

4425

2011-2012 Regular Sessions

I N A S S E M B L Y

February 3, 2011

Introduced by M. of A. P. RIVERA, DESTITO, TOWNS, PERRY, CLARK, MILLMAN, PEOPLES-STOKES, ROBINSON, NOLAN, SCHROEDER -- Multi-Sponsored by -- M. of A. JACOBS -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the economic development law, the executive law, the state finance law and the public authorities law, in relation to funding certain mandates set forth in the economic development law, strengthening certain provisions of the executive law as it relates to increasing procurement opportunities for minority and women-owned business enterprises, and strengthening reporting and compliance by state agencies and contracts within article 15-A of the executive law

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

1 Section 1. The economic development law is amended by adding a new
2 section 118-a to read as follows:
3 S 118-A. FUNDING OF MANDATES. NOT LESS THAN FIFTEEN MILLION DOLLARS OF
4 MONIES FROM THE BUDGET OF THE EMPIRE STATE DEVELOPMENT CORPORATION,
5 FOLLOWING APPROPRIATION BY THE LEGISLATURE FOR THIS PURPOSE AND THE
6 FURTHER ALLOCATION BY THE COMMISSIONER, SHALL BE MADE AVAILABLE ANNUALLY
7 TO FUND THE MANDATES SET FORTH IN SECTION ONE HUNDRED EIGHTEEN OF THIS
8 ARTICLE, SPECIFICALLY INCLUDING THE PROVISION OF TECHNICAL ASSISTANCE
9 AND ENTERPRISE ASSISTANCE PROGRAMS PURSUANT TO SUBDIVISIONS SEVEN,
10 EIGHT, NINE AND TEN OF SECTION ONE HUNDRED EIGHTEEN OF THIS ARTICLE.
11 S 2. Subdivision 3 of section 313 of the executive law, as amended by
12 chapter 175 of the laws of 2010, is amended to read as follows:
13 3. Solely for the purpose of providing the opportunity for meaningful
14 participation by certified businesses in the performance of state
15 contracts as provided in this section, state contracts shall include
16 leases of real property by a state agency to a lessee where: the terms
17 of such leases provide for the construction, demolition, replacement,
18 major repair or renovation of real property and improvements thereon by

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

LBD04150-01-1

1 such lessee; and the cost of such construction, demolition, replacement,
2 major repair or renovation of real property and improvements thereon
3 shall exceed the sum of one hundred thousand dollars. Reports to the
4 director pursuant to section three hundred fifteen of this article shall
5 include activities with respect to all such state contracts. Contracting
6 agencies shall include or require to be included with respect to state
7 contracts [for the acquisition, construction, demolition, replacement,
8 major repair or renovation of real property and improvements thereon,]
9 such provisions as may be necessary to effectuate the provisions of this
10 section in every bid specification and state contract, including, but
11 not limited to: (a) provisions requiring contractors to make a good
12 faith effort to solicit active participation by enterprises KNOWN TO BE
13 CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES OR identified in
14 the directory of certified businesses provided to the contracting agency
15 by the office; (b) requiring the parties to agree as a condition of
16 entering into such contract, to be bound by the provisions of section
17 three hundred sixteen of this article; and (c) requiring the contractor
18 to include the provisions set forth in paragraphs (a) and (b) of this
19 subdivision in every subcontract in a manner that the provisions will be
20 binding upon each subcontractor as to work in connection with such
21 contract. Provided, however, that no such provisions shall be binding
22 upon contractors or subcontractors in the performance of work or the
23 provision of services that are unrelated, separate or distinct from the
24 state contract as expressed by its terms, and nothing in this section
25 shall authorize the director or any contracting agency to impose any
26 requirement on a contractor or subcontractor except with respect to a
27 state contract.

28 S 3. Subdivision 3 of section 315 of the executive law, as amended by
29 chapter 175 of the laws of 2010, is amended to read as follows:

30 3. Each contracting agency shall report to the director with respect
31 to activities undertaken to promote employment of minority group members
32 and women and promote and increase participation by certified businesses
33 with respect to state contracts and subcontracts. Such reports shall be
34 submitted [periodically, but not less frequently than] annually[, as
35 required by the director] WITH QUARTERLY UPDATES, and shall include such
36 information as is necessary for the director to determine whether the
37 contracting agency and contractor have complied with the purposes of
38 this article AND SUCH SPECIFIC INFORMATION AS THE DIRECTOR MAY REQUEST,
39 including, without limitation, a summary of all waivers of the require-
40 ments of subdivisions six and seven of section three hundred thirteen of
41 this article allowed by the contracting agency during the period covered
42 by the report, including a description of the basis of the waiver
43 request and the rationale for granting any 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 S 4. Section 315 of the executive law is amended by adding a new
48 subdivision 8 to read as follows:

49 8. EACH STATE AGENCY, AUTHORITY OR MEMBER CORPORATION'S PERFORMANCE IN
50 ACHIEVING THE MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PARTICIPATION
51 AND OTHER DIVERSITY GOALS ESTABLISHED BY THIS ARTICLE SHALL BE PERIOD-
52 ICALLY REVIEWED AND EVALUATED BY THE DIRECTOR. IN THE EVENT THAT THE
53 DIRECTOR FINDS THAT A STATE AGENCY, AUTHORITY OR MEMBER CORPORATION HAS
54 NOT MADE REASONABLE, GOOD FAITH EFFORTS TO SET OR ACHIEVE REASONABLE
55 DIVERSITY GOALS FOR A PERIOD OF ONE YEAR FOLLOWING NOTICE OF NON-COMPLI-
56 ANCE BY THE DIRECTOR, THEN THE DIRECTOR SHALL HAVE THE POWER TO PARTIC-

1 IPATE IN THE CONTRACTING APPROVAL PROCESS OF SUCH STATE AGENCY, AUTHORI-
2 TY OR MEMBER CORPORATION UNTIL SUCH TIME AS THE DIRECTOR DEEMS SUCH
3 STATE AGENCY, AUTHORITY OR MEMBER CORPORATION TO BE IN COMPLIANCE WITH
4 THIS ARTICLE. SUCH POWER SHALL INCLUDE THE RIGHT TO PREVENT ANY STATE
5 AGENCY, AUTHORITY OR MEMBER CORPORATION DEEMED TO BE NON-COMPLIANT AS
6 SET FORTH ABOVE FROM MAKING CONTRACT AWARDS UNLESS THE DIRECTOR HAS
7 DEEMED SUCH AWARD TO BE IN COMPLIANCE WITH THIS ARTICLE.

8 S 5. Paragraph j of subdivision 1 of section 163 of the state finance
9 law, as added by chapter 83 of the laws of 1995, is amended to read as
10 follows:

11 j. "Best value" means the basis for awarding contracts for services to
12 the offerer which optimizes quality, cost and efficiency, among respon-
13 sive and responsible offerers AND WHICH ALSO TAKES INTO ACCOUNT THE
14 DIVERSITY PRACTICES OF EACH OFFERER. Such basis shall reflect, wherever
15 possible, objective and quantifiable analysis.

16 S 6. Subdivision 1 of section 163 of the state finance law is amended
17 by adding a new paragraph k to read as follows:

18 K. "DIVERSITY PRACTICES" MEANS THE OFFERER'S PRACTICES WITH RESPECT
19 TO: (I) APPOINTING, HIRING AND RETAINING MINORITY GROUP MEMBERS (AS
20 DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW) AND WOMEN IN SENIOR
21 MANAGEMENT POSITIONS OF THE OFFERER, INCLUDING AT THE LEVEL OF BOARD OF
22 DIRECTORS OR ITS COMPARABLE MANAGEMENT LEVEL BODY, AND AS SENIOR EXECU-
23 TIVE OFFICERS WITHIN THE OFFERER'S ORGANIZATION; (II) HIRING, TRAINING,
24 DEVELOPING, PROMOTING AND RETAINING MINORITY GROUP MEMBERS AND WOMEN
25 EMPLOYEES; (III) UTILIZING CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS
26 ENTERPRISES, AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR ANY
27 OTHER STATUTES OR REGULATIONS GOVERNING THE PARTICIPATION OF MINORITY
28 AND WOMEN-OWNED BUSINESS ENTERPRISES IN CONTRACTS AWARDED BY A STATE
29 AGENCY OR OTHER PUBLIC CORPORATION, AS SUBCONTRACTORS AND SUPPLIERS;
30 (IV) ENTERING INTO PARTNERSHIPS, JOINT VENTURES OR OTHER SIMILAR
31 ARRANGEMENTS WITH CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTER-
32 PRISES AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR OTHER
33 APPLICABLE STATUTE OR REGULATION GOVERNING AN ENTITY'S UTILIZATION OF
34 MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES; AND (V) UTILIZING SUBCON-
35 TRACTORS OR OTHER PARTNERS THAT DEMONSTRATE A SIGNIFICANT COMMITMENT TO
36 AND PROGRESS IN ATTRACTING, RETAINING AND PROMOTING DIVERSE TEAMS,
37 INCLUDING MINORITY GROUP MEMBERS AND WOMEN WITH RELEVANT DOMAIN EXPERI-
38 ENCE IN SENIOR MANAGEMENT OR STAFFING POSITIONS.

39 S 7. The opening paragraph of subparagraph (iv) of paragraph (b) of
40 subdivision 3 of section 2879 of the public authorities law, as amended
41 by chapter 383 of the laws of 1994, is amended to read as follows:

42 as used in this subparagraph, the term "professional firm" shall be
43 defined as any individual or sole proprietorship, partnership, corpo-
44 ration, association, or other legal entity permitted by law to practice
45 the professions [of architecture, engineering or surveying] OR OFFER
46 SERVICES RELATED TO ACCOUNTING, ARCHITECTURE, ASSET MANAGEMENT, ENGI-
47 NEERING, SURVEYING, FINANCIAL, LEGAL OR OTHER PROFESSIONAL SERVICES.

48 S 8. Paragraphs (k), (l), (m), (n), (o) and (p) of subdivision 3 of
49 section 2879 of the public authorities law, as relettered by chapter 174
50 of the laws of 2010, are relettered paragraphs (l), (m), (n), (o), (p)
51 and (q) and a new paragraph (k) is added to read as follows:

52 (K) REQUIREMENTS THAT THE EVALUATION CRITERIA FOR AWARDING ANY
53 PROCUREMENT CONTRACT OTHER THAN CONTRACTS REQUIRED BY LAW TO BE AWARDED
54 TO THE LOWEST RESPONSIBLE BIDDER PURSUANT TO SEALED BIDS INCLUDE AN
55 ASSESSMENT OF THE PROPOSER'S DIVERSITY PRACTICES. FOR PURPOSES OF THIS
56 PARAGRAPH, "DIVERSITY PRACTICES" SHALL MEAN THE PROPOSER'S PRACTICES

1 WITH RESPECT TO: (I) APPOINTING, HIRING AND RETAINING MINORITY GROUP
2 MEMBERS (AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW) AND WOMEN
3 IN SENIOR MANAGEMENT POSITIONS OF THE OFFERER, INCLUDING AT THE LEVEL OF
4 BOARD OF DIRECTORS OR ITS COMPARABLE MANAGEMENT LEVEL BODY, AND AS
5 SENIOR EXECUTIVE OFFICERS WITHIN THE OFFERER'S ORGANIZATION; (II)
6 HIRING, TRAINING, DEVELOPING, PROMOTING AND RETAINING MINORITY GROUP
7 MEMBERS AND WOMEN EMPLOYEES; (III) UTILIZING CERTIFIED MINORITY AND
8 WOMEN-OWNED BUSINESS ENTERPRISES, AS DEFINED IN ARTICLE FIFTEEN-A OF THE
9 EXECUTIVE LAW OR ANY OTHER STATUTES OR REGULATIONS GOVERNING THE PARTIC-
10 IPATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN CONTRACTS
11 AWARDED BY A STATE AGENCY OR OTHER PUBLIC CORPORATION, AS SUBCONTRACTORS
12 AND SUPPLIERS; (IV) ENTERING INTO PARTNERSHIPS, JOINT VENTURES OR OTHER
13 SIMILAR ARRANGEMENTS WITH THE CERTIFIED MINORITY AND WOMEN-OWNED BUSI-
14 NESS ENTERPRISES AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR
15 OTHER APPLICABLE STATUTE OR REGULATION GOVERNING AN ENTITY'S UTILIZATION
16 OF MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES; AND (V) UTILIZING
17 SUBCONTRACTORS OR OTHER PARTNERS THAT DEMONSTRATES A SIGNIFICANT COMMIT-
18 MENT TO AND PROGRESS IN ATTRACTING, RETAINING AND PROMOTING DIVERSE
19 TEAMS, INCLUDING MINORITY GROUP MEMBERS AND WOMEN WITH RELEVANT DOMAIN
20 EXPERIENCE IN SENIOR MANAGEMENT OR STAFFING POSITIONS.

21 IN THE CASE OF CONTRACTS REQUIRED BY LAW TO BE AWARDED TO THE LOWEST
22 RESPONSIBLE BIDDER PURSUANT TO SEALED BIDS, IN THE EVENT OF DETERMI-
23 NATION THAT TWO OR MORE BIDDERS HAVE PROVIDED BIDS THAT ARE ROUGHLY
24 EQUAL ANY DETERMINATION OF RESPONSIBILITY OR OTHER "TIE BREAKING"
25 FACTORS SHALL TAKE INTO ACCOUNT THE RESPECTIVE BIDDERS' RECORD OF
26 COMPLIANCE UNDER ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR OTHER APPLI-
27 CABLE STATUTES OR REGULATIONS GOVERNING THE PARTICIPATION OF MINORITY
28 AND WOMEN-OWNED BUSINESS ENTERPRISES IN CONTRACTS AWARDED BY A STATE
29 AGENCY OR OTHER PUBLIC CORPORATION.

30 S 9. Subdivision 6 of section 2879 of the public authorities law, as
31 amended by chapter 174 of the laws of 2010, is amended to read as
32 follows:

33 6. Each corporation, as part of the guidelines established pursuant to
34 subdivision three of this section, shall establish policies regarding
35 the preparation of publicly available reports on procurement contracts
36 entered into by such corporation. Such policies shall provide, at the
37 minimum, for the preparation of a report [no less frequently than annu-
38 ally] TO BE PUBLISHED ON AN ANNUAL BASIS WITH QUARTERLY UPDATES, summa-
39 rizing procurement activity by such corporation for the period of the
40 report, including a listing of all procurement contracts entered into,
41 all contracts entered into with New York state business enterprises and
42 the subject matter and value thereof, all contracts entered into with
43 certified minority or women-owned business enterprises and the subject
44 matter and value thereof, all referrals made and all penalties imposed
45 pursuant to section three hundred sixteen of the executive law, all
46 contracts entered into with foreign business enterprises, and the
47 subject matter and value thereof, the selection process used to select
48 such contractors, all procurement contracts which were exempt from the
49 publication requirements of article four-C of the economic development
50 law, the basis for any such exemption and the status of existing
51 procurement contracts. WITH RESPECT TO CONTRACTS ENTERED INTO WITH
52 MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES, SUCH CORPORATION SHALL
53 MAKE REPORTS TO THE DIVISION AS SET FORTH IN SECTION THREE HUNDRED
54 FIFTEEN OF THE EXECUTIVE LAW.

55 S 10. Severability clause. If any clause, sentence, paragraph, subdi-
56 vision, section or part of this act shall be adjudged by any court of

1 competent jurisdiction to be invalid, such judgment shall not affect,
2 impair, or invalidate the remainder thereof, but shall be confined in
3 its operation to the clause, sentence, paragraph, subdivision, section
4 or part thereof directly involved in the controversy in which such judg-
5 ment shall have been rendered. It is hereby declared to be the intent of
6 the legislature that this act would have been enacted even if such
7 invalid provision had not been included herein.

8 S 11. This act shall take effect on the ninetieth day after it shall
9 have become a law; provided that the amendments to article 15-A of the
10 executive law made by sections two, three and four of this act shall not
11 affect the expiration of such article and shall be deemed expired there-
12 with; and provided further that the amendments to section 163 of the
13 state finance law made by sections five and six of this act shall not
14 affect the repeal of such section and shall expire and be deemed
15 repealed therewith.