI-
48 NESS ENTERPRISES LISTED IN A SUCCESSFUL BID ARE ACTUALLY PARTICIPATING
49 TO THE EXTENT LISTED IN THE PROJECT FOR WHICH THE BID WAS SUBMITTED;

50 (H) PROVIDE FOR THE COLLECTION OF STATISTICAL DATA BY EACH AGENCY
51 CONCERNING ACTUAL MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PARTIC-
52 IPATION; AND

53 (I) REQUIRE EACH AGENCY TO CONSULT THE MOST CURRENT DISPARITY STUDY
54 WHEN CALCULATING AGENCY-WIDE AND CONTRACT SPECIFIC PARTICIPATION GOALS
55 PURSUANT TO THIS ARTICLE.

1 3. SOLELY FOR THE PURPOSE OF PROVIDING THE OPPORTUNITY FOR MEANINGFUL
2 PARTICIPATION BY CERTIFIED BUSINESSES IN THE PERFORMANCE OF STATE
3 CONTRACTS AS PROVIDED IN THIS SECTION, STATE CONTRACTS SHALL INCLUDE
4 LEASES OF REAL PROPERTY BY A STATE AGENCY TO A LESSEE WHERE: THE TERMS
5 OF SUCH LEASES PROVIDE FOR THE CONSTRUCTION, DEMOLITION, REPLACEMENT,
6 MAJOR REPAIR OR RENOVATION OF REAL PROPERTY AND IMPROVEMENTS THEREON BY
7 SUCH LESSEE; AND THE COST OF SUCH CONSTRUCTION, DEMOLITION, REPLACEMENT,
8 MAJOR REPAIR OR RENOVATION OF REAL PROPERTY AND IMPROVEMENTS THEREON
9 SHALL EXCEED THE SUM OF ONE HUNDRED THOUSAND DOLLARS. REPORTS TO THE
10 DIRECTOR PURSUANT TO SECTION THREE HUNDRED FIFTEEN OF THIS ARTICLE SHALL
11 INCLUDE ACTIVITIES WITH RESPECT TO ALL SUCH STATE CONTRACTS. Contracting
12 agencies shall include or require to be included with respect to state
13 contracts for the acquisition, construction, demolition, replacement,
14 major repair or renovation of real property and improvements thereon,
15 such provisions as may be necessary to effectuate the provisions of this
16 section in every bid specification and state contract, including, but
17 not limited to: (a) provisions requiring contractors to make a good
18 faith effort to solicit active participation by enterprises identified
19 in the directory of certified businesses provided to the contracting
20 agency by the office; (b) requiring the parties to agree as a condition
21 of entering into such contract, to be bound by the provisions of section
22 three hundred sixteen of this article; and (c) requiring the contractor
23 to include the provisions set forth in paragraphs (a) and (b) [above] OF
24 THIS SUBDIVISION in every subcontract in a manner that the provisions
25 will be binding upon each subcontractor as to work in connection with
26 such contract. Provided, however, that no such provisions shall be bind-
27 ing upon contractors or subcontractors in the performance of work or the
28 provision of services that are unrelated, separate or distinct from the
29 state contract as expressed by its terms, and nothing in this section
30 shall authorize the director or any contracting agency to impose any
31 requirement on a contractor or subcontractor except with respect to a
32 state contract.

33 [3.] 4. In the implementation of this section, the contracting agency
34 shall (A) CONSULT THE FINDINGS CONTAINED WITHIN THE DISPARITY STUDY
35 EVIDENCING RELEVANT INDUSTRY SPECIFIC AVAILABILITY OF CERTIFIED BUSI-
36 NESSES;

37 (B) IMPLEMENT A PROGRAM THAT WILL ENABLE THE AGENCY TO EVALUATE EACH
38 CONTRACT TO DETERMINE THE APPROPRIATENESS OF THE GOAL PURSUANT TO SUBDI-
39 VISION ONE OF THIS SECTION;

40 (C) consider WHERE PRACTICABLE, THE SEVERABILITY OF CONSTRUCTION
41 PROJECTS AND OTHER BUNDLED CONTRACTS; AND

42 (D) CONSIDER compliance with the requirements of any federal law
43 concerning opportunities for minority and women-owned business enter-
44 prises which effectuates the purpose of this section. The contracting
45 agency shall determine whether the imposition of the requirements of any
46 such law duplicate or conflict with the provisions hereof and if such
47 duplication or conflict exists, the contracting agency shall waive the
48 applicability of this section to the extent of such duplication or
49 conflict.

50 [4.] 5. (a) Contracting agencies shall administer the rules and regu-
51 lations promulgated by the director IN A GOOD FAITH EFFORT to [ensure
52 compliance with the provisions of this section] MEET THE MAXIMUM FEASI-
53 BLE PORTION OF THE AGENCY'S GOALS ADOPTED PURSUANT TO THIS ARTICLE AND
54 THE REGULATIONS OF THE DIRECTOR. Such rules and regulations: shall
55 require a contractor to submit a utilization plan after bids are opened,
56 when bids are required, but prior to the award of a state contract;

1 shall require the contracting agency to review the utilization plan
2 submitted by the contractor and to post the utilization plan and any
3 waivers of compliance issued pursuant to subdivision [five] SIX of this
4 section on the website of the contracting agency within a reasonable
5 period of time as established by the director; shall require the
6 contracting agency to notify the contractor in writing within a period
7 of time specified by the director as to any deficiencies contained in
8 the contractor's utilization plan; shall require remedy thereof within a
9 period of time specified by the director; shall require the contractor
10 to submit periodic compliance reports relating to the operation and
11 implementation of any utilization plan; shall NOT ALLOW ANY AUTOMATIC
12 WAIVERS BUT SHALL allow a contractor to apply for a partial or total
13 waiver of the minority and women-owned business enterprise participation
14 requirements pursuant to subdivisions [five and] six AND SEVEN of this
15 section; shall allow a contractor to file a complaint with the director
16 pursuant to subdivision [seven] EIGHT of this section in the event a
17 contracting agency has failed or refused to issue a waiver of the minor-
18 ity and women-owned business enterprise participation requirements or
19 has denied such request for a waiver; and shall allow a contracting
20 agency to file a complaint with the director pursuant to subdivision
21 [eight] NINE of this section in the event a contractor is failing or has
22 failed to comply with the minority and women-owned business enterprise
23 participation requirements set forth in the state contract where no
24 waiver has been granted.

25 (b) The rules and regulations promulgated pursuant to this subdivision
26 regarding a utilization plan shall provide that where enterprises have
27 been identified within a utilization plan, a contractor shall attempt,
28 in good faith, to utilize such enterprise at least to the extent indi-
29 cated. A contracting agency may require a contractor to indicate, within
30 a utilization plan, what measures and procedures he or she intends to
31 take to comply with the provisions of this article, but may not require,
32 as a condition of award of, or compliance with, a contract that a
33 contractor utilize a particular enterprise in performance of the
34 contract.

35 (c) Without limiting other grounds for the disqualification of bids or
36 proposals on the basis of non-responsibility, a contracting agency may
37 disqualify the bid or proposal of a contractor as being non-responsible
38 for failure to remedy notified deficiencies contained in the contrac-
39 tor's utilization plan within a period of time specified in regulations
40 promulgated by the director after receiving notification of such defi-
41 ciencies from the contracting agency. Where failure to remedy any noti-
42 fied deficiency in the utilization plan is a ground for disqualifica-
43 tion, that issue and all other grounds for disqualification shall be
44 stated in writing by the contracting agency. Where the contracting agen-
45 cy states that a failure to remedy any notified deficiency in the utili-
46 zation plan is a ground for disqualification the contractor shall be
47 entitled to an administrative hearing, on a record, involving all
48 grounds stated by the contracting agency. Such hearing shall be
49 conducted by the appropriate authority of the contracting agency to
50 review the determination of disqualification. A final administrative
51 determination made following such hearing shall be reviewable in a
52 proceeding commenced under article seventy-eight of the civil practice
53 law and rules, provided that such proceeding is commenced within thirty
54 days of the notice given by certified mail return receipt requested
55 rendering such final administrative determination. Such proceeding shall
56 be commenced in the supreme court, appellate division, third department

1 and such proceeding shall be preferred over all other civil causes
2 except election causes, and shall be heard and determined in preference
3 to all other civil business pending therein, except election matters,
4 irrespective of position on the calendar. Appeals taken to the court of
5 appeals of the state of New York shall be subject to the same prefer-
6 ence.

7 [5.] 6. Where it appears that a contractor cannot, after a good faith
8 effort, comply with the minority and women-owned business enterprise
9 participation requirements set forth in a particular state contract, a
10 contractor may file a written application with the contracting agency
11 requesting a partial or total waiver of such requirements setting forth
12 the reasons for such contractor's inability to meet any or all of the
13 participation requirements together with an explanation of the efforts
14 undertaken by the contractor to obtain the required minority and women-
15 owned business enterprise participation. In implementing the provisions
16 of this section, the contracting agency shall consider the number and
17 types of minority and women-owned business enterprises located in the
18 region in which the state contract is to be performed, the total dollar
19 value of the state contract, the scope of work to be performed and the
20 project size and term. If, based on such considerations, the contracting
21 agency determines there is not a reasonable availability of contractors
22 on the list of certified business to furnish services for the project,
23 it shall issue a waiver of compliance to the contractor. In making such
24 determination, the contracting agency shall first consider the avail-
25 ability of other business enterprises located in the region and shall
26 thereafter consider the financial ability of minority and women-owned
27 businesses located outside the region in which the contract is to be
28 performed to perform the state contract.

29 [6.] 7. For purposes of determining a contractor's good faith effort
30 to comply with the requirements of this section or to be entitled to a
31 waiver therefrom the contracting agency shall consider:

32 (a) whether the contractor has advertised in general circulation
33 media, trade association publications, and minority-focus and women-fo-
34 cus media and, in such event, (i) whether or not certified minority or
35 women-owned businesses which have been solicited by the contractor
36 exhibited interest in submitting proposals for a particular project by
37 attending a pre-bid conference; and

38 (ii) whether certified businesses which have been solicited by the
39 contractor have responded in a timely fashion to the contractor's solici-
40 tations for timely competitive bid quotations prior to the contracting
41 agency's bid date; and

42 (b) whether there has been written notification to appropriate certi-
43 fied businesses that appear in the directory of certified businesses
44 prepared pursuant to paragraph (f) of subdivision three of section three
45 hundred eleven of this article; and

46 (c) whether the contractor can reasonably structure the amount of work
47 to be performed under subcontracts in order to increase the likelihood
48 of participation by certified businesses.

49 [7.] 8. In the event that a contracting agency fails or refuses to
50 issue a waiver to a contractor as requested within twenty days after
51 having made application therefor pursuant to subdivision [five] SIX of
52 this section or if the contracting agency denies such application, in
53 whole or in part, the contractor may file a complaint with the director
54 pursuant to section three hundred sixteen of this article setting forth
55 the facts and circumstances giving rise to the contractor's complaint
56 together with a demand for relief. The contractor shall serve a copy of

1 such complaint upon the contracting agency by personal service or by
2 certified mail, return receipt requested. The contracting agency shall
3 be afforded an opportunity to respond to such complaint in writing.

4 [8.] 9. If, after the review of a contractor's minority and women
5 owned business utilization plan or review of a periodic compliance
6 report and after such contractor has been afforded an opportunity to
7 respond to a notice of deficiency issued by the contracting agency in
8 connection therewith, it appears that a contractor is failing or refus-
9 ing to comply with the minority and women-owned business participation
10 requirements as set forth in the state contract and where no waiver from
11 such requirements has been granted, the contracting agency may file a
12 written complaint with the director pursuant to section three hundred
13 sixteen of this article setting forth the facts and circumstances giving
14 rise to the contracting agency's complaint together with a demand for
15 relief. The contracting agency shall serve a copy of such complaint
16 upon the contractor by personal service or by certified mail, return
17 receipt requested. The contractor shall be afforded an opportunity to
18 respond to such complaint in writing.

19 S 6. The executive law is amended by adding a new section 313-a to
20 read as follows:

21 S 313-A. DIVERSITY PRACTICES OF STATE CONTRACTORS. THE DIRECTOR SHALL
22 PROMULGATE RULES AND REGULATIONS SETTING FORTH MEASURES AND PROCEDURES
23 TO REQUIRE ALL CONTRACTING AGENCIES, WHERE PRACTICABLE, FEASIBLE AND
24 APPROPRIATE, TO ASSESS THE DIVERSITY PRACTICES OF CONTRACTORS SUBMITTING
25 BIDS OR PROPOSALS IN CONNECTION WITH THE AWARD OF A STATE CONTRACT. SUCH
26 RULES AND REGULATIONS SHALL TAKE INTO ACCOUNT: THE NATURE OF THE LABOR,
27 SERVICES, SUPPLIES, EQUIPMENT OR MATERIALS BEING PROCURED BY THE STATE
28 AGENCY; THE METHOD OF PROCUREMENT REQUIRED TO BE USED BY A STATE AGENCY
29 TO AWARD THE CONTRACT AND MINORITY AND WOMEN-OWNED BUSINESS UTILIZATION
30 PLANS REQUIRED TO BE SUBMITTED PURSUANT TO SECTIONS THREE HUNDRED TWELVE
31 AND THREE HUNDRED THIRTEEN OF THIS ARTICLE; AND SUCH OTHER FACTORS AS
32 THE DIRECTOR DEEMS APPROPRIATE OR NECESSARY TO PROMOTE THE AWARD OF
33 STATE CONTRACTS TO CONTRACTORS HAVING SOUND DIVERSITY PRACTICES. SUCH
34 ASSESSMENT SHALL NOT IN ANY WAY PERMIT THE AUTOMATIC REJECTION OF A BID
35 OR PROCUREMENT CONTRACT PROPOSAL BASED ON LACK OF ADHERENCE TO DIVERSITY
36 PRACTICES. EACH BID OR PROPOSAL SHALL BE ANALYZED ON AN INDIVIDUAL PER
37 BID OR PER PROPOSAL BASIS WITH THE CONTRACTOR'S DIVERSITY PRACTICES
38 CONSIDERED AS ONLY A PART OF A WIDER CONSIDERATION OF SEVERAL FACTORS
39 WHEN DECIDING TO AWARD OR DECLINE TO AWARD A BID OR PROPOSAL. THE
40 DIRECTOR SHALL DEVELOP THE RULES AND REGULATIONS REQUIRED HEREUNDER ONLY
41 AFTER CONSULTATION WITH THE STATE PROCUREMENT COUNCIL ESTABLISHED BY
42 SECTION ONE HUNDRED SIXTY-ONE OF THE STATE FINANCE LAW.

43 S 7. Subdivision 3 of section 315 of the executive law, as added by
44 chapter 261 of the laws of 1988, is amended and four new subdivisions 4,
45 5, 6 and 7 are added to read as follows:

46 3. Each contracting agency shall report to the director with respect
47 to activities undertaken to promote employment of minority group members
48 and women and promote and increase participation by certified businesses
49 with respect to state contracts and subcontracts. Such reports shall be
50 submitted periodically, BUT NOT LESS FREQUENTLY THAN ANNUALLY, as
51 required by the director, AND SHALL INCLUDE SUCH INFORMATION AS IS
52 NECESSARY FOR THE DIRECTOR TO DETERMINE WHETHER THE CONTRACTING AGENCY
53 AND CONTRACTOR HAVE COMPLIED WITH THE PURPOSES OF THIS ARTICLE, INCLUD-
54 ING, WITHOUT LIMITATION, A SUMMARY OF ALL WAIVERS OF THE REQUIREMENTS OF
55 SUBDIVISIONS SIX AND SEVEN OF SECTION THREE HUNDRED THIRTEEN OF THIS
56 ARTICLE ALLOWED BY THE CONTRACTING AGENCY DURING THE PERIOD COVERED BY

1 THE REPORT, INCLUDING A DESCRIPTION OF THE BASIS OF THE WAIVER REQUEST
2 AND THE RATIONALE FOR GRANTING ANY SUCH WAIVER. EACH AGENCY SHALL ALSO
3 INCLUDE IN SUCH ANNUAL REPORT WHETHER OR NOT IT HAS BEEN REQUIRED TO
4 PREPARE A REMEDIAL PLAN, AND, IF SO, THE PLAN AND THE EXTENT TO WHICH
5 THE AGENCY HAS COMPLIED WITH EACH ELEMENT OF THE PLAN.

6 4. THE DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT SHALL
7 ISSUE AN ANNUAL REPORT WHICH: (A) SUMMARIZES THE REPORT SUBMITTED BY
8 EACH CONTRACTING AGENCY PURSUANT TO SUBDIVISION THREE OF THIS SECTION;
9 (B) CONTAINS SUCH COMPARATIVE OR OTHER INFORMATION AS THE DIRECTOR DEEMS
10 APPROPRIATE, INCLUDING BUT NOT LIMITED TO GOALS COMPARED TO ACTUAL
11 PARTICIPATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN STATE
12 CONTRACTING, TO EVALUATE THE EFFECTIVENESS OF THE ACTIVITIES UNDERTAKEN
13 BY EACH SUCH CONTRACTING AGENCY TO PROMOTE INCREASED PARTICIPATION BY
14 CERTIFIED MINORITY OR WOMEN-OWNED BUSINESSES WITH RESPECT TO STATE
15 CONTRACTS AND SUBCONTRACTS; (C) CONTAINS A SUMMARY OF ALL WAIVERS OF THE
16 REQUIREMENTS OF SUBDIVISIONS SIX AND SEVEN OF SECTION THREE HUNDRED
17 THIRTEEN OF THIS ARTICLE ALLOWED BY EACH CONTRACTING AGENCY DURING THE
18 PERIOD COVERED BY THE REPORT, INCLUDING A DESCRIPTION OF THE BASIS OF
19 THE WAIVER REQUEST AND THE CONTRACTING AGENCY'S RATIONALE FOR GRANTING
20 ANY SUCH WAIVER; (D) DESCRIBES ANY EFFORTS TO CREATE A DATABASE OR OTHER
21 INFORMATION STORAGE AND RETRIEVAL SYSTEM CONTAINING INFORMATION RELEVANT
22 TO CONTRACTING WITH MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES; AND
23 (E) CONTAINS A SUMMARY OF (I) ALL DETERMINATIONS OF VIOLATIONS OF THIS
24 ARTICLE BY A CONTRACTOR OR A CONTRACTING AGENCY MADE DURING THE PERIOD
25 COVERED BY THE ANNUAL REPORT PURSUANT TO SECTION THREE HUNDRED SIXTEEN-A
26 OF THIS ARTICLE AND (II) THE PENALTIES OR SANCTIONS, IF ANY, ASSESSED IN
27 CONNECTION WITH SUCH DETERMINATIONS AND THE RATIONALE FOR SUCH PENALTIES
28 OR SANCTIONS. COPIES OF THE ANNUAL REPORT SHALL BE PROVIDED TO THE
29 COMMISSIONER, THE GOVERNOR, THE COMPTROLLER, THE TEMPORARY PRESIDENT OF
30 THE SENATE, THE SPEAKER OF THE ASSEMBLY, THE MINORITY LEADER OF THE
31 SENATE, THE MINORITY LEADER OF THE ASSEMBLY AND SHALL ALSO BE MADE WIDE-
32 LY AVAILABLE TO THE PUBLIC VIA, AMONG OTHER THINGS, PUBLICATION ON A
33 WEBSITE MAINTAINED BY THE DIVISION OF MINORITY AND WOMEN'S BUSINESS
34 DEVELOPMENT.

35 5. EACH AGENCY SHALL INCLUDE IN ITS ANNUAL REPORT TO THE GOVERNOR AND
36 LEGISLATURE PURSUANT TO SECTION ONE HUNDRED SIXTY-FOUR OF THE EXECUTIVE
37 LAW ITS ANNUAL GOALS FOR CONTRACTS WITH MINORITY-OWNED AND WOMEN-OWNED
38 BUSINESS ENTERPRISES, THE NUMBER OF ACTUAL CONTRACTS ISSUED TO MINORI-
39 TY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES; AND A SUMMARY OF ALL
40 WAIVERS OF THE REQUIREMENTS OF SUBDIVISIONS SIX AND SEVEN OF SECTION
41 THREE HUNDRED THIRTEEN OF THIS ARTICLE ALLOWED BY THE REPORTING AGENCY
42 DURING THE PRECEDING YEAR, INCLUDING A DESCRIPTION OF THE BASIS OF THE
43 WAIVER REQUEST AND THE RATIONALE FOR GRANTING SUCH WAIVER. EACH AGENCY
44 SHALL ALSO INCLUDE IN SUCH ANNUAL REPORT WHETHER OR NOT IT HAS BEEN
45 REQUIRED TO PREPARE A REMEDIAL PLAN, AND, IF SO, THE PLAN AND THE EXTENT
46 TO WHICH THE AGENCY HAS COMPLIED WITH EACH ELEMENT OF THE PLAN.

47 6. EACH CONTRACTING AGENCY THAT SUBSTANTIALLY FAILS TO MEET THE GOALS
48 SUPPORTED BY THE DISPARITY STUDY, AS DEFINED BY REGULATION OF THE DIREC-
49 TOR, SHALL BE REQUIRED TO SUBMIT TO THE DIRECTOR A REMEDIAL ACTION PLAN
50 TO REMEDY SUCH FAILURE.

51 7. IF IT IS DETERMINED BY THE DIRECTOR THAT ANY AGENCY HAS FAILED TO
52 ACT IN GOOD FAITH TO IMPLEMENT THE REMEDIAL ACTION PLAN, PURSUANT TO
53 SUBDIVISION SIX OF THIS SECTION WITHIN ONE YEAR, THE DIRECTOR SHALL
54 PROVIDE WRITTEN NOTICE OF SUCH A FINDING, WHICH SHALL BE PUBLICLY AVAIL-
55 ABLE, AND DIRECT IMPLEMENTATION OF REMEDIAL ACTIONS TO:

1 (A) ASSURE THAT SUFFICIENT AND EFFECTIVE SOLICITATION EFFORTS TO WOMEN
2 AND MINORITY-OWNED BUSINESS ENTERPRISES ARE BEING MADE BY SAID AGENCY;

3 (B) DIVIDE CONTRACT REQUIREMENTS, WHEN ECONOMICALLY FEASIBLE, INTO
4 QUANTITIES THAT WILL EXPAND THE PARTICIPATION OF WOMEN AND
5 MINORITY-OWNED BUSINESS ENTERPRISES;

6 (C) ELIMINATE EXTENDED EXPERIENCE OR CAPITALIZATION REQUIREMENTS, WHEN
7 PROGRAMMATICALLY AND ECONOMICALLY FEASIBLE, THAT WILL EXPAND PARTIC-
8 IPATION BY WOMEN AND MINORITY-OWNED BUSINESS ENTERPRISES;

9 (D) IDENTIFY SPECIFIC PROPOSED CONTRACTS AS PARTICULARLY ATTRACTIVE OR
10 APPROPRIATE FOR PARTICIPATION BY WOMEN AND MINORITY-OWNED BUSINESS
11 ENTERPRISES WITH SUCH IDENTIFICATION TO RESULT FROM AND BE COUPLED WITH
12 THE EFFORTS OF PARAGRAPHS (A), (B), AND (C) OF THIS SUBDIVISION; AND

13 (E) UPON A FINDING BY THE DIRECTOR THAT AN AGENCY HAS FAILED TO TAKE
14 AFFIRMATIVE MEASURES TO IMPLEMENT THE REMEDIAL PLAN AND TO FOLLOW ANY OF
15 THE REMEDIAL ACTIONS SET FORTH BY THE DIRECTOR, AND IN THE ABSENCE OF
16 ANY OBJECTIVE PROGRESS TOWARDS THE AGENCY'S GOALS, REQUIRE SOME OR ALL
17 OF THE AGENCY'S PROCUREMENT, FOR A SPECIFIED PERIOD OF TIME, BE PLACED
18 UNDER THE DIRECTION AND CONTROL OF ANOTHER AGENCY OR AGENCIES.

19 S 8. Subdivision 2-a of section 314 of the executive law, as added by
20 section 2 of part BB of chapter 59 of the laws of 2006, is amended to
21 read as follows:

22 2-a. (a) The director shall establish a procedure enabling the office
23 to accept New York municipal corporation certification verification for
24 minority and women-owned business enterprise applicants in lieu of
25 requiring the applicant to complete the state certification process. The
26 director shall promulgate rules and regulations to set forth criteria
27 for the acceptance of municipal corporation certification. All eligible
28 municipal corporation certifications shall require business enterprises
29 seeking certification to meet the following standards:

30 (i) have at least fifty-one percent ownership by a minority or a
31 women-owned enterprise and be owned by United States citizens or perma-
32 nent resident aliens;

33 (ii) be an enterprise in which the minority and/or women-ownership
34 interest is real, substantial and continuing;

35 (iii) be an enterprise in which the minority and/or women-ownership
36 has and exercises the authority to control independently the day-to-day
37 business decisions of the enterprise;

38 (iv) be an enterprise authorized to do business in this state; [and]

39 (v) be subject to a physical site inspection to verify the fifty-one
40 percent ownership requirement[.];

41 (VI) BE OWNED BY AN INDIVIDUAL OR INDIVIDUALS, WHOSE OWNERSHIP,
42 CONTROL AND OPERATION ARE RELIED UPON FOR CERTIFICATION, WITH A PERSONAL
43 NET WORTH THAT DOES NOT EXCEED THREE MILLION FIVE HUNDRED THOUSAND
44 DOLLARS, AS ADJUSTED ANNUALLY FOR INFLATION ACCORDING TO THE CONSUMER
45 PRICE INDEX; AND

46 (VII) BE AN ENTERPRISE THAT IS A SMALL BUSINESS PURSUANT TO SUBDIVI-
47 SION TWENTY OF SECTION THREE HUNDRED TEN OF THIS ARTICLE.

48 (b) The director shall work with all municipal corporations that have
49 a municipal minority and women-owned business enterprise program to
50 develop standards to accept state certification to meet the municipal
51 corporation minority and women-owned business enterprise certification
52 standards.

53 (c) The director shall establish a procedure enabling the division to
54 accept federal certification verification for minority and women-owned
55 business enterprise applicants, PROVIDED SAID STANDARDS COMPORT WITH
56 THOSE REQUIRED BY THE STATE MINORITY AND WOMEN-OWNED BUSINESS PROGRAM,

1 in lieu of requiring the applicant to complete the state certification
2 process. The director shall promulgate rules and regulations to set
3 forth criteria for the acceptance of federal certification.

4 S 9. Section 316 of the executive law, as added by chapter 261 of the
5 laws of 1988, is amended to read as follows:

6 S 316. Enforcement. Upon receipt by the director of a complaint by a
7 contracting agency that a contractor has violated the provisions of a
8 state contract which have been included to comply with the provisions of
9 this article or of a contractor that a contracting agency has violated
10 such provisions or has failed or refused to issue a waiver where one has
11 been applied for pursuant to subdivision [five] SIX of section three
12 hundred thirteen of this article or has denied such application, the
13 director shall attempt to resolve the matter giving rise to such
14 complaint. If efforts to resolve such matter to the satisfaction of all
15 parties are unsuccessful, the director shall refer the matter, within
16 thirty days of the receipt of the complaint, to the [American Arbitration Association for proceeding thereon] DIVISION'S HEARING OFFICERS.
17 Upon conclusion of the [arbitration proceedings] ADMINISTRATIVE HEARING,
18 the [arbitrator] HEARING OFFICER shall submit to the director his or her
19 [award] DECISION regarding the alleged violation of the contract and
20 recommendations regarding the imposition of sanctions, fines or penalties.
21 [The director shall either: (a) adopt the recommendation of the
22 arbitrator; or (b) determine that no sanctions, fines or penalties
23 should be imposed; or (c) modify the recommendation of the arbitrator,
24 provided that such modification shall not expand upon any sanction
25 recommended or impose any new sanction, or increase the amount of any
26 recommended fine or penalty.] The director, within ten days of receipt
27 of the [arbitrator's award and recommendations] DECISION, shall file a
28 determination of such matter and shall cause a copy of such determination
29 along with a copy of this article to be served upon the [respondent]
30 CONTRACTOR by personal service or by certified mail return receipt
31 requested. The [award] DECISION of the [arbitrator] HEARING OFFICER
32 shall be final and may only be vacated or modified as provided in article
33 [seventy-five] SEVENTY-EIGHT of the civil practice law and rules
34 upon an application made within the time provided by [section seventy-five
35 hundred eleven of the civil practice law and rules] SUCH ARTICLE.
36 The determination of the director as to the imposition of any fines,
37 sanctions or penalties shall be reviewable pursuant to article seventy-eight
38 of the civil practice law and rules. THE PENALTIES IMPOSED FOR ANY
39 VIOLATION WHICH IS PREMISED UPON EITHER A FRAUDULENT OR INTENTIONAL
40 MISREPRESENTATION BY THE CONTRACTOR OR THE CONTRACTOR'S WILLFUL AND
41 INTENTIONAL DISREGARD OF THE MINORITY AND WOMEN-OWNED PARTICIPATION
42 REQUIREMENT INCLUDED IN THE CONTRACT MAY INCLUDE A DETERMINATION THAT
43 THE CONTRACTOR SHALL BE INELIGIBLE TO SUBMIT A BID TO ANY CONTRACTING
44 AGENCY OR BE AWARDED ANY SUCH CONTRACT FOR A PERIOD NOT TO EXCEED ONE
45 YEAR FOLLOWING THE FINAL DETERMINATION; PROVIDED HOWEVER, IF A CONTRACTOR
46 HAS PREVIOUSLY BEEN DETERMINED TO BE INELIGIBLE TO SUBMIT A BID
47 PURSUANT TO THIS SECTION, THE PENALTIES IMPOSED FOR ANY SUBSEQUENT
48 VIOLATION, IF SUCH VIOLATION OCCURS WITHIN FIVE YEARS OF THE FIRST
49 VIOLATION, MAY INCLUDE A DETERMINATION THAT THE CONTRACTOR SHALL BE
50 INELIGIBLE TO SUBMIT A BID TO ANY CONTRACTING AGENCY OR BE AWARDED ANY
51 SUCH CONTRACT FOR A PERIOD NOT TO EXCEED FIVE YEARS FOLLOWING THE FINAL
52 DETERMINATION. THE DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT
53 SHALL MAINTAIN A WEBSITE LISTING ALL CONTRACTORS THAT HAVE BEEN DEEMED
54 INELIGIBLE TO SUBMIT A BID PURSUANT TO THIS SECTION AND THE DATE AFTER
55 WHICH EACH CONTRACTOR SHALL ONCE AGAIN BECOME ELIGIBLE TO SUBMIT BIDS.
56

1 S 10. The executive law is amended by adding a new section 316-a to
2 read as follows:

3 S 316-A. PROHIBITIONS IN CONTRACTS; VIOLATIONS. EVERY CONTRACTING
4 AGENCY SHALL INCLUDE A PROVISION IN ITS STATE CONTRACTS EXPRESSLY
5 PROVIDING THAT ANY CONTRACTOR WHO WILLFULLY AND INTENTIONALLY FAILS TO
6 COMPLY WITH THE MINORITY AND WOMEN-OWNED PARTICIPATION REQUIREMENTS OF
7 THIS ARTICLE AS SET FORTH IN SUCH STATE CONTRACT SHALL BE LIABLE TO THE
8 CONTRACTING AGENCY FOR LIQUIDATED OR OTHER APPROPRIATE DAMAGES AND SHALL
9 PROVIDE FOR OTHER APPROPRIATE REMEDIES ON ACCOUNT OF SUCH BREACH. A
10 CONTRACTING AGENCY THAT ELECTS TO PROCEED AGAINST A CONTRACTOR FOR
11 BREACH OF CONTRACT AS PROVIDED IN THIS SECTION SHALL BE PRECLUDED FROM
12 SEEKING ENFORCEMENT PURSUANT TO SECTION THREE HUNDRED SIXTEEN OF THIS
13 ARTICLE; PROVIDED HOWEVER, THAT THE CONTRACTING AGENCY SHALL INCLUDE A
14 SUMMARY OF ALL ENFORCEMENT ACTIONS UNDERTAKEN PURSUANT TO THIS SECTION
15 IN ITS ANNUAL REPORT SUBMITTED PURSUANT TO SUBDIVISION THREE OF SECTION
16 THREE HUNDRED FIFTEEN OF THIS ARTICLE.

17 S 11. Severability. If any clause, sentence, paragraph, section or
18 part of this act shall be adjudged by any court of competent jurisdic-
19 tion to be invalid, the judgment shall not affect, impair, or invalidate
20 the remainder thereof, but shall be confined in its operation to the
21 clause, sentence, paragraph, section or part of this act directly
22 involved in the controversy in which the judgment shall have been
23 rendered.

24 S 12. The state financial system is authorized and directed to assist
25 the director of the office of minority and women's business development
26 in the implementation of this act.

27 S 13. The opening paragraph of subdivision (h) of section 121 of
28 chapter 261 of the laws of 1988, amending the state finance law and
29 other laws relating to the New York state infrastructure trust fund, as
30 amended by chapter 628 of the laws of 2003, is amended to read as
31 follows:

32 The provisions of section sixty-two through sixty-six of this act
33 shall expire on December thirty-first, two thousand [eighteen] SIXTEEN,
34 except that:

35 S 14. This act shall take effect on the ninetieth day after it shall
36 have become a law; provided however, that the amendments to article 15-A
37 of the executive law made by sections two, four, five, six, seven,
38 eight, nine, and ten of this act shall not affect the expiration of such
39 article and shall be deemed to expire therewith; provided, further that
40 the director of the division of minority and women's business develop-
41 ment shall be authorized to commence the rulemaking process required
42 pursuant to sections five and six of this act prior to the effective
43 date of this act; and provided further that any minority business enter-
44 prise and women's business enterprise certified prior to the effective
45 date of this section shall not be subject to any certification
46 restriction provided for in this act until such time as the certif-
47 ication is renewed.