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

6593

2011-2012 Regular Sessions

I N A S S E M B L Y

March 22, 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, in relation to making subcontractors subject to the provisions of law applicable to minority and women-owned business enterprise contracts

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

Section 1. Subdivision 1 of section 312 of the executive law, as added by chapter 261 of the laws of 1988, is amended to read as follows:

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

(a) The contractor *AND SUBCONTRACTORS* will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. For purposes of this article affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

(b) At the request of the contracting agency, the contractor *AND THE SUBCONTRACTORS* shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's *AND THE SUBCONTRACTOR'S* obligations herein.

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

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(c) The contractor AND ALL SUBCONTRACTORS shall state, in all solicitations or advertisements for employees, that, in the performance of the state 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 2. Section 313-a of the executive law, as added by chapter 175 of the laws of 2010, is amended to read as follows:

S 313-a. Diversity practices of state contractors AND SUBCONTRACTORS. The director shall promulgate rules and regulations setting forth measures and procedures to require all contracting agencies, where practicable, feasible and appropriate, to assess the diversity practices of contractors, AND THEIR SUBCONTRACTORS, submitting bids or proposals in connection with the award of a state contract. Such rules and regulations shall take into account: the nature of the labor, services, supplies, equipment or materials being procured by the state agency; the method of procurement required to be used by a state agency to award the contract and minority and women-owned business utilization plans required to be submitted pursuant to sections three hundred twelve and three hundred thirteen of this article; and such other factors as the director deems appropriate or necessary to promote the award of state contracts to contractors AND SUBCONTRACTORS having sound diversity practices. Such assessment shall not in any way permit the automatic rejection of a bid or procurement contract proposal based on lack of adherence to diversity practices. Each bid or proposal shall be analyzed on an individual per bid or per proposal basis with the contractor's AND ITS SUBCONTRACTOR'S diversity practices considered as only a part of a wider consideration of several factors when deciding to award or decline to award a bid or proposal. The director shall develop the rules and regulations required hereunder only after consultation with the state procurement council established by section one hundred sixty-one of the state finance law.

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, and shall include such information as is necessary for the director to determine whether the contracting agency and contractor AND THEIR SUBCONTRACTORS have complied with the purposes of this article, 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 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 OR SUBCONTRACTOR has violated the provisions of a state contract which have been included to comply with the provisions of this article or of a contractor OR SUBCONTRACTOR 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 OR SUBCONTRACTOR 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 SUBCONTRACTOR or the contractor's OR SUBCONTRACTOR'S willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor OR SUBCONTRACTOR 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 OR SUBCONTRACTOR 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 OR SUBCONTRACTOR 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 AND SUBCONTRACTORS that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor OR SUBCONTRACTOR shall once again become eligible to submit bids.

S 5. Section 316-a of the executive law, as added by chapter 175 of the laws of 2010, is amended to read as follows:

S 316-a. Prohibitions in contracts; violations. Every contracting agency shall include a provision in its state contracts expressly providing that any contractor OR SUBCONTRACTOR who willfully and intentionally fails to comply with the minority and women-owned participation requirements of this article as set forth in such state contract shall be liable to the contracting agency for liquidated or other appropriate damages and shall provide for other appropriate remedies on account of such breach. A contracting agency that elects to proceed against a contractor OR SUBCONTRACTOR for breach of contract as provided in this section shall be precluded from seeking enforcement pursuant to section three hundred sixteen of this article; provided however, that the contracting agency shall include a summary of all enforcement actions undertaken pursuant to this section in its annual report submitted

pursuant to subdivision three of section three hundred fifteen of this article.

S 6. 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, two, three, four and five of this act, shall not affect the expiration of such article and shall be deemed to expire therewith.