

2011-2012 Regular Sessions

S E N A T E - A S S E M B L Y

(PREFILED)

January 5, 2011

IN SENATE -- Introduced by Sen. MONTGOMERY -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

IN ASSEMBLY -- Introduced by M. of A. MILLMAN -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the executive law, in relation to participation by minority group members and women with respect to certain state contracts; and to amend the state finance law, in relation to establishing a mentor-protege program for small and minority and women-owned business concerns and in relation to performance and payment bond requirements

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

1 Section 1. Subdivisions 3 and 4 of section 311 of the executive law,
2 subdivision 3 as added by chapter 261 of the laws of 1988, paragraphs
3 (d) and (e) of subdivision 3 as amended by chapter 55 of the laws of
4 1992, paragraphs (g) and (h) of subdivision 3 as amended and paragraph
5 (i) of subdivision 3 as added by section 1 of part BB of chapter 59 of
6 the laws of 2006 and subdivision 4 as amended by chapter 361 of the laws
7 of 2009, are amended to read as follows:
8 3. The director shall have the following powers and duties:
9 (a) to encourage and assist contracting agencies in their efforts to
10 increase participation by minority and women-owned business enterprises
11 on state contracts and subcontracts so as to facilitate the award of a
12 fair share of such contracts to them AND TO PROVIDE ON THE DIVISION'S
13 WEBSITE A LIST OF EACH CONTRACTING AGENCY'S MINORITY AND WOMEN-OWNED
14 BUSINESS ENTERPRISES CERTIFICATION OUTREACH SEMINARS;
15 (b) to develop standardized forms and reporting documents necessary to
16 implement this article;

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

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1 (c) to conduct educational OUTREACH programs TO ENCOURAGE THE CERTIF-
2 ICATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES consistent with
3 the purposes of this article;

4 (d) to review [periodically] QUARTERLY the practices and procedures of
5 each contracting agency with respect to compliance with the provisions
6 of this article, and to require them to file [periodic] QUARTERLY
7 reports with the division of minority and women's business development
8 as to the level of minority and women-owned business enterprises partic-
9 ipation in the awarding of agency contracts for goods and services
10 INCLUDING BUT NOT LIMITED TO THE NUMBER OF STATE CONTRACTS AWARDED TO
11 CERTIFIED MINORITY-OWNED OR WOMEN-OWNED BUSINESS ENTERPRISES, THE MAXI-
12 MUM DOLLAR AMOUNT OBLIGATED PURSUANT TO ALL THOSE CONTRACTS, AND THE
13 TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH CONTRACTS; THE NUMBER OF
14 STATE CONTRACTS AWARDED TO CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS
15 ENTERPRISES, THE MAXIMUM DOLLAR AMOUNT OBLIGATED PURSUANT TO ALL THOSE
16 CONTRACTS, AND THE TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH
17 CONTRACTS; THE NUMBER OF STATE CONTRACTS AWARDED WHICH INCLUDE A UTILI-
18 ZATION PLAN FOR BUSINESS PARTICIPATION BY CERTIFIED MINORITY OR
19 WOMEN-OWNED BUSINESS ENTERPRISES, THE MAXIMUM AMOUNT OBLIGATED PURSUANT
20 TO THOSE CONTRACTS, AND THE TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH
21 CONTRACTS; THE NUMBER OF STATE CONTRACTS AWARDED UPON WHICH A WAIVER WAS
22 GRANTED FROM GOALS REQUIRED BY THE CONTRACTS FOR BUSINESS PARTICIPATION
23 BY CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES, AND THE MAXI-
24 MUM AMOUNT OBLIGATED PURSUANT TO THOSE CONTRACTS; THE NUMBER OF STATE
25 CONTRACTS AWARDED WHICH REQUIRED GOALS FOR EMPLOYMENT OF MINORITY GROUP
26 MEMBERS AND WOMEN; AND THE NUMBER OF STATE CONTRACTS AWARDED FOR WHICH
27 WAIVERS OF EMPLOYMENT GOALS REQUIRED BY THE CONTRACTS HAVE BEEN GRANTED;

28 (e) on January first of each year report to the governor, THE TEMPO-
29 RARY PRESIDENT OF THE SENATE, THE SPEAKER OF THE ASSEMBLY, THE MINORITY
30 LEADERS OF THE SENATE AND THE ASSEMBLY, and the chairpersons of the
31 senate finance and assembly ways and means committees on the [level]
32 ACTUAL VERSUS PROJECTED LEVELS of minority and women-owned business
33 enterprises participating in each agency's contracts for goods [and],
34 services AND CONSTRUCTION, INCLUDING BUT NOT LIMITED TO THE NUMBER OF
35 STATE CONTRACTS AWARDED TO CERTIFIED MINORITY-OWNED OR WOMEN-OWNED BUSI-
36 NESS ENTERPRISES, THE MAXIMUM DOLLAR AMOUNT OBLIGATED PURSUANT TO ALL
37 THOSE CONTRACTS, AND THE TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH
38 CONTRACTS, and on activities of the office and effort by each contract-
39 ing agency to promote employment of minority group members and women,
40 and to promote and increase participation by certified businesses with
41 respect to state contracts and subcontracts so as to facilitate the
42 award of a fair share of state contracts to such businesses. The comp-
43 troller shall assist the division in collecting information on the
44 participation of certified business for each contracting agency. Such
45 report may recommend new activities and programs to effectuate the
46 purposes of this article;

47 (f) THE DIRECTOR SHALL LIST IN THE DIVISION'S ANNUAL REPORT THE NAMES
48 OF NON-COMPLIANT AGENCIES AND THE EXTENT OF THEIR NONCOMPLIANCE IN
49 SUBMITTING ITS QUARTERLY MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE
50 UTILIZATION REPORTS; AND, SHALL IMPLEMENT A MASTER LIST OF ALL THE STATE
51 AGENCIES REQUIRED TO FILE QUARTERLY COMPLIANCE REPORTS AND SHALL ATTACH
52 SUCH LIST TO THE DIVISION'S ANNUAL REPORT.

53 (G) to prepare and update [periodically] QUARTERLY a directory of
54 certified minority and women-owned business enterprises which shall,
55 wherever practicable, be divided into categories of labor, services,
56 supplies, equipment, materials and recognized construction trades and

1 which shall indicate areas or locations of the state where such enter-
2 prises are available to perform services, AND TO USE THIS INFORMATION TO
3 CREATE AN INTERNET BASED, CENTRALIZED STATE REGISTRY TO ENABLE APPROPRI-
4 ATE STATE CERTIFIED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES TO
5 ACCESS CONTRACT AND SUBCONTRACT OPPORTUNITIES;

6 [(g)] (H) to appoint independent hearing officers who by contract or
7 terms of employment shall preside over adjudicatory hearings pursuant to
8 section three hundred fourteen of this article for the office and who
9 are assigned no other work by the office;

10 [(h)] (I) notwithstanding the provisions of section two hundred nine-
11 ty-six of this chapter, to file a complaint pursuant to the provisions
12 of section two hundred ninety-seven of this chapter where the director
13 has knowledge that a contractor may have violated the provisions of
14 paragraph (a), (b) or (c) of subdivision one of section two hundred
15 ninety-six of this chapter where such violation is unrelated, separate
16 or distinct from the state contract as expressed by its terms; and

17 [(i)] (J) to streamline the state certification process to accept
18 federal and municipal corporation certifications.

19 4. The director [may] SHALL provide assistance to, and facilitate
20 access to programs serving certified businesses as well as applicants to
21 ensure that such businesses benefit, as needed, from technical, manage-
22 rial and financial, and general business assistance; training; market-
23 ing; organization and personnel skill development; project management
24 assistance; technology assistance; bond and insurance education assist-
25 ance; and other business development assistance. In addition, the direc-
26 tor [may] SHALL, either independently or in conjunction with other state
27 agencies:

28 (a) develop a clearinghouse of information on programs and services
29 provided by entities that may assist such businesses;

30 (b) review bonding and paperwork requirements imposed by contracting
31 agencies that may unnecessarily impede the ability of such businesses to
32 compete; and

33 (c) seek to maximize utilization by minority and women-owned business
34 enterprises of available federal resources including but not limited to
35 federal grants, loans, loan guarantees, surety bonding guarantees, tech-
36 nical assistance, and programs and services of the federal small busi-
37 ness administration.

38 S 2. Subdivision 5 of section 312 of the executive law, as added by
39 chapter 261 of the laws of 1988, is amended to read as follows:

40 5. The director shall promulgate rules and regulations to ensure that
41 contractors and subcontractors undertake programs of affirmative action
42 and equal employment opportunity as required by this section. Such rules
43 and regulations as they pertain to any particular agency shall be devel-
44 oped after consultation with contracting agencies. Such rules and regu-
45 lations [may] SHALL require a contractor, after notice in a bid solici-
46 tation, to submit an equal employment opportunity program [after bid
47 opening and prior to the award of any contract] AT THE TIME BIDS ARE
48 SUBMITTED, and [may] SHALL require the contractor or subcontractor to
49 submit compliance reports relating to the contractor's or subcontrac-
50 tor's operation and implementation of any equal employment opportunity
51 program in effect as of the date the contract is executed. The contract-
52 ing agency [may recommend to the director that] SHALL HAVE THE RIGHT TO
53 RECOMMEND THAT the director take appropriate action according to the
54 procedures set forth in section three hundred sixteen of this article
55 against the contractor for noncompliance with the requirements of this

1 section. The contracting agency shall be responsible for monitoring
2 compliance with this section.

3 S 3. Subdivisions 2-a, 3 and paragraph (a) of subdivision 5 of section
4 313 of the executive law, subdivision 2-a as added and subdivision 3 and
5 paragraph (a) of subdivision 5 as amended by chapter 175 of the laws of
6 2010, are amended to read as follows:

7 2-a. The director shall promulgate rules and regulations that will
8 accomplish the following:

9 (a) provide for the certification and decertification of minority and
10 women-owned business enterprises for all agencies through a single proc-
11 ess that meets applicable requirements;

12 (b) require that each contract solicitation document accompanying each
13 solicitation set forth the expected degree of minority and women-owned
14 business enterprise participation based, in part, on:

15 (i) the potential subcontract opportunities available in the prime
16 procurement contract; and

17 (ii) the availability, as contained within the study, of certified
18 minority and women-owned business enterprises to respond competitively
19 to the potential subcontract opportunities;

20 (c) require that each agency provide a current list of certified
21 minority business enterprises to each prospective contractor;

22 (d) allow a contractor that is a certified minority-owned or women-
23 owned business enterprise to use the work it performs to meet require-
24 ments for use of certified minority-owned or women-owned business enter-
25 prises as subcontractors;

26 (e) provide for joint ventures, which a bidder may count toward meet-
27 ing its minority and women-owned business enterprise participation;

28 (f) consistent with subdivision six of this section, provide for
29 circumstances under which an agency may waive obligations of the
30 contractor relating to minority and women-owned business enterprise
31 participation;

32 (g) require that an agency verify that minority and women-owned busi-
33 ness enterprises listed in a successful bid are actually participating
34 to the extent listed in the project for which the bid was submitted;

35 (h) provide for the collection of statistical data by each agency
36 concerning actual minority and women-owned business enterprise partic-
37 ipation; [and]

38 (i) require each agency to consult the most current disparity study
39 when calculating agency-wide and contract specific participation goals
40 pursuant to this article[.]; AND

41 (J) ENCOURAGE JOINT VENTURES, PARTNERSHIPS, AND MENTOR-PROTEGE
42 RELATIONSHIPS AS DEFINED IN SECTION ONE HUNDRED FORTY-SEVEN OF THE STATE
43 FINANCE LAW, BETWEEN PRIME CONTRACTORS AND MINORITY AND WOMEN-OWNED
44 BUSINESS ENTERPRISES.

45 3. Solely for the purpose of providing the opportunity for meaningful
46 participation by certified businesses in the performance of state
47 contracts as provided in this section, state contracts shall include
48 leases of real property by a state agency to a lessee where: the terms
49 of such leases provide for the construction, demolition, replacement,
50 major repair or renovation of real property and improvements thereon by
51 such lessee; and the cost of such construction, demolition, replacement,
52 major repair or renovation of real property and improvements thereon
53 shall exceed the sum of one hundred thousand dollars. Reports to the
54 director pursuant to section three hundred fifteen of this article shall
55 include activities with respect to all such state contracts. Contracting
56 agencies shall include or require to be included with respect to state

1 contracts for the acquisition, construction, demolition, replacement,
2 major repair or renovation of real property and improvements thereon,
3 such provisions as [may] SHALL be necessary to effectuate the provisions
4 of this section in every bid specification and state contract, includ-
5 ing, but not limited to: (a) provisions requiring contractors to make a
6 good faith effort to solicit active participation by enterprises identi-
7 fied in the directory of certified businesses provided to the contract-
8 ing agency by the office; (b) requiring the parties to agree as a condi-
9 tion of entering into such contract, to be bound by the provisions of
10 section three hundred sixteen of this article; and (c) requiring the
11 contractor to include the provisions set forth in paragraphs (a) and (b)
12 of this subdivision in every subcontract in a manner that the provisions
13 will be binding upon each subcontractor as to work in connection with
14 such contract. Provided, however, that no such provisions shall be bind-
15 ing upon contractors or subcontractors in the performance of work or the
16 provision of services that are unrelated, separate or distinct from the
17 state contract as expressed by its terms, and nothing in this section
18 shall authorize the director or any contracting agency to impose any
19 requirement on a contractor or subcontractor except with respect to a
20 state contract.

21 (a) Contracting agencies shall administer the rules and regulations
22 promulgated by the director in a good faith effort to meet the maximum
23 feasible portion of the agency's goals adopted pursuant to this article
24 and the regulations of the director. Such rules and regulations: shall
25 require a contractor to submit a utilization plan [after bids are
26 opened] AT THE TIME THE BIDS ARE SUBMITTED, when bids are required[, but
27 prior to the award of a state contract]; shall require the contracting
28 agency to review the utilization plan submitted by the contractor and to
29 post the utilization plan and any waivers of compliance issued pursuant
30 to subdivision six of this section on the website of the contracting
31 agency within a reasonable period of time as established by the direc-
32 tor; shall require the contracting agency to notify the contractor in
33 writing within a period of time specified by the director as to any
34 deficiencies contained in the contractor's utilization plan; shall
35 require remedy thereof within a period of time specified by the direc-
36 tor; shall require the contractor to submit [periodic] QUARTERLY compli-
37 ance reports relating to the operation and implementation of any utili-
38 zation plan; shall not allow any automatic waivers but shall allow a
39 contractor to apply for a partial or total waiver of the minority and
40 women-owned business enterprise participation requirements pursuant to
41 subdivisions six and seven of this section; shall allow a contractor to
42 file a complaint with the director pursuant to subdivision eight of this
43 section in the event a contracting agency has failed or refused to issue
44 a waiver of the minority and women-owned business enterprise partic-
45 ipation requirements or has denied such request for a waiver; and shall
46 allow a contracting agency to file a complaint with the director pursu-
47 ant to subdivision nine of this section in the event a contractor is
48 failing or has failed to comply with the minority and women-owned busi-
49 ness enterprise participation requirements set forth in the state
50 contract where no waiver has been granted.

51 S 4. Subdivisions 1, 2 and 3 of section 315 of the executive law,
52 subdivisions 1 and 2 as added by chapter 261 of the laws of 1988 and
53 subdivision 3 as amended by chapter 175 of the laws of 2010 are amended
54 and a new subdivision 2-a is added to read as follows:

55 1. Each contracting agency shall be responsible for monitoring state
56 contracts under its jurisdiction, and recommending matters to the office

1 respecting non-compliance with the provisions of this article so that
2 the office [may] SHALL take such action as [is appropriate] STATED IN
3 SUBDIVISION THREE OF SECTION THREE HUNDRED SIXTEEN OF THIS ARTICLE. EACH
4 CONTRACTING AGENCY SHALL HAVE THE RIGHT TO RECOMMEND THAT THE DIRECTOR
5 IMPOSE A SANCTION, PENALTY, OR FINE FOR THREE OR MORE VIOLATIONS OF
6 SUBDIVISION ONE OF SECTION THREE HUNDRED SIXTEEN OF THIS ARTICLE, to
7 insure compliance with the provisions of this article, the rules and
8 regulations of the director issued hereunder and the contractual
9 provisions required pursuant to this article. All contracting agencies
10 shall comply with the rules and regulations of the office and are
11 directed to cooperate with the office and to furnish to the office such
12 information and assistance as may be required in the performance of its
13 functions under this article.

14 2. Each contracting agency shall provide to prospective bidders a
15 current copy of the directory of certified businesses, and a copy of the
16 regulations required pursuant to sections three hundred twelve and three
17 hundred thirteen of this article at the time bids or proposals are
18 solicited.

19 2-A. EACH CONTRACTING AGENCY WHEN NOTIFYING A CONTRACTOR OF A WINNING
20 BID AWARD SHALL ALSO NOTIFY ANY MINORITY OR WOMEN-OWNED BUSINESS ENTER-
21 PRISES AFFILIATED WITH SUCH CONTRACTOR, PER THE CONTRACTOR'S SUBMITTED
22 UTILIZATION PLAN, OF SUCH CONTRACTOR'S RECEIPT OF THE WINNING BID AWARD.

23 3. [Each contracting agency shall report to the director with respect
24 to activities undertaken to promote employment of minority group members
25 and women and promote and increase participation by certified businesses
26 with respect to state contracts and subcontracts. Such reports shall be
27 submitted periodically, but not less frequently than annually, as
28 required by the director, and shall include such information as is
29 necessary for the director to determine whether the contracting agency
30 and contractor have complied with the purposes of this article, includ-
31 ing, without limitation, a summary of all waivers of the requirements of
32 subdivisions six and seven of section three hundred thirteen of this
33 article allowed by the contracting agency during the period covered by
34 the report, including a description of the basis of the waiver request
35 and the rationale for granting any such waiver. Each agency shall also
36 include in such annual report whether or not it has been required to
37 prepare a remedial plan, and, if so, the plan and the extent to which
38 the agency has complied with each element of the plan.] (A) EACH
39 CONTRACTING AGENCY SHALL PREPARE A QUARTERLY REPORT AND SUBMIT COPIES TO
40 THE COMMISSIONER OF ECONOMIC DEVELOPMENT, THE COMMISSIONER OF GENERAL
41 SERVICES, AND THE DIRECTOR AS TO THE LEVEL OF MINORITY AND WOMEN-OWNED
42 BUSINESS ENTERPRISES PARTICIPATION IN THE AWARDING OF AGENCY CONTRACTS
43 FOR GOODS AND SERVICES, INCLUDING BUT NOT LIMITED TO, THE NUMBER OF
44 STATE CONTRACTS AWARDED TO CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS
45 ENTERPRISES; THE MAXIMUM DOLLAR AMOUNT OBLIGATED PURSUANT TO ALL THOSE
46 CONTRACTS, AND THE TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH
47 CONTRACTS; THE NUMBER OF STATE CONTRACTS AWARDED WHICH INCLUDE A UTILI-
48 ZATION PLAN FOR BUSINESS PARTICIPATION BY CERTIFIED MINORITY OR
49 WOMEN-OWNED BUSINESS ENTERPRISES, THE MAXIMUM AMOUNT OBLIGATED PURSUANT
50 TO THOSE CONTRACTS, AND THE TOTAL EXPENDITURES MADE PURSUANT TO ALL SUCH
51 CONTRACTS; THE NUMBER OF STATE CONTRACTS AWARDED UPON WHICH A WAIVER WAS
52 GRANTED FROM GOALS REQUIRED BY THE CONTRACTS FOR BUSINESS PARTICIPATION
53 BY CERTIFIED MINORITY OR WOMEN-OWNED BUSINESS ENTERPRISES, AND THE MAXI-
54 MUM AMOUNT OBLIGATED PURSUANT TO THOSE CONTRACTS; THE NUMBER OF STATE
55 CONTRACTS AWARDED WHICH REQUIRED GOALS FOR EMPLOYMENT OF MINORITY GROUP

1 MEMBERS AND WOMEN; AND THE NUMBER OF STATE CONTRACTS AWARDED FOR WHICH
2 WAIVERS OF EMPLOYMENT GOALS REQUIRED BY THE CONTRACTS HAVE BEEN GRANTED;

3 (B) IN ADDITION, EACH CONTRACTING AGENCY SHALL BE RESPONSIBLE FOR THE
4 COST OF AN INDEPENDENT AUDIT RESULTING FROM THE AGENCY'S REPEATED
5 VIOLATIONS OF THIS SECTION.

6 (C) WITHIN THIRTY DAYS AFTER COMPLETION, A COPY OF THE QUARTERLY
7 MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE REPORT SHALL BE TRANSMITTED
8 TO THE COMMISSIONER OF ECONOMIC DEVELOPMENT, THE COMMISSIONER OF GENERAL
9 SERVICES, AND THE DIRECTOR. A CONTRACTING AGENCY, WHICH HAS NOT LET MORE
10 THAN TWO MILLION DOLLARS IN SERVICE AND/OR CONSTRUCTION CONTRACTS WITHIN
11 THE APPLICABLE PERIOD MAY APPLY TO THE COMMISSIONER OF ECONOMIC DEVELOP-
12 MENT, AND THE DIRECTOR FOR A WAIVER OF THE REQUIRED ANNUAL REPORT. THE
13 WAIVER APPLICATION SHALL BE MADE ON SUCH FORM AS THE COMMISSIONER OF
14 ECONOMIC DEVELOPMENT AND THE DIRECTOR MAY PRESCRIBE.

15 (D) IF A CONTRACTING AGENCY SHALL FAIL TO FILE OR SUBSTANTIALLY
16 COMPLETE, AS DETERMINED BY THE COMMISSIONER OF ECONOMIC DEVELOPMENT AND
17 THE DIRECTOR, THE REPORT REQUIRED BY THIS SECTION, THE DIRECTOR SHALL
18 PROVIDE NOTICE TO THE CONTRACTING AGENCY. THE NOTICE SHALL STATE THE
19 FOLLOWING:

20 (I) THAT THE FAILURE TO FILE A REPORT AS REQUIRED IS A VIOLATION OF
21 THIS SECTION, OR IN THE CASE OF AN INSUFFICIENT REPORT, THE MANNER IN
22 WHICH THE REPORT SUBMITTED IS DEFICIENT;

23 (II) THAT THE CONTRACTING AGENCY HAS THIRTY DAYS TO COMPLY WITH THIS
24 SECTION OR PROVIDE AN ADEQUATE WRITTEN EXPLANATION TO THE COMMISSIONER
25 OF ECONOMIC DEVELOPMENT AND THE COMMISSIONER OF GENERAL SERVICES AND THE
26 DIRECTOR OF THE CONTRACTING AGENCY'S REASONS FOR THE INABILITY TO
27 COMPLY; AND

28 (III) THAT THE CONTRACTING AGENCY'S CONTINUED FAILURE TO PROVIDE
29 EITHER THE REQUIRED REPORT OR AN ADEQUATE EXPLANATION WILL RESULT IN AN
30 INDEPENDENT AUDIT OF THE CONTRACTING AGENCY, THE COST OF WHICH SHALL BE
31 BORNE BY THE CONTRACTING AGENCY.

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

34 S 316. [Enforcement] VIOLATIONS AND ENFORCEMENT. 1. IT SHALL BE A
35 VIOLATION FOR ANY PERSON OR ENTITY TO:

36 (A) INTENTIONALLY USE OR ACQUIRE AN MWBE NAME THROUGH DECEIT OR OTHER
37 DISHONEST MEANS IN ORDER TO NEGOTIATE A LOWER BID FROM A NON-MWBE.

38 (B) SUBMIT TO THE DEPARTMENT OF ECONOMIC DEVELOPMENT, DOCUMENTS OR
39 OTHER MATERIAL AS EVIDENCE OF A GOOD FAITH EFFORT TO COMPLY WITH THE
40 PROVISIONS OF THIS ARTICLE WITHOUT, IN FACT, HAVING ENTERED INTO ANY
41 CONTRACT, AGREEMENT, SUBCONTRACT, OR SUB-AGREEMENT WITH AN MWBE FOR THE
42 USE OR PURCHASE OF SUCH BUSINESS ENTERPRISE'S GOODS OR SERVICES IN THE
43 PERFORMANCE OF THE AWARDED STATE CONTRACT.

44 (C) FAIL TO PROVIDE AN MWBE WITH SUFFICIENT INFORMATION OR OTHER
45 REQUIRED SUPPORTING DOCUMENTATION IN ORDER FOR THE MWBE TO PREPARE A
46 PROPER BID.

47 2. Upon receipt by the director of a complaint by a contracting agency
48 that a contractor has violated the provisions of a state contract which
49 have been included to comply with the provisions of this article or of a
50 contractor that a contracting agency has violated such provisions or has
51 failed or refused to issue a waiver where one has been applied for
52 pursuant to subdivision six of section three hundred thirteen of this
53 article or has denied such application, the director shall attempt to
54 resolve the matter giving rise to such complaint. If efforts to resolve
55 such matter to the satisfaction of all parties are unsuccessful, the
56 director shall refer the matter, within thirty days of the receipt of

1 the complaint, to the division's hearing officers. Upon conclusion of
2 the administrative hearing, the hearing officer shall submit to the
3 director his or her decision regarding the alleged violation of the
4 contract and recommendations regarding the imposition of sanctions,
5 fines or penalties. The director, within ten days of receipt of the
6 decision, shall file a determination of such matter and shall cause a
7 copy of such determination along with a copy of this article to be
8 served upon the contractor by personal service or by certified mail
9 return receipt requested. The decision of the hearing officer shall be
10 final and may only be vacated or modified as provided in article seven-
11 ty-eight of the civil practice law and rules upon an application made
12 within the time provided by such article. The determination of the
13 director as to the imposition of any fines, sanctions or penalties shall
14 be reviewable pursuant to article seventy-eight of the civil practice
15 law and rules. The penalties imposed for any violation which is premised
16 upon either a fraudulent or intentional misrepresentation by the
17 contractor or the contractor's willful and intentional disregard of the
18 minority and women-owned participation requirement included in the
19 contract may include a determination that the contractor shall be ineli-
20 gible to submit a bid to any contracting agency or be awarded any such
21 contract for a period not to exceed one year following the final deter-
22 mination; provided however, if a contractor has previously been deter-
23 mined to be ineligible to submit a bid pursuant to this section, the
24 penalties imposed for any subsequent violation, if such violation occurs
25 within five years of the first violation, may include a determination
26 that the contractor shall be ineligible to submit a bid to any contract-
27 ing agency or be awarded any such contract for a period not to exceed
28 five years following the final determination. The division of minority
29 and women's business development shall maintain a website listing all
30 contractors that have been deemed ineligible to submit a bid pursuant to
31 this section and the date after which each contractor shall once again
32 become eligible to submit bids.

33 3. THE DIRECTOR SHALL IMPOSE A SANCTION, PENALTY, OR FINE ON ANY
34 INDIVIDUAL OR ENTITY THAT HAS THREE OR MORE VIOLATIONS OF THIS ARTICLE
35 WITHIN FIVE YEARS. SUCH FINE SHALL BE PAID BY SUCH INDIVIDUAL OR ENTITY.
36 SUCH FINE SHALL BE REMITTED AND DEPOSITED INTO A FUND, TO BE MANAGED BY
37 THE COMMISSIONER OF ECONOMIC DEVELOPMENT. SUCH FUNDS SHALL BE USED TO
38 SUBSIDIZE THE FACILITATION OF THE PROVISIONS OF THIS ARTICLE. OTHER
39 SANCTIONS SHALL INCLUDE BARRING SUCH ENTITY OR INDIVIDUAL FROM CONTRACT-
40 ING WITH SUCH AGENCY FOR A PERIOD NOT TO EXCEED FIVE YEARS.

41 S 6. Subdivision 1 of section 137 of the state finance law, as sepa-
42 rately amended by section 17 of part MM of chapter 57 and by chapter 619
43 of the laws of 2008, is amended to read as follows:

44 1. In addition to other bond or bonds, if any, required by law for the
45 completion of a work specified in a contract for the prosecution of a
46 public improvement for the state of New York a municipal corporation, a
47 public benefit corporation or a commission appointed pursuant to law, or
48 in the absence of any such requirement, the comptroller may or the other
49 appropriate official, respectively, shall nevertheless require prior to
50 the approval of any such contract a bond guaranteeing prompt payment of
51 moneys due to all persons furnishing labor or materials to the contrac-
52 tor or any subcontractors in the prosecution of the work provided for in
53 such contract. Whenever a municipal corporation issues a permit subject
54 to compliance with section two hundred twenty of the labor law, such
55 permittee or its contractor or subcontractors furnishing workers shall
56 post a payment bond subject to this section. Provided, however, that all

1 performance bonds and payment bonds may, at the discretion of the head
2 of the state agency, public benefit corporation or commission, or his or
3 her designee, be dispensed with for the completion of a work specified
4 in a contract for the prosecution of a public improvement for the state
5 of New York for which bids are solicited where the aggregate amount of
6 the contract is under one hundred FIFTY thousand dollars and provided
7 further, that in a case where the contract is not subject to the multi-
8 ple contract award requirements of section one hundred thirty-five of
9 this article, such requirements may be dispensed with where the head of
10 the state agency, public benefit corporation or commission finds it to
11 be in the public interest and where the aggregate amount of the contract
12 awarded or to be awarded is less than two hundred thousand dollars. THE
13 HEAD OF THE STATE AGENCY, PUBLIC BENEFIT CORPORATION OR COMMISSION, OR
14 HIS OR HER DESIGNEE, SHALL ADJUST THE AGGREGATE CONTRACT AMOUNTS LISTED
15 IN THIS SUBDIVISION EVERY YEAR TO ACCOUNT FOR INCREASES IN THE COSTS OF
16 CONSTRUCTION. ADVERTISEMENTS FOR BIDS SHALL PROVIDE INFORMATION ON THE
17 REQUIREMENTS FOR, OR DISPENSATION OF, PERFORMANCE AND PAYMENT BONDS.
18 Provided further, that in a case where a performance or payment bond is
19 dispensed with, twenty per centum may be retained from each progress
20 payment or estimate until the entire contract work has been completed
21 and accepted, at which time the head of the state agency, public benefit
22 corporation or commission shall, pending the payment of the final esti-
23 mate, pay not to exceed seventy-five per centum of the amount of the
24 retained percentage.

25 S 7. Subdivision 4 of section 139-f of the state finance law, as
26 amended by chapter 83 of the laws of 1995, is amended to read as
27 follows:

28 4. Notwithstanding any other provision of this section or other law,
29 requirements for the furnishing of a performance bond or a payment bond
30 may be dispensed with at the discretion of the head of the state agency
31 or corporation, or his or her designee, where the public owner is a
32 state agency or corporation described in subdivision one-a of this
33 section and the aggregate amount of the contract awarded or to be
34 awarded is under fifty thousand dollars and, in a case where the
35 contract is not subject to the multiple contract award requirements of
36 section one hundred thirty-five of this article, such requirements may
37 be dispensed with where the head of the state agency or corporation
38 finds it to be in the public interest and where the aggregate amount of
39 the contract awarded or to be awarded is under [two] THREE hundred thou-
40 sand dollars. THE HEAD OF THE STATE AGENCY, PUBLIC BENEFIT CORPORATION
41 OR COMMISSION, OR HIS OR HER DESIGNEE, SHALL ADJUST THE AGGREGATE
42 CONTRACT AMOUNTS LISTED IN THIS SUBDIVISION EVERY YEAR TO ACCOUNT FOR
43 INCREASES IN THE COSTS OF CONSTRUCTION. ADVERTISEMENTS FOR BIDS SHALL
44 PROVIDE INFORMATION ON THE REQUIREMENTS FOR, OR DISPENSATION OF,
45 PERFORMANCE AND PAYMENT BONDS. Provided further, that in a case where a
46 performance or payment bond is dispensed with, twenty per centum may be
47 retained from each progress payment or estimate until the entire
48 contract work has been completed and accepted, at which time the head of
49 the state agency or corporation shall, pending the payment of the final
50 estimate, pay not to exceed seventy-five per centum of the amount of the
51 retained percentage.

52 S 8. The opening paragraph of section 139-g of the state finance law,
53 as amended by chapter 636 of the laws of 2003, is amended to read as
54 follows:

55 In every state agency, department and authority which has let more
56 than two million dollars in service and construction contracts AND STATE

1 ASSISTED PROJECT CONTRACTS in the prior fiscal year, the chief executive
2 officer of that agency, department or authority shall, with respect to
3 those contracts AND STATE ASSISTED PROJECT CONTRACTS let by his OR HER
4 agency, department or authority:

5 S 9. The opening paragraph of subdivision (b) of section 139-g of the
6 state finance law, as amended by chapter 636 of the laws of 2003, is
7 amended to read as follows:

8 identify all small-business and certified women and minority-owned
9 business concerns which, in the judgment of the chief executive officer
10 of that agency, department or authority, can bid on those contracts AND
11 STATE ASSISTED PROJECT CONTRACTS which are usually and customarily let
12 by that agency, department or authority, OR IN WHICH THAT AUTHORITY
13 PROVIDES A GRANT OR LOAN OR TAX EXEMPT FINANCING, with a reasonable
14 expectation of success. Such chief executive officers shall carry out
15 the provisions of this subdivision:

16 S 10. Section 139-g of the state finance law is amended by adding a
17 new subdivision (e) to read as follows:

18 (E) FOR THE PURPOSES OF THIS SECTION, THE FOLLOWING WORDS SHALL HAVE
19 THE FOLLOWING MEANINGS:

20 (I) "STATE ASSISTED PROJECT CONTRACT" SHALL MEAN ANY WRITTEN AGREEMENT
21 ARISING OUT OF A STATE ASSISTED HOUSING PROJECT OR STATE ASSISTED
22 ECONOMIC DEVELOPMENT PROJECT OR STATE ASSISTED HIGHER EDUCATION PROJECT
23 OR STATE ASSISTED HOSPITAL OR HEALTH CARE FACILITY PROJECT, FOR WHICH
24 THE TOTAL PROJECT COST EXCEEDS TWO MILLION DOLLARS AND FOR WHICH THE
25 PROJECT OWNER IS COMMITTED TO SPEND OR DOES EXPEND FUNDS FOR THE ACQUI-
26 SITION, CONSTRUCTION, DEMOLITION, REPLACEMENT, MAJOR REPAIR, OR RENO-
27 VATION OF REAL PROPERTY AND IMPROVEMENTS THEREON FOR SUCH PROJECT.

28 (II) "STATE ASSISTED HOUSING PROJECT" SHALL MEAN THOSE PROJECTS WHICH
29 RECEIVE FROM THE NEW YORK STATE HOUSING FINANCE AGENCY TAX-EXEMPT
30 FINANCING FOR ALL OR PART OF THE TOTAL PROJECT COST.

31 (III) "STATE ASSISTED ECONOMIC DEVELOPMENT PROJECT" SHALL MEAN THOSE
32 PROJECTS WHICH RECEIVE FROM THE NEW YORK FOUNDATION OF SCIENCE TECHNOLO-
33 GY AND INNOVATION, OR THE URBAN DEVELOPMENT CORPORATION AND ITS SUBSID-
34 IARIES A GRANT OR LOAN OR TAX-EXEMPT FINANCING FOR ALL OR PART OF THE
35 TOTAL PROJECT COST.

36 (IV) "STATE ASSISTED HIGHER EDUCATION PROJECT" SHALL MEAN THOSE
37 PROJECTS WHICH RECEIVE FROM THE DORMITORY AUTHORITY OF THE STATE OF NEW
38 YORK A GRANT OR LOAN OR TAX-EXEMPT FINANCING FOR ALL OR PART OF THE
39 TOTAL PROJECT COST.

40 (V) "STATE ASSISTED HOSPITAL OR HEALTH CARE FACILITY PROJECT" SHALL
41 MEAN THOSE PROJECTS WHICH RECEIVE FROM THE DORMITORY AUTHORITY OF THE
42 STATE OF NEW YORK A GRANT OR LOAN OR TAX-EXEMPT FINANCING FOR ALL OR
43 PART OF THE TOTAL PROJECT COST.

44 S 11. This act shall take effect immediately, provided however, the
45 amendments to article 15-A of the executive law made by sections one,
46 two, three, four and five of this act shall not affect the expiration of
47 such article and shall expire therewith.