

10699

I N A S S E M B L Y

April 14, 2010

Introduced by M. of A. P. RIVERA -- read once and referred to the
Committee on Governmental Operations

AN ACT to amend the executive law and the general municipal law, in
relation to participation by minority group members and women with
respect to city contracts

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

1 Section 1. Subdivisions 2, 3, 9, 13 and 14 of section 310 of the exec-
2 utive law, subdivisions 2, 3, 9 and 14 as added by chapter 261 of the
3 laws of 1988, subdivision 13 as amended by chapter 506 of the laws of
4 2009, are amended and two new subdivisions 1-a and 1-b are added to read
5 as follows:

6 1-A. "CITY" SHALL MEAN A CITY IN THIS STATE.

7 1-B. "CITY AGENCY" SHALL MEAN (A) ANY CITY DEPARTMENT, OR (B) ANY
8 DIVISION, BOARD, COMMISSION OR BUREAU OF ANY CITY DEPARTMENT.

9 2. "Contracting agency" shall mean a state agency OR A CITY AGENCY
10 which is a party or a proposed party to a state contract or, in the case
11 of a state contract described in paragraph (c) of subdivision thirteen
12 of this section, shall mean the New York state housing finance agency,
13 housing trust fund corporation or affordable housing corporation, which-
14 ever has made or proposes to make the grant or loan for the state
15 assisted housing project.

16 3. "Contractor" shall mean an individual, a business enterprise,
17 including a sole proprietorship, a partnership, a corporation, a not-
18 for-profit corporation, or any other party to a state OR CITY contract,
19 or a bidder in conjunction with the award of a state OR CITY contract or
20 a proposed party to a state OR CITY contract.

21 9. "Utilization plan" shall mean a plan prepared by a contractor and
22 submitted in connection with a proposed state OR CITY contract. The
23 utilization plan shall identify certified minority or women-owned busi-
24 ness enterprises, if known, that have committed to perform work in
25 connection with the proposed state OR CITY contract as well as any such
26 enterprises, if known, which the contractor intends to use in connection
27 with the contractor's performance of the proposed state OR CITY

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

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1 contract. The plan shall specifically contain a list, including the
2 name, address and telephone number, of each certified enterprise with
3 which the contractor intends to subcontract.

4 13. ["State contract"] "CONTRACT" shall mean: (a) a written agreement
5 or purchase order instrument, providing for a total expenditure in
6 excess of twenty-five thousand dollars, whereby a contracting agency is
7 committed to expend or does expend funds in return for labor, services
8 including but not limited to legal, financial and other professional
9 services, supplies, equipment, materials or any combination of the fore-
10 going, to be performed for, or rendered or furnished to the contracting
11 agency; (b) a written agreement in excess of one hundred thousand
12 dollars whereby a contracting agency is committed to expend or does
13 expend funds for the acquisition, construction, demolition, replacement,
14 major repair or renovation of real property and improvements thereon;
15 and (c) a written agreement in excess of one hundred thousand dollars
16 whereby the owner of a state assisted housing project is committed to
17 expend or does expend funds for the acquisition, construction, demoli-
18 tion, replacement, major repair or renovation of real property and
19 improvements thereon for such project.

20 14. "Subcontract" shall mean an agreement providing for a total
21 expenditure in excess of twenty-five thousand dollars for the
22 construction, demolition, replacement, major repair, renovation, plan-
23 ning or design of real property and improvements thereon between a
24 contractor and any individual or business enterprise, including a sole
25 proprietorship, partnership, corporation, or not-for-profit corporation,
26 in which a portion of a contractor's obligation under a state OR CITY
27 contract is undertaken or assumed, but shall not include any
28 construction, demolition, replacement, major repair, renovation, plan-
29 ning or design of real property or improvements thereon for the benefi-
30 cial use of the contractor.

31 S 2. Paragraphs (a) and (e) of subdivision 3 of section 311 of the
32 executive law, paragraph (a) as added by chapter 261 of the laws of 1988
33 and paragraph (e) as amended by chapter 55 of the laws of 1992, are
34 amended to read as follows:

35 (a) to encourage and assist contracting agencies in their efforts to
36 increase participation by minority and women-owned business enterprises
37 on state AND CITY contracts and subcontracts so as to facilitate the
38 award of a fair share of such contracts to them;

39 (e) on January first of each year report to the governor and the
40 chairpersons of the senate finance and assembly ways and means commit-
41 tees on the level of minority and women-owned business enterprises
42 participating in each agency's contracts for goods and services and on
43 activities of the office and effort by each contracting agency to
44 promote employment of minority group members and women, and to promote
45 and increase participation by certified businesses with respect to state
46 AND CITY contracts and subcontracts so as to facilitate the award of a
47 fair share of state AND CITY contracts to such businesses. The comp-
48 troller shall assist the division in collecting information on the
49 participation of certified business for each contracting agency. Such
50 report may recommend new activities and programs to effectuate the
51 purposes of this article;

52 S 3. Subdivision 2 of section 311-a of the executive law, as added by
53 section 4 of part BB of chapter 59 of the laws of 2006, is amended to
54 read as follows:

55 2. The advocate shall act as a liaison for minority and women-owned
56 business enterprises (MWBES) to assist them in obtaining technical,

1 managerial, financial and other business assistance for certified busi-
2 nesses and applicants. The advocate shall investigate complaints brought
3 by or on behalf of MWBEs concerning certification delays and instances
4 of violations of law by state AND CITY agencies. The statewide advocate
5 shall assist certified businesses and applicants in the certification
6 process. Other functions of the statewide advocate shall be directed by
7 the commissioner. The advocate may request and the director may appoint
8 staff and employees of the division of minority and women business
9 development to support the administration of the office of the statewide
10 advocate.

11 S 4. The opening paragraph and paragraph (c) of subdivision 1 of
12 section 312 of the executive law, as added by chapter 261 of the laws of
13 1988, are amended to read as follows:

14 All state AND CITY contracts and all documents soliciting bids or
15 proposals for state AND CITY contracts shall contain or make reference
16 to the following provisions:

17 (c) The contractor shall state, in all solicitations or advertisements
18 for employees, that, in the performance of the state OR CITY contract,
19 all qualified applicants will be afforded equal employment opportunities
20 without discrimination because of race, creed, color, national origin,
21 sex, age, disability or marital status.

22 S 5. Subdivision 3 of section 312 of the executive law, as added by
23 chapter 261 of the laws of 1988, is amended to read as follows:

24 3. The provisions of this section shall not be binding upon contrac-
25 tors or subcontractors in the performance of work or the provision of
26 services or any other activity that are unrelated, separate or distinct
27 from the state OR CITY contract as expressed by its terms.

28 S 6. Subdivisions 1, 2, 5 and 8 of section 313 of the executive law,
29 as added by chapter 261 of the laws of 1988, are amended to read as
30 follows:

31 1. The director shall promulgate rules and regulations that provide
32 measures and procedures to ensure that certified businesses shall be
33 given the opportunity for meaningful participation in the performance of
34 state AND CITY contracts and to identify those state AND CITY contracts
35 for which certified businesses may best bid to actively and affirmative-
36 ly promote and assist their participation in the performance of state
37 AND CITY contracts so as to facilitate the award of a fair share of
38 state AND CITY contracts to such businesses. Such rules and regulations
39 as they pertain to any particular agency shall be developed after
40 consultation with the contracting agency. Nothing in the provisions of
41 this article shall be construed to limit the ability of any certified
42 business to bid on any contract.

43 2. Contracting agencies shall include or require to be included with
44 respect to state AND CITY contracts for the acquisition, construction,
45 demolition, replacement, major repair or renovation of real property and
46 improvements thereon, such provisions as may be necessary to effectuate
47 the provisions of this section in every bid specification and state AND
48 CITY contract, including, but not limited to: (a) provisions requiring
49 contractors to make a good faith effort to solicit active participation
50 by enterprises identified in the directory of certified businesses
51 provided to the contracting agency by the office; (b) requiring the
52 parties to agree as a condition of entering into such contract, to be
53 bound by the provisions of section three hundred sixteen of this arti-
54 cle; and (c) requiring the contractor to include the provisions set
55 forth in paragraphs (a) and (b) above in every subcontract in a manner
56 that the provisions will be binding upon each subcontractor as to work

1 in connection with such contract. Provided, however, that no such
2 provisions shall be binding upon contractors or subcontractors in the
3 performance of work or the provision of services that are unrelated,
4 separate or distinct from the state OR CITY contract as expressed by its
5 terms, and nothing in this section shall authorize the director or any
6 contracting agency to impose any requirement on a contractor or subcon-
7 tractor except with respect to a state OR CITY contract.

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

31 8. If, after the review of a contractor's minority and women owned
32 business utilization plan or review of a periodic compliance report and
33 after such contractor has been afforded an opportunity to respond to a
34 notice of deficiency issued by the contracting agency in connection
35 therewith, it appears that a contractor is failing or refusing to comply
36 with the minority and women-owned business participation requirements as
37 set forth in the state OR CITY contract and where no waiver from such
38 requirements has been granted, the contracting agency may file a written
39 complaint with the director pursuant to section three hundred sixteen of
40 this article setting forth the facts and circumstances giving rise to
41 the contracting agency's complaint together with a demand for relief.
42 The contracting agency shall serve a copy of such complaint upon the
43 contractor by personal service or by certified mail, return receipt
44 requested. The contractor shall be afforded an opportunity to respond to
45 such complaint in writing.

46 S 7. Paragraph (a) of subdivision 4 of section 313 of the executive
47 law, as amended by chapter 429 of the laws of 2009, is amended to read
48 as follows:

49 (a) Contracting agencies shall administer the rules and regulations
50 promulgated by the director to ensure compliance with the provisions of
51 this section. Such rules and regulations: shall require a contractor to
52 submit a utilization plan after bids are opened, when bids are required,
53 but prior to the award of a state OR CITY contract; shall require the
54 contracting agency to review the utilization plan submitted by the
55 contractor and to post the utilization plan and any waivers of compli-
56 ance issued pursuant to subdivision five of this section on the website

1 of the contracting agency within a reasonable period of time as estab-
2 lished by the director; shall require the contracting agency to notify
3 the contractor in writing within a period of time specified by the
4 director as to any deficiencies contained in the contractor's utiliza-
5 tion plan; shall require remedy thereof within a period of time speci-
6 fied by the director; shall require the contractor to submit periodic
7 compliance reports relating to the operation and implementation of any
8 utilization plan; shall allow a contractor to apply for a partial or
9 total waiver of the minority and women-owned business enterprise partic-
10 ipation requirements pursuant to subdivisions five and six of this
11 section; shall allow a contractor to file a complaint with the director
12 pursuant to subdivision seven of this section in the event a contracting
13 agency has failed or refused to issue a waiver of the minority and
14 women-owned business enterprise participation requirements or has denied
15 such request for a waiver; and shall allow a contracting agency to file
16 a complaint with the director pursuant to subdivision eight of this
17 section in the event a contractor is failing or has failed to comply
18 with the minority and women-owned business enterprise participation
19 requirements set forth in the state OR CITY contract where no waiver has
20 been granted.

21 S 8. Subdivision 1 of section 314 of the executive law, as added by
22 chapter 261 of the laws of 1988, is amended to read as follows:

23 1. The director shall promulgate rules and regulations providing for
24 the establishment of a statewide certification program including rules
25 and regulations governing the approval, denial or revocation of any such
26 certification; PROVIDED, HOWEVER, THAT THE OWNERS OF A WOMEN-OWNED BUSI-
27 NESS ENTERPRISE SEEKING CERTIFICATION PURSUANT TO THIS SECTION SHALL NOT
28 BE REQUIRED TO PROVIDE THE DIRECTOR WITH ANY DOCUMENTS OR INFORMATION
29 OTHER THAN COPIES OF THE OWNERS' BIRTH CERTIFICATE AND COPIES OF A FORM
30 OF IDENTIFICATION WITH A PHOTOGRAPHIC IMAGE OF THE HOLDER THEREOF; AND
31 THE OWNERS OF A MINORITY-OWNED BUSINESS ENTERPRISE SEEKING CERTIFICATION
32 PURSUANT TO THIS SECTION SHALL NOT BE REQUIRED TO PROVIDE THE DIRECTOR
33 WITH ANY DOCUMENT OR INFORMATION OTHER THAN PROOF OF THE OWNERS' ORIGIN
34 AND COPIES OF A FORM OF IDENTIFICATION WITH A PHOTOGRAPHIC IMAGE OF THE
35 HOLDER THEREOF. Such rules and regulations shall include, but not be
36 limited to, such matters as may be required to ensure that the estab-
37 lished procedures thereunder shall at least be in compliance with the
38 code of fair procedure set forth in section seventy-three of the civil
39 rights law. NOTWITHSTANDING ANY RULES AND REGULATIONS PROMULGATED
40 PURSUANT TO THIS SUBDIVISION:

41 (A) EVERY BUSINESS ENTERPRISE CERTIFIED FOR PARTICIPATION IN A MINORI-
42 TY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM OPERATED BY ANY CITY
43 SHALL BE DEEMED TO BE CERTIFIED FOR THE PURPOSES OF THIS ARTICLE; AND

44 (B) EVERY BUSINESS ENTERPRISE WHICH IS CERTIFIED FOR PARTICIPATION IN
45 THE MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM PURSUANT TO
46 THIS ARTICLE SHALL BE DEEMED TO BE CERTIFIED FOR PARTICIPATION IN ANY
47 MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM OPERATED BY A CITY.

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

50 S 316. Enforcement. Upon receipt by the director of a complaint by a
51 contracting agency that a contractor has violated the provisions of a
52 state OR CITY contract which have been included to comply with the
53 provisions of this article or of a contractor that a contracting agency
54 has violated such provisions or has failed or refused to issue a waiver
55 where one has been applied for pursuant to subdivision five of section
56 three hundred thirteen of this article or has denied such application,

1 the director shall attempt to resolve the matter giving rise to such
2 complaint. If efforts to resolve such matter to the satisfaction of all
3 parties are unsuccessful, the director shall refer the matter, within
4 thirty days of the receipt of the complaint, to the American Arbitration
5 Association for proceeding thereon. Upon conclusion of the arbitration
6 proceedings, the arbitrator shall submit to the director his or her
7 award regarding the alleged violation of the contract and recommenda-
8 tions regarding the imposition of sanctions, fines or penalties. The
9 director shall either: (a) adopt the recommendation of the arbitrator;
10 or (b) determine that no sanctions, fines or penalties should be
11 imposed; or (c) modify the recommendation of the arbitrator, provided
12 that such modification shall not expand upon any sanction recommended or
13 impose any new sanction, or increase the amount of any recommended fine
14 or penalty. The director, within ten days of receipt of the arbitrator's
15 award and recommendations, shall file a determination of such matter and
16 shall cause a copy of such determination along with a copy of this arti-
17 cle to be served upon the respondent by personal service or by certified
18 mail return receipt requested. The award of the arbitrator shall be
19 final and may only be vacated or modified as provided in article seven-
20 ty-five of the civil practice law and rules upon an application made
21 within the time provided by section seventy-five hundred eleven of the
22 civil practice law and rules. The determination of the director as to
23 the imposition of any fines, sanctions or penalties shall be reviewable
24 pursuant to article seventy-eight of the civil practice law and rules.

25 S 10. Section 317 of the executive law, as added by chapter 261 of the
26 laws of 1988, is amended to read as follows:

27 S 317. Superseding effect of article with respect to state law. The
28 provisions of this article shall supersede any other provision of state
29 law, which expressly implements or mandates an equal employment opportu-
30 nity program or a program for securing participation by minority and
31 women-owned business enterprises, concerning action to be taken by any
32 party to a state OR CITY contract, to which the provisions of this arti-
33 cle apply; provided, however, that the provisions of any state law, not
34 as hereinabove superseded, which expressly implement or mandate such
35 programs shall remain unimpaired by the provisions of this article,
36 except that the provisions of any such law shall be construed as if the
37 provisions of subdivisions five, six, seven and eight of section three
38 hundred thirteen and section three hundred sixteen of this article were
39 fully set forth therein and made applicable only to complaints of
40 violations under such provisions of law occurring on or after September
41 first, nineteen hundred eighty-eight; provided, further, that nothing
42 contained in this article shall be construed to limit, impair, or other-
43 wise restrict any state OR CITY agency's authority or discretionary
44 power in effect prior to the enactment of this article to establish or
45 continue, by rule, regulation or resolution, an equal opportunity
46 program or a program for securing participation of minority and women-
47 owned business enterprises with regard to banking relationships, the
48 issuance of insurance policies or contracts for the sale of bonds, notes
49 or other securities; and, provided further, that nothing contained in
50 the immediately preceding proviso shall be construed to create, impair,
51 alter, limit, modify, enlarge, abrogate or restrict any agency's author-
52 ity or discretionary power with respect to an equal opportunity program
53 or a program for securing participation of minority and women-owned
54 enterprises.

55 S 11. The general municipal law is amended by adding a new section
56 103-g to read as follows:

1 S 103-G. MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAMS;
2 CITIES. EVERY CITY WHICH ESTABLISHES A MINORITY AND WOMEN-OWNED BUSINESS
3 ENTERPRISE PROGRAM SHALL ESTABLISH A CERTIFICATION FOR ELIGIBILITY
4 THEREFOR WHICH, TO THE EXTENT PRACTICABLE, COMPLIES WITH THE RULES AND
5 REGULATIONS ESTABLISHED BY THE DIRECTOR OF THE DIVISION OF MINORITY AND
6 WOMEN'S BUSINESS DEVELOPMENT PURSUANT TO SUBDIVISION ONE OF SECTION
7 THREE HUNDRED FOURTEEN OF THE EXECUTIVE LAW.

8 S 12. This act shall take effect on the first of January next succeed-
9 ing the date on which it shall have become a law; provided, however,
10 that the amendments to article 15-A of the executive law, made by
11 sections one through ten of this act, shall not affect the expiration of
12 such article and shall be deemed to expire therewith and; provided,
13 further, that effective immediately, the addition, amendment and/or
14 repeal of any rule or regulation necessary for the implementation of
15 this act on its effective date are authorized and directed to be made
16 and completed on or before such effective date.