S T A T E O F N E W Y O R K

4276

2011-2012 Regular Sessions

I N A S S E M B L Y

February 2, 2011

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 ASSEMBLY, DO ENACT AS FOLLOWS:

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

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

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

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

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

9. "Utilization plan" shall mean a plan prepared by a contractor and submitted in connection with a proposed state OR CITY contract. The utilization plan shall identify certified minority or women-owned business enterprises, if known, that have committed to perform work in

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

LBD01194-01-1

connection with the proposed state OR CITY contract as well as any such enterprises, if known, which the contractor intends to use in connection with the contractor's performance of the proposed state OR CITY contract. The plan shall specifically contain a list, including the name, address and telephone number, of each certified enterprise with which the contractor intends to subcontract.

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

14. "Subcontract" shall mean an agreement providing for a total expenditure in excess of twenty-five thousand dollars for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon between a contractor and any individual or business enterprise, including a sole proprietorship, partnership, corporation, or not-for-profit corporation, in which a portion of a contractor's obligation under a state OR CITY contract is undertaken or assumed, but shall not include any construction, demolition, replacement, major repair, renovation, planning or design of real property or improvements thereon for the beneficial use of the contractor.

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

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

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

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

2. The advocate shall act as a liaison for minority and women-owned business enterprises (MWBEs) to assist them in obtaining technical, managerial, financial and other business assistance for certified businesses and applicants. The advocate shall investigate complaints brought by or on behalf of MWBEs concerning certification delays and instances of violations of law by state AND CITY agencies. The statewide advocate shall assist certified businesses and applicants in the certification process. Other functions of the statewide advocate shall be directed by the commissioner. The advocate may request and the director may appoint staff and employees of the division of minority and women business development to support the administration of the office of the statewide advocate.

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

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

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

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

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

S 6. Subdivisions 1-a, 2, 3, 6 and 9 of section 313 of the executive law, subdivisions 1-a and 2 as added and subdivisions 3, 6 and 9 as amended by chapter 175 of the laws of 2010, are amended to read as follows:

1-a. The director shall ensure that each state agency AND CITY AGENCY has been provided with a copy of the two thousand ten disparity study.

2. The director shall promulgate rules and regulations pursuant to the goals established in subdivision one of this section that provide measures and procedures to ensure that certified minority and women-owned businesses shall be given the opportunity for maximum feasible participation in the performance of state AND CITY contracts and to assist in the agency's identification of those state contracts for which minority and women-owned certified businesses may best bid to actively and affirmatively promote and assist their participation in the performance of state OR CITY contracts so as to facilitate the agency's achievement of the maximum feasible portion of the goals for state OR CITY contracts to such businesses.

3. Solely for the purpose of providing the opportunity for meaningful participation by certified businesses in the performance of state AND CITY contracts as provided in this section, state AND CITY contracts shall include leases of real property by a state OR CITY agency to a lessee where: the terms of such leases provide for the construction, demolition, replacement, major repair or renovation of real property and improvements thereon by such lessee; and the cost of such construction,

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

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

9. If, after the review of a contractor's minority and women owned business utilization plan or review of a periodic compliance report and after such contractor has been afforded an opportunity to respond to a notice of deficiency issued by the contracting agency in connection therewith, it appears that a contractor is failing or refusing to comply with the minority and women-owned business participation requirements as set forth in the state OR CITY contract and where no waiver from such

requirements has been granted, the contracting agency may file a written complaint with the director pursuant to section three hundred sixteen of this article setting forth the facts and circumstances giving rise to the contracting agency's complaint together with a demand for relief. The contracting agency shall serve a copy of such complaint upon the contractor by personal service or by certified mail, return receipt requested. The contractor shall be afforded an opportunity to respond to such complaint in writing.

S 7. Paragraph (a) of subdivision 5 of section 313 of the executive law, as amended by chapter 175 of the laws of 2010, is amended to read as follows:

(a) Contracting agencies shall administer the rules and regulations promulgated by the director in a good faith effort to meet the maximum feasible portion of the agency's goals adopted pursuant to this article and the regulations of the director. Such rules and regulations: shall require a contractor to submit a utilization plan after bids are opened, when bids are required, but prior to the award of a state OR CITY contract; shall require the contracting agency to review the utilization plan submitted by the contractor and to post the utilization plan and any waivers of compliance issued pursuant to subdivision six of this section on the website of the contracting agency within a reasonable period of time as established by the director; shall require the contracting agency to notify the contractor in writing within a period of time specified by the director as to any deficiencies contained in the contractor's utilization plan; shall require remedy thereof within a period of time specified by the director; shall require the contractor to submit periodic compliance reports relating to the operation and implementation of any utilization plan; shall not allow any automatic waivers but shall allow a contractor to apply for a partial or total waiver of the minority and women-owned business enterprise participation requirements pursuant to subdivisions six and seven of this section; shall allow a contractor to file a complaint with the director pursuant to subdivision eight of this section in the event a contracting agency has failed or refused to issue a waiver of the minority and women-owned business enterprise participation requirements or has denied such request for a waiver; and shall allow a contracting agency to file a complaint with the director pursuant to subdivision nine of this section in the event a contractor is failing or has failed to comply with the minority and women-owned business enterprise participation requirements set forth in the state OR CITY contract where no waiver has been granted.

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

1. The director shall promulgate rules and regulations providing for the establishment of a statewide certification program including rules and regulations governing the approval, denial or revocation of any such certification; PROVIDED, HOWEVER, THAT THE OWNERS OF A WOMEN-OWNED BUSINESS ENTERPRISE SEEKING CERTIFICATION PURSUANT TO THIS SECTION SHALL NOT BE REQUIRED TO PROVIDE THE DIRECTOR WITH ANY DOCUMENTS OR INFORMATION OTHER THAN COPIES OF THE OWNERS' BIRTH CERTIFICATE AND COPIES OF A FORM OF IDENTIFICATION WITH A PHOTOGRAPHIC IMAGE OF THE HOLDER THEREOF; AND THE OWNERS OF A MINORITY-OWNED BUSINESS ENTERPRISE SEEKING CERTIFICATION PURSUANT TO THIS SECTION SHALL NOT BE REQUIRED TO PROVIDE THE DIRECTOR WITH ANY DOCUMENT OR INFORMATION OTHER THAN PROOF OF THE OWNERS' ORIGIN AND COPIES OF A FORM OF IDENTIFICATION WITH A PHOTOGRAPHIC IMAGE OF THE HOLDER THEREOF. Such rules and regulations shall include, but not be

limited to, such matters as may be required to ensure that the established procedures thereunder shall at least be in compliance with the code of fair procedure set forth in section seventy-three of the civil rights law. NOTWITHSTANDING ANY RULES AND REGULATIONS PROMULGATED PURSUANT TO THIS SUBDIVISION:

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

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

S 9. Section 316 of the executive law, as amended by chapter 175 of the laws of 2010, is amended to read as follows:

S 316. Enforcement. Upon receipt by the director of a complaint by a contracting agency that a contractor has violated the provisions of a state OR CITY contract which have been included to comply with the provisions of this article or of a contractor that a contracting agency has violated such provisions or has failed or refused to issue a waiver where one has been applied for pursuant to subdivision six of section three hundred thirteen of this article or has denied such application, the director shall attempt to resolve the matter giving rise to such complaint. If efforts to resolve such matter to the satisfaction of all parties are unsuccessful, the director shall refer the matter, within thirty days of the receipt of the complaint, to the division's hearing officers. Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The director, within ten days of receipt of the decision, shall file a determination of such matter and shall cause a copy of such determination along with a copy of this article to be served upon the contractor by personal service or by certified mail return receipt requested. The decision of the hearing officer shall be final and may only be vacated or modified as provided in article seventy-eight of the civil practice law and rules upon an application made within the time provided by such article. The determination of the director as to the imposition of any fines, sanctions or penalties shall be reviewable pursuant to article seventy-eight of the civil practice law and rules. The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include a determination that the contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such contract for a period not to exceed five years following the final determination. The division of minority and women's business development shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

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

S 317. Superseding effect of article with respect to state law. The provisions of this article shall supersede any other provision of state law, which expressly implements or mandates an equal employment opportunity program or a program for securing participation by minority and women-owned business enterprises, concerning action to be taken by any party to a state OR CITY contract, to which the provisions of this article apply; provided, however, that the provisions of any state law, not as hereinabove superseded, which expressly implement or mandate such programs shall remain unimpaired by the provisions of this article, except that the provisions of any such law shall be construed as if the provisions of subdivisions five, six, seven and eight of section three hundred thirteen and section three hundred sixteen of this article were fully set forth therein and made applicable only to complaints of violations under such provisions of law occurring on or after September first, nineteen hundred eighty-eight; provided, further, that nothing contained in this article shall be construed to limit, impair, or otherwise restrict any state OR CITY agency's authority or discretionary power in effect prior to the enactment of this article to establish or continue, by rule, regulation or resolution, an equal opportunity program or a program for securing participation of minority and women-owned business enterprises with regard to banking relationships, the issuance of insurance policies or contracts for the sale of bonds, notes or other securities; and, provided further, that nothing contained in the immediately preceding proviso shall be construed to create, impair, alter, limit, modify, enlarge, abrogate or restrict any agency's authority or discretionary power with respect to an equal opportunity program or a program for securing participation of minority and women-owned enterprises.

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

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

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