

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 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

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

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

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

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

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

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

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

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

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

16 S 4. The opening paragraph and paragraph (c) of subdivision 1 of
17 section 312 of the executive law, as added by chapter 261 of the laws of
18 1988, are amended to read as follows:

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

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

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

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

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

37 1-a. The director shall ensure that each state agency AND CITY AGENCY
38 has been provided with a copy of the two thousand ten disparity study.

39 2. The director shall promulgate rules and regulations pursuant to the
40 goals established in subdivision one of this section that provide meas-
41 ures and procedures to ensure that certified minority and women-owned
42 businesses shall be given the opportunity for maximum feasible partic-
43 ipation in the performance of state AND CITY contracts and to assist in
44 the agency's identification of those state contracts for which minority
45 and women-owned certified businesses may best bid to actively and affir-
46 matively promote and assist their participation in the performance of
47 state OR CITY contracts so as to facilitate the agency's achievement of
48 the maximum feasible portion of the goals for state OR CITY contracts to
49 such businesses.

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

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

27 6. Where it appears that a contractor cannot, after a good faith
28 effort, comply with the minority and women-owned business enterprise
29 participation requirements set forth in a particular state OR CITY
30 contract, a contractor may file a written application with the contract-
31 ing agency requesting a partial or total waiver of such requirements
32 setting forth the reasons for such contractor's inability to meet any or
33 all of the participation requirements together with an explanation of
34 the efforts undertaken by the contractor to obtain the required minority
35 and women-owned business enterprise participation. In implementing the
36 provisions of this section, the contracting agency shall consider the
37 number and types of minority and women-owned business enterprises
38 located in the region in which the state OR CITY contract is to be
39 performed, the total dollar value of the state OR CITY contract, the
40 scope of work to be performed and the project size and term. If, based
41 on such considerations, the contracting agency determines there is not a
42 reasonable availability of contractors on the list of certified business
43 to furnish services for the project, it shall issue a waiver of compli-
44 ance to the contractor. In making such determination, the contracting
45 agency shall first consider the availability of other business enter-
46 prises located in the region and shall thereafter consider the financial
47 ability of minority and women-owned businesses located outside the
48 region in which the contract is to be performed to perform the state OR
49 CITY contract.

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

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

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

12 (a) Contracting agencies shall administer the rules and regulations
13 promulgated by the director in a good faith effort to meet the maximum
14 feasible portion of the agency's goals adopted pursuant to this article
15 and the regulations of the director. Such rules and regulations: shall
16 require a contractor to submit a utilization plan after bids are opened,
17 when bids are required, but prior to the award of a state OR CITY
18 contract; shall require the contracting agency to review the utilization
19 plan submitted by the contractor and to post the utilization plan and
20 any waivers of compliance issued pursuant to subdivision six of this
21 section on the website of the contracting agency within a reasonable
22 period of time as established by the director; shall require the
23 contracting agency to notify the contractor in writing within a period
24 of time specified by the director as to any deficiencies contained in
25 the contractor's utilization plan; shall require remedy thereof within a
26 period of time specified by the director; shall require the contractor
27 to submit periodic compliance reports relating to the operation and
28 implementation of any utilization plan; shall not allow any automatic
29 waivers but shall allow a contractor to apply for a partial or total
30 waiver of the minority and women-owned business enterprise participation
31 requirements pursuant to subdivisions six and seven of this section;
32 shall allow a contractor to file a complaint with the director pursuant
33 to subdivision eight of this section in the event a contracting agency
34 has failed or refused to issue a waiver of the minority and women-owned
35 business enterprise participation requirements or has denied such
36 request for a waiver; and shall allow a contracting agency to file a
37 complaint with the director pursuant to subdivision nine of this section
38 in the event a contractor is failing or has failed to comply with the
39 minority and women-owned business enterprise participation requirements
40 set forth in the state OR CITY contract where no waiver has been grant-
41 ed.

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

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

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

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

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

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

15 S 316. Enforcement. Upon receipt by the director of a complaint by a
16 contracting agency that a contractor has violated the provisions of a
17 state OR CITY contract which have been included to comply with the
18 provisions of this article or of a contractor that a contracting agency
19 has violated such provisions or has failed or refused to issue a waiver
20 where one has been applied for pursuant to subdivision six of section
21 three hundred thirteen of this article or has denied such application,
22 the director shall attempt to resolve the matter giving rise to such
23 complaint. If efforts to resolve such matter to the satisfaction of all
24 parties are unsuccessful, the director shall refer the matter, within
25 thirty days of the receipt of the complaint, to the division's hearing
26 officers. Upon conclusion of the administrative hearing, the hearing
27 officer shall submit to the director his or her decision regarding the
28 alleged violation of the contract and recommendations regarding the
29 imposition of sanctions, fines or penalties. The director, within ten
30 days of receipt of the decision, shall file a determination of such
31 matter and shall cause a copy of such determination along with a copy of
32 this article to be served upon the contractor by personal service or by
33 certified mail return receipt requested. The decision of the hearing
34 officer shall be final and may only be vacated or modified as provided
35 in article seventy-eight of the civil practice law and rules upon an
36 application made within the time provided by such article. The determi-
37 nation of the director as to the imposition of any fines, sanctions or
38 penalties shall be reviewable pursuant to article seventy-eight of the
39 civil practice law and rules. The penalties imposed for any violation
40 which is premised upon either a fraudulent or intentional misrepresen-
41 tation by the contractor or the contractor's willful and intentional
42 disregard of the minority and women-owned participation requirement
43 included in the contract may include a determination that the contractor
44 shall be ineligible to submit a bid to any contracting agency or be
45 awarded any such contract for a period not to exceed one year following
46 the final determination; provided however, if a contractor has previous-
47 ly been determined to be ineligible to submit a bid pursuant to this
48 section, the penalties imposed for any subsequent violation, if such
49 violation occurs within five years of the first violation, may include a
50 determination that the contractor shall be ineligible to submit a bid to
51 any contracting agency or be awarded any such contract for a period not
52 to exceed five years following the final determination. The division of
53 minority and women's business development shall maintain a website list-
54 ing all contractors that have been deemed ineligible to submit a bid
55 pursuant to this section and the date after which each contractor shall
56 once again become eligible to submit bids.

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

3 S 317. Superseding effect of article with respect to state law. The
4 provisions of this article shall supersede any other provision of state
5 law, which expressly implements or mandates an equal employment opportu-
6 nity program or a program for securing participation by minority and
7 women-owned business enterprises, concerning action to be taken by any
8 party to a state OR CITY contract, to which the provisions of this arti-
9 cle apply; provided, however, that the provisions of any state law, not
10 as hereinabove superseded, which expressly implement or mandate such
11 programs shall remain unimpaired by the provisions of this article,
12 except that the provisions of any such law shall be construed as if the
13 provisions of subdivisions five, six, seven and eight of section three
14 hundred thirteen and section three hundred sixteen of this article were
15 fully set forth therein and made applicable only to complaints of
16 violations under such provisions of law occurring on or after September
17 first, nineteen hundred eighty-eight; provided, further, that nothing
18 contained in this article shall be construed to limit, impair, or other-
19 wise restrict any state OR CITY agency's authority or discretionary
20 power in effect prior to the enactment of this article to establish or
21 continue, by rule, regulation or resolution, an equal opportunity
22 program or a program for securing participation of minority and women-
23 owned business enterprises with regard to banking relationships, the
24 issuance of insurance policies or contracts for the sale of bonds, notes
25 or other securities; and, provided further, that nothing contained in
26 the immediately preceding proviso shall be construed to create, impair,
27 alter, limit, modify, enlarge, abrogate or restrict any agency's author-
28 ity or discretionary power with respect to an equal opportunity program
29 or a program for securing participation of minority and women-owned
30 enterprises.

31 S 11. The general municipal law is amended by adding a new section
32 103-g to read as follows:

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

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