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

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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:

Section 1. The economic development law is amended by adding a new section 118-a to read as follows:

S 118-A. FUNDING OF MANDATES. NOT LESS THAN FIFTEEN MILLION DOLLARS OF MONIES FROM THE BUDGET OF THE EMPIRE STATE DEVELOPMENT CORPORATION, FOLLOWING APPROPRIATION BY THE LEGISLATURE FOR THIS PURPOSE AND THE FURTHER ALLOCATION BY THE COMMISSIONER, SHALL BE MADE AVAILABLE ANNUALLY TO FUND THE MANDATES SET FORTH IN SECTION ONE HUNDRED EIGHTEEN OF THIS ARTICLE, SPECIFICALLY INCLUDING THE PROVISION OF TECHNICAL ASSISTANCE AND ENTERPRISE ASSISTANCE PROGRAMS PURSUANT TO SUBDIVISIONS SEVEN, EIGHT, NINE AND TEN OF SECTION ONE HUNDRED EIGHTEEN OF THIS ARTICLE.

S 2. Subdivision 3 of section 313 of the executive law, as amended by chapter 175 of the laws of 2010, is amended to read as follows:

3. Solely for the purpose of providing the opportunity for meaningful participation by certified businesses in the performance of state contracts as provided in this section, state contracts shall include leases of real property by a state 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

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

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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 contracts. Contracting agencies shall include or require to be included with respect to state 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 contract, including, but not limited to: (a) provisions requiring contractors to make a good faith effort to solicit active participation by enterprises KNOWN TO BE CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES OR 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 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 contract.

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

3. Each contracting agency shall report to the director with respect to activities undertaken to promote employment of minority group members and women and promote and increase participation by certified businesses with respect to state contracts and subcontracts. Such reports shall be submitted [periodically, but not less frequently than] annually[, as required by the director] WITH QUARTERLY UPDATES, and shall include such information as is necessary for the director to determine whether the contracting agency and contractor have complied with the purposes of this article AND SUCH SPECIFIC INFORMATION AS THE DIRECTOR MAY REQUEST, including, without limitation, a summary of all waivers of the requirements of subdivisions six and seven of section three hundred thirteen of this article allowed by the contracting agency during the period covered by the report, including a description of the basis of the waiver request and the rationale for granting any such waiver. Each agency shall also include in such annual report whether or not it has been required to prepare a remedial plan, and, if so, the plan and the extent to which the agency has complied with each element of the plan.

S 4. Section 315 of the executive law is amended by adding a new subdivision 8 to read as follows:

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

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

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

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

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

K. "DIVERSITY PRACTICES" MEANS THE OFFERER'S PRACTICES WITH RESPECT TO: (I) APPOINTING, HIRING AND RETAINING MINORITY GROUP MEMBERS (AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW) AND WOMEN IN SENIOR MANAGEMENT POSITIONS OF THE OFFERER, INCLUDING AT THE LEVEL OF BOARD OF DIRECTORS OR ITS COMPARABLE MANAGEMENT LEVEL BODY, AND AS SENIOR EXECUTIVE OFFICERS WITHIN THE OFFERER'S ORGANIZATION; (II) HIRING, TRAINING, DEVELOPING, PROMOTING AND RETAINING MINORITY GROUP MEMBERS AND WOMEN EMPLOYEES; (III) UTILIZING CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES, AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR ANY OTHER STATUTES OR REGULATIONS GOVERNING THE PARTICIPATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN CONTRACTS AWARDED BY A STATE AGENCY OR OTHER PUBLIC CORPORATION, AS SUBCONTRACTORS AND SUPPLIERS; (IV) ENTERING INTO PARTNERSHIPS, JOINT VENTURES OR OTHER SIMILAR ARRANGEMENTS WITH CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR OTHER APPLICABLE STATUTE OR REGULATION GOVERNING AN ENTITY'S UTILIZATION OF MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES; AND (V) UTILIZING SUBCONTRACTORS OR OTHER PARTNERS THAT DEMONSTRATE A SIGNIFICANT COMMITMENT TO AND PROGRESS IN ATTRACTING, RETAINING AND PROMOTING DIVERSE TEAMS, INCLUDING MINORITY GROUP MEMBERS AND WOMEN WITH RELEVANT DOMAIN EXPERIENCE IN SENIOR MANAGEMENT OR STAFFING POSITIONS.

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

as used in this subparagraph, the term "professional firm" shall be defined as any individual or sole proprietorship, partnership, corporation, association, or other legal entity permitted by law to practice the professions [of architecture, engineering or surveying] OR OFFER SERVICES RELATED TO ACCOUNTING, ARCHITECTURE, ASSET MANAGEMENT, ENGINEERING, SURVEYING, FINANCIAL, LEGAL OR OTHER PROFESSIONAL SERVICES.

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

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

WITH RESPECT TO: (I) APPOINTING, HIRING AND RETAINING MINORITY GROUP MEMBERS (AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW) AND WOMEN IN SENIOR MANAGEMENT POSITIONS OF THE OFFERER, INCLUDING AT THE LEVEL OF BOARD OF DIRECTORS OR ITS COMPARABLE MANAGEMENT LEVEL BODY, AND AS SENIOR EXECUTIVE OFFICERS WITHIN THE OFFERER'S ORGANIZATION; (II) HIRING, TRAINING, DEVELOPING, PROMOTING AND RETAINING MINORITY GROUP MEMBERS AND WOMEN EMPLOYEES; (III) UTILIZING CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES, AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR ANY OTHER STATUTES OR REGULATIONS GOVERNING THE PARTICIPATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES IN CONTRACTS AWARDED BY A STATE AGENCY OR OTHER PUBLIC CORPORATION, AS SUBCONTRACTORS AND SUPPLIERS; (IV) ENTERING INTO PARTNERSHIPS, JOINT VENTURES OR OTHER SIMILAR ARRANGEMENTS WITH THE CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES AS DEFINED IN ARTICLE FIFTEEN-A OF THE EXECUTIVE LAW OR OTHER APPLICABLE STATUTE OR REGULATION GOVERNING AN ENTITY'S UTILIZATION OF MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES; AND (V) UTILIZING SUBCONTRACTORS OR OTHER PARTNERS THAT DEMONSTRATES A SIGNIFICANT COMMITMENT TO AND PROGRESS IN ATTRACTING, RETAINING AND PROMOTING DIVERSE TEAMS, INCLUDING MINORITY GROUP MEMBERS AND WOMEN WITH RELEVANT DOMAIN EXPERIENCE IN SENIOR MANAGEMENT OR STAFFING POSITIONS.

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

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

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

S 10. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of

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

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